

1988

## Gregg v. Gregg : Brief of Respondent

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

DONALD D. GREGG,	:	
Plaintiff/Respondent	:	Case No. 880384-CA
vs.	:	Priority Classification 14b
PATRICIA J. GREGG,	:	
Defendant/Appellant	:	

BRIEF OF RESPONDENT

Appeal from the Second Judicial District Court of Weber County, State of Utah, the Honorable John F. Wahlquist, District Judge.

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DEC 8 1988

APPEALS

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IN THE UTAH COURT OF APPEALS

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DONALD D. GREGG, :  
Plaintiff/Respondent :  
vs. : Case No. 880384-CA  
PATRICIA J. GREGG, : Priority Classification 14b  
Defendant/Appellant :

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IN THE UTAH COURT OF APPEALS

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DONALD D. GREGG, :  
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PATRICIA J. GREGG, : Priority Classification 14b  
Defendant/Appellant :

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BRIEF OF RESPONDENT

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STATEMENT OF JURISDICTION

Plaintiff/ Respondent concurs with Appellant that jurisdiction to hear this appeal is conferred upon this Court by Section 78-2a-3(2)(g), Utah Code Annotated, as amended.

STATEMENT OF THE NATURE OF THE PROCEEDINGS

This appeal is taken from a Judgment and Decree of Divorce granted on May 16, 1988 determining issues of alimony, attorney fees, and property division between the parties.

STATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion in awarding Appellant alimony in the amount of \$700.00 per month for five years?

2. Did the trial court abuse its discretion in limiting Appellant's designation as the beneficiary of Respondent's civil service spouse survivor annuity to \$700.00 per month, and for the five year alimony period?

3. Did the trial court err in valuing Appellant's Certificate of Deposit at \$25,000.00, instead of \$21,500.00?

4. Did the trial court abuse its discretion in awarding Appellant \$500.00 attorney's fees from Respondent?

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,  
ORDINANCES AND RULES

Section 30-3-5(1) Utah Code Annotated, as amended,  
(Disposition of property-maintenance and health care of parties  
and children - Court to have continuing jurisdiction)

30-3-5(1)           When a decree of divorce is  
                  rendered, the Court may include in  
                  it equitable orders relating to the  
                  children, property, and parties . . .

30-3-5(3)

The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, . . . . ., or the distribution of property as is reasonable and necessary.

STATEMENT OF THE CASE

1. Nature of the Case. This is a divorce proceeding; trial was held before the Honorable John F. Wahlquist in the Second Judicial District Court of Weber County. The Decree of Divorce was entered on May 16, 1988. Defendant appeals the alimony award and attorney fee award.

2. Course of the Proceedings. The plaintiff filed a Complaint for divorce on August 4, 1987. Defendant was served and filed an Answer on September 1, 1987. Plaintiff filed a Request for Pre-trial on September 18, 1987 and Pre-trial was scheduled for November 9, 1987.

Defendant obtained new counsel and filed an Amended Answer on November 4, 1987, together with an Order to Show Cause. The Order to Show Cause was heard before Domestic Relations Commissioner Maurice Richards on December 1, 1987. Plaintiff was ordered to pay \$300.00 per month temporary alimony in addition to paying the first and second mortgage on the parties' condominium;



the maintenance fee for the condominium association; all the defendant's utilities and monthly taxes on the parties' condominium. Defendant filed an Objection to the Commissioner's Recommended Order on Order to Show Cause on December 3, 1987. The Commissioner's Recommended Order was later affirmed by District Judge Ronald O. Hyde.

After discovery was completed, a Pre-trial was held before Commissioner Richards on February 8, 1988. Commissioner Richards recommended plaintiff receive all equity in the condominium as he had paid the down payment from pre-marital assets; defendant to receive payment from her son, Robert Tippin, in the sum of \$9,500.00, payable at \$250.00 per month in lieu of any share of plaintiff's civil service retirement; defendant to be awarded the 1986 Toyota Camray with plaintiff to pay the indebtedness thereon; plaintiff to receive the 1979 Chevrolet Pickup, the Prowler House trailer and one-half the IRA accounts (\$5,952.00), defendant to be awarded a \$25,000.00 Certificate of Deposit inherited from an aunt, and one-half the IRA accounts (\$5,952.00). The recommendation for alimony provided for defendant to receive \$1,000.00 per month for six months; \$800.00 per month for six months; \$500.00 per month for four years; and \$200.00 per month for one year with the provision that \$100.00 per month alimony will be deducted for each \$400.00

per month gross wages earned by defendant. It was recommended that plaintiff contribute \$500.00 toward defendant's attorney fees. Defendant filed objections protesting the alimony award as inadequate and the award of attorney fees. Plaintiff also filed objections, arguing the amount of alimony was excessive.

The matter was tried on March 22 and 23, 1988 before the Honorable John F. Wahlquist. He agreed with Commissioner Richards as to the property award and the attorney fee award. He disagreed with Commissioner Richards alimony ruling and increased the alimony award to \$700.00 per month for five years.

3. Disposition at Trial Court. The trial court accepted the Domestic Relations Commissioner's Recommendations as to disposition of real and personal property, payment of debts and attorney fees (Memorandum Decision, p.7). The trial court increased the award of alimony to \$700.00 per month for five years to cease upon remarriage or the general limitations (Memorandum Decision p.7) The trial court recognized that the alimony award would have to be paid from plaintiff's pre-marital property (Memorandum Decision p.7)

The trial court ordered plaintiff to continue to carry defendant as his designated spouse beneficiary so long as the alimony award remained in effect and to the sum of \$700.00 per month. The court recognized that this order may cost plaintiff

some additional monies and considered this cost in adjusting the amount of alimony awarded and the length of time it was awarded (Memorandum Decision p.8 and TR., at 17).

4. Relevant Facts. The parties married on July 21, 1979 and separated in May, 1987, after seven years of marriage (Tr., at 20, 21). The divorce became final on May 16, 1988. It was a third marriage for both parties, and no children were born of issue from the marriage (Tr., at 20, 21).

Plaintiff's date of birth is December 4, 1925. (Tr., at 22). He was 62 years old at the time of trial. Plaintiff is diabetic; has a restricted diet; and takes insulin daily to control his diabetes (Tr., at 22). In approximately, July, 1986, plaintiff had an insulin shock reaction requiring hospitalization (Tr., at 22). Defendant testified thereafter plaintiff had a convalescence period of several months and was not able to dress or feed himself (Tr., at 103). Defendant also testified plaintiff has suffered in the last couple of years a decline in ability to remember facts and figures (Tr., at 107). Plaintiff appeared depressed, withdrawn and discouraged to the trial judge (Findings of Fact #13).

Plaintiff was an engineer at Hill Air Force Base until he retired in December, 1980 (Tr., at 23). Plaintiff retired after approximately sixteen months of marriage to defendant (Tr.,

at 23). Plaintiff listed his monthly gross income at \$2,557.00 civil service retirement, \$900.00 from contract sale of a home he owned prior to marrying defendant, and \$335.00 commission earned from Wardley Real Estate Corporation (Exhibit 10-P). Plaintiff's total monthly gross income at the time of trial was \$3,792.00 and his net monthly income was \$3,381.00. The court found that plaintiff took a job as a real estate salesman with his primary motive being to eventually qualify for social security benefits (Findings of Fact #9). Plaintiff did not qualify for any social security benefits, such as medicare and medicade at the time of trial (Tr., at 25). The court found that plaintiff would retire from his real estate salesman's job as soon as he qualified for a minimum pension with social security (Findings of Fact #9). Plaintiff stated he intended to only work another two years as a real estate salesman (Tr., at 26). Accordingly, in approximately two years, plaintiff's net income will be reduced to approximately \$3,000.00 per month. The court found plaintiff's monthly financial expenses to be approximately \$2,100.00 per month. (Findings of Fact #11).

Defendant was fifty (50) years old at the time of trial (Tr., at 89, 90), and was in excellant health (Tr., at 23). Defendant graduated from high school, attended Stetson University for one year, Hannover College for a semester in 1957 majoring in

physical education (Tr., at 90). Defendant first married in 1957, had two children, and obtained a divorce in 1960 (Tr., at 90, 91). Defendant married Robert Tippin a year later, and had two more children as issue of that marriage (Tr., at 91). Defendant divorced Robert Tippin in 1978, having been married 18 years (Tr., at 91, 92). Defendant received \$900.00 per month alimony for seven years and \$100.00 per month for each of two children from Mr. Tippen. (Tr., at 92). The court found this alimony award had obviously been placed higher than normal in comparison with the child support because of the tax advantages to her ex-husband (Findings of Fact #27). Representations were made to the court that defendant was advised by former counsel to take the support in the form of alimony rather than child support because of the age of the kids (Tr., at 10). Defendant would shortly lose the child support because her children were near 18 years of age (Tr., at 10). Mr. Tippen had been a metallurgical engineer earning \$45,000.00 per year (Tr., at 93). When defendant married plaintiff in July, 1979, the alimony award of seven years from Robert Tippen terminated (Tr., at 92).

Defendant received from Robert Tippin approximately thirteen to fifteen thousand dollars as her equity in their family residence (Tr., at 93). Defendant on her own volition, prior to meeting plaintiff, purchased with these proceeds, two

condominiums, one in Riverdale, Utah and one in Park City, Utah (Tr., at 128). Defendant sold the Riverdale condominium several years after marrying plaintiff and applied the proceeds to a balloon payment due on the Park City Condominium (Tr., at 128, 133). Defendant was awarded in this divorce the Park City condominium (Decree of Divorce #10).

During the last three or four years of marriage, defendant worked and was part owner of a business known as The Ultimate Look and Fashion Academy (Tr., at 101). The business was acquired with some of defendant's pre-marital assets and approximately Five Thousand Dollar contribution by plaintiff (Tr., at 101, 102). Defendant also devoted part time to a job with a company known as Professional Leasing (Tr., at 134). Defendant testified she did not have time to look for employment because the jobs at The Ultimate Look and at Professional Leasing took up her full time (Tr., at 135). Prior to establishing the Ultimate Look and Fashion Academy, defendant was free to do whatever she wanted to do with her time (Tr., at 41). Thereafter, defendant's interests turned from the home to the business (Tr., at 41).

Defendant testified she had not applied for any employment and had no intentions of applying for a job (Tr., at 135). The court found the defendant to be an employable person,

that many women her age and intelligence took the Federal Civil Service exams, and worked part time for the Internal Revenue Service on a seasonal basis, which led to other jobs, such parties were hired off written examinations and applications which may or may not contain reference to age (Findings of Fact #18). The court also found the defendant to be employable in the retail world or in any portion of private industry that needs individuals who have skills in greeting and communicating with others (Findings of Fact #19). The court found the defendant could earn either a minimum wage or to the sum of \$2,000.00 a month depending on how hard she wanted to work (Findings of Fact #21).

The court found defendant's financial needs to be approximately \$1,700.00 per month to maintain a lifestyle exactly as she has maintained during her marriage to plaintiff (Findings of Fact #22). This sum includes \$500.00 per month for rent, \$100.00 per month for vacations, \$100.00 a month for clothes, \$100.00 per month entertainment, and \$100.00 for gifts (Defendant's exhibit #9). After the parties separated in May, 1987, defendant toured Europe for six weeks (Tr., at 142). Unknown to plaintiff, defendant charged the airfare of \$1,400.00 to plaintiff's Visa card which he paid (Tr., at 48, 49). Defendant claimed her Aunt Virginia of San Diego, California paid

her other expenses incurred while touring Europe (Tr., at 142). Defendant's children paid for her 10 day trip to San Diego over the Christmas holidays (Tr., at 142).

The trial court awarded defendant \$700.00 per month alimony for five years and plaintiff was ordered to maintain her as beneficiary on his Federal Civil Service Survivor Annuity to the level of \$700.00 for five years (Decree of Divorce #5 and #6). Defendant was awarded the right to receive \$9,500.00, payable at \$250.00 per month from her son, Robert Tippen, Jr., which sum was financed by a second mortgage on the parties' condominium (Decree of Divorce #8 and Findings of Fact #35). Defendant was awarded the 1986 Toyota Camray, valued at \$10,500.00 and plaintiff was ordered to pay for the vehicle (Decree of Divorce #11). Defendant was awarded the modeling agency known as The Ultimate Look (Decree of Divorce #12). Defendant was awarded \$5,952.00, one-half the IRA account. (Decree of Divorce #18). Defendant was awarded the \$25,000.00 Certificate of Deposit inherited from her Aunt Charlotte (Decree of Divorce #20). Defendant claims she will have to pay \$3,500.00 of debt for her deceased aunt although she had made no payments to date (Tr., at 116).



### SUMMARY OF THE ARGUMENT

1. The trial court did not abuse its discretion in awarding defendant alimony in the sum of \$700.00 per month for a period of five years.

2. The trial court did not abuse its discretion in awarding defendant to be the designated spouse beneficiary of plaintiff's Civil Service Survivor Annuity to \$700.00 per month for a period of five years.

3. The trial court did not err in valuing defendant's Certificate of Deposit at \$25,000.00, instead of \$21,500.00.

4. The trial court did not abuse its discretion in awarding defendant \$500.00 attorney fees from plaintiff. Plaintiff had agreed to follow the Pre-trial Recommendation of the Domestic Relations Commissioner (Tr., at 7, 55). Defendant objected to the alimony recommendation as she desired \$1,500.00 per month alimony (Defendant's Objection to Pre-trial Recommendation).

### ARGUMENT

POINT I: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ALIMONY OF \$700.00 PER MONTH FOR FIVE YEARS.

In divorce proceedings, the trial court has considerable discretion in adjusting the parties' financial interests. Lee v. Lee, 744 P.2d 1378, 1380 (Utah Ct. App. 1987). The trial court's decision will not be disturbed unless it is clearly unjust or an abuse of discretion. Gardner v. Gardner, 748 P.2d 1076, 1078 (Utah 1988). The most important function of alimony is to provide the support for the wife as nearly as possible at the standard of living she enjoyed during marriage, and to prevent the wife from becoming a public charge. Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985); English v. English, 565 P.2d 409, 411 (Utah 1977). In awarding alimony, the trial court must consider three factors: (1) the financial conditions and need of the spouse seeking alimony; (2) the ability of the spouse seeking alimony to produce sufficient income; and (3) the ability of the paying spouse to provide support. Smith v. Smith, 751 P.2d 1149, 1152 (Utah Ct. App. 1988). The trial court must make findings on all material issues, and its failure to do so constitutes reversible error unless the facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment. Gardner v. Gardner, 748 P.2d at 1078.

The record is uncontroverted that defendant is in excellent health (Tr., at 23). She testified she has cystic

masses in both breasts, which condition does not presently constitute a health hazard (Tr., at 121). She has an eye condition, macular degeneration, for which she receives semi-annual optical exams (Tr., at 121, 122). But none of these problems affect her present general health, nor her ability to work (Findings of Fact #15).

The court found defendant's financial needs were approximately \$1,700.00 per month to live exactly in the same lifestyle as she had been accustomed during the marriage (Findings of Fact #22). This monthly sum included \$100.00 per month for vacations, \$100.00 per month for gifts, \$100.00 per month for clothes; and \$100.00 per month for entertainment (Defendant's Exhibit #9). The trial court awarded defendant the Certificate of Deposit of \$25,000.00, which earns \$2,000.00 per year interest, paid semi-annually (Tr., at 116); \$5,952.00, one-half the IRA account; the right to receive \$9,500.00, payable at \$250.00 per month from her son; her condominium in Park City, Utah; 1986 Toyota Camray, household furnishings, and personal effects.

Defendant was fifty years old at the time of trial as her date of birth is July 6, 1937 (Tr., at 93). She had one and one-half years college but more importantly the court found her to be an employable person, that many women her age and

intelligence take the Federal Civil Service exams and perhaps work for the Internal Revenue Service on a seasonal basis, which leads to other jobs (Findings of Fact #18). The trial court found the defendant obviously employable in the retail world or in private industry that needs an individual who has skills in greeting and communicating with others (Findings of Fact #19). The trial court found defendant could earn a minimum wage salary or to the sum of \$2,000.00 a month depending on how hard she wanted to work (Findings of Fact #21). The problem is defendant does not want to work. The defendant had not applied for any job at any place of employment in the ten (10) months the parties were separated before trial (Tr., at 135). She testified she had no intentions of applying for work (Tr., at 135). The trial court in its Memorandum Decision ruled the defendant should be given alimony but that she has no right to require others to work and not work herself (Memorandum Decision at 7).

Plaintiff at the time of trial listed his monthly income of \$2,577.00 civil service retirement, \$900.00 from sale of a home by contract acquired prior to this marriage, and \$335.00 real estate commissions (Exhibit 10-P). The trial court found defendant would no longer work as a real estate salesman as soon as he qualified for social security benefits (Findings of Fact #19). Accordingly, plaintiff's net income will be about

\$3,000.00 per month after termination of his real estate sales position. The trial court found plaintiff's health to be questionable as he has diabetes, taken daily insulin shots, has a history of hospitalization, and appears to be older than 62 years (Findings of Fact #12). That plaintiff's monthly expenses were approximately \$2,100.00 per month exclusive of any alimony payment (Findings of Fact #11).

The trial court ordered plaintiff to maintain defendant as his designated spouse beneficiary up to the sum of \$700.00 per month for five years recognizing that by naming defendant as his designated spouse he would receive less income from his civil service retirement (Tr., at 17), and the court specifically considered that cost in adjusting the amount of alimony and length of time awarded (Memorandum Decision at 8).

Accordingly, the court considered all of the factors set forth in Jones and substantiated the same with findings of fact. The trial court did not abuse its discretion in its award of alimony to defendant.

This is not a case for permanent alimony. Defendant is not in her mid fifties as in Jones, she has been employed outside the home for the last three or four years of marriage, has college training as well as fashion academy training, and was specifically found to be an employable person. The parties were

married only seven years at time of separation which stretched out to eight years by the time of trial. It was a third marriage for each and no children had been born of issue. Defendant gave up nothing to marry plaintiff. In Sampinos v. Sampinos, 750 P.2d 615 (Utah Ct. App. 1988), the Court of Appeals expressed that of particular concern is what the parties gave up by the marriage. Defendant's alimony from her previous husband terminated after seven years, i.e., in 1985 (Tr., at 92). Defendant was not forced during the marriage to use her inheritance, nor proceeds from the sale of her home, to support and maintain plaintiff.

The facts of this case readily support the conclusion reached by the trial court that the state of defendant's health, her intelligence and abilities would not preclude her from earning a livelihood. Since there is a specific finding that defendant has the ability to work, and even earn up to \$2,000.00 per month, she is not precluded in the future from asking the court to modify her alimony award based on a change of circumstances if she can demonstrate in the future that she is unable to work and earn a sum to meet her needs as found by the trial court. Section 30-3-5(3) gives the court continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties. To modify the award of alimony by the trial court is to speculate about the future

earnings and needs of defendant and is merely substituting one's judgment for that of the trial court. Since there are specific findings about defendant's ability to work, there is a "baseline" determination with which to compare her future circumstances, Higley v. Higley, 676 P.2d 379, 382 (Utah 1983).

Defendant seeks \$1,500.00 per month alimony, which is an attempt to equalize income between the parties. Such is not the holding of Gardiner, Jones, and English. Alimony should be a product of length of marriage, health of the parties, what they gave up for the marriage, what assets they acquired in the marriage, the respective abilities of the parties to earn an income, and their respective financial needs.

POINT II: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION  
IN AWARDING ATTORNEY'S FEES OF \$500.00

An award of attorney fees must be based on evidence of both financial need of the party and reasonableness of the fee awarded. Walther v. Walther, 709 P.2d 387, 388 (Utah 1985). The decision to deny or award attorney fees lies primarily within the trial court's discretion. Rasband v. Rasband, 752 P.2d 1331, 1336 (Utah Ct. App. 1988).

Plaintiff agreed to pay the alimony recommendation of the Domestic Relations Commissioner and recommended property

division (Tr., at 7, 55). Defendant disagreed and argued for a greater sum of alimony which caused the matter to go to trial.

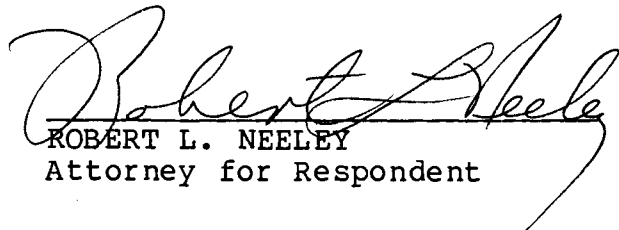
Defendant has the means with which to pay her fees as she was awarded \$5,952.00, one-half of the IRA account and a \$25,000.00 Certificate of Deposit which earns \$2,000.00 per year, paid semi-annually. Under the circumstances, the trial court did not abuse its discretion in awarding attorney fees of \$500.00.

CONCLUSION

Plaintiff respectfully requests this Court to affirm the decision of the trial court as it was well within its discretion in making this award.

RESPECTFULLY submitted this 7<sup>th</sup> day of December, 1988.

CAMPBELL & NEELEY

  
ROBERT L. NEELEY  
Attorney for Respondent

CERTIFICATE OF MAILING

\* \* \* \* \*

I hereby certify that on the 17<sup>th</sup> day of December,



1988, I mailed eight copies of the above and foregoing Brief of Respondent to the Clerk of the Utah Court of appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102 and four copies to Martin W. Custen, Attorney for Defendant/Appellant, 2661 Washington Blvd., Suite 202, Ogden, Utah 84401.

*Cynthia Campbell*  
*L. S. Stewart*  
\_\_\_\_\_  
SECRETARY



and throughout the second marriage she remained unemployed. She was also unemployed during the interval between the second divorce and this marriage to this plaintiff, which was for a little over a year. She continued to raise the children for a brief period after her third marriage. She has remained unemployed for the approximately eight years of this marriage. She has occupied herself helping the college in connection with artistic presentations and in coaching of beauty contestants. These endeavors did not produce income and served primarily as a tax shelter, to the extent that they affected the parties' income.

3. Before this marriage the plaintiff had been employed at Hill Air Force Base as an engineer for approximately 28 1/2 years. He remained so employed for about 18 months after this marriage. He was presented with an opportunity to retire early because of a reduction in force at the Base. He accepted this opportunity. He then took a job selling real estate. His primary motive in accepting a job selling real estate was to eventually qualify for social security. His earnings have been less than \$400 per month as a real estate salesman. He does not particularly enjoy this endeavor. He plans to retire as soon as he qualifies for social security. He plans to retire as soon as he qualifies for a minimum pension.

4. Each of the parties brought into this marriage children, and they were in their home for a few years.

5. The plaintiff asked for this divorce. He is careful not to say anything derogatory about his wife. She is careful not to say anything derogatory about her husband. The plaintiff has not testified as to his motives for leaving the marriage. The Court has observed that each of the parties are polite to one another throughout the proceedings, but there does not appear to be any indications of affection. The actual separation was brought on by the plaintiff's announcement that "he intended to live alone". The Court does not know the exact reason for this decision, except as it may be suggested by the health of the plaintiff.

6. The plaintiff appears to be older than his chronological age of 62. He has diabetes. The diabetes is sufficiently severe that he takes daily injections. He has a restricted diet. He has a history of hospitalizations because of insulin shock. Throughout the proceedings he appears to be depressed, withdrawn, and discouraged. The defendant is approximately 52 years of age and is somewhat overweight. She does speak quickly and behaves in accordance with the suggestion that she trains beauty contestants. She appears to be a well person. She is depressed over the events that threaten her through of the divorce situation.

7. The plaintiff's employment future will be brief. He does not indicate any particular enthusiasm for the selling of real estate. He will retire as soon as he qualifies for social security.

8. The defendant shows no enthusiasm for entering the job market. She prefers the role of the wife of a successful man. Her lack of employment for economic gain is not a result of any request made by the plaintiff. The defendant has enjoyed her hobby-type work that involves the arts. She prefers to enjoy those endeavors other than facing the employment world. The Court does find that she is an employable person. As an example, many of the women of her age and intelligence take the federal civil service tests and go to work part time for the I.R.S. on a seasonable basis, which lead to other jobs. These women are hired off written examinations. The papers may or may not contain their age. This defendant is also obviously employable in the retail world or in any portion of industry that needs individuals who have skill in greeting and communicating with others.

9. The parties have not accumulated any measurable wealth during the eight years of their marriage, except during the first 18 months the plaintiff was earning retirement time. Actually, the wealth the plaintiff now holds is the result of his 30 years employment at Hill Air Force Base and the accumulation of some real estate before this marriage was entered into. Actually, he has lost money in real estate ventures during this marriage from the investment standpoint. This has not been the result of any lack of wisdom on his part. It is the result of a suppressed condominium market in the Park City vicinity, etc.

10. The defendant came out of her second marriage with child support at \$100 per child, for two children, and alimony at \$900 per month for a fixed number of years. The alimony had obviously been placed higher than normal in comparison with the child support because of the tax advantages to her ex-husband. She also gained some property from the divorce. It was in the form of real estate, etc. She was single for approximately a year before the courtship with this plaintiff developed. This marriage has lasted approximately eight years. She has accumulated no wealth during this marriage and has suffered some reversals in real estate investments. The real estate investment losses are not the result of the misconduct of either party. She continues to object to the suggestion she should work. The trial court has struggled with the question of whether or not this marriage can be saved and has concluded that it cannot. The reason is a lack of affection evidenced on the part of either of the parties and the obvious lack of vigor on the part of plaintiff and the presence of vigor on the part of the defendant. The Court is convinced that the differences are irreconcilable.

11. There is no real conflict between the parties as to the amount of wealth each of the parties now possesses or as to the income or income history of the each. The Domestic Relations Commissioner has been successful in resolving these areas, except

in minor matters. The Court finds that the debt owed the couple by the plaintiff's daughter should be awarded to the plaintiff inasmuch as he would have the best opportunity to collect the debt. The debt owed by the defendant's son to the couple on the car transaction of \$9,500 should be awarded to the defendant in that she would have the best opportunity to collect it, and could likely collect it if she was aggressive, such as the repossessing of the car in question. A division of the property and payment of debt as such should be in compliance with the recommendation made by Commissioner Richards. This trial has been conducted because of the conflicting parties' position on the issue of alimony. The Court modifies the recommendation of the Commissioner on the question of alimony to some extent, as indicated below. The plaintiff presents the reverse side of the Woodward decision. He states that he earned this retirement almost entirely before he ever knew his wife. Her contribution in the earning of the retirement is meager. He contends that pursuant to the spirit of that decision he should be entitled to keep this property without any obligation to pay alimony because of its existence. He also points out that he enjoys the receipt of some \$900 per month on a house sale and developed it fully before he met the defendant. He points out that his earnings are now at the minimal level, are very difficult for him to secure, and are of a limited duration and will not continue indefinitely.

She can earn greater wages than he can now earn. He points out that any alimony he may pay will be paid from his past accumulated wealth, from his separate pre-marital property.

12. The defendant does not contest these basic contentions of the plaintiff on the issue of the source of the funds that might be used to pay alimony. She does contend that the length of the marriage, to-wit: eight to nine years, and her lack of training or employment history, and the lifestyle to which she has grown accustomed during the last nine years, entitles her to receive alimony even though it must come from her husband's pre-marital property.

#### RULING

The Court accepts the Domestic Relations Commissioner's recommendations in all matters except as that indicated below.

The Court awards to the defendant and against the plaintiff alimony for a period not to exceed five years. This alimony shall be in the amount of \$700. The alimony shall cease upon remarriage, etc., or the general limitations. The Court recognizes that this sum will have to be paid from plaintiff's pre-marital property. The Court believes that, in equity, the defendant should be given rehabilitation alimony as indicated above. The Court believes that if she applies herself intelligently, she should be rehabilitated within that time. She has no right to require others to work and not work herself.

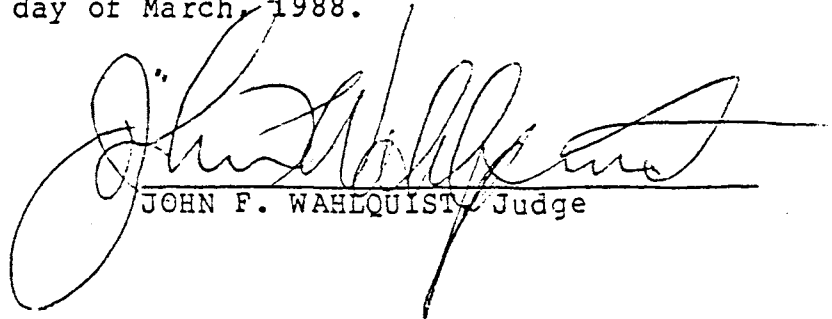


Probably the most sensitive issue throughout the trial is the issue of whether or not the plaintiff should be required to designate his spouse for spousal protection in connection with his federal pension. The defendant's pretended motivation for making this request is because it would permit her to buy health insurance for a few dollars less than she would otherwise be able to make such a purchase is not the real issue at stake. This pretended issue would effect perhaps \$50 a month or perhaps even less in connection with some of the complications. The real issue is the unmentionable one that the plaintiff's health is very precarious, he has grown weaker in recent years, and has had some crises in his health. The chief motivation for desiring this continuation is the security it would produce in the event of the death of the plaintiff, for his ex-wife. The Court orders plaintiff to continue to carry her as his designated spouse beneficiary so long as the alimony continues and to \$700. The Court recognizes that this may cost him some additional monies. The Court has considered this possible cost in adjusting the amount of alimony awarded and the length of time it is awarded for.

The Court follows the recommendation that attorney's fees to be awarded in the amount of \$500. The Court recognizes considerable litigation has been taken place since this recommendation has been made, but also recognizes that this

defendant has approximately \$31,000 plus available in various assets, and is able to carry attorney's fees above the \$500 level.

DATED this 29 day of March, 1988.

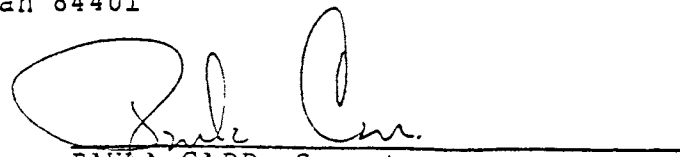
  
JOHN F. WAHLQUIST, Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 29 day of March, 1988, a true and correct copy of the foregoing Memorandum Decision was served upon the following:

Robert L. Neeley  
CAMPBELL & NEELEY  
Attorneys for Plaintiff  
2485 Grant Avenue  
Ogden, Utah 84401

Martin W. Custen  
MARQUARDT, HASENYAGER & CUSTEN  
Attorneys for Defendant  
2661 Washington Boulevard  
Ogden, Utah 84401

  
PAULA CARR, Secretary



ROBERT L. NEELEY #2373  
OF CAMPBELL & NEELEY  
2485 Grant Ave., Suite 200  
Ogden, Utah 84401  
Telephone: 621-3646

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IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

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DONALD D. GREGG,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
Plaintiff,	)	
vs.	)	
PATRICIA J. GREGG,	)	
	)	
Defendant.	)	Civil No. 99905

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That trial in the above-entitled matter, having come on regularly for hearing on the 22nd day of March, 1988, before the Honorable John F. Wahlquist, sitting without a jury; plaintiff, Donald D. Gregg, was personally present and represented by his attorney of record, Robert L. Neeley; defendant, Patricia J. Gregg, was personally present and represented by her attorney of record, Martin W. Custen; that each party having been sworn and testified, and the Court having received certain documentary evidence, and having heard the arguments and representations of counsel; and having issued its Memorandum Decision; the Court being fully advised in the premises, hereby makes the following:

FINDINGS OF FACT

1. That plaintiff is a bona fide resident of Weber County, State of Utah, and has been for more than three months immediately prior to commencement of this action for divorce.

FINDINGS OF FACT  
GREGG VS. GREGG  
Civil No. 99905

2. That plaintiff and defendant are husband and wife, having been married on the 21st day of July, 1979, in Ogden, Weber County, Utah.

3. That plaintiff has been previously married. His previous wife having passed away leaving plaintiff to raise their four children. The raising of one of these children continued on into this present marriage for a short period of time.

4. That there are no children born as issue of this marriage, and none are expected.

5. That defendant had been an employed person until she married her first husband at the age of approximately twenty years. Thereafter during her first marriage, she was not employed. Her first marriage ended in a divorce.

6. Defendant remarried and remained married for a period of approximately eighteen years. During the period between the marriages and throughout her second marriage, she remained unemployed. Defendant was also unemployed during the interval between the second divorce and this marriage to plaintiff, which was for a period of time in excess of one year. Defendant had children by her prior marriages and continued to raise the children for a brief period after her marriage to plaintiff.

7. The Court finds that there exists irreconcilable

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differences between the parties for which the relationship should be terminated.

8. Defendant has remained essentially unemployed for approximately eight years of this marriage to plaintiff. Defendant has kept herself occupied by helping Weber State College in connection with artistic presentations and in coaching of beauty contestants. She operated a business known as The Ultimate Look in connection with the beauty pageants. These endeavors did not produce income and served primarily as a tax shelter, to the extent that they effected the parties' income.

9. Prior to the marriage, plaintiff had been employed at Hill Air Force Base as a engineer for approximately 28 1/2 years. He remained so employed for about eighteen months after this marriage. Plaintiff was presented with an opportunity to retire early because of a reduction in force at Hill Air Force and accepted this opportunity. Thereafter, plaintiff took a job as a real estate salesman with his primary motive being to eventually qualify for social security. The Court finds plaintiff's earnings to have been less than \$400.00 per month as a real estate salesman. The Court finds that plaintiff does not particularly enjoy this endeavor and plans to retire as soon as he qualifies for a minimum pension with social security.

10. The Court finds that plaintiff has a gross monthly

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income of \$335.00 from Wardley Real Estate, \$2,557.00 from Civil Service Retirement, and approximately \$900.00 from the Real Estate Contract on his home on Ross Drive, Ogden, Utah, for a total sum of \$3,792.00 gross per month. The Court finds that plaintiff has a net monthly income of \$3,381.00 after deducting Federal, State income taxes, social security and health and life insurance premiums.

11. The Court finds plaintiff's present monthly expenses to be approximately \$2,100.00 per month as outlined in his exhibit for monthly expenses.

12. The Court finds that the plaintiff appears to be older than his chronological age of 62. Plaintiff suffers from diabetes and to the degree that he must take daily injections. Plaintiff has a restricted diet and a history of hospitalizations as a result of insulin shock.

13. Throughout these proceedings, the Court finds the plaintiff to be depressed, withdrawn and discouraged.

14. The Court finds the defendant to be approximately 52 years of age and is somewhat overweight. Defendant does speak quickly and behaves in accordance with the suggestion that she trains beauty contestants.

15. The Court finds the defendant to be a well person although she is depressed over the events that threaten her as a

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result of this divorce situation.

16. The Court finds the defendant shows no enthusiasm for entering the job market and prefers the role of being a wife to a successful man. The Court finds that defendant has enjoyed her hobby type work that involves the arts and prefers to enjoy those endeavors rather than facing the employment world.

17. The Court finds that her present lack of employment is not as a result of any request made by this plaintiff.

18. The Court does find the defendant is an employable person. The Court finds that many of the women of her age and intelligence take the Federal Service Civil Service tests and perhaps work part time for the Internal Revenue Service on a seasonal basis, which leads to other jobs. Such women are hired off written examinations and applications which may or may not contain reference to their age.

19. The Court finds that the defendant is also obviously employable in the retail world or in any portion of private industry that needs individual who have the skills in greeting and communicating with others.

20. The Court finds the defendant continues to object to the suggestion that she should obtain employment.

21. The Court finds that defendant can earn either a



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minimum wage salary or to the sum of \$2,000.00 a month depending upon how hard she wants to work.

22. The Court finds that defendant's financial needs are approximately \$1,722.00 per month to maintain a lifestyle exactly as she has maintained during her marriage to plaintiff. However, the Court finds plaintiff will have to reduce his standard of living in order that defendant will maintain the exact standard of living she has enjoyed the last eight years of marriage.

23. The Court finds that the parties have purchased a condominium situated at 5545 S. 1000 E., Ogden, Utah during the course of their marriage of which plaintiff paid the down payment and financing cost from his pre-marital assets.

24. The Court finds the parties have not accumulated any measurable wealth during the eight years of marriage except during the first eighteen months that plaintiff was earning retirement at Hill Air Force Base.

25. The Court finds the actual wealth of plaintiff now holds is the result of his thirty years of employment at Hill Air Force Base and the accumulation of some real estate acquired before this marriage.

26. The Court finds that plaintiff has lost money in real estate ventures during this marriage not as a result of any

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lack of wisdom on his part but as a result of the suppressed real estate market.

27. The Court finds that defendant was awarded as a result of her second divorce child support at the rate of \$100.00 per month per child for two children and alimony at \$900.00 per month for seven years at which time alimony was to automatically terminate. The Court finds the alimony awarded in that divorce to be placed higher than normal in comparison with child support because of certain tax advances afforded to her ex-husband.

28. The Court finds that defendant gained some property from her second marriage in the form of real estate, automobiles and household furniture and furnishings.

29. The Court finds that defendant was single for approximately one year before the courtship with the plaintiff, Donald D. Gregg. The Court finds that this marriage lasted approximately eight years prior to separation, and that defendant has accumulated no wealth during this marriage and has suffered some reversals in real estate investments.

30. The Court finds the real estate investments and losses are not as a result of misconduct of either party but due to the present real estate market.

31. The Court finds there is no real conflict between the parties as to the amount of wealth and property each of the

FINDINGS OF FACT  
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parties now possess or as to the income or income history of each.

32. The Court finds the Domestic Relations Commissioner has been successful in resolving these areas except in minor manners.

33. The Court finds this trial has been conducted because of the parties conflicting position on the issue of alimony.

34. The Court finds that the debt owed the parties by the plaintiff's daughter should be awarded to the plaintiff inasmuch as he would have the best opportunity to collect the same.

35. The Court finds the debt owed by the defendant's son to the parties on his automobile of \$9,500.00 should be awarded to defendant as she would likely have the best opportunity to collect it. The Court finds that debt to be payable at the rate of \$250.00 per month for approximately four years. The Court finds that she could likely collect it if she acted in an aggressive manner such as repossessing the car in question if necessary.

36. The Court finds division of the property and payment of the debts should be in compliance with the recommendation of the Domestic Relations Commissioner.

FINDINGS OF FACT  
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Based on the foregoing Findings of Fact, the Court now makes and enter its:

CONCLUSIONS OF LAW

1. That plaintiff shall be granted a Decree of Divorce on the grounds of irreconcilable differences; the same to become final upon entry.

2. That the proceeds from sale of the condominium situated at 5545 S. 1000 E., Ogden, Utah shall be awarded to plaintiff when the sale is finalized in July, 1988. Defendant shall have the right to use and occupy the premises until at least June 30, 1988 as no prospective purchaser may occupy the same until July 1, 1988. Plaintiff shall maintain the payments on said condominium including the mortgage and second mortgage, maintenance fees together with utility costs.

3. That when the condominium at 5545 S. 1000 E., Ogden, Utah is sold, the first and second mortgages are to be paid and discharged.

4. That plaintiff shall pay to defendant the sum of \$300.00 per month temporary alimony as long as she is occupying the condominium and is ordered to pay the first and second mortgage, maintenance fee, and utility payments thereon until the condominium is sold.

5. If the sale of the home is finalized in July, 1988

FINDINGS OF FACT  
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as contemplated, then commencing with the month of July, 1988 and continuing thereafter for a period of five years, plaintiff shall pay to defendant the sum of \$700.00 per month alimony. The Court recognizes this sum will have to be paid from plaintiff's pre-marital property but believes that defendant should be given rehabilitative alimony.

6. Plaintiff shall name defendant as a designated beneficiary so long as the alimony continues and to the sum of \$700.00 per month for that period of time.

7. Plaintiff shall assume and pay The Ultimate Look indebtedness which is part of the second mortgage.

8. That defendant is awarded the right to receive payment of the indebtedness of \$9,500.00 from her son, Robert Tippin, in connection with the automobile loan made to him.

9. That each party shall be awarded the personal property, household furniture, furnishings, and personal effects that each party acquired prior to their marriage.

10. That defendant may be awarded the condominium situated at Prospector's Square No. 44, Park City, Summit County, Utah.

11. That defendant may be awarded the 1986 Toyota Camra, motor vehicle valued at \$10,500.00.

12. That defendant may be awarded the modeling agency

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known as The Ultimate Look together with all assets connected therewith.

13. That plaintiff shall assume and discharge the 1987 tax obligation of approximately \$2,100.00.

14. That plaintiff is awarded 100% of his civil service retirement.

15. That plaintiff is awarded the 1979 Chevrolet Pickup valued at \$2,700.00.

16. That plaintiff is awarded Lot 62, Beus Hill Subdivision, valued at \$31,000.00 as it was his property acquired prior to marriage to defendant.

17. That plaintiff is awarded the Prowler Trailer valued at \$7,000.00.

18. That the IRA accounts totaling \$11,905.00 are to be divided equally, and that each party shall be awarded the sum of \$5,952.00.

19. That plaintiff is awarded the balance of approximately \$4,100.00 in the America First Credit Union, the boat motor which is valued at approximately \$1,000.00, the cash surrender value and Northwestern Life Insurance in the approximate sum of \$5,000.00 which insurance policy was acquired prior to the parties' marriage.

20. That defendant is awarded the TV, VCR, computer,

FINDINGS OF FACT  
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having a value between approximately \$1,600.00 to \$3,200.00 and the certificate of deposit in the amount of \$25,000.00 which she inherited from her aunt.

21. Plaintiff is not ordered to pay for defendant's medical plan but she is entitled to exercise rights and privileges afforded her under plaintiff's medical plan.

22. That plaintiff is ordered to contribute the sum of \$500.00 toward defendant's attorney fees.


DATED this 16 day of May, 1988.

JOHN F. WAHLQUIST

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JOHN F. WAHLQUIST  
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

  
\_\_\_\_\_  
MARTIN W. CUSTEN  
Attorney for Defendant

ROBERT L. NEELEY #2373  
OF CAMPBELL & NEELEY  
2485 Grant Ave., Suite 200  
Ogden, Utah 84401  
Telephone: 621-3646

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IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

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DONALD D. GREGG, ) DECREE OF DIVORCE  
Plaintiff, )  
vs. )  
PATRICIA J. GREGG, )  
Defendant. ) Civil No. 99905

---

That trial in the above-entitled matter, having come on regularly for hearing on the 22nd day of March, 1988, before the Honorable John F. Wahlquist, sitting without a jury; plaintiff, Donald D. Gregg, was personally present and represented by his attorney of record, Robert L. Neeley; defendant, Patricia J. Gregg, was personally present and represented by her attorney of record, Martin W. Custen; that each party having been sworn and testified, and the Court having received certain documentary evidence, and having heard the arguments and representations of counsel; and having issued its Memorandum Decision; the Court being fully advised in the premises, and having made and signed its Findings of Fact and Conclusions of Law, NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That plaintiff is hereby granted a Decree of Divorce on the grounds of irreconcilable differences; the same



DECREE OF DIVORCE  
GREGG VS. GREGG  
Civil No. 99905

to become final upon entry.

2. That the proceeds from sale of the condominium situated at 5545 S. 1000 E., Ogden, Utah is hereby awarded to plaintiff when the sale is finalized in July, 1988. Defendant shall have the right to use and occupy the premises until at least June 30, 1988 as no prospective purchaser may occupy the same until July 1, 1988. Plaintiff shall maintain the payments on said condominium including the mortgage and second mortgage, maintenance fees together with utility costs.

3. That when the condominium at 5545 S. 1000 E., Ogden, Utah is sold, the first and second mortgages are to be paid and discharged.

4. That plaintiff is hereby ordered to pay to defendant the sum of \$300.00 per month temporary alimony as long as she is occupying the condominium and he is ordered to pay the first and second mortgage, maintenance fee, and utility payments thereon until the condominium is sold.

5. If the sale of the home is finalized in July, 1988 as contemplated, then commencing with the month of July, 1988 and continuing thereafter for a period of five years, plaintiff shall pay to defendant the sum of \$700.00 per month alimony. The Court recognizes this sum will have to be paid from plaintiff's pre-marital property but believes that defendant should be given

DECREE OF DIVORCE  
GREGG VS. GREGG  
Civil No. 99905

rehabilitative alimony.

6. Plaintiff shall name defendant as a designated beneficiary so long as the alimony continues and to the sum of \$700.00 per month for that period of time.

7. Plaintiff is hereby ordered to assume and pay for The Ultimate Look indebtedness which is part of the second mortgage.

8. That defendant is hereby awarded the right to receive payment of the indebtedness of \$9,500.00 from her son, Robert Tippin, in connection with the automobile loan made to him.

9. That each party is hereby awarded the personal property, household furniture, furnishings, and personal effects that each party acquired prior to their marriage.

10. That defendant is hereby awarded the condominium situated at Prospector's Square No. 44, Park City, Summit County, Utah.

11. That defendant is hereby awarded the 1986 Toyota Camra, motor vehicle valued at \$10,500.00.

12. That defendant is hereby awarded the modeling agency known as The Ultimate Look together with all assets connected therewith.

13. That plaintiff is hereby ordered to assume and

DECREE OF DIVORCE  
GREGG VS. GREGG  
Civil No. 99905

discharge the 1987 tax obligation of approximately \$2,100.00.

14. That plaintiff is hereby awarded 100% of his civil service retirement.

15. That plaintiff is hereby awarded the 1979 Chevrolet Pickup valued at \$2,700.00.

16. That plaintiff is hereby awarded Lot 62, Beus Hill Subdivision, valued at \$31,000.00 as it was his property acquired prior to marriage to defendant.

17. That plaintiff is hereby awarded the Prowler Trailer valued at \$7,000.00.

18. That the IRA accounts totaling \$11,905.00 are to be divided equally, and that each party is hereby awarded the sum of \$5,952.00.

19. That plaintiff is hereby awarded the balance of approximately \$4,100.00 in the America First Credit Union, the approximate sum of \$4,911.00, the boat motor which is valued at approximately \$1,000.00, the cash surrender value and Northwestern Life Insurance in the approximate sum of \$5,000.00 which insurance policy was acquired prior to the parties' marriage.

20. That defendant is awarded the TV, VCR, computer, having a value between approximately \$1,600.00 to \$3,200.00 and the certificate of deposit in the amount of \$25,000.00 which she inherited from her aunt.

DECREE OF DIVORCE  
GREGG VS. GREGG  
Civil No. 99905

21. Plaintiff is not ordered to pay for defendant's medical plan but she is entitled to exercise rights and privileges afforded her under plaintiff's medical plan.

22. That plaintiff is ordered to contribute the sum of \$500.00 toward defendant's attorney fees.

DATED this 16 day of May, 1988.

151 JOHN F. WAHLQUIST  
JOHN F. WAHLQUIST  
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

Martin W. Custen  
MARTIN W. CUSTEN  
Attorney for Defendant

STATE OF UTAH }  
COUNTY OF WEBER } 557

I HEREBY CERTIFY THAT THIS IS A TRUE COPY  
OF THE ORIGINAL ON FILE IN MY OFFICE.  
DATED THIS 16 DAY OF May 1988  
RICHARD R. GREENE COUNTY CLERK &  
BY OFFICIAL CLERK OF THE DISTRICT COURT  
BY Doreen M. Peterson

DISPOSITION OF PROPERTY - MAINTENANCE AND HEALTH  
CARE OF PARTIES AND CHILDREN - COURT TO HAVE  
CONTINUING JURISDICTION -

30-3-5(1)           When a decree of divorce is rendered, the Court may include in it equitable orders relating to the children, property, and parties . . . . .

30-3-5(3)           The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, . . . . ., or the distribution of the property as is reasonable and necessary.