

1986

# Martha A. Totzke v. Henry A. Totzke : Brief of Appellant

Utah Supreme Court

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BRIEF

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DOCKET NO. 860206

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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MARTHA A. TOTZKE,

Plaintiff and  
Respondent,

vs.

HENRY A. TOTZKE,

Defendant and  
Appellant.

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Case No. 860206-CA  
860279

Category No. 13b

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BRIEF OF APPELLANT HENRY A. TOTZKE

APPEAL FROM THE SECOND JUDICIAL  
DISTRICT COURT IN AND FOR THE  
COUNTY OF WEBER, STATE OF UTAH,  
HONORABLE RONALD O. HYDE,  
PRESIDING

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FILED

AUG 25 1986

Clerk, Supreme Court, Utah

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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MARTHA A. TOTZKE,	:	
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Plaintiff and	:	
Respondent,	:	Case No. 860279
	:	
vs.	:	Category No. 13b
	:	
HENRY A. TOTZKE,	:	
	:	
Defendant and	:	
Appellant.	:	

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BRIEF OF APPELLANT HENRY A. TOTZKE

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STATEMENT OF ISSUES

A. Did the court err in excluding inherited property from consideration in its division of marital assets solely because it was inherited?

B. Did the court err in ordering Appellant to pay \$600.00 per month in child support when the evidence showed that Respondent has greater assets than Appellant, more than adequate income, and there was no evidence presented as to the child's needs?

### STATEMENT OF THE CASE

This is a divorce action originally tried before Judge Ronald O. Hyde in the Second Judicial District Court of Weber County. Appellant appeals from the Memorandum Decision, Findings of Fact and Conclusions of Law, and the Decree of Divorce entered May 6, 1986, contesting the property division and child support order.

### STATEMENT OF THE FACTS

The parties were married on January 27, 1962 (R. at 71). At the time of the marriage, Appellant was a medical resident and Respondent was finishing her degree in education (R. at 72). Shortly thereafter, Respondent taught school for two years in Texas, quitting upon the birth of her first child (R. at 73). Four children were born of the marriage (R. at 44). Two presently attend college (R. at 71) and two are minors, Michael Totzke, born April 8, 1969, and Chris Totzke, born April 28, 1973 (R. at 44). Upon stipulation Appellant has custody of Michael and Respondent has custody of Chris (R. at 54).

During the marriage, Appellant received \$50,000 through inheritance (R. at 117). This money was used for marital

purposes (R. at 85). In 1966, Respondent's father died and his estate went into a 10 year trust. Respondent received Arkansas timber lands and stocks from the trust in 1976 (R. at 85-86). The income and dividends from those properties has totaled approximately \$225,000 (R. at 87). The income for 1980-1985 averaged \$45,000 a year (R. at 95), though Respondent testified the amount of profits will go down (R. at 88). This income was always put back into the family and used to increase marital assets (R. at 46, 87). At no time prior to the divorce did Respondent indicate to Appellant that she viewed the lands and stocks as her separate property (R. at 126).

Throughout the entire 24 year marriage, all monies were treated jointly by the parties, whether they came from Appellant's salary, Respondent's teaching, or income and dividends from the properties (R. at 126). The income was placed in joint accounts and joint investments, and all expenses were paid from those accounts (R. at 126). Income tax returns were always filed jointly during the marriage (R. at 127). Prior to the divorce, there was never any disagreement between the parties regarding the joint use of

funds (R. at 126). Appellant viewed all property as being joint (R. at 127) and Respondent never said that she viewed some of the property as hers as opposed to theirs (R. at 126).

Appellant is employed as a pathologist and earns approximately \$140,000 a year (R. at 161). His average net income following payment of taxes, pension plan and professional corporation expenses for 1985 was \$4,800 a month (R. at 145, Def. Ex. 8). Appellant introduced a list of his expenses at trial (Def. Ex. 3 and 4), and testified that his checks for a 12 month period averaged out to \$4,840 per month (R. at 153). In addition to paying household costs and his own expenses, Appellant supports the sixteen year old boy in his custody. Both parties state that they want to support all four children through college (R. at 101, 156), and costs are estimated at \$8,000 per year per child (R. at 101-102). Costs for supporting the two children currently in college average \$1,300 a month (R. at 155). Respondent did not introduce any evidence of her expenses at trial, beyond stating that her rent is \$800.00 a month (R. at 106). She also did not testify as to the financial needs of the child in her custody.

Other than the initial few years in which she taught school, Respondent has not been employed during the marriage (R. at 74). She could certify to teach in Utah with 6-9 hours of training (R. at 98). She chooses not to teach at the present time because of the emotional commitment (R. at 76), and works as a food service supervisor/cashier at Park City Resort (R. at 75). She could increase her income by \$4,000 to \$8,000 per year if she resumed teaching (R. at 100).

Respondent was awarded all of the income producing property of the marriage (R. at 143). She was awarded all of the inherited property now valued at \$381,500, as her sole and separate property (R. at 54). The balance of the marital assets, totaling \$749,100, were divided equally, with the court ordering Appellant to pay Respondent an additional \$102,250 over the next 9 years as an equalizing factor (R. at 58). A list of the properties divided and their corresponding values is attached as Exhibit A.

By court order, the parties now stand in this position:

Respondent

Marital Estate Division	\$ 272,300	(R. at 22 & 32)
Payment from Appellant to the Respondent equalizing marital estate division	\$ 102,250	(R. at 22)
	<hr/>	

Sub-total	\$ 374,550	
Inherited Property	\$ 381,500	(R. at 54-55)
	<hr/>	
TOTAL . . . . .	\$ 756,050	

Appellant

Marital Estate Division	\$ 476,800	(R. at 22)
Payment from Appellant to Respondent equalizing marital estate division	- \$ 102,250	(R. at 22)
	<hr/>	
Sub-total	\$ 374,550	
TOTAL . . . . .	\$ 374,550	

Respondent has employment income of \$6.00 an hour (R. at 75), income from property of \$45,000 per year (R. at 77) and, under the court's decree, payment of \$1,436.00 monthly (or \$17,272 annually) from Appellant to amortize the \$102,050 equalizing obligation (R. at 57-58). Her total annual income (without child support) equals:

Work (\$6.00 X 2000 hours)	\$ 12,000
Property	\$ 45,000
Appellant's equaling payments	\$ 17,274
	<hr/>
TOTAL . . . . .	\$ 74,274

The court held that in addition to being the sole support of Michael, Appellant should pay Respondent \$600.00 per month in child support. (R. at 58).

#### SUMMARY OF THE ARGUMENT

Appellant argues that the inherited properties should not have been excluded from the marital estate simply because they were inherited. A factual analysis should be applied in each case to see if the inherited property was treated as a joint asset by the parties during the marriage. The decisions of other jurisdictions addressing this issue support a review of the facts of each situation, rather than an exclusion of the property per se because it was inherited.

The facts of this case show that the inherited lands and stocks have been treated as a family asset since their acquisition. Indeed, all income of the parties was used jointly throughout the marriage, including the dividends from the inherited properties. Respondent never indicated that she viewed the assets as her separate property until the divorce. Accordingly, Appellant asks that the trial court's decision be remanded to include inherited property in the marital estate for purposes of reaching an equitable distribution.

Appellant further seeks reversal of the trial court's order that he pay Respondent \$600.00 a month in child support. The primary focus in child support questions is on the needs of the child and the ability of the parent to provide support. No evidence was introduced at trial as to the child's needs. Appellant maintains that Respondent has more than sufficient income to support the child in her custody and accordingly seeks remand of the child support order.

#### ARGUMENT

##### I

THE TRIAL COURT ERRED IN EXCLUDING THE INHERITED  
PROPERTIES FROM THE MARITAL ESTATE SOLELY BECAUSE  
THEY WERE INHERITED

Appellant seeks reversal of the trial court's property distribution awarding Respondent all lands and stocks she inherited during the marriage as her separate property. The facts of this case warrant the inclusion of the inherited property in the marital estate, and Appellant argues that the trial court's decision was inequitable and represents a sufficient abuse of discretion to require reversal.

The distribution of marital property in a divorce action is governed by U.C.A., 1953, Section 35-3-5 (1985 ed.), which reads in part: "When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property and parties".

Appellant contests the trial court's division under this statute on two grounds:

- 1) The exclusion of inherited property from the marital estate is not justified when the sole reason for exclusion is the fact that it was inherited; and
- 2) The particular facts of this case warrant the inclusion of the inherited property when dividing the parties' marital assets.

A. The Court Should Apply a Factual Analysis In Divorce Proceedings Involving Inherited Properties.

Appellant maintains that neither Utah statutes or case law require that inherited property be excluded per se from the marital estate. Each case is to be decided on the basis of its facts, MacDonald v. MacDonald, 120 Utah 573, 236 P.2d 1066, 1069 (1951), and the source of an asset is not determinative. This approach was used in this Court's analysis in the recent case of Preston v. Preston, 646 P.2d 705 (Utah 1982).

Preston was a divorce action which raised the question of division of inherited property. The husband sought, in part, a half interest in the inherited property the wife brought to the seven year marriage. Both had been married before. The trial court awarded the inherited property to the wife. In reviewing the distribution on appeal, this Court did not state that the property should go to the wife because it was inherited. Rather, the Court reviewed the facts of the case, including the short duration of the marriage, the husband's efforts in working on the property (consisting of primarily nearby land parcels), and whether the property was a "family project". After reviewing all of the facts, the Court found it equitable to deny the husband a share in the inherited lands and correspondingly deny the wife an interest in the husband's separate property contributed to a family cabin. Id. at 76.

Such a factual analysis is lacking here. The trial court excluded the property from the Totzke marital estate without making any findings regarding either the character of the inherited property (i.e. whether it was a family asset) or the parties' respective efforts in maintaining the assets once acquired. The lands and stock were awarded to Respondent merely because they were inherited.

Under the ruling of MacDonald vs. MacDonald, cited above and discussed in detail later, the source of an asset is but one factor to be considered by the court in making an equitable distribution. This Court has held that the title to property is not determinative in asset division in a divorce proceeding. In Workman vs. Workman, 652 P.2d 931 (Utah 1982), a decision rendered shortly after Preston, this Court held (quoting Jackson vs. Jackson, 617 P.2d 338, 340-41 (Utah 1980):

The state of title to marital property prior to a divorce decree is not necessarily binding on the trial court in its distribution of such property pursuant to such decree. The trial court is empowered to make such distributions as are just and equitable, and may compel such conveyances as are necessary to that end.

In some instances, equity will require that each party to a divorce recover the separate property he or she brought to the marriage. E.g., Preston v. Preston, Utah, 646 P.2d 705 (1982). However, that rule is not invariable. . .

Workman, at 933.

Appellant argues that this is not a case where Respondent should be awarded all of the property inherited during the marriage. It is not suggested that inherited property should always be included in the marital estate. Rather, it should be analyzed under the same framework used

in Preston, and not automatically excluded because of its source.

This factual approach has been followed in other jurisdictions. Mack v. Mack, 389 So. 2d 1156 (Ala. Cir App. 1980) involved facts similar to the case at hand. In Mack, the Court of Civil Appeals of Alabama reviewed the trial court's award to the husband of inherited property valued at approximately \$300,000. The wife appealed, arguing that the property division was inadequate because the trial court refused to consider the husband's inheritance in fashioning the decree. The appellate court held:

While the source of the marital property may be considered, along with other circumstances and factors, it is not controlling. Mullins v. Mullins, Ala. Civ. App., 344 So.2d 511, cert. denied, 344 So.2d 515 (1977). In making an equitable division of the property, there is no requirement that the trial court should attempt to put aside assets obtained in the past by inheritance or gift when these assets become the property of both spouses. Bouler v. Bouler. Ala.Civ.App., 366 So.2d 290 (1979); Campbell v. Campbell, supra. Thus, there is no error in ordering the sale and division of property owned by one party merely because that party inherited the property, provided the equities require such a step. Mullins v. Mullins, supra.

Id. at 1159.

In reviewing the facts of that case, the Court noted that while the husband did work during the marriage, "[h]ere there was uncontroverted evidence, in this instance, the parties had used the inherited property and the income produced therefrom to support their chosen style of living." Id. at 1160. Accordingly, the Court found it was reversible error for the trial court to have focused entirely on the inherited nature of the property, rather than considering additional factors (age, length of marriage, future prospects of parties, etc.) in dividing the marital assets. Id. at 1159-60.

In similar fashion, Appellant argues that it was reversible error for the trial court to focus only on the source of the property in the matter at hand. As in Mack, the parties here also used the income from the inherited properties to supplement family revenue. The evidence supports a finding that the Totzkes intended the inherited properties to be used jointly. The income generated by the properties was spent on joint business projects, and the parties used joint banking accounts and joint tax returns.

The Supreme Court of Alaska has held properties originally owned separately may be divided equally upon

divorce, where the facts indicate that the assets were treated jointly during the marriage. In Rossen v. Rossen, 635 P.2d 469 (Alaska 1981), the wife brought substantial real estate to the parties' marriage. She and her husband merged their businesses, she being a real estate broker and he a contractor. The marriage lasted under two years. In reviewing the lower court's equal division of property, the Court noted:

At trial, the court found that the parties had made no effort during the time they lived together to separate their property and funds. The parties treated all monies received and all expenses paid as joint monies and expenses. They jointly applied their efforts and financial resources to the operation of their business. The court concluded that it was the intent of the parties to treat all property, whether initially separate or joint, as joint property, with the exception of two parcels of land owned by Shirley that Thomas agreed Shirley could have.

Id. at 470.

The Alaska Court found these facts constituted sufficient evidence to support the court's findings that the parties intended to treat all property (except for the two parcels) jointly. The Court upheld the equal division of the assets noting that the wife had invested little capital in their joint affairs and would have gained much if they had been successful and that she should accordingly share in the

losses. Appellant asks this Court to similarly rule that the parties here treated the inherited assets as joint property during the marriage, and that as such the assets are subject to division.

The importance of analyzing each inheritance issue according to its facts was further emphasized in Vivian v. Vivian, 583 P.2d 1072 (Mont. 1978). There the Supreme Court of Montana was asked to review a distribution where the husband's inheritance was deducted from the value of the parties' home prior to dividing the marital estate. The wife claimed error in the exclusion and the Montana Court agreed, citing to an earlier decision wherein it addressed the issue as follows:

This Court, in Morse v. Morse (1977), Mont., 571 P.2d 1147, 34 St.Rep. 1334, held that an inheritance received during the marriage is a marital asset. We went on to explain that this holding meant that an inheritance had to be taken into consideration in dividing the assets. However, in Morse, we recognized that no definite rule could be established as to how the trial court was to consider this asset. Each case has to be decided on its own facts.

Id. at 1074.

The inclusion of inherited property to arrive at an equitable property division was also upheld in Sheedy v. Sheedy, 1 Hawaii App. 595, 623 P.2d 95 (1981). Sheedy involved parties who married after the husband had graduated from medical school and divorced 21 years later. The trial court awarded the husband one half of the wife's inheritance. On appeal, the Intermediate Court of Appeals upheld the decision, noting that the pertinent state statute allowed the court to distribute all property of either or both parties subject only to the qualification that the division be equitable. The court noted that "the award to husband of one-half the value of wife's inheritance from his father's estate is not to be viewed in isolation. Rather, it must be viewed as an integral part of the entire division and distribution". Id. at 96.

See also McGain v. McGain, 219 Kan. 780, 549 P.2d 896 (1976) where the Supreme Court of Kansas stated that inherited property should not be per se excluded from a marital estate division.

Appellant asks that the analysis of the above courts be followed in reviewing the inherited property at issue. In addition, Appellant states that the Utah Court has also

recognized that inherited property may properly be included in determining the value of the marital estate. In MacDonald, the parties filed for divorce in January of 1950. During that year, the wife inherited \$8,000. The trial court listed the balance of the inheritance (\$6,948.25) as an asset of the parties and awarded it to the wife upon distribution. While the case did not raise the specific issue of inherited funds, the Court upheld the property division and commented on the inheritance, saying, "True, this cash is hers, but it was properly taken into account in appraising the entire financial situation of the parties and adjusting their property rights." Id. at 1070.

Appellant asks this Court to find that the trial court abused its discretion in not including the inherited property in its division of the marital estate. The above cases support a factual analysis of each inheritance question and the specific facts of this matter warrant the property's inclusion.

B. The Facts of this Case Justify Treating the Inherited Properties as Marital Assets.

As stated above, the Utah statute governing property distribution requires that the court do it equitably. While

this directive is broad, it is not without limitations. This Court has referred to the trial court's responsibility in property distribution as follows:

In the distribution of the marital estate, there is no fixed rule or formula. The statutory standard is established in Section 30-3-5, the court may make such orders in relation to the parties as may be equitable. The responsibility of the trial court is to endeavor to provide a just and equitable adjustment of their economic resources so that the parties might reconstruct their lives on a happy and useful basis. In adjusting the rights and obligations of the parties, this court listed fifteen factors which the trial court might consider in MacDonald v. MacDonald.

Gramme vs. Gramme, 587 P.2d 144, 148 (Utah 1978).

Those fifteen factors and the corresponding facts of this case that apply to each are as follows:

1. The social position and standard of living of each before marriage: Both were students. He was a medical school resident and she was in education.
2. The respective ages of the parties upon marriage, he was 29, she was 23.
3. What each may have given up for the marriage: There is nothing significant shown here.
4. What money or property each brought into the marriage: No specific properties are listed in the record. Appellant brought his resident's salary.

5. The physical and mental health of the parties: Both assumed to be good.
6. The relative ability, training and education of the parties. He was a resident in pathology at the time of the marriage; she was earning a degree in education and later taught for two years.
7. The time of duration of the marriage: 24 years.
8. The present income of the parties and the property acquired during the marriage and owned either jointly or by each now: He earns \$140,000 (gross) annually; as outlined above, she is expected to annually earn \$74,274 as presently divided (without child support). A list of the properties acquired during the marriage and the values assigned to each is attached as Exhibit A.
9. How it was acquired and the efforts of each in doing so: All of the assets listed by the court as marital property were acquired by Appellant's salary, and by the yearly income generated by the inherited properties. The lands and stock listed by the court as Respondent's separate property were inherited.
10. Children reared, their present ages and obligations to them or help which may in some instances be required: One child (13) resides with Respondent; another child (16) resides with Appellant; two older children (19 and 21) attend college. All four children will be supported through college.
11. The present mental and physical health of the parties: Both are assumed to be good.
12. The present ages: He is 54, she is 47.
13. The happiness and pleasure, or lack of it experienced during the marriage: The parties began not communicating well the last few years of their marriage.

14. Any extraordinary sacrifice, devotion or care which may have been given to the spouse or others: Nothing pertinent on these facts.
15. The present standards of living and needs of each, including the cost of living: Both appear to have sufficient for their needs. Respondent did not submit a statement of her expenses; Appellant's statement was received through Exhibits D.3 and D.4 and through testimony.

MacDonald, at 1070. The citations to the trial record are in the Statement of Facts.

In addition to the above factors, Appellant asks this Court to consider the following facts regarding the inherited properties themselves.

1. The lands and stocks were inherited in 1966, four years after the parties had married.
2. For approximately the next 18 years, the property was treated as a family asset.
3. The parties filed joint income tax returns and paid taxes with joint funds.
4. The income generated by the inherited properties was directed back into joint accounts and financial ventures and used as family income.
5. At no time prior to seeking a divorce did Respondent indicate to Appellant that she viewed the lands and stock as her separate property.
6. Appellant has supported Respondent with his salary for all but the initial two years of the marriage. Accordingly, the inherited properties now remain intact.

Again, no findings were made by the trial court to indicate that it considered any of the above factors in its decision. It appears that the allocation was based entirely on the fact that the properties were inherited. There is nothing in the record to show that the court evaluated Appellant's contributions in maintaining the property as a family asset, as was done by this Court in Preston.

There is also no indication that the court considered the value of the inherited properties in reviewing Respondent's financial position. The property was given outright to Respondent, with the court's adjusting only the balance of the assets to afford each an equal share. The result is that Respondent left the marriage with \$381,500 above that which was awarded Appellant.

The property has been treated by both parties as a marital asset for the past ten years. It is incongruous to now treat it as something different when the only thing that has changed is the filing of this suit. Accordingly, Appellant asks that the trial court's decision be reversed and the inherited property be included in the marital estate for purposes of computing an equitable division.

## II

THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING RESPONDENT \$600.00 A MONTH IN CHILD SUPPORT WHEN THE RECORD CONTAINS NO EVIDENCE SUPPORTING THE JUDGMENT.

The only reference to child support in the divorce decree reads as follows:

It is further ordered that because of the large discrepancy between the parties' monthly income, plaintiff be and she is hereby awarded child support in the sum of \$600.00 per month which is over and above what she would owe to the defendant as and for child support for the child in defendant's custody.

(R. at 58).

Appellant contests this ruling on two grounds:

1) no evidence was introduced at trial establishing the financial needs of the child; and

2) respondent has more than adequate income to provide for the needs of the child in her custody and, in fact has greater assets than appellant.

The standard for determining the amount of child support is set forth in U.C.A., 1953, as amended, Section 78-45-7 (2), as follows:

(2) When no prior court order exists, or a material change in circumstances has occurred, the court in determining the amount of prospective support, shall consider all relevant factors including but not limited to:

- (a) the standard of living and situation of the parties;
- (b) the relative wealth and income of the parties;
- (c) the ability of the obligor to earn;
- (d) the ability of the obligee to earn;
- (e) the need of the obligee;
- (f) the age of the parties;
- (g) the responsibility of the obligor for the support of others.

This Court has held that the principal considerations in determining child support are "the needs of the child and the ability of the parent to provide such support." Forbush v. Forbush, 578 P.2d 518, 519 (Utah 1978).

Appellant argues that the trial court did not consider the needs of the child in establishing the amount to be paid by Appellant. The court based its award solely on the disparity of income between the parties. Judge Hyde explained his reasons for awarding child support in his Memorandum Decision as follows:

As to the child support, the figures here are not covered by our charts. There is a large discrepancy between the parties' monthly incomes, and the child living with the plaintiff should be entitled to the benefit of the defendant's substantial income. However, there are two children going to college. While they are technically emancipated, the parties both agree that they should go to college and they are being assisted in their college educations, which does constitute substantial expense. I hold that defendant shall pay to the plaintiff the sum of \$600.00 per month over and above what she would owe to the defendant as and for child support.

(R. at 22).

No additional clarification as to the needs of the child is provided in the Findings of Fact. The Conclusions of Law again cite only to the disparity in the parties' income. The transcript of proceedings is void of any evidence as to debts incurred on behalf of the child or of his proportional share of monthly expenses.

Appellant recognizes that the Court has discretion in the amount of support it orders, and that the trial court's decision will not be reversed absent a clear abuse of discretion. Bader vs. Bader, 18 Utah 2d 407, 424 P.2d 150 (1967). Appellant states that such an abuse of discretion occurred in this case because no findings were made regarding the child's needs. The Court of Appeals of Colorado,

Division 1, found such an abuse of discretion based upon similar facts in In re Marriage of Berry, 660 P.2d 512 (Colo. App. 1983).

Berry involved a divorce action wherein a husband appealed that portion of the order requiring him to pay \$1,000 per month per child for each of his two children. The trial court found that the children had no financial resources and that the husband, a dentist, earned \$118,000 - \$165,000 annually. The court further found that the husband had assets totalling approximately \$1,000,000 and had minimal expenses in relation to income. The wife was awarded \$427,000 in cash and the family home, per stipulation of the parties. The husband contested the child support award on the grounds that there was insufficient evidence to support the amount ordered. The Court of Appeals agreed, holding that the record lacked evidence as to the needs of the children. Id.

The Court reasoned as follows:

In determining child support, the primary focus is on the needs of the child, and the court may order a parent to pay an amount "reasonable or necessary" for the child's support after considering the relevant factors which include life-style and economic class. See [Section] 14-10-115, C.R.S. 1973; Wright v. Wright, 182 Colo. 425, 514 P.2d 73 (1973). In this case, the only quantitative evidence of the children's needs was the wife's financial affidavit. The affidavit listed monthly

expenses of \$2,312 for her and the children, including a \$300.00 per month church contribution, \$160.00 a month in psychotherapy expenses for wife, and certain other expenses which were attributable solely to her. There was no breakdown in the affidavit identifying the needs or expenses of the children, nor was there any testimony concerning the amount of money required to fulfill the needs of the children.

The court based its order, in part, on its findings that the standard of living would have eventually increased and that the children were emotionally upset, and were probably going to need psychological help. With regard to the increased standard of living, the trial court had before it no evidence on which to base its determination. Rather, it focused upon the substantial income of husband, and determined that \$1,000 per month was "commensurate" with his income, notwithstanding a lack of evidence showing the children required that much monthly support.

Id. at 513.

In similar fashion, the trial court in the present case focused solely on the Appellant's income in determining child support, notwithstanding a lack of evidence showing that it is needed.

While the Colorado support statute differs in wording from the Utah statute (See Appendix B), the basic thrust of the law is the same. Both statutes require the court to review the circumstances of the parties and consider the needs of the child when ordering support. The trial court

abused its discretion in not issuing such findings regarding need and appellant accordingly requests that the trial court's order be reversed.

Moreover, Appellant asserts that Respondent has more than adequate income to provide for the support of the thirteen year old boy in her custody. As outlined in the Statement of Facts, Respondent is expected to receive approximately \$74,274 per year from her wages, dividends and payments from Appellant. In addition, her employment income could increase by \$4,000-8,000 per year if she chose to continue teaching. Respondent was awarded \$756,050 in the property division, while Appellant was awarded \$374,500. Her award included all of the income producing property of the marriage.

Respondent did not introduce any evidence at trial regarding her monthly expenses, beyond a statement that her rent was \$800.00 a month. Appellant testified that his net income per month following payment of taxes, pension plan and professional corporation expenses is approximately \$4,800 per month from which he pays household costs, his own expenses and supports the sixteen year old child in his custody.

The Court below readily acknowledged that the income figures here are not covered by the Uniform Child Support Schedule. Appellant asserts that there is no evidence in the record to justify the award of \$600.00 a month and that the decree does not reflect a proper consideration of the factors enumerated in U.C.A. 78-47-7 (2). As this Court noted in Forbush, when reviewing an order for child support, "the findings must themselves be sufficient to provide a sound foundation for the judgment. . ." Id. at 519. Such findings are absent here and Appellant asks that the judgment be reversed.


#### CONCLUSION

Based upon the facts and law stated herein, Respondent respectfully requests that the case be remanded to the trial court for review with reference to the treatment of the inherited property as part of the marital estate and for review of the child support order.

DATED this 25 day of August, 1986.

Respectfully submitted,

CAMPBELL, NEELEY & HADLEY

  
RICHARD W. CAMPBELL #3627  
2485 Grant Avenue, Suite 200  
Ogden, Utah 84401

Attorney for Defendant-  
Appellant

A D D E N D U M

APPENDIX A

Marital Assets Awarded to Plaintiff-Respondent:

- A. Park City property option.  
Value \$5,000.00.
- B. Arkansas timber property (5/8 interest).  
Value \$85,000.00.
- C. Arkansas/Louisiana Gas stock.  
Value \$10,000.00.
- D. IRA accounts.  
Value \$81,600.00.
- E. Woodtick property (1/4 interest).  
Value \$62,500.00.
- F. 1982 Volvo automobile.  
Value \$9,000.00.
- G. Furniture and appliances presently in her possession, including the following: Rocker, cedar chest, father's chair and desk, one stained glass door panel, miscellaneous personalties.  
Value \$4,200.00.
- H. Plaintiff's savings.  
Value \$15,000.00.

Inherited Property Awarded to Respondent as  
Her Sole and Separate Property

- A. Arkansas timber property (1/8 interest)  
Equity \$17,000.00.
- B. Louisiana timber property (675 acres at  
\$500.00 per acre).  
Equity \$337,500.00.
- C. American Can stock.  
Equity \$5,500.00.
- D. AT & T and Nynex stock.  
Equity \$12,000.00.
- E. Homer National Bank stock.  
Equity \$9,500.00.

Marital Assets Awarded to Appellant:

- A. Sharon Circle home.  
Value \$140,000.00.
- B. Lot 28.  
Value \$50,000.00.
- C. Lot 32.  
Value \$35,000.00.
- D. Woodtick property (1/4 interest).  
Value \$62,500.00.
- E. Life insurance (cash surrender value).  
Value \$51,500.00.
- F. Merrill Lynch pension benefit account.  
Value \$88,000.00.
- G. CMA savings.  
Value \$53,000.00.
- H. Coins.  
Value \$3,000.00.
- I. Northeast Utility stock.  
Value \$1,000.00.
- J. 1979 Bronco automobile.  
Value \$5,200.00.

- K. Furniture and appliances presently in his possession excluding those specifically awarded to the plaintiff and including sporting equipment, guns, yard equipment, crystal, china and silver.  
Value \$18,600.00.
- L. Savings account in Missouri.  
Value \$2,000.00.

## APPENDIX B

Colorado Revised Statutes, 1973.

14-10-115. Child Support. (1) In a proceeding for dissolution of marriage, legal separation, maintenance, or child support, the court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable or necessary for his support, without regard to marital misconduct, after considering all relevant factors including:

- (a) The financial resources of the child;
- (b) The financial resources of the custodial parent;
- (c) The standard of living the child would have enjoyed had the marriage not been dissolved;
- (d) The physical and emotional condition of the child and his educational needs; and
- (e) The financial resources and needs of the noncustodial parent.

Brian R. Florence #1091  
of FLORENCE AND HUTCHISON  
Attorney for Plaintiff  
818-26th Street  
Ogden, UT 84401  
399-9291

MAY 6 3 55 PM '86  
WEBER COUNTY CLERK  
RICHARD R. GREENE

IN THE DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

---

MARTHA V. TOTZKE,	:	
Plaintiff,	:	FINDINGS OF FACT AND
	:	<u>CONCLUSIONS OF LAW</u>
vs.	:	
HENRY A. TOTZKE,	:	Civil No. 93039
Defendant.	:	

---

The above-entitled matter came on for trial on the 20th March, 1986, before the Honorable Ronald O. Hyde, Judge of the above-entitled Court, sitting without a jury, plaintiff present and represented by counsel, Brian R. Florence, and defendant present and represented by counsel, Richard W. Campbell, and the parties having been duly sworn and testified, and the Court having been fully advised in the premises and having taken the matter under advisement and having subsequently issued its Memorandum Decision, now enters its:

FINDINGS OF FACT

1. That defendant is an actual and bona-fide resident of Weber County, State of Utah, and has been for

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more than three months prior to the commencement of this action.

2. That plaintiff and defendant are husband and wife, having been married to each other on January 27, 1962 in Baton Rouge, Louisiana.

3. That four children have been born as issue of this marriage, to-wit: TERRI LEE TOTZKE, born February 12, 1965; JACK TOTZKE, born October 9, 1966; MICHAEL TOTZKE, born April 8, 1969 and CHRIS TOTZKE, born April 28, 1973. That Terri is emancipated and living away from home. That Jack has reached his majority.

4. That defendant has treated plaintiff cruelly, causing her great mental distress and suffering.

5. That plaintiff is working for Ogden Food Service earning \$6.00 per hour and also periodically receives dividends from inherited property.

6. That defendant is employed independently by McKay-Dee Hospital and has an annual gross income of \$140,000.00.

7. That during the course of the marriage, the parties have acquired the following marital assets which

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are valued as follows:

- A. Home at 5965 South Sharon Circle, Ogden.  
Equity - \$140,000.00.
- B. Lot 28 (tennis court adjacent to home)  
Equity \$50,000.00.
- C. Lot 32 across from home.  
Equity \$35,000.00.
- D. Park City property option.  
Equity \$5,000.00.
- E. Arkansas Timber Farm (5/8 interest).  
Equity \$85,000.00.
- F. Woodtick/Pineview property (90 acres)  
(1/2 interest).  
Equity \$125,000.00.
- G. Arkansas/Louisiana Gas stock  
Equity \$10,000.00.
- H. Life Insurance.  
Equity \$51,500.00.
- I. Merrill Lynch pension benefit account.  
Equity \$88,000.00.
- J. CMA savings account.  
Equity \$53,000.00.

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K. Limited partnership.

Equity \$0.

L. IRA in plaintiff's name.

Equity \$9,200.00.

M. IRA and annuity in defendant's name.

Equity \$72,400.00.

N. Savings account for children.

Equity \$10,000.00.

O. Savings account in Missouri.

Equity \$2,000.00.

P. Savings account (plaintiff's)

Equity \$15,000.00.

Q. Coins.

Equity \$3,000.00.

R. Northeast Utility stock.

Equity \$1,000.00.

8. That during the course of the marriage,  
plaintiff inherited from her father the following property:

A. Arkansas timber property (1/8 interest)

Equity \$17,000.00.

B. Louisiana timber property (675 acres at  
\$500.00 per acre).

Equity \$337,500.00.

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- C. American Can stock.  
Equity \$5,500.00.
- D. AT&T and Nynex stock.  
Equity \$12,000.00.
- E. Homer National Bank stock.  
Equity \$9,500.00.

This property has produced approximately \$200,000.00 in income and dividends which have been absorbed in the marital relationship and increased marital assets.

9. That during the course of the marriage, the defendant inherited approximately \$50,000.00 from his family which has likewise been absorbed into the marital relationship.

10. That the defendant anticipates an additional \$33,000.00 obligation for past taxes in connection with the limited partnership investments which should be paid from the CMA savings.

From the foregoing Facts, the Court now makes and enters its:

CONCLUSIONS OF LAW

- 1. That plaintiff should be awarded a Decree of

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Divorce from defendant above-named and said Decree should become final immediately upon its being signed and filed with the Clerk of this Court.

2. That defendant should be awarded the care, custody and control of Michael and plaintiff should be awarded the care, custody and control of Chris. That both parties should be awarded reasonable rights of visitation with the child not in their custody.

3. That plaintiff should be awarded as her sole and separate property that which she inherited from her father which specifically includes the following:

- A. Arkansas timber property (1/8 interest)  
Equity \$17,000.00.
- B. Louisiana timber property (675 acres at  
\$500.00 per acre).  
Equity \$337,500.00.
- C. American Can stock.  
Equity \$5,500.00.
- D. AT&T and Nynex stock.  
Equity \$12,000.00.
- E. Homer National Bank stock.  
Equity \$9,500.00.

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4. That of the marital assets, the plaintiff should be awarded the following:

- A. Park City property option.  
Value \$5,000.00.
- B. Arkansas timber property (5/8 interest).  
Value \$85,000.00.
- C. Arkansas/Louisiana Gas stock.  
Value \$10,000.00.
- D. IRA accounts.  
Value \$81,600.00.
- E. Woodtick property (1/4 interest).  
Value \$62,500.00.
- F. 1982 Volvo automobile.  
Value \$9,000.00.
- G. Furniture and appliances presently in her possession including the following: Rucker, cedar chest, father's chair and desk, one stained glass door panel, miscellaneous personalties.  
Value \$4,200.00.
- H. Plaintiff's savings.  
Value \$15,000.00.

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5. That of the marital assets, the defendant should be awarded the following:

- A. Sharon Circle home.  
Value \$140,000.00.
- B. Lot 28.  
Value \$50,000.00.
- C. Lot 32.  
Value \$35,000.00.
- D. Woodtick property (1/4 interest).  
Value \$62,500.00.
- E. Life insurance (cash surrender value).  
Value \$51,500.00.
- F. Merrill Lynch pension benefit account.  
Value \$88,000.00.
- G. CMA savings.  
Value \$53,000.00.
- H. Coins.  
Value \$3,000.00.
- I. Northeast Utility stock.  
Value \$1,000.00.
- J. 1979 Bronco automobile.  
Value \$5,200.00.

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K. Furniture and appliances presently in his possession excluding those specifically awarded to the plaintiff and including sporting equipment, guns, yard equipment, crystal, china and silver.

Value \$18,600.00.

L. Savings account in Missouri.

Value \$2,000.00.

6. That the CMA account being awarded to the defendant has actually been valued for purposes of this division at \$20,000.00, creating a reserve for the defendant of \$33,000.00 for the payment of taxes in connection with the limited partnership problems. Whatever remaining amount of the \$33,000.00 which is not actually needed or used for taxes should be divided equally between the parties.

7. That based upon the property distribution above, the plaintiff should be entitled to receive \$102,250.00 from the defendant to equalize the marital asset property distribution. Judgment should therefore be awarded to the plaintiff in this sum which should be paid

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as a cash settlement amortized over a nine-year period with 10% interest per annum or \$1,439.56 per month principal and interest.

8. That because of the large discrepancy between the parties' monthly income, plaintiff should be awarded child support in the sum of \$600.00 per month which is over and above what she would owe to the defendant as and for child support for the child in defendant's custody.

9. That each of the parties should be required to waive all claims of alimony from the other.

10. That defendant should be required to maintain health and accident insurance on the two minor children and each of the parties should be required to pay one-half of all noncovered medical and dental expenses for said children.

11. That plaintiff's request concerning defendant maintaining the plaintiff on his life insurance should be denied.

12. That each of the parties should be required to pay their own attorney fees incurred herein.

13. That defendant should be required to pay

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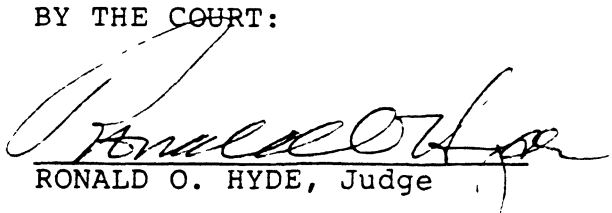
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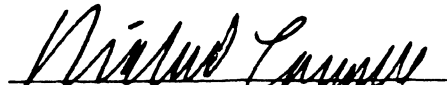
plaintiff's costs incurred herein. Judgment should  
therefore be entered against the defendant in the sum of  
\$54.00 for filing plaintiff's Complaint and one certified  
copy of the Decree.

DATED this 6 day of <sup>May</sup> April, 1986.

BY THE COURT:

  
RONALD O. HYDE, Judge

APPROVED AS TO FORM:

  
RICHARD W. CAMPBELL  
Attorney for Defendant

FLORENCE  
and  
HUTCHISON

ATTORNEYS AT  
LAW

3 - 26TH STREET  
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TOTZKE/C

Brian R. Florence #1091  
of FLORENCE AND HUTCHISON  
Attorney for Plaintiff  
818-26th Street  
Ogden, UT 84401  
399-9291

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WEBER COUNTY CLERK  
RICHARD R. STEENE

IN THE DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

---

MARTHA V. TOTZKE,	:	
	:	
Plaintiff,	:	<u>DECREE OF DIVORCE</u>
	:	
vs.	:	
	:	
HENRY A. TOTZKE,	:	Civil No. 93039
	:	
Defendant.	:	

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*11/3/86*

The above-entitled matter came on for trial on the 20th March, 1986, before the Honorable Ronald O. Hyde, Judge of the above-entitled Court, sitting without a jury, plaintiff present and represented by counsel, Brian R. Florence, and defendant present and represented by counsel, Richard W. Campbell, and the parties having been duly sworn and testified, and the Court having been fully advised in the premises and having taken the matter under advisement and having subsequently issued its Memorandum Decision, and the Court having heretofore signed and files its Findings of Fact and Conclusions of Law, now orders as follows:

IT IS HEREBY ORDERED that plaintiff be and she is

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hereby awarded a Decree of Divorce from defendant above-named and said Decree shall become final immediately upon its being signed and filed with the Clerk of this Court.

IT IS FURTHER ORDERED that defendant be and he is hereby awarded the care, custody and control of Michael and plaintiff is hereby awarded the care, custody and control of Chris. That both parties are hereby awarded reasonable rights of visitation with the child not in their custody.

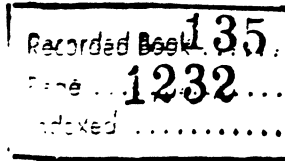
IT IS FURTHER ORDERED that plaintiff be and she is hereby awarded as her sole and separate property that which she inherited from her father which specifically includes the following:

- A. Arkansas timber property (1/8 interest)  
Equity \$17,000.00.
- B. Louisiana timber property (675 acres at  
\$500.00 per acre).  
Equity \$337,500.00.
- C. American Can stock.  
Equity \$5,500.00.
- D. AT&T and Nynex stock.  
Equity \$12,000.00.

FLORENCE  
and  
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E. Homer National Bank stock.

Equity \$9,500.00.

IT IS FURTHER ORDERED that of the marital assets,  
the plaintiff be and she is hereby awarded the following:

A. Park City property option.

Value \$5,000.00.

B. Arkansas timber property (5/8 interest).

Value \$85,000.00.

C. Arkansas/Louisiana Gas stock.

Value \$10,000.00.

D. IRA accounts.

Value \$81,600.00.

E. Woodtick property (1/4 interest).

Value \$62,500.00.

F. 1982 Volvo automobile.

Value \$9,000.00.

G. Furniture and appliances presently in her  
possession including the following: Rocker,  
cedar chest, father's chair and desk, one  
stained glass door panel, miscellaneous  
personalities.

Value \$4,200.00.

FLORENCE  
and  
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TOTZKE v. TOTZKE  
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H. Plaintiff's savings.

Value \$15,000.00.

IT IS FURTHER ORDERED that of the marital assets,  
the defendant be and he is hereby awarded the following:

A. Sharon Circle home.

Value \$140,000.00.

B. Lot 28.

Value \$50,000.00.

C. Lot 32.

Value \$35,000.00.

D. Woodtick property (1/4 interest).

Value \$62,500.00.

E. Life insurance (cash surrender value).

Value \$51,500.00.

F. Merrill Lynch pension benefit account.

Value \$88,000.00.

G. CMA savings.

Value \$53,000.00.

H. Coins.

Value \$3,000.00.

I. Northeast Utility stock.

Value \$1,000.00.

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J. 1979 Bronco automobile.

Value \$5,200.00.

K. Furniture and appliances presently in his possession excluding those specifically awarded to the plaintiff and including sporting equipment, guns, yard equipment, crystal, china and silver.

Value \$18,600.00.

L. Savings account in Missouri.

Value \$2,000.00.

IT IS FURTHER ORDERED that the CMA account being awarded to the defendant has actually been valued for purposes of this division at \$20,000.00, creating a reserve for the defendant of \$33,000.00 for the payment of taxes in connection with the limited partnership problems. Whatever remaining amount of the \$33,000.00 which is not actually needed or used for taxes shall be divided equally between the parties.

IT IS FURTHER ORDERED that based upon the property distribution above, the plaintiff be and she is hereby entitled to receive \$102,250.00 from the defendant to

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equalize the marital asset property distribution. Judgment is therefore awarded to the plaintiff in this sum which shall be paid as a cash settlement amortized over a nine-year period with 10% interest per annum or \$1,439.56 per month principal and interest.

IT IS FURTHER ORDERED that because of the large discrepancy between the parties' monthly income, plaintiff be and she is hereby awarded child support in the sum of \$600.00 per month which is over and above what she would owe to the defendant as and for child support for the child in defendant's custody.

IT IS FURTHER ORDERED that each of the parties be and they are hereby required to waive all claims of alimony from the other.

IT IS FURTHER ORDERED that defendant be and he is hereby required to maintain health and accident insurance on the two minor children and each of the parties shall be required to pay one-half of all noncovered medical and dental expenses for said children.

IT IS FURTHER ORDERED that plaintiff's request concerning defendant maintaining the plaintiff on his life

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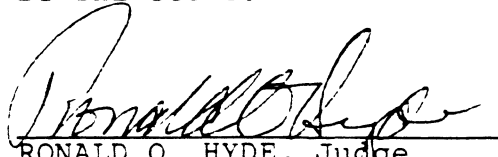
insurance be and is hereby denied.

IT IS FURTHER ORDERED that each of the parties be and they are hereby required to pay their own attorney fees incurred herein.


IT IS FURTHER ORDERED that defendant be and he is hereby be required to pay plaintiff's costs incurred herein. Judgment is therefore entered against the defendant in the sum of \$54.00 for filing plaintiff's Complaint and one certified copy of the Decree.

DATED this 5 day of <sup>May</sup> April, 1986.

BY THE COURT:

  
RONALD O. HYDE, Judge

APPROVED AS TO FORM:

  
RICHARD W. CAMPBELL  
Attorney for Defendant

FLORENCE  
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DEN, UTAH 84401

TOTZKE1/C

APR 1 3 12 PM '86

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

MARTHA V. TOTZKE,

Plaintiff,

vs.

HENRY A. TOTZKE,

Defendant.

MEMORANDUM DECISION

Case No. 93039

Plaintiff is granted a divorce upon the grounds of mental cruelty. The divorce is to become final upon entry.

The parties have two children not yet emancipated. Michael's custody is awarded to the defendant; Chris' custody is awarded to the plaintiff. Each party is granted a reasonable right of visitation with the child not in their custody.

The major dispute between the parties appears to be the distribution of the property. Plaintiff inherited considerable property from her parents. The defendant takes the position that all property is joint and requests disposition accordingly. Plaintiff takes the position that the inherited property is separate and not part of the marital assets. I hold that the inherited property that is still easily identifiable is not a marital asset and does belong to the plaintiff as her separate property. The evidence shows that the defendant did inherit some

\$50,000 which was absorbed into the marital relationship; however, the income from the plaintiff's property would be over \$200,000 that was also absorbed into the marital relationship and no doubt has accounted for an increase in the marital assets.

Each of the parties has submitted a proposed distribution. The defendant's proposal basically gives the plaintiff what she inherited, plus approximately \$80,000 in other properties, and he takes the balance, which includes the family home.

The requested division by plaintiff strikes me as basically being very fair. Her requested division is made so as to not disturb the defendant any more than necessary. This is an instance where alimony could easily be asked and probably be awarded. She makes \$6.00 an hour; he makes some \$140,000 per year. She makes no claim to his business and no request for alimony. The defendant argues that plaintiff's proposed request for distribution creates a real injustice for him. It appears to me that she has made every effort to make the division so as to not disturb the defendant's business or living arrangements. I must comment that it is much more equitable than his proposal, which in effect would have given her her inherited property, no alimony, no support, while he would take basically the marital assets and have no claim against his business corporation.

I accept and adopt the plaintiff's proposed distribution set out on the trial outline on Page 8, with the exception that in the distribution to the defendant, it appears the CMA savings correct figure is \$53,000, rather than \$64,000; further, holding a reserve for \$33,000 for the 1979 taxes would be reasonable. If there is a \$33,000 obligation on the 1979 taxes this would be a marital obligation. This would make the defendant's share total \$476,800, rather than the \$520,800, with \$33,000 being held in reserve. If the \$33,000 is not needed for taxes, this would be one-half plaintiff's funds. This would change the figure from \$124,250 to equalize, to \$102,250. I think it is reasonable that this difference be paid to her in a cash settlement over the nine-year period at 10% per annum.

As to the child support, the figures here are not covered by our charts. There is a large discrepancy between the parties' monthly incomes, and the child living with the plaintiff should be entitled to the benefit of the defendant's substantial income. However, there are two children going to college. While they are technically emancipated, the parties both agree that they should go to college and they are being assisted in their college educations, which does constitute substantial expense. I hold that the defendant shall pay to the plaintiff the sum of \$600 per month over and above what she would owe to the defendant as and for child support. Defendant is required maintain health

and accident insurance for the benefit of the minor children. The parties shall divide non-covered medical and dental expenses. As plaintiff's proposed property distribution was basically accepted, she has waived alimony, therefore, none is awarded.

As to attorneys' fees, one of the requirements is need. Admittedly, most people's needs are greater than their income and assets; however, in this case, plaintiff's total assets are better than half a million dollars. Each of the parties will bear their own attorney's fees. Plaintiff is awarded costs. I make no order in regard to life insurance.

Plaintiff's attorney to prepare findings, conclusions and judgment in accordance herewith.

DATED this 31 day of March, 1986.

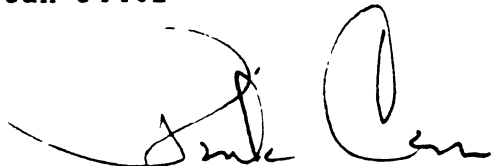
  
RONALD O. HYDE, Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of March, 1986, a true and correct copy of the foregoing Memorandum Decision was served upon the following:

Brian R. Florence  
FLORENCE & HUTCHISON  
Attorney for Plaintiff  
818 26th Street  
Ogden, Utah 84401

Richard W. Campbell  
CAMPBELL, NEELEY & HADLEY  
Attorney for Defendant  
2485 Grant Avenue  
Ogden, Utah 84401


  
\_\_\_\_\_  
PAULA CARR, Secretary

CERTIFICATE OF MAILING

I hereby certify that I mailed (4) true and correct  
copies of the foregoing BRIEF OF APPELLANT to:

Brian R. Florence  
FLORENCE & HUTCHISON  
Attorney for Plaintiff-Respondent  
818 - 26th Street  
Ogden, Utah 84401

postage prepaid, this 25 day of August, 1986.

  
RICHARD W. CAMPBELL  
Attorney at Law