

1997

Kim Larson v. Brad Larson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KIM LARSON)	
)	BRIEF OF APPELLANT
Plaintiff/Appellee/)	
Cross-Appellant)	Appellate Court No.
)	970434-CA
vs.)	
)	
BRAD LARSON)	Priority No. 15
)	
Defendant/Appellant/)	
Cross-Appellee)	

APPEAL FROM THE DECREE OF DIVORCE ENTERED BY THE
FIRST JUDICIAL DISTRICT COURT, CACHE COUNTY
STATE OF UTAH, JUDGE CLINT S. JUDKINS

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UTAH COURT OF APPEALS
BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii/iv
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE ISSUES	1
DETERMINATIVE STATUTORY LAW	2
STATEMENT OF THE CASE.....	3
A. Nature of the Case.....	3
B. Course of Proceedings.....	3
C. Disposition in the Trial Court.....	5
D. Statement of the Facts	6
SUMMARY OF THE ARGUMENT	8
ARGUMENT	8
I. TRIAL COURT’S FINDING THAT APPELLANT EARNS \$460,903.00 PER YEAR IS CLEARLY ERRONEOUS INASMUCH AS THIS FINDING IS NOT SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE.	8
A. APPELLANT’S HISTORICAL INCOME DOES NOT ACCURATELY PREDICT APPELLANT’S PRESENT INCOME.....	9
i. When calculating income, trial court may not rely upon overtime which is inconsistent and speculative.	10
ii. The overwhelming weight of evidence demonstrated that changes in health care caused lower incomes for doctors. ...	11
B. TRIAL COURT’S TEN PERCENT REDUCTION IN INCOME IS ARBITRARY AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.	12

II.	TRIAL COURT'S FAILURE TO CONSIDER PAYOR SPOUSE'S ABILITY TO PROVIDE SUPPORT CONSTITUTES ERROR.....	14
III.	TRIAL COURT'S FAILURE TO ENTER SUFFICIENT FINDINGS ON THE ISSUE OF ALIMONY WARRANTS REVERSAL OF TRIAL COURT'S FINDINGS.	16
IV.	THE ONLY EVIDENCE BEFORE THE COURT SUPPORTS A FINDING THAT APPELLEE SHOULD HAVE IMPUTED INCOME OF \$2,500.00 PER MONTH FROM THE TIME THE COURT ENTERS THE DECREE OF DIVORCE.	17
V.	TRIAL COURT ERRED BY ORDERING APPELLANT TO PAY AWARDED ALIMONY RETROACTIVE TO TIME OF TRIAL.....	18
CONCLUSION.....		19

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>Paffel v. Paffel</u> , 732 P.2d 96, 100 (Utah 1986)	1
<u>Paffel v. Paffel</u> , 732 P.2d 96, 100 (Utah 1986)	1
<u>Peterson v. Peterson</u> , 818 P.2d 1305, 1307-08 (Utah App. 1991).....	1
<u>Paffel v. Paffel</u> , 732 P.2d 96, 100 (Utah 1986)	2
<u>Peterson v. Peterson</u> , 818 P.2d 1305, 1307-08 (Utah App. 1991).....	2
<u>Paffel v. Paffel</u> , 732 P.2d 96, 100 (Utah 1986)	2
<u>Cummings v. Cummings</u> , 821 P.2d 472 (Utah App. 1991).....	8
<u>Saunders v. Sharp</u> , 806 P.2d 198 (Utah 1991)	8
<u>Crompton v. Crompton</u> , 888 P.2d 686 (Utah App. 1994)	10
<u>Jones v. Jones</u> , 700 P.2d 1072 (Utah 1985).....	14
<u>Paffel v. Paffel</u> , 732 P.2d 96, 100 (Utah 1986)	14
<u>Cox v. Cox</u> , 877 P.2d 1262, 1267 (Utah App. 1994).....	15
<u>Olson v. Olson</u> , 704 P.2d 564, 566 (Utah 1985).....	15
<u>Breinholt v. Breinholt</u> , 905 P.2d 877, 880 (Utah App. 1995)	16
<u>Howell v. Howell</u> , 806 P.2d 1209, 1218 (Utah App. 1991)	16
<u>Willey v. Willey</u> , 866 P.2d 547, 551 (Utah App. 1993)	16
<u>Chambers v. Chambers</u> , 840 P.2d 841,843 (Utah App. 1992)	17
<u>Wisdon v. Salina</u> , 696 P.2d 1205 (Utah 1985)	18
<u>Pate v. Marathon Steel Co.</u> , 692 P.2d 765 (Utah 1984)	18
<u>Whitehead v. Whitehead</u> , 836 P.2d 814, 816 (Utah App. 1992).....	18
<u>Wallis v. Wallis</u> , 324 P.2d 103 (Utah 1959).....	18
<u>Shelton v. Shelton</u> , 885 P.2d 807 (Utah App. 1994)	18
<u>Whitehead v. Whitehead</u> , 836 P.2d 816 (Utah App. 1992)	19

<u>Shelton v. Shelton</u> , 885 P.2d 808 (Utah App. 1994)	19
<u>Larsen v. Larsen</u> , 561 P.2d 1077, 1079 (Utah 1977)	19
<u>Karen v. State Dept. of Social Serve.</u> , 716 P.2d 810, 813 (Utah 1986)	19

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 78-2a-3(2)(h)	1
Utah Code Ann. § 30-3-5 (7)(a)	2
Utah Code Ann. § 78-45-7.5 (7)(a)	2
Utah Code Ann. § 78-45-7.5 (7)(b)	2
Utah Code Ann. § 30-3-5 (7)(a)	3
Utah Code Ann. § 30-3-5 (7)(a)	14
Utah Code Ann. § 78-45-7.5 (7)	17

JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction to decide this matter pursuant to Utah Code Ann. Section 78-2a-3(2)(h).

STATEMENT OF THE ISSUES

The first issue for the Court to determine is whether the trial court's failure to consider the ability of the payor spouse to provide support constitutes an abuse of discretion. The standard of appellate review is that the appellate court will not reverse the trial court unless there exists a clear and prejudicial abuse of discretion. Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986).

The second issue for the Court to decide is whether the trial court's failure to enter sufficient findings on the ability of the payor spouse to provide support constitutes an abuse of discretion. The standard of appellate review is that the trial court will not be overturned unless there is a clear and prejudicial abuse of discretion. Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986).

The third issue for the Court to decide is whether the trial court erred when the trial court calculated Appellant's current income at a level equal to a ten percent reduction of Appellant's average income from the years 1992-1995 notwithstanding the fact that Appellant presented clear and convincing evidence that his actual current income is significantly lower than the \$460,903.00 amount and the fact that neither party presented evidence tending to validate the trial court's conclusion that Appellant currently makes ninety percent of his past income. The standard of appellate review is that the trial court's finding of fact will not be set aside unless clearly erroneous. Peterson v. Peterson, 818 P.2d 1305, 1307-08 (Utah App. 1991).

The fourth issue for the Court to decide is whether the trial court's failure to enter sufficient findings as to how the trial court concluded that Appellant's current income is ninety percent of his past average income constitutes an abuse of discretion. The standard of review is that the appellate

court will not reverse the trial court unless there is a clear and prejudicial abuse of discretion. Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986).

The fifth issue for the Court to determine is whether the trial court erred by only imputing \$1,000.00 per month until May of 1998 when the clear weight of evidence demonstrated that the Court should have imputed \$2,500.00 per month beginning from the time of trial. The standard of appellate review is that the trial court's findings of fact will not be overturned unless clearly erroneous.

Peterson v. Peterson, 818 P.2d 1305, 1307-08 (Utah App. 1991).

The sixth issue for the Court to determine is whether the trial court erred by ordering a retroactive modification of the temporary alimony even though Appellant had already made a timely payment of the debt as it became due. The standard of appellate review is that the appellate court will not reverse the trial court unless there is a clear and prejudicial abuse of discretion. Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986).

DETERMINATIVE STATUTORY LAW

"The court shall consider at least the following factors in determining alimony: (i) the financial condition and needs of the recipient spouse; (ii) the recipient's earning capacity or ability to produce income; (iii) the ability of the payor spouse to provide support; and (iv) the length of the marriage. Utah Code Ann., § 30-3-5 (7)(a).

"Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding made that the parent is voluntarily unemployed or under-employed." Utah Code Ann., § 78-45-7.5 (7)(a).

"If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community." Utah Code Ann., § 78-45-7.5 (7)(b).

STATEMENT OF THE CASE

A. Nature of the Case

The parties in this matter were married on March 19, 1975. This case is an appeal from a decree of divorce granted to Appellee on June 3, 1997. In essence, this case centers on whether the trial court's failure to consider evidence which clearly tends to show that Appellant currently makes well below the income levels which the court attributes to him constitutes an abuse of discretion. Since income and ability to pay support are inextricably connected, Appellant maintains that the court's failure to consider such evidence violates the mandate of Utah Code Ann., § 30-3-5 (7)(a) wherein the trial judge must consider the ability of the payor spouse to provide support.

B. Course of Proceedings

Appellee filed a Complaint for Divorce on March 6, 1995. On April 21, 1995, the parties entered into a Stipulation governing temporary matters whereby Appellant agreed to pay \$6,500.00 per month to Appellee for temporary alimony. Appellant also agreed to pay \$1,500.00 a month to Appellee for child support bringing the total monthly amount paid to Appellee to \$8,000.00. Trial in this matter was set for May 2, and May 3, 1996, in the First District Court before the Honorable Clint S. Judkins.

At the time of trial, counsel informed the court that the parties would limit the issues to alimony, property division and attorney's fees. With regard to the issue of alimony, the parties specifically disputed the amount of money earned by Appellant and the amount of money imputed to Appellee. During trial, both parties produced witnesses and submitted exhibits to the Court. On May 7, 1996, the Court issued its ruling.

Notwithstanding an abundance of evidence to the contrary, the trial court determined that

Appellant earned \$512,114.00 per annum based on the average of his earnings for 1992-1995. In reaching this figure, the trial court refused to consider evidence of Appellant's income from the first four months of 1996 which reflected the new area hospital contracts. The trial court also refused to consider the undisputed fact that Appellant's unusually high 1994 income simply reflected the fact that one of his partners had not worked during the 1994 year and that Appellant had worked an inordinate amount of overtime to compensate for this absence. Rather, the trial court simply and arbitrarily anticipated that Appellant's 1996 earnings would decrease by ten percent (10%) leaving him with an income of \$460,903.00 from which to calculate alimony.

After child support and taxes, the trial court concluded that Appellant's income totaled approximately \$22,029.00 per month. From this total the trial court awarded Appellee alimony in the amount of \$11,015.00 per month. The total monthly amount awarded to Appellee was \$12,415.00. In reaching this amount the trial court imputed \$1,000.00 a month to Appellee. The trial court concluded, however, that inasmuch as Appellee could earn her teaching certificate in as little as two quarters, this imputed amount would increase to \$2,500.00 in May of 1998. Correspondingly, the trial court reduced the alimony award by \$1,500.00 at this time.

Following the May 1996, trial, the Court required both parties to re-brief the case. In November of 1996, the court heard additional argument in this matter. After hearing additional argument regarding the tax consequences of the Court's previous ruling, the Court reduced Appellant's alimony obligations by \$500.00. The trial court refused, however, to consider current evidence regarding Appellant's present income.

The Final Findings of Fact and Conclusions of Law were prepared by Appellee over the objection of Appellant and were entered by the trial court on June 3, 1997. The final Decree of Divorce was entered on June 3, 1997.

C. Disposition in the Trial Court

The trial court concluded that, based on an average of Appellant's income from 1992-1995, that Appellant earned \$460,903.00 per annum. From this amount the trial court awarded Appellee \$11,015.00 per month as alimony. Following a re-hearing on the issue to consider tax consequences, the trial court reduced this amount to \$10,515.00. The Court ordered Appellant to pay this amount retroactively to the date of the trial. The trial court also ordered Appellant to pay Appellee an additional \$1,400.00 per month in child support.

The trial court further divided the marital estate. Pursuant to this division, the trial court awarded to Appellee the Logan home and furnishings, the Central Life account, two Jackson National accounts, a Suburban automobile, and a one-half interest in the VEBA, RANCON and Genesis general partnership. The trial court found the value of this portion of the estate to equal \$326,215.00. The trial court awarded to Appellant the Providence home and furnishings, a recreational four-wheeler, a Blazer automobile, five Jackson National accounts, a Central Life account, Lord Abbot, IDEX, Oppenheimer, ATEL, and a one-half interest in the VEBA and RANCON accounts and a one-half interest in the Genesis general partnership. The trial court found the value of this estate to equal \$221,469.00.

To equalize the division of the property, the court ordered Appellee to pay Appellant the sum of \$57,953.50. To satisfy this judgment, the court allowed Appellant to offset this amount owed against the arrearages which had accumulated in Appellant's alimony from the date of the trial until the date of the decree. The court then allowed Appellant to reduce his alimony payment by \$1,000.00 per month until Appellee retired the debt owed to Appellant.

The Court ordered each party to bear their own attorney's fees by finding that the amount of Appellee's alimony and property award were sufficient to pay such a fee. The court upheld the parties'

stipulations with regards to the remaining issues of the divorce.

D. Statement of the Facts

1. The parties were married on March 19, 1975. During the course of this marriage three children were born, two of whom remain minors. (R. at 65).

2. On March 6, 1995, Appellee filed a Complaint for Divorce. (R. at 357).

3. On April 21, 1995, the parties entered into a stipulation whereby the parties agreed that Appellant would pay the total of \$8,000.00 to Appellee in support with \$6,500.00 of this sum allocated to alimony and \$1,500.00 allocated to child support. At a subsequent Pre-Trial Conference held on March 26, 1996, the parties affirmed this stipulation. (R. at 2-6).

4. Trial on this matter was held on May 2 and 3, 1996. The parties reserved three issues for resolution at trial: alimony, property division and attorney's fees. (R. at 7).

5. During trial, Appellant presented extensive testimony regarding his present level of income. (R. At 443).

6. Ruth Ann Finch, an assistant administrator at Western Surgery, testified that medical insurance companies had recently expanded the practice of discounting the rates for which they would pay doctors for the procedures which they perform. (R. at 167). Ms. Finch gave the specific example that a knee surgery performed in 1993 which paid the Appellant \$1,211.00 would only pay \$773.36 in 1996. (R. At 169-70). Ms. Finch attributed this reduction to insurance company discounting. Appellee did not offer evidence to rebut this testimony. Ms. Finch further testified that Appellant derived 75% of his business from insurance contracts. (R. At 181).

7. Ms. Finch also testified that 1994 represented an unusually high departure from Appellant's average income. (R. At 178). Ms. Finch attributed this departure to the fact that one of Appellant's partners took an extensive sabbatical in 1994 which created an opportunity for Appellant to perform the

surgeries which his partner would have performed. (R. At 178). Appellee did not offer evidence to rebut this testimony.

8. Ms. Finch testified that another doctor at Western Surgery currently made 35% less in 1996 as compared with previous years due to changes in the medical climate in Cache Valley. (R. At 180). Appellee did not offer evidence to rebut his testimony.

9. Rusty Shelton, the CEO of Western Surgery, offered testimony showing that four new surgeons had signed contracts to enter the already saturated orthopedic surgeon market in Cache Valley in 1995 and 1996. (R. At 220). Mr. Shelton testified that this increase would immediately have a negative impact on Appellant's current salary. (R. At 220).

10. Mr. Shelton, after concluding extensive national research on the subject, also testified that as the managed care and third party payors penetrated the Cache valley market that physicians in Cache Valley could expect to earn as much as 35% less in the future. (R. At 225). Appellee failed to introduce any evidence to show that national trends would not affect Cache Valley economies.

11. Richard Dorigatti, the CPA for Western Surgery and the physicians therein, testified that Appellant had earned \$100,398.00 during the first four months of 1996. Projected out over the remainder of the year, Mr. Dorigatti calculated that Appellant would earn \$330,631.00 as a total for 1996. (R. At 254).

12. Troy Martin, another CPA employed by Western Surgery, testified that, unlike scenarios which present in other closely held corporations, Appellant could not artificially manipulate his income downward inasmuch as the administrators at Western Surgery controlled Appellant's billing as opposed to Appellant himself. (R. At 352-53).

13. Appellee's own witness, Paul Simpkins, testified that he had failed to review Appellant's 1996 records to determine Appellant's current income despite the fact that such records were available for

review. (R. At 107). Mr. Simpkins further conceded that the most accurate method to determine Appellant's present income would be to take into consideration his 1996 income. (R. At 108).

SUMMARY OF THE ARGUMENT

Utah law mandates that a trial judge must consider the ability of the payor spouse to provide support when calculating the amount of alimony awarded to the receiving spouse. Failure to make such a consideration constitutes an abuse of discretion which the appellate court must reverse. When factoring in the payor spouse's ability to pay, the Court must consider his present ability as opposed to his historical ability to pay such an award inasmuch as the award will be paid from present as opposed to historical income.

Following trial, the trial court failed to prepare adequate findings of fact. Utah law requires the Court to prepare adequate factual findings on all material issues necessary to support an award of alimony. The trial court's failure to make specific findings of fact with regard to Appellant's ability to provide support constitutes an error which the appellate court must rectify by overturning the award and remanding the matter.

ARGUMENT

I. TRIAL COURT'S FINDING THAT APPELLANT EARNS \$460,903.00 PER YEAR IS CLEARLY ERRONEOUS INASMUCH AS THIS FINDING IS NOT SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE.

The appellate court reviews the trial court's findings of fact under the clearly erroneous standard. Cummings v. Cummings, 821 P.2d 472 (Utah App. 1991). This standard requires the Appellant to show that such findings are not supported by substantial and competent evidence. Saunders v. Sharp, 806 P.2d 198 (Utah 1991). To meet this burden, Appellant must marshal all of the evidence supporting the findings and then demonstrate that the evidence is legally insufficient to support the Court's decision below. Id.

In the Final Findings of Fact, paragraph 32, the trial court found:

It is likely Defendant's income will be lower in 1996 and thereafter than the four year average determined by the Court. The Court finds that ten percent (10%) is an appropriate amount to reduce the average income, which is approximately \$51,211.00. The Court, therefore, finds that Defendant's current income is \$460,903.00 per year or \$38,408.00 per month.

Appellant must now marshal all of the evidence presented in trial which supports this finding that Appellant currently makes \$460,903.00 and then demonstrate that such evidence is legally insufficient to support such a finding. In the instant case, Appellant's task is compounded by the fact that the trial court failed to prepare adequate findings of fact relative to how the trial court arrived at ten percent as the Appropriate amount" to reduce Appellant's historical income.

In arriving at the \$460,903.00 figure, the trial court makes two errors not supported by substantial evidence: 1) Relying on Appellant's historical income as an accurate gauge by which to measure Appellant's current income; and 2) Arbitrarily assigning the figure of ten percent as an accurate measure of Appellant's reduction in income.

A. APPELLANT'S HISTORICAL INCOME DOES NOT ACCURATELY PREDICT APPELLANT'S PRESENT INCOME.

With respect to the first issue, Appellant concedes that Appellee produced sufficient evidence at trial from which the Court could adduce that Appellant averaged \$512,114.00 per year from the time period 1992-1995. This fact notwithstanding, Appellee did not produce legally sufficient evidence to allow the Court to use this average as a true reflection of Appellant's current income when measured against the substantial evidence to the contrary.

In making the decision to use the average of 1992-1995 and exclude evidence from the first four months of 1996, the Court stated that "a four month duration is too short a time to determine any reliability, that it is not reflective of Defendant's actual income, and that a four year average is more appropriate to determine current income." (Findings of Fact at paragraph 30). This sentiment echoes

the testimony of witness Paul Simpkins who opined that a four month period was too short to determine Appellant's income given the fluctuations which existed in Appellant's month to month income. (R. At 325-26).

The Court's decision to exclude 1996 records and rely solely on the four year average, however, does not conform to the overwhelming bulk of testimony presented to the contrary. In fact, Appellee's own witness, Paul Simpkins, upon whom the Court apparently relied in making its finding, conceded during cross-examination that the best indication of Appellant's current income has to take into consideration the 1996 income. (R. At 108). In addition, Appellant's witnesses, Ruth Ann Finch, Richard Dorigatti and Rusty Shelton, all testified that a four year average from 1992-1995 would not give an accurate measure of Appellant's income. In reaching this conclusion, the witnesses cited two controlling facts: 1) 1994 was an aberrant year for earnings; and 2) the medical climate no longer fostered the types of income historically seen.

i. When calculating income, trial court may not rely upon overtime which is inconsistent and speculative.

When a court calculates a payor spouse's income for purposes of determining an alimony award, overtime income may be used only if the overtime has been consistent and the calculation of overtime is not speculative. Crompton v. Crompton, 888 P.2d 686 (Utah App. 1994). In calculating Appellant's income, the trial court erred by including figures from 1994. The clear weight of testimony presented at trial tended to show that Appellant earned significantly more during 1994 than he had earned before or since. The testimony conclusively demonstrated that this increase resulted from the overtime which Appellant worked during this year.

Ms. Finch testified that during 1994, Appellant had the opportunity to increase his earnings by filling in for a partner who had taken a six month sabbatical. (R. At 178). During this period of time, Appellant performed more procedures and subsequently earned more money than he ever had

previously or has since. (R. At 178). When the partner returned, Appellant's opportunities to perform additional procedures decreased. Appellee did not offer evidence to rebut this testimony, rather, Mr. Simpkins conceded that Appellant's revenue increased dramatically in 1994. (R. At 95). Mr. Simpkins also admitted that Appellant's income fell in 1995 following the return of the absent doctor. (R. At 96).

For purposes of calculating alimony, this increase in 1994 can only be attributed to the overtime which Appellant worked during his partner's sabbatical. Since this doctor's return, Appellant did not have the opportunity to work consistent overtime. Since the overtime was not consistent, the trial court's inclusion of 1994 for purposes of calculating income is an error under Crompton.

ii. The overwhelming weight of evidence demonstrated that changes in health care caused lower incomes for doctors.

Ms. Finch, Mr. Shelton and Mr. Dorigatti each testified that the medical economy in Cache Valley no longer supported the amounts of income historically seen. Ms. Finch testified that the practice of insurance companies paying discounted rates for procedures increased during the period 1992-1996. (R. At 167). As such, a surgery which paid \$1,211.00 in 1993 only paid \$773.36 in 1995. (R. At 169-70). Ms. Finch testified that seventy-five percent of Appellant's practice stemmed from insurance contracts. (R. At 181). Appellee did not offer testimony to refute this testimony, rather, Mr. Simpkins acknowledged that insurance discounts had recently increased. (R. At 124).

Mr. Shelton testified that national health management trends had begun to affect Cache Valley in 1995 and 1996. (R. At 245). As a result of these trends, physicians could realistically expect to earn thirty-five percent less in 1996 than in the previous years. (R. At 225). Ms. Finch testified that another doctor employed at Western Surgery made thirty-five percent less in 1996 than he did in 1995. (R. At 180). Mr. Shelton also testified to the fact that four additional surgeons were under contract in

1996 than in 1994. The addition of these four surgeons would only decrease the amount of money which Appellant earned and make the historical average less reliable. (R. At 220). Mr. Dorigatti testified that Appellant's revenues for 1996 were significantly lower in 1996 when compared to previous years. (R. At 244). When projected over a twelve month period, Mr. Dorigatti estimated that Appellant would earn \$330,631.00 for the 1996 year. (R. At 254). Appellee did not offer testimony regarding any changes in the medical economy in Cache Valley.

In short, witnesses for both Appellant and Appellee stated that the trial court should at least consider 1996 revenue when determining Appellant's current income. In addition, Appellant produced an overwhelming amount of unrefuted testimony tending to show that Appellant's historical average did not accurately reflect Appellant's present income. At the very least, the trial court's failure to consider 1996 revenue leads to a clearly erroneous finding not supported by substantial evidence. The substantial bulk of testimony, however, demonstrated that any reliance on Appellant's historical average could only lead to an erroneous finding.

B. TRIAL COURT'S TEN PERCENT REDUCTION IN INCOME IS ARBITRARY AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

With regard to the second issue, Appellant's task of marshaling evidence which supports the trial court's finding is compounded by the trial court's failure to prepare adequate Findings of Fact. In the Findings of Fact, the Court states that "ten percent is an appropriate amount to reduce the average income." The Court, however, neglects to inform the parties exactly how the court determined that ten percent became the appropriate number.

During trial, several witnesses gave testimony regarding Appellant's ability to earn income. Mr. Simpkins provided the court with a four year historical average of Appellant's earnings and concluded that Appellant showed an overall increase in his net average from 1992 to 1995. (R. At 96). Ms. Finch testified that physicians at Western Surgery were all making much less in 1996 when

compared to previous years. (R. At 180). In particular, one doctor at Western Surgery was making thirty-five percent less in 1996 than he had in previous years. (R. At 180). Mr. Shelton confirmed that orthopedic surgeons in Utah could expect to earn thirty-five percent less than they had made historically. (R. At 225). Appellee did not offer testimony refuting the fact that physicians at Western Surgery made less in 1996 than they had made previously. Rather, Mr. Simpkins conceded that he had undertaken no independent analysis of Western Surgery or the Cache Valley medical economy. (R. At 92, 343).

Other testimony offered during trial isolated the cause of the decrease in revenue. Ms. Finch attributed part of the decrease to insurance discounting. (R. At 167). Another part she attributed to the addition of new doctors. (R. At 179). Mr. Shelton traced a portion of the decrease to reduced Medicare payments. (R. At 231). Still another, he attributed to managed health care programs. (R. At 225). The witnesses each assigned different percentages to the decreases they listed. Without knowing more, Appellant cannot guess as to which number the Court decided to use to arrive at the ten percent reduction the Court employed.

What is certain, however, is that Appellant's witnesses looked at hard data in determining that Appellant's 1996 income was lower than previous years. Mr. Dorigatti presented receipts from the first four months of 1996. This data showed that Appellant earned \$100,398.00 for the first four months of 1996. (R. At 254). Appellee presented no competent or substantial evidence which showed that Appellant earned more than this figure. When projected over a twelve month period, Mr. Dorigatti estimated that Appellant would earn \$330,631.00 during 1996. (R. At 254). The Court will note that in arriving at this conclusion, Mr. Dorigatti did more than simply multiply the revenues from the first four months by three. Rather, this figure represents the best professional estimate which Mr. Dorigatti could form when presented with all available data.

In arriving at its ten percent reduction figure for 1996, the trial court did not rely on any evidence regarding 1996 presented by Appellee. Mr. Simpkins, Appellee's only financial expert, acknowledged that he had opted not to review any 1996 data even though such data was available. (R. At 107-08). It is particularly worth noting that Mr. Simpkins makes this acknowledgment while conceding that the best indication of Appellant's current income would have to consider 1996 revenue. (R. At 108). But, since Appellee offered no competent or substantial evidence regarding 1996 income, the Court could not rely upon such when arriving at the ten percent figure.

Rather, it appears the Court accepted the premise that Appellant would make less in 1996 and thereafter when compared to his historical income. Instead of relying on the unrefuted data which Mr. Dorigatti presented, however, the trial court apparently arbitrarily designated ten percent as the number by which to reduce Appellant's historical income. Inasmuch as the overwhelming bulk of the testimony presented at trial does not support this finding, this finding is clearly erroneous.

II. TRIAL COURT'S FAILURE TO CONSIDER PAYOR SPOUSE'S ABILITY TO PROVIDE SUPPORT CONSTITUTES ERROR.

Utah Code Ann. § 30-3-5 (7)(a) provides: "The court shall consider at least the following factors in determining alimony: (i) the financial conditions and needs of the recipient spouse; (ii) the recipient's earning capacity or ability to produce income; (iii) the ability of the payor spouse to provide support; and (iv) the length of the marriage." The third factor requires the Court to make a determination as to the ability of Appellant to provide support to Appellee. This inquiry typically requires the trial court to ascertain the payor spouse's income. Jones v. Jones, 700 P.2d 1072 (Utah 1985). The Court of Appeals has stated unequivocally that a "[f]ailure to analyze the parties' circumstances in light of these three factors constitutes an abuse of discretion." Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986). Merely establishing an arbitrary income figure not supported by the evidence, however, will not suffice.

As outlined above, in determining Appellant's income the trial court simply subtracted ten percent from Appellant's historical income averaged from 1992-1995. In so doing, the Court made two erroneous assumptions: 1) That the historical average accurately evidenced Appellant's current income; and 2) That the ten percent figure accurately reflected Appellant's actual decrease in income. Not only does this assumption lead to a clearly erroneous finding, however, this approach does not comply with statutory mandates.

Utah courts have consistently held that a trial court may only rely on historical evidence of income as an accurate measure of ability when a party experiences a temporary decrease in income. As this Court stated in Cox v. Cox, 877 P.2d 1262, 1267 (Utah App. 1994), "In assessing spousal support, trial courts have appropriately relied on historical income rather than income at the time of the divorce where a party has experienced a temporary decrease in income," (quoting Olson v. Olson, 704 P.2d 564, 566 (Utah 1985)).

The instant case, however, does not present a situation where a trial court may use Appellant's historical average as a measure of Appellant's ability to provide support. The case law is clear that historical income may only be used when the payor spouse experiences a *temporary* decrease in income. In the instant case, witnesses for the Appellant presented extensive evidence that Appellant's decrease in income was permanent. As mentioned above, witnesses isolated several causes for the decrease in income ranging from changes in health care management to market saturation. No evidence was presented at trial to suggest these causes were temporary in nature. Rather, these causes will permanently affect Appellant's income.

In the Findings of Fact, the trial court appears to accept the premise that Appellant's earnings have decreased permanently. In paragraph 32, the Court states, "The Court finds that it is likely Defendant's income will be lower in 1996 and *thereafter* than the four year average determined by the

Court," (emphasis added). Hence, the Court accepts that the causes leading to the decline in income will continue to exist beyond a temporary time period. Since the decline is not temporary, the Court may not use any evidence of historical income but must instead rely on evidence of current income.

Mr. Dorigatti presented evidence that Appellant's current income amounted to \$330,631.00. (R. At 254). Witnesses for Appellee chose not to present evidence regarding Appellant's 1996 income. (R. At 108). Since current income and ability to pay are inescapably connected, the trial court committed error by awarding alimony based on the \$460,903.00 amount as opposed to the amount shown at trial to be Appellant's current income.

III. TRIAL COURT'S FAILURE TO ENTER SUFFICIENT FINDINGS ON THE ISSUE OF ALIMONY WARRANTS REVERSAL OF TRIAL COURT'S FINDINGS.

In addition to considering the above listed factors, the trial court is required to enter sufficient findings in the record. As the Court stated in Breinholt v. Breinholt, 905 P.2d 877, 880 (Utah App. 1995), "The trial court is required to enter sufficient findings on the three enumerated factors, and we will reverse if it fails to do so unless the relevant facts contained within the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment,'" (quoting Howell v. Howell, 806 P.2d 1209, 1218 (Utah App. 1991)). Moreover, the Court must make factual findings on the reasonableness of each need for which the receiving spouse claims to require support. Willey v. Willey, 866 P.2d 547, 551 (Utah App. 1993). In the instant case, the trial court has failed to prepare sufficient findings relative to the four factors enumerated by statute.

With regard to the issue of Appellant's ability to provide support, the trial court expressly found that Appellant earned \$460,903.00 per year. The Court stated that it reached this amount by taking the historical amount earned by Appellant in the four previous years and then subtracting ten percent of this amount. This conclusory mention of how the Court arrived at its figure does not qualify

as an "adequate factual finding on all material issues necessary to support an award of alimony." Chamber v. Chambers, 840 P.2d 841, 843 (Utah App. 1992). Neither does such a finding fit into the exception as a fact which is clear, uncontroverted, and capable of supporting only a finding in favor of judgment.

As detailed above, the clear weight of testimony offered at trial tended to show that Appellant earned significantly less than \$460,903.00. Absent a detailed finding outlining how the court arrived at the ten percent figure, this finding cannot stand. This error in and of itself requires this Court to reverse the finding of the trial court.

IV. THE ONLY EVIDENCE BEFORE THE COURT SUPPORTS A FINDING THAT APPELLEE SHOULD HAVE IMPUTED INCOME OF \$2,500.00 PER MONTH FROM THE TIME THE COURT ENTERS THE DECREE OF DIVORCE.

Utah Code Ann. § 78-45-7.5 (7) describes the procedure to be used at trial to impute income to a party. Said statute provides:

(7) (a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding is made that the parent is voluntarily unemployed or under-employed.

(7) (b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community.

In order to impute income to a party, the trial court must follow the guidelines enumerated in this statute.

In the instant case, the only evidence before the Court on the amount of income to be imputed to Appellee was undisputed. John Matthews, a labor economist employed by the State of Utah, testified that a new teacher in Cache Valley earned \$12.96 per hour or \$29,299.00 per year. (R. At 21-23). Mr. Matthews also testified that there were currently fifty openings in the State of Utah for

elementary and secondary level teachers. (R. At 23).

In light of these facts, Appellee testified that she could earn her teaching certificate in four quarters. (R. At 360). Appellee also testified that during the hours between 8:30 a.m. and 3:30 p.m. that her children attended school and that she could do as she pleased during that time. (R. At 361). Notwithstanding this testimony, however, Appellee admitted that she hadn't taken steps to advance her career training in the year and four months since her separation and the time of trial. (R. At 363).

Applying this unrefuted testimony to the relative statute shows that Appellee was voluntarily unemployed and that Appellee could realistically expect to earn nearly \$30,000.00 per year as a teacher upon the completion of her teacher certificate. Had Appellee begun work toward the completion of this certificate upon her separation, Appellee would have completed this certificate before the beginning of trial. The statute is clear. Appellee does not have the option of staying home or accepting a lower paying job; she must take steps to support herself and her children.

V. TRIAL COURT ERRED BY ORDERING APPELLANT TO PAY AWARDED ALIMONY RETROACTIVE TO TIME OF TRIAL.

Under Utah law, a judgment does not become enforceable until such judgment is signed and filed with the clerk of the court. Rule 58(c), Utah Rules of Civil Procedure; Wisdon v. Salina, 696 P.2d 1205 (Utah 1985); Pate v. Marathon Steel Co., 692 P.2d 765 (Utah 1984). Further, this Court has stated, "Once temporary support obligations become due, they are no more retroactively modifiable than final decrees." Whitehead v. Whitehead, 836 P.2d 814, 816 (Utah App. 1992).

The State of Utah has long recognized the authority of the parties to make agreements concerning the monetary terms of a divorce, and absent a showing of fraud, hardship, duress, concealment, or mutual mistake, the court may not retroactively upset such an agreement. Wallis v. Wallis, 342 P.2d 103 (Utah 1959); Shelton v. Shelton, 885 P.2d 807 (Utah App. 1994). In the instant case, the parties reached a stipulation on April 21, 1995. Pursuant to the terms of this stipulation, the

parties agreed that Appellant would pay the sum of \$6,500.00 per month as temporary alimony. Appellant paid this amount from April, 1995, until June 1997 (the date the final decree of divorce was signed and entered in the record).

In the Divorce Decree, signed June 3, 1997, the trial court ordered Appellant to pay \$10,515.00 per month as and for alimony commencing May 1, 1996. This order constitutes an abuse of discretion. Once Appellant makes the payments as the payments become due, they become unalterable debts which cannot be changed or modified thereafter. Whitehead, at 816; Shelton, at 808; Larsen v. Larsen, 561 P.2d 1077, 1079 (Utah 1977). Had the Court wished to modify the stipulation, the Court could have ordered a prospective modification to govern the interim period between trial and the entering of judgment. Karen v. State Dept. of Social Serve., 716 P.2d 810, 813 (Utah 1986). The Court, however, failed to make such an order.

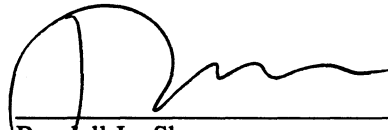
On these facts, the Court simply cannot award retroactive alimony. Each of the payments was paid in a timely manner prior to the entry of judgment. The Court's order amounts to an abuse of discretion which this Court must reverse.

CONCLUSION

For the above reasons, Appellant hereby moves this Court to reverse the trial court's award of alimony in favor of an award commensurate with the facts presented at trial and Utah Law.

Dated this 5th day of March, 1998.

SKEEN & ROBINSON, L.L.C.



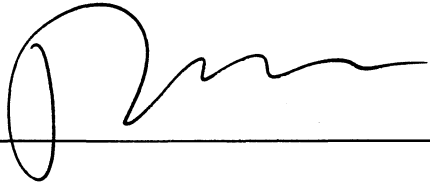
Randall L. Skeen,
Shawn H. Robinson,

Attorneys for Appellant

CERTIFICATE OF SERVICE

I herewith certify that I am a member of and/or employed by the law firm of SKEEN & ROBINSON, L.L.C. 3760 So. Highland Drive, Suite 400, Salt Lake City, UT 84106, and that in said capacity the foregoing BRIEF OF APPELLANT was served upon the Appellee by mailing via first-class mail, postage prepaid, two true and correct copies thereof to the following this 5th day of March, 1998:

HELEN E. CHRISTIAN (2247)
GUSTIN & CHRISTIAN
Suite 722, Boston Building
9 Exchange Place
Salt Lake City, UT 84111


A handwritten signature in black ink, appearing to read 'Helen E. Christian', is written over a horizontal line.

IN THE UTAH COURT OF APPEALS

KIM LARSON)	
)	
Plaintiff /Appellee/)	
Cross-Appellant)	
)	
vs.)	First District Court
)	Civil No. 954-081-DA
BRAD LARSON,)	
)	Appellate Court No. 970434-CA
Defendant/Appellant/)	
Cross-Appellee)	

ADDENDUM TO BRIEF OF APPELLANT

EXHIBIT A	-	FINAL DECREE OF DIVORCE
EXHIBIT B	-	FINAL FINDINGS OF FACT & CONCLUSIONS OF LAW
EXHIBIT C	-	Utah Code Ann. § 78-2a-3(2)(h)
EXHIBIT D	-	Utah Code Ann. § 30-3-5(7)(a)
EXHIBIT E	-	Utah Code Ann. § 78-45-7.5(7)(a)(b)

Stephen W. Jewell, 3814
Attorney for Plaintiff
15 South Main, Third Floor
Logan, Utah 84321
Telephone: (801) 753-2000

FIRST DISTRICT
COURT

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PRINCE, YEATES, & GELDZAHNER

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

KIM LARSON,

Plaintiff,

vs.

BRAD LARSON,

Defendant.

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FINAL
DECREE OF DIVORCE

Civil No. 954-081 DA

Judge Clint S. Judkins

This matter came before the Court for trial on May 2 - 3, 1996, the Honorable Clint S. Judkins, District Court Judge, presiding. Plaintiff appeared in person and with her attorney, Stephen W. Jewell. Defendant appeared in person and with his attorney, Kenneth A. Okazaki, PRINCE, YEATES & GELDZAHNER. The Court having received and accepted certain stipulations of the parties and having heard and received testimony and evidence, and all other kindred matters having been resolved and the Court having examined the evidence and being fully advised in the premises after subsequent hearings, arguments

of counsel and the submission of memoranda, and having previously entered a Decree of Divorce dated June 12, 1996, intended as a temporary Decree of Divorce until the resolution of all issues, those issues having been ruled upon by the Court, and having previously entered its Findings of Fact and Conclusions of Law, now makes and enters the following Decree:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The Court reaffirms the Decree of Divorce entered in this action, the same to be final as of June 12, 1996.

CUSTODY AND VISITATION

2. The parties shall be and are hereby granted joint legal and physical custody of the minor children of the parties, to wit: Krista Larson, born July 4, 1982; and Gregory Larson, born November 20, 1986. Plaintiff is awarded seventy-five percent (75%) of the custodial time and Defendant is awarded twenty-five percent (25%) of the custodial time with said minor children. Custodial exchanges will continue on the current schedule, with Defendant to have the children every Tuesday overnight and every other weekend, unless as otherwise agreed between the parties. All other custodial time, unless otherwise agreed between the parties, will be pursuant to the Utah Statutory Visitation Guidelines, Section 30-3-33, Utah Code, including four (4) consecutive weeks during the summer. Visitation shall otherwise be as follows:

A. In years ending in an odd number, the father, (Defendant) is entitled to the following holidays:

- (1) Day before or after child(ren)'s actual birthday beginning at 3:00 p.m. until 9:00 p.m.;
- (2) Human Rights Day beginning 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;
- (3) Easter holiday beginning at 6:00 p.m. on Friday until Sunday at 7:00 p.m., unless the holiday extends for a lengthier period of time to which the father (Defendant) is completely entitled;
- (4) Memorial Day beginning 6:00 p.m. on Friday until Monday at 7:00 p.m., unless the holiday extends for a lengthier period of time to which the father (Defendant) is completely entitled;
- (5) July 24th beginning 6:00 p.m. on the day before the holiday until 11:00 p.m. on the holiday;
- (6) Veteran's day holiday beginning 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday; and
- (7) The first portion of the Christmas school vacation** as defined in Subsection 30-3-32(3)(b) plus Christmas Eve and Christmas Day until 1:00 p.m., so long as the entire holiday is equally divided;

B. In years ending in an even number, the father (Defendant) is entitled to the following holidays:

- (1) Child(ren)'s birthday on actual birth date beginning at 3:00 p.m. until 9:00 p.m.;
- (2) New Year's Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;
- (3) President's Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;

- (4) July 4th beginning at 6:00 p.m. the day before the holiday until 11:00 p.m. on the holiday;
 - (5) Labor Day beginning at 6:00 p.m. on Friday until Monday at 7:00 p.m. unless the holiday extends for lengthier period of time to which the father (Defendant) is completely entitled;
 - (6) The fall school break, if applicable, commonly known as U.E.A. weekend beginning at 6:00 p.m. on Wednesday until Sunday at 7:00 p.m. unless the holiday extends for a lengthier period of time to which the father (Defendant) is completely entitled;
 - (7) Columbus Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;
 - (8) Thanksgiving holiday beginning Wednesday at 7:00 p.m. until Sunday at 7:00 p.m.; and
 - (9) The second portion of the Christmas school vacation** as defined in Subsection 30-3-32(3)(b) plus Christmas day beginning at 1:00 p.m. until 9:00 p.m., as long as the entire Christmas holiday is equally divided;
- C. Father's Day shall be spent with the father every year beginning at 9:00 a.m. until 7:00 p.m. on the holiday;
- D. Mother's Day shall be spent with the mother every year beginning at 9:00 a.m. until 7:00 p.m. on the holiday;
- E. Extended visitation with the father (Defendant) may be:
- (1) Up to four (4) weeks consecutive at the option of the father (Defendant);
 - (2) Two (2) weeks shall be uninterrupted time for the noncustodial parent father (Defendant); and

- (3) The remaining two (2) weeks shall be subject to visitation for the custodial parent mother (Plaintiff) consistent with these guidelines;
- F. The mother (Plaintiff) shall have an identical two (2) week period of uninterrupted time during the child(ren)'s summer vacation from school for purposes of vacation;
 - G. If the child(ren) is/are enrolled in year-round school, the father's (Defendant) extended visitation shall be one-half (½) of the vacation time for year-round school breaks, provided the mother (Plaintiff) has holiday and telephone visits;
 - H. Notification of extended visitation or vacation weeks with the child(ren) shall be provided at least thirty (30) days in advance to the other parent;
 - I. Holidays take precedence over the weekend visitation, and changes shall not be made to the regular rotation of the alternating weekend visitation schedule;
 - J. If a holiday falls on a regularly scheduled school day, the father (Defendant) shall be responsible for the child(ren)'s attendance at school for that school day;
 - K. If a holiday falls on a weekend or on a Friday or Monday and the total holiday period extends beyond that time so that the child(ren) is/are free from school and the parent is free from work, the father (Defendant) shall be entitled to this lengthier holiday period;
 - L. Telephone contact at reasonable hours; and
 - M. Such other times as agreed between the parties.

*****"Christmas school vacation"** means the time period beginning on the evening the child gets out of school for the Christmas school break until the evening before the child returns to school, except for Christmas Eve, Christmas Day, and New Year's Day.

“Extended visitation” means a period of visitation other than a weekend, holiday as provided in Subsections 30-3-35(2)(f) and (2)(g), religious holidays as provided in Subsections 30-3-33(4) and (16), and “Christmas school vacation.

The parties shall further comply with the following:

Keep each other advised of their current address and telephone number within twenty four (24) hours of any change;

Special consideration shall be given by each parent to make the child(ren) available to attend family functions including funerals, weddings, family reunions, religious holidays, important ceremonies, and other significant events in the life of the child(ren) or in the life of either parent which may inadvertently conflict with the visitation schedule;

The father (Defendant) shall pick up the child(ren) at the time specified and return the child(ren) at the time specified, and the child(ren)'s regular school hours shall not be interrupted;

The mother (Plaintiff) shall notify the father (Defendant) within twenty-four (24) hours of receiving notice of all significant school, social, sports, and community function in which the child(ren) is/are participating or being honored, and the father (Defendant) shall be entitled to attend and participate fully;

The father (Defendant) shall have access directly to all school reports including preschool and day care reports and medical records and shall be notified immediately by the mother (Plaintiff) in the event of a medical emergency;

Parental care shall be presumed to be better care for the child(ren) than surrogate care and the court shall encourage the parties to cooperate in allowing the father (Defendant), if willing and able, to provide child care;

Each parent shall be entitled to an equal division of major religious holidays celebrated by the parents, and the parent who celebrates a religious holiday that the other parent does not celebrate shall have the right to be together with the child(ren) on the religious holiday.

Refrain from making derogatory remarks about or to the other in the presence of the minor children.

CHILD SUPPORT AND CHILD CARE

3. Child support shall be and is hereby ordered at \$1,400.00 per month for the parties' two (2) minor children, less a credit for one-half of the insurance premium as provided in Paragraph 7.

4. Said child support payments shall be and are hereby due one-half ($\frac{1}{2}$) on or before the fifth (5th) day and one-half ($\frac{1}{2}$) on or before the twentieth (20th) day of each month commencing May 1, 1996, and continuing every month thereafter until each child reaches the age of eighteen (18) or graduates from high school through normal matriculation, whichever is later. Upon Defendant's child support obligation for Krista being terminated, child support shall be automatically rescheduled using the maximum child support amount for one (1) child.

5. Child support payments may be made directly to Plaintiff. If Defendant becomes delinquent in payment of support, said payments shall then be paid through automatic income withholding through the Utah State Department of Human Services, Office of Recovery Services by serving an Order to Withhold and Deliver. In accordance with Utah Code Annotated § 62A-11-403(2)(b) and 78-45-7(4), the Defendant will then be assessed an additional check processing fee in the amount of \$7.00, or such other amount as required by statute. This fee shall be included in the amount withheld and paid to the Office of Recovery

Services. As an alternative to automatic income withholding, Defendant may pay support by wage assignment and/or direct deposit to Plaintiff's checking account.

6. Child support shall be abated by one-half ($\frac{1}{2}$) during summer visitation as long as the children are with Defendant for at least twenty-five (25) of thirty (30) consecutive days.

HEALTH INSURANCE

7. That Defendant shall provide health insurance for said minor children if insurance is available at a reasonable cost. Each party should pay one-half ($\frac{1}{2}$) of the uninsured medical and dental expenses for the children. Medical coverage should include all regular health and medical care, eye care, psychological care, dental and orthodontic work. Reimbursement shall be made by the other party within thirty (30) days of receipt of such verification.

LIFE INSURANCE

8. Each party shall be and is hereby awarded their present life insurance policies on themselves. The Court makes no order regarding maintaining insurance on behalf of the children.

DIVISION OF PROPERTY

9. The Plaintiff shall be and is hereby awarded the parties' home and real property located at 240 North 1480 East, Logan, Utah, valued at \$520,000.00 with an equity of \$245,506.00, free and clear of any interest of Defendant. Defendant shall immediately

execute a Quit Claim Deed in favor of Plaintiff. Plaintiff shall be responsible for the mortgage, taxes, insurance and any other costs or assessments related to said property.

10. The Defendant is shall be and is hereby awarded the home and real property with improvements at 745 East Foxridge, Providence, Utah, with an equity value of \$105,600.00, free and clear of any interest of Plaintiff. Defendant shall be responsible for the mortgage, taxes, insurance and any other costs or assessment related to said property.

11. Plaintiff shall return to Defendant his own personal genealogy and the figurines from his grandmother. The parties will also find a convenient time for Defendant to review family pictures and make copies of any family pictures requested by Defendant. Plaintiff shall make those pictures available for copying at Defendant's expense. Defendant will be responsible for returning all pictures to Plaintiff as quickly as possible.

12. Plaintiff shall be and is hereby awarded the furniture and furnishings in her possession at a value of \$50,000.00.

13. Defendant shall be and is hereby awarded the furniture and furnishings in his possession, including the stereo, books, office and computer, valued at \$16,000.00.

14. Defendant shall be and is hereby awarded the four-wheeler with blade, valued at \$3,000.00.

15. Plaintiff shall be and is hereby awarded the Suburban valued at \$28,500.00.

16. Defendant shall be and is hereby awarded the Blazer valued at \$24,000.00.

17. Plaintiff shall be and is hereby awarded the Central Life and two (2) Jackson National Policies identified hereinafter.

18. Defendant shall be and is hereby awarded the five (5) Jackson National Policies, Central Life Policy, Lord Abbot IRA, IDEX 401(K), Oppenheimer and ATEL Account as stated hereinafter.

19. The Court does not establish the value on the VEBA and hereby awards one-half ($\frac{1}{2}$) of the VEBA to each party to be distributed pursuant to a qualified domestic relations order. However, the Court will allow Defendant, at his sole discretion, to otherwise liquidate the VEBA, providing notice to Plaintiff of any such liquidation. Defendant shall immediately pay one-half ($\frac{1}{2}$) of any net proceeds realized from the VEBA to Plaintiff, if it is liquidated.

20. The Court further hereby awards one-half ($\frac{1}{2}$) of the RANCON Investment to each of the parties. The Genesis Family Limited Partnership shall be and is hereby awarded as follows: Fifty percent (50%) each party. However, the Court creates a voting right and awards that right to Defendant so that he has voting rights of all four shares. Plaintiff has an economic one-half interest, but Defendant has the right to control the partnership.^{2 1}

The Court, therefore, hereby awards the property and values as follows:

To Plaintiff:

<u>ASSET</u>	<u>VALUES</u>
Logan home	\$ 245,506.00
Furnishings in Logan home	50,000.00

Central Life	1,593.00
Jackson National	324.00
Jackson National	292.00
Suburban (Trade/Pontiac)	28,500.00
One-half (½) VEBA	N/A
One-half (½) RANCON	N/A
One-half (½) General Partnership, Genesis	N/A
	<hr/>
TOTAL:	\$ 326,215.00

To Defendant:

<u>ASSET</u>	<u>VALUES</u>
Providence home	\$ 105,600.00
Furnishings in Providence home	16,000.00
Four-wheeler with blade	3,000.00
Blazer	24,000.00
Jackson National	2,340.00
Jackson National	6,213.00
Jackson National	2,009.00
Jackson National	1,991.00

Jackson National	2,575.00
Central Life	18,481.00
Lord Abbot	6,590.00
IDEX	8,061.00
Oppenheimer	2,229.00
ATEL	22,380.00
One-half (1/2) VEBA	N/A
One-half (1/2) RANCON	N/A
One-half (1/2) General Partnership, Genesis	N/A
<hr/>	
TOTAL	\$ 221,469.00

DEBTS AND OBLIGATIONS

22. Each party shall assume and pay the mortgage associated with the property awarded to each party, holding the other harmless therefrom.

23. Defendant shall assume and be responsible for the credit card debt with MBNA at \$11,161.00.

24. Each party shall be responsible for all individual and personal debts and obligations incurred since the parties' separation on or about February 1, 1995, holding the other party harmless therefrom.

EQUALIZATION OF MARITAL ESTATE

25. As of June 1, 1997, Plaintiff shall pay to Defendant the balance of the amount due on the property division of \$7,058.50 (as provided in Paragraphs 27 and 28 of the Findings of Fact and Conclusions of Law), to be paid by allowing Defendant to deduct up to \$1,000.00 per month for alimony until said \$7,058.50 is paid and satisfied.

ALIMONY

26. Defendant shall pay to Plaintiff \$10,515.00 per month as and for alimony commencing May 1, 1996.

27. Commencing May 1, 1998, alimony shall be automatically reduced by \$1,500.00 per month.

28. Alimony shall continue until the death of either party, Plaintiff's remarriage or cohabitation, or as otherwise provided by statute or order of the Court.

ATTORNEY'S FEES AND COSTS

29. Each party shall pay his or her own attorney's fees and costs incurred in this matter.

DATED this 3 day of June, 1997.

BY THE COURT:


/s/ CLINT S. JUDKINS

Clint S. Judkins
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of May, 1997, I mailed a true and correct copy of the foregoing *FINAL DECREE OF DIVORCE*, to the following person(s), postage pre-paid thereon, by depositing in the U.S. Mail.

Kenneth A. Okazaki
PRINCE, YEATES & GELDZAHLER
City Centre I, Suite 900
175 East 400 South
Salt Lake City, UT 84111



NOTICE

You will please take notice that the above entitled document will be presented by the clerk to the assigned commissioner and/or judge for his signature upon the expiration of five (5) days from the date of this Notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Utah Rules of Judicial Administration.

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MAY 24 1997

THE CLERK OF COURT

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IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY

STATE OF UTAH

KIM LARSON,	*	FINAL
		FINDINGS OF FACT
Plaintiff,	*	AND
		CONCLUSIONS OF LAW
vs.	*	
		Civil No. 954-081 DA
BRAD LARSON,	*	
		Judge Clint S. Judkins
Defendant.	*	

This matter came before the Court for trial on May 2 - 3, 1996, the Honorable Clint S. Judkins, District Court Judge, presiding. Plaintiff appeared in person and with her attorney, Stephen W. Jewell. Defendant appeared in person and with his attorney, Kenneth A. Okazaki, PRINCE, YEATES & GELDZAHLER. The Court having received and accepted certain stipulations of the parties and having heard and received testimony and

evidence, and all other kindred matters having been resolved and the Court having examined the evidence and being fully advised in the premises after subsequent hearings, arguments of counsel and the submission of memoranda, and having previously entered its Findings of Fact and Conclusions of Law dated June 12, 1996, intended as temporary Findings and Conclusions until the resolution of all issues, those issues having been ruled upon by the Court, now makes and enters the following:

FINAL FINDINGS OF FACT

JURISDICTION

1. That the Plaintiff is now and has been for three (3) months immediately preceding the filing of this action, a resident of Cache County, State of Utah.

2. That Plaintiff and Defendant were married to each other on the 19th day of March, 1975, in Salt Lake City, Salt Lake County, State of Utah.

GROUND

3. That there have arisen irreconcilable differences of the marriage between Plaintiff and Defendant. The parties have attempted reconciliation of their differences, but are unable to continue the marriage.

CUSTODY AND VISITATION

4. The parties shall be granted joint legal and physical custody of the minor children of the parties, to wit: Krista Larson, born July 4, 1982; and Gregory Larson, born

November 20, 1986. Plaintiff is awarded seventy-five percent (75%) of the custodial time and Defendant is awarded twenty-five percent (25%) of the custodial time with said minor children. Custodial exchanges will continue on the current schedule, with Defendant to have the children every Tuesday overnight and every other weekend, unless as otherwise agreed between the parties. All other custodial time, unless otherwise agreed, will be pursuant to the Utah Statutory Visitation Guidelines, Section 30-3-33, Utah Code, including four (4) consecutive weeks during the summer. Visitation shall otherwise be as follows:

A. In years ending in an odd number, the father, (Defendant) is entitled to the following holidays:

- (1) Day before or after child(ren)'s actual birthday beginning at 3:00 p.m. until 9:00 p.m.;
- (2) Human Rights Day beginning 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;
- (3) Easter holiday beginning at 6:00 p.m. on Friday until Sunday at 7:00 p.m., unless the holiday extends for a lengthier period of time to which the father (Defendant) is completely entitled;
- (4) Memorial Day beginning 6:00 p.m. on Friday until Monday at 7:00 p.m., unless the holiday extends for a lengthier period of time to which the father (Defendant) is completely entitled;
- (5) July 24th beginning 6:00 p.m. on the day before the holiday until 11:00 p.m. on the holiday;

- (6) Veteran's day holiday beginning 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday; and
- (7) The first portion of the Christmas school vacation** as defined in Subsection 30-3-32(3)(b) plus Christmas Eve and Christmas Day until 1:00 p.m., so long as the entire holiday is equally divided;

B. In years ending in an even number, the father (Defendant) is entitled to the following holidays:

- (1) Child(ren)'s birthday on actual birth date beginning at 3:00 p.m. until 9:00 p.m.;
- (2) New Year's Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;
- (3) President's Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;
- (4) July 4th beginning at 6:00 p.m. the day before the holiday until 11:00 p.m. on the holiday;
- (5) Labor Day beginning at 6:00 p.m. on Friday until Monday at 7:00 p.m. unless the holiday extends for lengthier period of time to which the father (Defendant) is completely entitled;
- (6) The fall school break, if applicable, commonly known as U.E.A. weekend beginning at 6:00 p.m. on Wednesday until Sunday at 7:00 p.m. unless the holiday extends for a lengthier period of time to which the father (Defendant) is completely entitled;
- (7) Columbus Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;
- (8) Thanksgiving holiday beginning Wednesday at 7:00 p.m. until Sunday at 7:00 p.m.; and

- (9) The second portion of the Christmas school vacation** as defined in Subsection 30-3-32(3)(b) plus Christmas day beginning at 1:00 p.m. until 9:00 p.m., as long as the entire Christmas holiday is equally divided;
- C. Father's Day shall be spent with the father every year beginning at 9:00 a.m. until 7:00 p.m. on the holiday;
- D. Mother's Day shall be spent with the mother every year beginning at 9:00 a.m. until 7:00 p.m. on the holiday;
- E. Extended visitation with the father (Defendant) may be:
- (1) Up to four (4) weeks consecutive at the option of the father (Defendant);
 - (2) Two (2) weeks shall be uninterrupted time for the noncustodial parent father (Defendant); and
 - (3) The remaining two (2) weeks shall be subject to visitation for the custodial parent mother (Plaintiff) consistent with these guidelines;
- F. The mother (Plaintiff) shall have an identical two (2) week period of uninterrupted time during the child(ren)'s summer vacation from school for purposes of vacation;
- G. If the child(ren) is/are enrolled in year-round school, the father's (Defendant) extended visitation shall be one-half (1/2) of the vacation time for year-round school breaks, provided the mother (Plaintiff) has holiday and telephone visits;
- H. Notification of extended visitation or vacation weeks with the child(ren) shall be provided at least thirty (30) days in advance to the other parent;
- I. Holidays take precedence over the weekend visitation, and changes shall not be made to the regular rotation of the alternating weekend visitation schedule;

- J. If a holiday falls on a regularly scheduled school day, the father (Defendant) shall be responsible for the child(ren)'s attendance at school for that school day;
- K. If a holiday falls on a weekend or on a Friday or Monday and the total holiday period extends beyond that time so that the child(ren) is/are free from school and the parent is free from work, the father (Defendant) shall be entitled to this lengthier holiday period;
- L. Telephone contact at reasonable hours; and
- M. Such other times as agreed between the parties.

*****"Christmas school vacation"** means the time period beginning on the evening the child gets out of school for the Christmas school break until the evening before the child returns to school, except for Christmas Eve, Christmas Day, and New Year's Day.

"Extended visitation" means a period of visitation other than a weekend, holiday as provided in Subsections 30-3-35(2)(f) and (2)(g), religious holidays as provided in Subsections 30-3-33(4) and (16), and "Christmas school vacation.

The parties shall further comply with the following:

Keep each other advised of their current address and telephone number within twenty four (24) hours of any change;

Special consideration shall be given by each parent to make the child(ren) available to attend family functions including funerals, weddings, family reunions, religious holidays, important ceremonies, and other significant events in the life of the child(ren) or in the life of either parent which may inadvertently conflict with the visitation schedule;

The father (Defendant) shall pick up the child(ren) at the time specified and return the child(ren) at the time specified, and the child(ren)'s regular school hours shall not be interrupted;

The mother (Plaintiff) shall notify the father (Defendant) within twenty-four (24) hours of receiving notice of all significant school, social, sports, and community function in which the child(ren) is/are participating or being honored, and the father (Defendant) shall be entitled to attend and participate fully;

The father (Defendant) shall have access directly to all school reports including preschool and day care reports and medical records and shall be notified immediately by the mother (Plaintiff) in the event of a medical emergency;

Parental care shall be presumed to be better care for the child(ren) than surrogate care and the court shall encourage the parties to cooperate in allowing the father (Defendant), if willing and able, to provide child care;

Each parent shall be entitled to an equal division of major religious holidays celebrated by the parents, and the parent who celebrates a religious holiday that the other parent does not celebrate shall have the right to be together with the child(ren) on the religious holiday.

Refrain from making derogatory remarks about or to the other in the presence of the minor children.

CHILD SUPPORT AND CHILD CARE

5. For purposes of child support, the Court is going to use the maximum amount for two (2) children as stated on the current Uniform Child Support Guidelines. The Court finds that Defendant's income substantially exceeds the maximum on the schedule and that the needs of the children fall below the maximum of the schedule. The Court does not impute any income to Plaintiff for child support purposes. Therefore, for two (2) children, the child support shall be \$1,400.00 per month as set forth in the Child Support Obligation

Worksheet (Sole Custody), which is attached hereto and incorporated herein by reference, less a credit for one-half ($\frac{1}{2}$) of the insurance premium as provided in Paragraph 9. (The parties stipulated that the Court use a sole custody worksheet in determining child support.)

6. Said child support payments shall be due one-half ($\frac{1}{2}$) on or before the fifth (5th) day and one-half ($\frac{1}{2}$) on or before the twentieth (20th) day of each month commencing May 1, 1996, and continuing every month thereafter until each child reaches the age of eighteen (18) or graduates from high school through normal matriculation, whichever is later. Upon Defendant's child support obligation for Krista being terminated, child support shall be automatically rescheduled using the maximum child support amount for one (1) child.

7. Child support payments may be made directly to Plaintiff. If Defendant becomes delinquent in payment of support, said payments shall then be paid through automatic income withholding through the Utah State Department of Human Services, Office of Recovery Services by serving an Order to Withhold and Deliver. In accordance with Utah Code Annotated § 62A-11-403(2)(b) and 78-45-7(4), the Defendant will then be assessed an additional check processing fee in the amount of \$7.00, or such other amount as required by statute. This fee shall be included in the amount withheld and paid to the Office of Recovery Services. As an alternative to automatic income withholding, Defendant may pay support by wage assignment and/or direct deposit to Plaintiff's checking account.

8. Child support shall be abated by one-half ($\frac{1}{2}$) during summer visitation as long as the children are with Defendant for at least twenty-five (25) of thirty (30) consecutive

days.

HEALTH INSURANCE

9. That Defendant should provide health insurance for said minor children if insurance is available at a reasonable cost. Each party should pay one-half (½) of the uninsured medical and dental expenses for the children. Medical coverage should include all regular health and medical care, eye care, psychological care, dental and orthodontic work. A party who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other party within thirty (30) days of payment. Reimbursement shall be made by the other party within thirty (30) days of receipt of such verification.

LIFE INSURANCE

10. Each party shall be awarded their present life insurance policies on themselves. The Court makes no order regarding maintaining insurance on behalf of the children.

DIVISION OF PROPERTY

11. The Plaintiff shall be awarded the parties' home and real property located at 240 North 1480 East, Logan, Utah, valued at \$520,000.00 with an equity of \$245,506.00, free and clear of any interest of Defendant. Defendant shall immediately execute a Quit Claim Deed in favor of Plaintiff. Plaintiff shall be responsible for the mortgage, taxes, insurance and any other costs or assessments related to said property.

12. The Defendant is awarded the home and real property with improvements at 745 East Foxridge, Providence, Utah, with an equity value of \$105,600.00, free and clear of any interest of Plaintiff. Defendant shall be responsible for the mortgage, taxes, insurance and any other costs or assessment related to said property.

13. Pursuant to the Stipulation of the parties, the Court finds that Plaintiff should return to Defendant his own personal genealogy and the figurines from his grandmother. The parties will also find a convenient time for Defendant to review family pictures and make copies of any family pictures requested by Defendant. Plaintiff shall make those pictures available for copying at Defendant's expense. Defendant will be responsible for returning all pictures to Plaintiff as quickly as possible.

14. Plaintiff is awarded the furniture and furnishings in her possession at a value of \$50,000.00.

15. Defendant is awarded the furniture and furnishings in his possession, including the stereo, books, office and computer, valued at \$16,000.00.

16. Defendant is awarded the four-wheeler with blade, valued at \$3,000.00.

17. Plaintiff is awarded the Suburban valued at \$28,500.00 as appraised by Thomas Axtell.

18. Defendant is awarded the Blazer valued at \$24,000.00 as appraised by Thomas Axtell.

19. Plaintiff is awarded the Central Life and two (2) Jackson National Policies identified hereinafter.

20. Defendant is awarded the five (5) Jackson National Policies, Central Life Policy, Lord Abbot IRA, IDEX 401(K), Oppenheimer and ATEL Account as stated hereinafter.

21. The Court does not establish the value on the VEBA and awards one-half ($\frac{1}{2}$) of the VEBA to each party to be distributed pursuant to a qualified domestic relations order. However, based on the testimony of the value of the VEBA, the Court will allow Defendant, at his sole discretion, to otherwise liquidate the VEBA, providing notice to Plaintiff of any such liquidation. Defendant shall immediately pay one-half ($\frac{1}{2}$) of any net proceeds realized from the VEBA to Plaintiff, if it is liquidated.

22. The Court further awards one-half ($\frac{1}{2}$) of the RANCON Investment to each of the parties. The Genesis Family Limited Partnership should be awarded as follows: Fifty percent (50%) each party. However, the Court creates a voting right and awards that right to Defendant so that he has voting rights of all four shares. Plaintiff has an economic one-half interest, but Defendant has the right to control the partnership.

23. The Court, therefore, awards the property and values as follows:

To Plaintiff:

<u>ASSET</u>	<u>VALUES</u>
Logan home	\$ 245,506.00
Furnishings in Logan home	50,000.00
Central Life	1,593.00
Jackson National	324.00
Jackson National	292.00
Suburban (Trade/Pontiac)	28,500.00
One-half (½) VEBA	N/A
One-half (½) RANCON	N/A
One-half (½) General Partnership, Genesis	N/A
TOTAL:	\$ 326,215.00

To Defendant:

<u>ASSET</u>	<u>VALUES</u>
Providence home	\$ 105,600.00
Furnishings in Providence home	16,000.00
Four-wheeler with blade	3,000.00
Blazer	24,000.00
Jackson National	2,340.00
Jackson National	6,213.00
Jackson National	2,009.00
Jackson National	1,991.00
Jackson National	2,575.00
Central Life	18,481.00
Lord Abbot	6,590.00
IDEX	8,061.00
Oppenheimer	2,229.00
ATEL	22,380.00
One-half (½) VEBA	N/A
One-half (½) RANCON	N/A

One-half (½) General Partnership, Genesis

N/A

TOTAL

\$ 221,469.00

DEBTS AND OBLIGATIONS

24. Each party shall assume and pay the mortgage associated with the property awarded to each party, holding the other harmless therefrom.

25. Defendant should pay and be liable for the MBNA Master Card Charge in the amount of \$11,161.00. The Court finds that even though the MBNA Master Card debt has been paid partially by Plaintiff, the Court has considered that fact and confirms that Defendant should pay the balance of the MBNA Master Card.

26. Each party should be responsible for all individual and personal debts and obligations incurred since the parties' separation on or about February 1, 1995, holding the other party harmless therefrom.

EQUALIZATION OF MARITAL ESTATE

27. The Court finds the difference between the property awarded to Plaintiff and the property and debt awarded to Defendant to be \$115,907.00. To equalize the division of property between the parties, the Court finds that it is necessary for Plaintiff to pay to Defendant \$57,953.50.

28. In order to satisfy the amount awarded to Defendant to equalize the property distribution, the Court will deduct therefrom the difference of the alimony and child support awarded by the Court as provided in Paragraphs 38 and 39 from the alimony and child support actually paid to Plaintiff. As of June 1, 1997, the balance of the amount due on the property division, or \$7,058.50, as provided in Paragraph 39, shall be paid by allowing Defendant to deduct up to \$1,000.00 per month until that amount is paid and satisfied. The deduction of \$3,915.00 per month which have accumulated for thirteen (13) months (May 1996 through May, 1997), as well as the ongoing deduction of \$1,000.00 per month until the balance of the property division is satisfied are clarified to be alimony to be treated as such by the parties for tax purposes.

ALIMONY

29. The Court finds that Defendant's average income for the past four (4) years (i.e., 1992 through 1995), is \$512,114.00 after deducting reasonable and necessary business expenses. The Court did not add back the VEBA or other amounts.

30. The Court did not include in the four (4) year average the income for the first four (4) months of January through April, 1996. The Court finds that a four (4) month duration is too short a time to determine any reliability, that it is not reflective of Defendant's actual income, and that a four (4) year average is more appropriate to determine current income.

31. The Court finds that the Plaintiff's current ability to earn an income is approximately \$1,000.00 per month. The Court finds that there was testimony that Plaintiff could obtain a teaching certificate in four (4) quarters, or approximately one (1) year, but the Court believes realistically it would take approximately two (2) years for Plaintiff to obtain a teaching certificate. The Court further finds that Plaintiff is capable and will qualify as a teacher and that there was testimony that the average salary for teachers in Cache County is approximately \$29,000.00 a year.

32. The Court finds that it is likely Defendant's income will be lower in 1996 and thereafter than the four (4) year average determined by the Court. The Court finds that ten percent (10%) is an appropriate amount to reduce the average income, which is approximately \$51,211.00. The Court, therefore, finds that Defendant's current income is \$460,903.00 per year or \$38,408.00 per month.

33. To determine alimony, the Court finds that Defendant will pay approximately forty-eight and twenty-five one hundredths percent (48.25%) of his income in federal and state income taxes, or \$18,531.00 per month. The Court will deduct that amount from Defendant's monthly income to derive a net monthly income, after taxes, of \$19,876.00.

34. If the Court were to deduct child support of \$1,400.00 and Plaintiff's income of \$1,000.00 in order to determine a difference in incomes and then equalize that income, the difference between the parties' incomes would be \$17,478.00 and the equalized income

would be \$8,738.00.

35. However, upon considering the tax consequences as argued by the parties, the Court finds that the actual cost of alimony paid by Defendant is sixty percent (60%) of the projected amount of \$8,738.00, realizing a tax savings to Defendant of \$3,496.00. Adding the tax savings back in to the projected alimony would equal \$12,734.00 [sic] (November 15, 1996 Hearing, p. 34 1.20).

36. The Court further finds that Plaintiff's projected tax consequences are approximately seventeen percent (17%) of her income. The amount of taxes Plaintiff would pay on the projected alimony of \$8,738.00 would be \$1,485.00, reducing the net projected alimony to \$7,253.00. Adding Plaintiff's imputed income of \$1,000.00 would realize net income to Plaintiff of \$8,253.00. Including the child support award of \$1,400.00 would increase the net income to Plaintiff to \$9,653.00.

37. If the Court were to then equalize the net incomes, the Court would order Defendant to pay an additional \$2,240.00, for a total of \$10,978.00. [sic] (November 15, 1996 Hearing, p. 35, 1.10-12). The Court, therefore, establishes and reaffirms alimony to Plaintiff at \$10,515.00 per month as stated in the Court's ruling on May 7, 1996. (November 15, 1996 Hearing, p. 36, 1.8-10).

38. Although the Court initially determined that alimony should be paid retroactive to April 1, 1995, upon further consideration and argument from the parties, the Court finds

that the permanent award of alimony should commence as of the date of trial, or May 3, 1996. However, since Defendant has been allowed to continue paying alimony at the temporary level of \$6,600.00 per month, the difference, or \$3,915.00 per month shall be credited toward the \$57,553.50 owed to Defendant to equalize the division of the marital estate as determined by the Court.

39. Alimony shall commence at the permanent level of \$10,515.00 on June 1, 1997. Therefore, thirteen (13) months at \$3,915.00 per month, or \$50,895.00, shall be subtracted from the amount owed to Defendant of \$57,953.50, leaving a total net amount owing to Defendant as of June 1, 1997, of \$7,058.50. That amount can be paid to Plaintiff by Defendant deducting \$1,000.00 per month from ongoing alimony payments, commencing June 1, 1997, until satisfied.

40. The Court finds that Plaintiff's monthly expenses as provided in Plaintiff's Exhibit No. 5, not including savings, retirement or tithing; equal approximately \$10,462.00 and that Defendant's monthly expenses as provided in Defendant's Exhibit No. 16, not including expenses for Tim or tithing, equal approximately \$4,340.00. However, the Court finds that there is substantial income in excess of the needs of the parties contrary to most divorce actions, and not only bases the alimony award on the stated needs, but in adjusting the available income between the parties.

41. Based on the Court's finding that Plaintiff should be able to earn an income

of approximately \$2,500.00 per month commencing approximately May 1, 1998, the Court finds that alimony should be reduced by \$1,500.00 per month effective May 1, 1998.

ATTORNEY'S FEES AND COSTS

42. The Court finds that Plaintiff's attorney's fees are reasonable and necessarily incurred in this matter. However, based on the alimony award, the Court finds that each party has the ability to pay his or her own attorney's fees and does not award attorney's fees.

From the foregoing Findings of Fact, the Court now enters its

CONCLUSIONS OF LAW

1. The Findings of Fact and Conclusions of Law previously entered by the Court on or about June 12, 1996 are hereby reaffirmed.

2. Each party should be awarded the property and debts as indicated in the Findings of Fact.

3. That Defendant should be ordered to pay alimony and child support in the amount as stated in the Findings of Fact and for the reasons stated therein.

4. That the parties are entitled to a Decree entered in accordance with all of the Findings of Fact as stated hereinabove.

DATED this _____ day of _____, 1997.

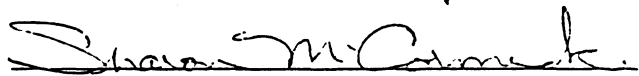
BY THE COURT:

Clint S. Judkins
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of May, 1997, I mailed a true and correct copy of the foregoing *FINAL FINDINGS OF FACT AND CONCLUSIONS OF LAW*, to the following person(s), postage pre-paid thereon, by depositing in the U.S. Mail.

Kenneth A. Okazaki
PRINCE, YEATES & GELDZAHLER
City Centre I, Suite 900
175 East 400 South
Salt Lake City, UT 84111


Sharon McCormick

NOTICE

You will please take notice that the above entitled document will be presented by the clerk to the assigned commissioner and/or judge for his signature upon the expiration of five (5) days from the date of this Notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Utah Rules of Judicial Administration.

IN THE FIRST DISTRICT COURT
CACHE COUNTY, STATE OF UTAH

KIM LARSON,

Plaintiff,

vs.

BRAD LARSON,

Defendant.

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*

CHILD SUPPORT OBLIGATION WORKSHEET
(SOLE CUSTODY AND PATERNITY)

Civil No. 954-081

	MOTHER	FATHER	COMBINED
1. Enter the # of Natural and Adopted Children of this Mother and Father for Whom Support Is to Be Awarded.	////////// //////////	////////// //////////	2
2a. Enter the father's and mother's gross monthly income. Refer to Instructions for definition of income.	\$ -0-	\$ 38,408.00	////////// //////////
2b. Enter previously ordered alimony that is actually paid. (Do not enter alimony ordered for this case).	-	-	////////// //////////
2c. Enter previously ordered child support. (Do not enter obligations ordered for the children in Line 1).	-	-	////////// //////////
2d. OPTIONAL: Enter the amount from Line 12 of the Children in Present Home Worksheet for either parent	-	-	////////// //////////
3. Subtract Lines 2b, 2c, and 2d from 2a. This is the Adjusted Gross Income for child support purposes.	\$ -0-	\$ 38,408.00	\$ 38,408.00
4. Take the COMBINED figure in Line 3 and the number of children in Line 1 to the Support Table. Find the Base Combined Support Obligation. Enter it here.	////////// ////////// //////////	////////// ////////// //////////	\$ 1,400.00
5. Divide each parent's adjusted monthly gross in Line 3 by the COMBINED adjusted monthly gross in Line 3.	-0- %	100 %	////////// //////////
6. Multiply Line 4 by Line 5 for each parent to obtain each parent's share of the Base Support Obligation.	\$	\$ 1,400.00	////////// //////////

7. BASE CHILD SUPPORT AWARD: Bring down the amount in Line 6 for the Obligor Parent or enter the amount from the Low Income Table.	\$ 1,400.00
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8. Which parent is the obligor? () Mother (X) Father
9. Is the support award the same as the guideline amount in Line 7? (X) Yes () No
If NO, enter the amount ordered: \$ _____, and answer number 10.
10. What were the reasons stated by the Court for the deviation?
 () property settlement
 () excessive debts of the marriage
 () absence of need of the custodial parent
 () Other: _____

Attorney Bar No. 3814

() Electronic filing

(X) Manual Filing

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

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

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

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

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

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

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

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

(iii) provisions for the enforcement of these orders; and

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services.

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

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) (a) In determining visitation rights of parents, grandparents, and other members of the immediate family, the court shall consider the best interest of the child.

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

(5) If a petition for modification of child custody or visitation provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(6) If a petition alleges substantial noncompliance with a visitation order by a parent, a grandparent, or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation.

(7) (a) The court shall consider at least the following factors in determining alimony:

(i) the financial condition and needs of the recipient spouse;

(ii) the recipient's earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support; and

(iv) the length of the marriage.

(b) The court may consider the fault of the parties in determining alimony.

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

- (1) As used in the guidelines, "gross income" includes:
 - (a) prospective income from any source, including nonearned sources, except under Subsection (3); and
 - (b) income from salaries, wages, commissions, royalties, bonuses, rents, gifts from anyone, prizes, dividends, severance pay, pensions, interest, trust income, alimony from previous marriages, annuities, capital gains, social security benefits, workers' compensation benefits, unemployment compensation, disability insurance benefits, and payments from "nonmeans-tested" government programs.
- (2) Income from earned income sources is limited to the equivalent of one full-time 40-hour job. However, if and only if during the time prior to the original support order, the parent normally and consistently worked more than 40 hours at his job, the court may consider this extra time as a pattern in calculating the parent's ability to provide child support.
- (3) Specifically excluded from gross income are:
 - (a) Aid to Families with Dependent Children (AFDC);
 - (b) benefits received under a housing subsidy program, the Job Training Partnership Act, S.S.I., Medicaid, Food Stamps, or General Assistance; and
 - (c) other similar means-tested welfare benefits received by a parent.
- (4) (a) Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. The income and expenses from self-employment or operation of a business shall be reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. Only those expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts.
 - (b) Gross income determined under this subsection may differ from the amount of business income determined for tax purposes.
- (5) (a) When possible, gross income should first be computed on an annual basis and then recalculated to determine the average gross monthly income.
 - (b) Each parent shall provide verification of current income. Each parent shall provide year-to-date pay stubs or employer statements and complete copies of tax returns from at least the most recent year unless the court finds the verification is not reasonably available. Verification of income from records maintained by the Office of Employment Security may be substituted for pay stubs, employer statements, and income tax returns.
 - (c) Historical and current earnings shall be used to determine whether an underemployment or overemployment situation exists.
- (6) Gross income includes income imputed to the parent under Subsection (7).
- (7) (a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.
 - (b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community.
 - (c) If a parent has no recent work history, income shall be imputed at least at the federal minimum wage for a 40-hour work week. To impute a greater income, the judge in a judicial proceeding or the presiding officer in an administrative proceeding shall enter specific findings of fact as to the evidentiary basis for the imputation.
 - (d) Income may not be imputed if any of the following conditions exist:
 - (i) the reasonable costs of child care for the parents' minor children approach or equal the amount of income the custodial parent can earn;
 - (ii) a parent is physically or mentally disabled to the extent he cannot earn minimum wage;
 - (iii) a parent is engaged in career or occupational training to establish basic job skills; or
 - (iv) unusual emotional or physical needs of a child require the custodial parent's presence in the home