

1997

## Mary J. Rehn v. Charles C. Rehn : Brief of Appellee

Utah Court of Appeals

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**IN THE COURT OF APPEALS IN AND FOR  
THE STATE OF UTAH**

MARY J. REHN,  Plaintiff/Appellee,  vs.  CHARLES C. REHN,  Defendant/Appellant.	Case No. 970700-CA  Priority 15
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**APPELLEE'S BRIEF**

**APPEAL FROM A DIVORCE DECREE  
IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SUMMIT COUNTY  
STATE OF UTAH**

**The Honorable Pat B. Brian, District Judge**

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**IN THE COURT OF APPEALS IN AND FOR  
THE STATE OF UTAH**

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**STATEMENT OF JURISDICTION**

Defendant Charles C. Rehn has appealed a Decree of Divorce entered by the Third District Court pursuant to Utah Code Ann. § 78-2a-3(2)(h) (1996).

**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

**ISSUE 1: The trial court failed to make the necessary findings for the amount and length of its alimony award; for its deviation from the child support guidelines; and for its award of attorney’s fees.**

**STANDARD OF REVIEW:** Any award of property, alimony, child support, and attorney’s fees is within the sound discretion of the trial court and such an award will not be disturbed unless the trial court’s findings amounted to an abuse of discretion. *Boyle*

*v. Boyle*, 735 P.2d 669 (Utah App. 1987); *Searle v. Searle*, 522 P.2d 697 (Utah 1974); see also *Paffel v. Paffel*, 732 P.2d 96 (Utah 1986) (relating the standard to an award of alimony); *Maughan v. Maughan*, 770 P.2d 156, 162 (Utah App. 1989) (relating the standard to an award of attorney's fees).

**ISSUE 2: The trial court erred in excluding Charles Rehn's witness regarding Mary Rehn's underemployment and income potential.**

**STANDARD OF REVIEW:** Trial courts are given broad discretion in managing their cases, and the Utah Court of Appeals will not interfere with that management unless it amounts to an abuse of discretion. *Berrett v. Denver and Rio Grande Western R. Co., Inc.*, 830 P.2d 291 (Utah App. 1992); citing *Dugan v. Jones*, 615 P.2d 1239, 1244 (Utah 1980).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS**

The following constitutional and statutory provisions are set forth in full in Addendum A attached to this Brief:

Utah Code Ann. § 30-3-3 (1993)

Utah Code Ann. § 30-3-5 (1997)

Utah R.Civ.P. 26(b)(4) (1987)

Utah R.Civ.P. 37(b)(2) (1987)

Utah Code of Judicial Administration, Rule 4-502 (1996)



### **STATEMENT OF THE CASE**

This is a divorce of a long-term marriage, the Divorce Decree signed by the Honorable Pat B. Brian, District Judge, in Summit County, Utah, and entered in the Court's records on September 26, 1997.

The parties were married on August 27, 1977, and at the time of trial on August 14, 1997, had been married nearly 20 years. (Tr. 2, 10, 124).

There were two (2) children born of the marriage: Kyle, d.o.b. 3/11/88, who was nine years old at the time of trial; and, Shawn, d.o.b. 3/12/91, who was six years old at the time of trial. (Tr. 12-13).

The facts were uncontroverted that Mary Rehn was the primary caretaker of the minor children, and had structured her employment around the children's school and activities. In fact, Mary had gone so far as to work all holidays, weekends and evenings when Charles Rehn was present to care for the children, so as to help the family with child care payments. (Tr. 14-18, 22, 36, 39-43, 121-122).

The parties had established their marriage as Mary being the in-home caretaker of the children and Charles the outside wage earner. (Tr. 46-47, 121-122, 125).

At the time of trial, Charles was earning \$82,000 a year, which constituted approximately 80 percent of the family income and \$6833 per month gross. (Tr. 63-74, 121).

Mary, through a series of part-time jobs, earned \$17,154 for the year prior to trial,

which was approximately 20 percent of the family income, and resulted in a gross monthly income of \$1429. (Tr. 63, 121).

Child support was set by the parties by Stipulation in the amount of \$1045 to be paid by Charles to Mary. This amount was confirmed in the Findings and Decree, and a child support schedule was attached as an exhibit to those documents. (Tr. 5, 63-64, 122, Findings of Fact, ¶ 18-19, Decree of Divorce, ¶ 5).

Alimony was ordered by the Court to be paid by Charles to Mary in the amount of \$1200. Charles' total financial obligation to Mary for child support and alimony was \$2245, approximately 33 percent of his gross monthly income. (Tr. 125).

Since the trial, Charles has entered an Appeal contesting the Court's Orders concerning the amount and length of alimony, the alleged deviation from child support guidelines, the award of attorney's fees to Mary from Charles, and alleges the Court erred in excluding Charles' expert witness.

### **SUMMARY OF THE APPELLANT'S ARGUMENT**

For his first issue on appeal, Charles Rehn argues, basically, that every financial element of the trial court's findings and order was an abuse of discretion. Mr. Rehn argues that the award alimony, the amount of child support, the division of the parties debts, and the award of attorneys fees were all an abuse of discretion by the trial court. The essence of Mr. Rehn's argument is that the trial court failed to make sufficient

findings to support these awards. In response, Ms. Rehn first argues that to the degree these arguments raise factual issues already resolved by, and within, the sound discretion of the trial court, they should not be relitigated at the appellate court level. To the degree these arguments legitimately address an abuse of discretion by the trial court, Ms. Rehn argues that the trial court made sufficient findings to support these awards. Judge Brian, perhaps anticipating the likelihood of appeal, carefully reviewed the evidence presented by both parties, and then made a series of detailed findings regarding the expenses of the parties, the need of assistance by Ms. Rehn and her children, and the ability of Mr. Rehn to assist and provide for these expenses. In responding to Mr. Rehn's arguments, Ms. Rehn argues that there were sufficient findings to support the award and, therefore, no abuse of discretion occurred.

For his second issue, Charles Rehn argues that the trial court erred in excluding a "vocational" expert from testifying at trial. Ms. Rehn respectfully argues, in response, that there is no law, judicial or statutory, that allows an attorney to give notice to opposing counsel that he is supplementing his witness list to include a new expert one day before trial. This is particularly the case where the attorney admits that it was his responsibility to obtain the expert witness and he failed to do so, simply because the parties were trying to settle the case. Ms. Rehn will argue that the trial court acted within its discretion, and within the Utah Rules of Civil Procedure and the Utah Rules of Judicial Administration, in excluding the expert witness.

## ARGUMENT

**ISSUE 1: The trial court failed to make the necessary findings for the amount and length of its alimony award; for its deviation from the child support guidelines; and for its award of attorney’s fees.**

A. Award of Alimony.

Charles Rehn, in his appeal, attacks the Third District Court's award of permanent alimony to Mary Rehn in the amount of \$1200 per month. Courts have long recognized that the purpose of such support is to enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage. *Paffel v. Paffel*, 732 P.2d 96, 100 (Utah 1986). In a divorce action, the trial court has considerable discretion in awarding alimony and, on appeal, this discretion will not be disturbed “absent a showing of a clear and prejudicial abuse of discretion.” *Paffel*, 732 P.2d at 100; *Rashband v. Rashband*, 725 P.2d 1331, 1333 (Utah App. 1988).

The Utah Supreme Court has held that it is an abuse of discretion not to consider: (1) the financial condition and the needs of the spouse requesting alimony, (2) the ability of the spouse seeking alimony to provide sufficient income for him or herself, and (3) the ability of payor spouse to provide that support for the requesting spouse. *Paffel*, 732 P.2d at 100-101. However, “so long as the record is clear that the trial court has considered these three factors, we will not disturb its determination regarding alimony unless it has

clearly abused its discretion.” *Chambers v. Chambers*, 840 P.2d 841, 843 (Utah App.1992). Judge Brian, in his Findings of Fact and Conclusions of Law, found that the parties had been married 20 years and, therefore, alimony was appropriate. (Findings, ¶ 30). In reviewing the financial condition and needs of Mary Rehn, Judge Brian referred to Plaintiff’s Exhibit 2, which sets out -- in detail -- Ms. Rehn’s monthly expenses. (Findings, ¶ 32). The Court then found these expenses reasonable and real, and that the needs of Ms. Rehn and her two children were approximately \$3300 per month. (Findings, ¶ 7, 32-33). The Court further noted that \$3300 per month in expenses is not unreasonable for a mother and two children, particularly when the expenses associated with the children would increase as the children grew in age. (Findings, ¶ 7).

In reviewing the ability of Ms. Rehn to provide income for herself and her two children, Judge Brian found that Ms. Rehn has been willing to provide for herself and her family. Specifically, he found that she has worked weekends and holidays to provide for her family (Findings, ¶ 11), and she has earned, while working as industriously as possible, \$1072 per month in income from her various jobs. (Findings, ¶ 34). The Court further noted that the emphasis of the parties has been to ensure that the children were properly cared for by their mother (Findings, ¶ 16), that Ms. Rehn had historically been the primary caretaker of the children (Findings, ¶ 14), and that despite that:

[she] has scrounged for multiple jobs, some of them perhaps less dignified and less rewarding financially and otherwise than she would have liked to have, but nevertheless, she has bent her back and gone to work.

(Findings, ¶ 12). Therefore, the Court concluded, there is “no issue of unemployment or underemployment based on the historical roles Plaintiff and Defendant have assumed in this marriage.” (Findings, ¶ 13).

In considering Charles Rehn’s ability to provide alimony for Mary Rehn, Judge Brian noted that Ms. Rehn had a clear need for assistance and Mr. Rehn had a clear ability to pay alimony. (Findings, ¶ 37). Specifically, where Charles Rehn earns \$6833 gross income per month and Mary Rehn earns \$1428 gross income per month (Plaintiff’s Exhibit 2), the Court noted that the ratio of earned income earned between the parties is approximately 80% for Charles Rehn and 20% for Mary Rehn (Findings, ¶ 9). The Court went on to note that “[h]istorically, and as far as the court can see into the future, the ability to earn income definitely favors Defendant.” (Findings, ¶ 13). Finally, the Court recognized that, because of its order, “the parties are going to have to tighten their belts and make do with less.” (Findings, ¶ 20).

Appellee respectfully argues that the Findings of Fact and Conclusions of Law clearly indicate that Judge Brian gave weight to and considered the facts relating to each of the three factors required by *Paffel*. The issue then remaining is whether this consideration amounted to a clear abuse of discretion. Judge Brian considered the income of both parties and the relationship that these incomes bore one to each other. He considered the monthly expenses of Mary Rehn and her children, and Ms. Rehn’s efforts and ability to provide for herself and her family. He considered the parties’ expenses and

the ability of Charles Rehn to pay alimony. In *Schaumberg v. Schaumberg*, the Utah Court of Appeals held that the trial court did not abuse its discretion in awarding the wife alimony because:

Wife submitted documents reflecting her changing circumstances as she moved from a family household to a single household. In addition, she testified at trial that her stated needs amounted to \$2272.58 per month. . . . [T]he court awarded Wife \$800 per month alimony, imputed an earning ability of \$1000 per month and awarded her a portion of Husband's military retainer amounting to \$589 per month. Thus, the court's award contemplated that Wife would receive a monthly income of \$2389. That figure is close to Wife's stated monthly need of \$2272.58. In view of the trial court's equitable distribution of the marital assets and debts, Wife's uncontroverted testimony regarding her projected needs and past standard of living, and Husband's ability to pay, we conclude that the court considered the necessary factors.

*Schaumberg v. Schaumberg*, 875 P.2d 598, 602 (Utah App. 1994); see also *Rosenbahl v. Rosenbahl*, 876 P.2d 870, 874 (Utah App. 1994).

On appeal, Charles Rehn argues that the trial court abused its discretion by failing to resolve factual discrepancies between Ms. Rehn's testimony and her estimated expenses as set forth in Plaintiff's Exhibit 2. The trial court, in exercising its discretion, gave weight to Ms. Rehn's expenses as set forth in Plaintiff's Exhibit 2 and found they were reasonable for a mother with two children. Furthermore, Mr. Rehn argues that the trial court making no findings as to Mr. Rehn's expenses or his ability to pay alimony. Mr. Rehn argues that his monthly income of \$6833 per month is insufficient to pay the \$2245 per month in child and spousal support ordered by the trial court, such support being only

33% of his current gross income.<sup>1</sup> The trial court did, in again exercising its discretion, find that Mr. Rehn's gross monthly income was four times that of Ms. Rehn, and that he has the ability to pay the support ordered.<sup>2</sup>

*Hill v. Hill* [869 P.2d 963, (Utah App. 1994)] addressed the issue of what constituted adequate findings of a spouse's ability to pay alimony. Mr. Hill argued that the court did not make the requisite findings on his ability to provide alimony for his ex-wife. *Hill*, 869 P.2d at 966. He argued that based upon his salary of \$1100 per month, a child support award of \$600 per month and an alimony award of \$100 per month was an abuse of discretion because it was simply more than he could afford to pay. *Ibid.* In affirming the award of alimony, the appellate court noted that:

Mrs. Hill concedes that the court did not make an express finding on Mr. Hill's ability to pay, but notes that the court fully considered this factor at trial. Mr. Hill provided the court with documentation concerning his present and historical earnings, along with his current expenses. . . . [The alimony] determination was therefore reasonable, given the remainder of the court's orders regarding the parties' financial obligations and the court did not abuse its discretion in making this determination.

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<sup>1</sup> This Court should note that because of favorable tax treatment afforded the payor of alimony payments, Mr. Rehn in this case, a payment of \$1,200 for alimony or spousal support equates to an \$800 to \$900 in out of pocket payment, as the other \$300 to \$400 would be lost to the payor to taxes regardless of the alimony award.

<sup>2</sup> Appellee notes that while Judge Brian, in his findings, referred specifically to his review of the parties exhibits (which would include both parties' monthly expenses), he did not list the monthly budget for each of the parties as a specific finding. Appellee knows of no case requiring a trial court to make explicit findings regarding the month expenses of the parties in determining whether alimony should be awarded.



*Ibid.* Mr Rehn was given the opportunity to and did submit a list of his monthly expenses to the trial court. Judge Brian, in his findings, noted that “the parties are simply going to have to tighten up their belts and make do with less.” (Findings, ¶ 20). It is clear from this statement he considered the expenses of both parties, and the impact of his decision on these expenses, in making his award of alimony.

Finally, Charles Rehn argues on appeal that the trial court erred in finding there was no issue of underemployment, and in not using Mary Rehn’s historical earnings to impute an income higher than that attributed to her. (Appellant’s Brief 13-15). It is settled law that a trial court **may** but is not **required** to impute a higher income to a party where their historical earnings have been significantly higher and where the party clearly has the capacity to find employment consistent with their historical earnings. *Westenskow v. Westenskow*, 562 P.2d 1256 (Utah 1977). Furthermore, Utah courts have historically recognized that, where the mother’s time is needed at home to provide adequate care and nurturing for the parties’ minor children, it is not necessary to impute full-time employment income or even any income at all. *Fletcher v. Fletcher*, 615 P.2d 1218, 1123 (Utah 1980); *Watson v. Watson*, 837 P.2d 1, 3 (Utah App. 1992). In *Fletcher*, the court noted:

The record in the case will sustain the alimony award as an appropriate sum for support and maintenance. Plaintiff introduced into evidence a budget indicating family needs. . . . Her income was limited by part-time employment so she might give adequate care and nurturing to the three younger children,

ranging in age from four to eight. Defendant had sufficient income to provide support. The record sustains trial court's finding that the sum awarded for alimony was reasonable.

*Fletcher*, 615 P.2d at 1123. In addition, the Utah Court of Appeals has held that an award of \$2000 per month in alimony was not an abuse of discretion despite the trial court's failure to impute income to the wife. *Watson*, 837 P.2d at 3. The trial court had found that there was an "agreement by the parties that [Mrs. Watson] would not work outside the home but would remain in the home to care for the parties' minor child." *Ibid*. Based on that finding, it was not an abuse of discretion for the trial court to "decline to impute any income to the plaintiff, at least until the child is in school on a full time basis." *Ibid*.

In the present case, Judge Brian found that Mary Rehn has been the primary caretaker for the parties' minor children. (Findings, ¶ 14, 38; Tr. 122). Furthermore, he found that "the emphasis of the parties has been properly placed in making sure that the children have been properly cared for by their mother." (Findings, ¶ 16; Tr. 122). Finally, he noted the age of the children, that "the youngest is just barely entering into the first grade." (Findings, ¶ 15). It is clear from the findings of Judge Brian that he properly considered the factors set forth in *Paffel*, and in considering those factors, also properly considered the necessary and important role that Ms. Rehn will have to play as mother of

the parties' children.<sup>3</sup>

Charles Rehn, in appealing the issue of alimony -- as well as the various other issues that he has raised on appeal -- raises a plethora of factual issues for the Court of Appeals' consideration. However, on appeal of these issues, Mr. Rehn is limited to arguing abuse of discretion and is not allowed to relitigate factual issues within the discretion of the trial court. In 1997 the Utah Supreme Court reiterated the long standing principal that alimony issues "are within the sound discretion of the trial court because of its advantaged position to assess evidence and ascertain facts." *Willey v. Willey*, 951 P.2d 226 (Utah 1997); citing to *Owen v. Owen*, 579 P.2d 911, 913 (Utah 1978). Furthermore, the Court noted that, while the Court of Appeals reviews these determinations for abuse of discretion, "considerable deference [should be granted] to the trial court due to its familiarity with the facts and the evidence." *Willey*, 951 P.2d 226, (Utah 1997), citing to *Paffel v. Paffel*, 732 P.2d 96, 100 (Utah App. 1986).

While Ms. Rehn recognizes the Court of Appeals' responsibility to review these cases for an abuse of discretion by the trial court, she respectfully argues that these factual issues raised by Charles Rehn were thoughtfully considered by Judge Brian before making

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<sup>3</sup> Another issue regarding Ms. Rehn's employability -- and one which Mr. Rehn on appeal has carefully chosen to ignore -- is the physical and psychological damage associated with an acoustic neurinoma tumor which, when discovered in 1984, had grown into her brain stem. The tumor was surgically removed but resulted in a loss of hearing in her left ear and a loss of nerve control in the muscles associated with her mouth. This issue is set forth in detail at Tr. 23-25.

his findings. To ask the appellate court to reconsider factual issues such as Ms. Rehn's employment history or Mr. Rehn's income and expenses, after Judge Brian has already considered these issues and made specific findings relating to them, seeks to invade that province of factual determination rightfully left to the trial court. The findings clearly indicate that Judge Brian carefully considered the three factors in *Paffel*, that he articulated specific findings relative to those three factors, and then issued an award of alimony consistent with Ms. Rehn's needs and Mr. Rehn's ability to pay.

For these reasons set forth above, there was clearly no abuse of discretion in awarding alimony in this case; therefore, Mr. Rehn's request that the matter be reversed and remanded back to the trial court should be denied.

#### B. Permanent Alimony

Charles Rehn also argues on appeal that the trial court erred in awarding alimony beyond the duration of the parties marriage. Mr. Rehn argues that, pursuant to the language in Utah Code Ann. § 30-3-5(7)(h),<sup>4</sup> a specific finding by the court that extenuating circumstances exists is necessary before an award of permanent alimony is made. Judge Brian, in awarding alimony, noted that:

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<sup>4</sup> Utah Code Ann. § 30-3-5(7)(h) (1997) provides:

Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to the termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

alimony has been carefully considered factoring in the length of the marriage, disparity in the abilities of the parties to earn income, the historical roles of both parties have played in this family during the 20-year marriage, the age of the little children who are the primary responsibility of the Plaintiff, and all other pertinent facts.

(Findings, ¶ 38). It is clear from that statement that the circumstances of the marriage, including the duration of the marriage, were fully considered by the court before it awarded alimony.

In *Watson v. Watson*, 837 P.2d 1 (Utah App. 1992), Mr. Watson argued that the trial court erred in awarding permanent alimony to his ex-wife. Using the same abuse of discretion standard which the court of appeals applies to all alimony reviews, the court affirmed an award of \$2,000 per month in alimony for two years, and for \$1,500 per month thereafter, until “the plaintiff remarries, dies or cohabits as defined by statute, or until further order of the court.” *Watson*, 837 P.2d at 3. The court of appeals held that the trial court did not abuse its discretion by basing its award “upon [Mr. Watson's] ability to earn, and the needs of [Mrs. Watson].” *Ibid*. In the present case, the findings clearly demonstrate that Judge Brian considered the 20 year duration of the marriage, Ms. Rehn’s work history and her need to care for and nurture her children, Mr. Rehn’s earning capacity and history, and his projected earning capacity. Therefore, Ms. Rehn respectfully argues that an award of permanent alimony in this case, when considered in light of the trial court’s findings, was appropriate and not an abuse of discretion.

### C. Child Support

Charles Rehn alleges that the Court made insufficient findings for a deviation from the child support guidelines. However, Charles Rehn fails to mention that the child support schedule used by the parties was agreed to prior to the trial and presented to the Court as a Stipulation. Furthermore, the actual child support shedule, to which Mr. Rehn now objects, was entered into evidence as Plaintiff's Exhibit 5, without any objection by opposing counsel. (Tr. 63-64). Therefore, the only Findings that the Court needed, or actually made, related to the Stipulation of the parties that child support would be in the amount of \$1045. (Tr. 5 and Tr. 122).

Additionally, the Findings of Fact, Conclusions of Law, and Decree of Divorce relayed the same information concerning child support, including the child support schedule attached as an exhibit to both documents. These documents were mailed to, and approved as to form by, Charles Rehn's counsel and returned to Mary Rehn's counsel prior to filing with the Court. If there was a problem with the stipulated amount of child support, that was the time for Charles Rehn to bring his objection. However, nothing was relayed to Mary's counsel, and no objection was entered either to the Findings, the Decree, or the child support schedule attached to those documents.

Evidently, Charles Rehn does not like the benefit of his bargain at this late date, and so chooses to now place the blame for the child support amount at the feet of the trial judge alleging insufficient and improper Findings.

#### D. Debt Allocation

In attacking the trial court's allocation of marital debt between the parties, Charles Rehn again seeks to raise factual issues generally considered within the sound discretion of the trial court. Mr. Rehn, again, argues that there was insufficient findings to support the division of marital debt. As is noted above, Judge Brian found that, based upon the four to one ratio in income favorable to Mr. Rehn, he should bear the substantial portion of the marital debt. (Findings, ¶ 8-9, 17, 22).

It is a settled issue of law, as noted above, that an appellate court will not disturb the property and debt distribution of the trial court in a divorce action unless a clear abuse of discretion is shown. *Boyle v. Boyle*, 735 P.2d 669, 670 (Utah App. 1987); citing to *Searle v. Searle*, 522 P.2d 697 (Utah 1974). In such a case, the trial court is clearly in the best position to weigh the evidence, determine credibility and arrive at factual conclusions. *Boyle*, 735 P.2d at 670. Furthermore, the Court of Appeals has held that it was not an abuse of discretion for one party to end up with 87% of the marital debt. *Hill v. Hill*, 869 P.2d 963, 966 (Utah App. 1994).

As has been note above, the trial court in this case carefully reviewed the evidence before it and entered findings based upon the needs of Ms. Rehn and her children, her ability to support her family and contribute to any marital debt, and Mr. Rehn's ability to provide assistance in paying such debt. Ms. Rehn respectfully argues that the trial court's findings sufficiently indicate a careful review and consideration of the evidence before the

court and, therefore, the distribution of debt was not the result of an abuse of discretion.

E. Attorney's Fees

Utah Code Ann. § 30-3-3 (1993) grants trial courts the power to award attorney fees in divorce cases. It is settled law that when a trial court enters an award of attorney's fees pursuant to § 30-3-3, it "must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees." *Bell v. Bell*, 810 P.2d 489, 493 (Utah App.1991). Such an award, including the amount, is within the sound discretion of the trial court. *Kerr v. Kerr*, 610 P.2d 1380, 1385 (Utah 1980). On appeal, the award will not be disturbed the finding unless it amounts to an abuse of discretion. *Maughan v. Maughan*, 770 P.2d 156, 162 (Utah App. 1989). Failure to make adequate findings to explain the award constitutes an abuse of discretion.

The findings clearly indicate that the Court addressed Ms. Rehn's need of assistance with her attorney's fees, Mr. Rehn's ability to pay, and the reasonableness of the fees. As noted above, Judge Brian, in deciding the financial issues relating to the divorce decree, found that a ratio of 80%, attributable to Charles Rehn, and 20%, attributable to Mary Rehn, was appropriate in light of the evidence of the parties incomes. (Findings, ¶ 9, 17). The Court went on to find that Mary Rehn had incurred \$8,600 in legal fees and costs (Findings, ¶ 25), that these fees were necessarily incurred by Ms. Rehn in securing a divorce, that work accomplished was reasonable in terms of time and scope,



that the charge per hour was appropriate, and that these rates were normal based upon attorney's with similar experience and expertise. (Findings, ¶ 27). Continuing, the Court found that "Plaintiff has need for assistance with her attorney's fees and Defendant has the ability to pay." (Findings, ¶ 26). In determining the award of attorney fees, Judge Brian applied the 80% to 20% ratio that he used in deciding the financial issues of this case, and awarded Ms. Rehn attorney's fees in the amount of \$6,880. (Findings, ¶ 28).

On appeal, Charles Rehn argues that there were insufficient findings by the trial court to demonstrate a need by Ms. Rehn to have assistance in paying her fees. He argues "Mary's attorney fee award is unsupported by any factual finding of need or of Charles' (sic) [ability to pay?]." (Appellant's Brief, p. 23). However, the findings indicate that court considered the financial situation of both parties, their incomes, and Ms. Rehn's ability to meet her and her children's obligations.

Therefore, for these reasons, Judge Brian did not abuse his discretion in awarding attorney's fees in this case, and therefore Mr. Rehn's request that the matter be reversed and remanded back to the trial court should be denied.

**ISSUE 2: The trial court erred in excluding Charles Rehn's witness regarding Mary Rehn's underemployment and income potential.**

**Factual Background Relating to Issue 2.**

Appellant maintains in his brief that he informed Mr. Cathcart by fax two days before trial that he intended to call a vocational expert whom he had just retained. (Appellant's Brief, p. 23). The fax received in Mr. Cathcart's office indicates that it was actually faxed at 17:49 (5:49 p.m.) on August 12, 1997, two days before trial. (See Addendum B). The trial record shows that Mr. Cathcart actually received the fax sent by Mr. Christensen at 7:30 a.m the day before trial. (Tr. 80-81). This is the first notice Mr. Cathcart received that this witness was going to be called at the trial. (Tr. 80, 83). Interrogatories had been served on, and answered by, Mr. Christensen and he made no mention of any "vocational expert" or any expert witness of this nature. (Tr. 83). These answers had been signed by Mr. Rehn less than two months prior to trial. While Charles Rehn argues that the "vocational" expert was disclosed as soon as he was located and retained (Appellant's Brief, p. 23), it should be noted that the matter had been pending before the trial court for over seventeen months. Furthermore, the issue to which the expert would testify -- namely, Mary Rehn's earning potential relative to alimony -- was an issue that was before the Court and before counsel from the day that Plaintiff's Complaint was originally filed on March 18th and served on March 21st of 1996. Mr.

Christensen's only explanation for his failure to disclose or retain the witness earlier was "we have made four or five attempts to settle this case" (Tr. 81), and in the end he admitted "the failure to get the witness was my own responsibility." (Tr. 81).

The trial court, in two different scheduling orders, one dated July 3, 1997, and the other dated July 16, 1997, ordered that all discovery (including responses to discovery) and all exhibits and witness lists to completed and exchanged pursuant to deadlines and requirements imposed by rules of court and civil procedure.<sup>5</sup>

Judge Brian, in ruling to exclude the witness, specifically found that Utah Rules of Civil Procedure require that a party considering calling an expert witness at trial give "timely" notice of the expert and their testimony to opposing counsel. (Tr. 84). In addition, the Court found that the expert was not divulged to opposing counsel until about 24 hours before trial and that prejudice would occur if the expert was allowed to testify. (Tr. 84). Specifically, the Court found that Mary Rehn would be prejudiced because they would be unable to "consult with a counter-expert, and discuss the anticipated testimony and to obtain a counter-expert to testify" with 24 hours. (Tr. 84-85). The only other alternative for Ms. Rehn was to continue the matter for another five months.<sup>6</sup> (Tr. 81-83).

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<sup>5</sup> The July 3, 1997, Scheduling Order specifically requires discovery and the exchange of exhibits and witness lists to be completed by "(as per rules)." The July 16, 1997, Scheduling Order requires the parties to "(see prior notice)."

<sup>6</sup> In speaking with the court clerk, Mr. Christensen was informed that the next date for which the trial could be set was January 13, 1998, a full five months from the scheduled date of August 14, 1997. (Tr. 80).

Mr. Cathcart will admit that he considered continuing the matter for two or, possibly, three months. However, to continue this matter another five months, when it had already been pending 18 months, where there was a real financial need on the part of Ms. Rehn (not to mention the need bring closure to the matter), was simply too prejudicial to Ms. Rehn, particularly in light of Mr. Christensen's admission that the failure to obtain the expert was his responsibility.

#### Legal Analysis Relating to Appellant's Point 2

The Utah Rules of Civil Procedure require a party in a civil matter to disclose every person the party expects to call as an expert witness at trial and the subject matter of the expert's testimony, when requested to do so in the opposing party's interrogatories. See Utah R.Civ.P. 26(b)(4). The rules further require that a party "seasonably" supplement his or her responses to an opposing party's interrogatories to include "the identity of each person expected to be called as an expert witness at trial." Utah R.Civ.P. 26(e)(1)(B). In addition to these requirements, the Utah Code of Judicial Administration requires "all discovery proceedings shall be completed, including all responses thereto, . . . no later than thirty (30) days before the date set for trial of the case." Utah Code Jud.Admin. Rule 4-502. The rule further requires that any discovery conducted within the thirty (30) day period prior to trial, to be by motion of the party seeking to conduct discovery (or amend their responses) and shall be at the discretion of the trial court. *Ibid.* The rule further states:

In exercising its discretion, the court shall take into consideration the necessity and reasons for such discovery, the diligence or lack of diligence of the parties seeking discovery, whether permitting such discovery will prevent the case from going to trial on the scheduled date, or result in prejudice to any party.

Utah Code of Jud. Admin. Rule 4-502 (5).

The Utah Court of Appeals also long recognized this broad discretion given to trial courts to manage discovery in the cases pending before them. *Berrett v. Denver & Rio Grande Western R. R.*, 830 P.2d 291, 293 (Utah.Ct.App. 1992); *Macris & Associates, Inc. v. Images & Attitude, Inc.*, 941 P.2d 636, 642 (Utah.Ct.App. 1997). Furthermore, a trial court has the discretion and power to sanction a party for failing to comply with an order issued as the result of a discovery conference, including the power to exclude a witness from testifying. See Utah R.Civ.P. 37(b)(2); *Macris & Associates, Inc.*, 941 P.2d at 642; *Berrett*, 830 P.2d at 293-294. On appeal, any exercise of this discretion by the trial court will not be interfered with unless it amounts to an abuse of discretion. *Berrett*, 830 P.2d at 293; *Marcis & Associates, Inc.*, 941 P.2d at 642.

Charles Rehn, in support of his second issue raised on appeal, argues that the trial court abused its discretion in excluding the expert witness because none of the scheduling orders required witnesses be disclosed by a “certain deadline.” (Appellant’s Brief, 25). In support of this proposition, Appellant cites to *Berrett v. Denver and Rio Grande Western R.R. Co., Inc.*, 830 P.2d 291, 296 (Utah App. 1992), which held that “absent an

order creating a judicially imposed deadline, a trial court may not sanction a party by excluding its witness under rule 37(b)(2).” In *Berrett*, the plaintiff disclosed an expert witness 14 days before trial and before a deadline which had been imposed by the defendant. *Berrett*, 830 P.2d at 293. The defendant, in moving to exclude the witness, argued that despite his deadline, the plaintiff’s expert should be excluded because disclosure did not meet the trial court’s earlier, more generalized, deadline.<sup>7</sup> The Utah Court of Appeals held the trial court abused its discretion by excluding an expert witness under rule 37(b)(2) where there was no order creating a judicially imposed deadline for disclosing witness lists. *Ibid*, at 296. In reaching its decision in *Berrett*, the Court of Appeals noted the fact there was never a scheduling order in place, that the defense counsel had previously proposed a pre-trial order which would require disclosure within 10 days of trial, and defense counsel’s own conduct (by requiring disclosure at a later date) contradicted their argument for an earlier disclosure date. *Ibid*, at 294-196. This case presently before the Court of Appeals is factually distinguishable from the *Berrett* case. In *Berrett*, the plaintiff had never disclosed a witness list to the defendant, and the defendant has notice that there were witnesses to be called of which he had no knowledge.

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<sup>7</sup> Defendant, in *Berrett* relied upon the follow statement by the trial court:

“So I’m going to direct that whatever motions you are going to file that, either to compel [discovery] or any purpose, that we ought to have those filed no later than ten days from today [June 27th].” *Berrett*, 830 P.2d at 295.

Defense counsel, in *Berrett*, was continually aware that he needed to obtain a list of witnesses, including experts, who would be testifying at the trial. In the present case, Mr. Christensen, in answering Mr. Cathcart's interrogatories, had submitted to Mr. Cathcart a list of witnesses including only Charles Rehn and a certified public accountant. (Tr. 82-83). There was never any discussion and Mr. Cathcart had no idea that Mr. Christensen was planning to call another witness. (Tr. 83). The fax that he received in his office at 7:30 a.m. the day before trial was Mr. Cathcart's first notice that another witness was going to be called.

Furthermore, Mr. Christensen did not give 23, 14, or even 10 days notice that he was going to call a "vocational expert." Instead, Mr. Cathcart received notice at 7:30 a.m. the day before trial. (Tr. 80-81).<sup>8</sup> Ms. Rehn respectfully asks this Court to note that there were four scheduling orders in the present case, as opposed to none in *Berrett*, and the last two required an exchange of witness lists and a completion of discovery pursuant to the court rules and the rules of civil procedure. Pursuant to those rules, Mr. Christensen was required to complete discovery, including supplementing his answers to interrogatories, within 30 days prior to trial and the failure to do so placed him squarely within the trial court's discretion to exclude any further evidence his responses might disclose. Mr.

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<sup>8</sup> In addition to the 14 days disclosure given in the *Berrett* case, the Court of Appeals, in rendering its decision in *Berrett*, appears to have relied on cases where the disclosure took place at least several days before trial. See e.g. *Pratt v. Stein*, 444 A.2d 674 (Pa.Sup. 1982) (disclosure took place 23 days before trial).

Christensen, by signing his interrogatories on June 20, 1997, appeared to have complied with these disclosure requirements. There was no reason for Mr. Cathcart or Mr. Christensen to expect that a trial judge bound by these rules would allow either party to supplement their responses to include another witness, particularly an expert witness.

Despite these significant factual differences, Charles Rehn argues that his eleventh hour amendment of his witness list to include the “vocational expert” fits within the parameters of this Court’s *Berrett* decision and that the trial court’s excluding his witness from testifying at the trial the next day was an abuse of discretion based upon the holding in *Berrett*. Appellee respectfully argues that such an interpretation of *Berrett* is ludicrous. Under such an interpretation, a court could require the parties to conform to the rules of civil procedure, rules of judicial administration, and local rules, and unless a specific -- exact -- date is given for supplementing or amending discovery requests and witness lists, a party could add an additional expert to the list a hour before trial if they so desired. Furthermore, the trial court, Mr. Rehn seems to argue, would have to either allow the witness to testify at the extreme prejudice of the other party or continue the matter to a later date. With due respect to this Court and Mr. Rehn, such an extension of the holding in *Berrett* would subject attorneys and their clients to the very kind of evidentiary sabotage the Utah Rules of Civil Procedure and the Utah Rules of Judicial Administration seek to prevent.



For these reasons, Ms. Rehn argues that the exclusion of the “vocational” expert was proper and not an abuse of discretion by trial court, based on Mr. Christensen’s eleventh hour notice to Mr. Cathcart his prior knowledge that the issue of Ms. Rehn’s earning capacity would be an issue at the trial, and his blatant admission that the responsibility for obtaining this witness was his alone.

### **CONCLUSION**

In regards to the first issue raised by Mr. Rehn on appeal, Mary Rehn asks this Court to affirm the findings of the trial court relating to alimony, child support, the allocation of marital debt, and the award of attorney’s fees. Furthermore, Ms. Rehn requests this Court affirm the trial court’s exclusion of the expert witness.

Finally, should Ms. Rehn prevail on appeal, she respectfully requests this Court grant her an award of her reasonable attorney’s fees and costs associated with her appeal. “Generally, when the trial court awards fees in a domestic action to the party who then substantially prevails on appeal, fees will also be awarded to that party on appeal.” *Burt v. Burt*, 799 P.2d 1166, 1171 (Utah App.1990); *Carouse v. Carouse*, 817 P.2d 836 (Utah App. 1991). When an appeal involves multiple issues, the party receiving attorney fees below need not prevail on every issue in order to be awarded fees on appeal. *Bell v. Bell*, 810 P.2d 489, 494 (Utah App.1991); *Ostler v. Ostler*, 789 P.2d 713, 717 (Utah App.1990).

Respectfully submitted this 9<sup>th</sup> day of June, 1998.

/s/  
TERRY L. CATHCART  
Attorney for the Plaintiff/Appellee

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that four copies of the foregoing APPELLEE'S BRIEF were  
mailed, first class, postage prepaid, on the <sup>9<sup>th</sup></sup>~~8<sup>th</sup>~~ day of June, 1998, to:

Mr. Steve S. Christensen, Esq.  
Attorney for the Defendant/Appellant  
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/s/  
Terry L. Cathcart

## **ADDENDUM A**

## Section

- 30-3-11.1. Family Court Act — Purpose.
- 30-3-11.2. Appointment of counsel for child.
- 30-3-11.3. Mandatory educational course for divorcing parents — Purpose — Curriculum — Exceptions.
- 30-3-12. Courts to exercise family counseling powers.
- 30-3-13. Repealed.
- 30-3-13.1. Establishment of family court division of district court.
- 30-3-14. Repealed.
- 30-3-14.1. Designation of judges — Terms.
- 30-3-15. Repealed.
- 30-3-15.1. Appointment of domestic relations counselors, family court commissioner, and assistants and clerks.
- 30-3-15.2. Repealed.
- 30-3-15.3. Commissioners — Powers.
- 30-3-15.4. Salaries and expenses.
- 30-3-16. Repealed.
- 30-3-16.1. Jurisdiction of family court division — Powers.
- 30-3-16.2. Petition for conciliation.
- 30-3-16.3. Contents of petition.
- 30-3-16.4. Procedure upon filing of petition.
- 30-3-16.5. Fees.
- 30-3-16.6. Information not available to public.
- 30-3-16.7. Effect of petition — Pendency of action.
- 30-3-17. Power and jurisdiction of judge.
- 30-3-17.1. Proceedings deemed confidential — Written evaluation by counselor.
- 30-3-18. Waiting period for hearing after filing for divorce — Exemption — Use of counseling and education services not to be construed as condonation or promotion.
- 30-3-19 to 30-3-31. Repealed.
- 30-3-32. Visitation — Intent — Policy — Definitions.
- 30-3-33. Advisory guidelines.
- 30-3-34. Best interests — Rebuttable presumption.
- 30-3-35. Minimum schedule for visitation for children 5 to 18 years of age.
- 30-3-35.5. Minimum schedule for visitation for children under five years of age.
- 30-3-36. Special circumstances.
- 30-3-37. Relocation.
- 30-3-38. Pilot Program for Expedited Visitation Enforcement.

**30-3-1. Procedure — Residence — Grounds.**

(1) Proceedings in divorce are commenced and conducted as provided by law for proceedings in civil causes, except as provided in this chapter.

(2) The court may decree a dissolution of the marriage contract between the petitioner and respondent on the grounds specified in Subsection (3) in all cases where the petitioner or respondent has been an actual and bona fide resident of this state and of the county where the action is brought, or if members of the armed forces of the United States who are not legal residents of this state, where the petitioner has been stationed in this state under military orders, for three months next prior to the commencement of the action.

(3) Grounds for divorce:

- (a) impotency of the respondent at the time of marriage;
- (b) adultery committed by the respondent subsequent to marriage;
- (c) willful desertion of the petitioner by the respondent for more than one year;

(d) willful neglect of the respondent to provide for the petitioner the common necessities of life;

(e) habitual drunkenness of the respondent;

(f) conviction of the respondent for a felony;

(g) cruel treatment of the petitioner by the respondent to the extent of causing bodily injury or great mental distress to the petitioner;

(h) irreconcilable differences of the marriage;

(i) incurable insanity; or

(j) when the husband and wife have lived separately under a decree of separate maintenance of any state for three consecutive years without cohabitation.

(4) A decree of divorce granted under Subsection (3)(j) does not affect the liability of either party under any provision for separate maintenance previously granted.

(5) (a) A divorce may not be granted on the grounds of insanity unless:

(i) the respondent has been adjudged insane by the appropriate authorities of this or another state prior to the commencement of the action; and

(ii) the court finds by the testimony of competent witnesses that the insanity of the respondent is incurable.

(b) The court shall appoint for the respondent a guardian ad litem who shall protect the interests of the respondent. A copy of the summons and complaint shall be served on the respondent in person or by publication, as provided by the laws of this state in other actions for divorce, or upon his guardian ad litem, and upon the county attorney for the county where the action is prosecuted.

(c) The county attorney shall investigate the merits of the case and if the respondent resides out of this state, take depositions as necessary, attend the proceedings, and make a defense as is just to protect the rights of the respondent and the interests of the state.

(d) In all actions the court and judge have jurisdiction over the payment of alimony, the distribution of property, and the custody and maintenance of minor children, as the courts and judges possess in other actions for divorce.

(e) The petitioner or respondent may, if the respondent resides in this state, upon notice, have the respondent brought into the court at trial, or have an examination of the respondent by two or more competent physicians, to determine the mental condition of the respondent. For this purpose either party may have leave from the court to enter any asylum or institution where the respondent may be confined. The costs of court in this action shall be apportioned by the court.

1997

**30-3-2. Right of husband to divorce.**

The husband may in all cases obtain a divorce from his wife for the same causes and in the same manner as the wife may obtain a divorce from her husband.

1953

**30-3-3. Award of costs, attorney and witness fees — Temporary alimony.**

(1) In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

(2) In any action to enforce an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party

is impecunious or enters in the record the reason for not awarding fees.

(3) In any action listed in Subsection (1), the court may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.

(4) Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment. 1993

#### **30-3-4. Pleadings — Findings — Decree — Use of affidavit — Sealing.**

(1) (a) The complaint shall be in writing and signed by the petitioner or petitioner's attorney.

(b) A decree of divorce may not be granted upon default or otherwise except upon legal evidence taken in the cause. If the decree is to be entered upon the default of the respondent, evidence to support the decree may be submitted upon the affidavit of the petitioner with the approval of the court.

(c) If the petitioner and the respondent have a child or children, a decree of divorce may not be granted until both parties have attended the mandatory course described in Section 30-3-11.3, and have presented a certificate of course completion to the court. The court may waive this requirement, on its own motion or on the motion of one of the parties, if it determines course attendance and completion are not necessary, appropriate, feasible, or in the best interest of the parties.

(d) All hearings and trials for divorce shall be held before the court or the court commissioner as provided by Section 78-3-31 and rules of the Judicial Council. The court or the commissioner in all divorce cases shall enter the decree upon the evidence or, in the case of a decree after default of the respondent, upon the petitioner's affidavit.

(2) The file, except the decree of divorce, may be sealed by order of the court upon the motion of either party. The sealed portion of the file is available to the public only upon an order of the court. The concerned parties, the attorneys of record or attorney filing a notice of appearance in the action, the Office of Recovery Services if a party to the proceedings has applied for or is receiving public assistance, or the court have full access to the entire record. This sealing does not apply to subsequent filings to enforce or amend the decree. 1997

#### **30-3-4.1 to 30-3-4.4. Repealed.**

1990

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iv) the length of the marriage.

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

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

(f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(g) (i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this subsection.

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

(h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

(8) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(9) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

1997

### **30-3-5.1. Provision for income withholding in child support order.**

Whenever a court enters an order for child support, it shall include in the order a provision for withholding income as a means of collecting child support as provided in Title 62A, Chapter 11, Recovery Services.

1997

### **30-3-5.2. Allegations of child abuse or child sexual abuse — Investigation.**

When, in any divorce proceeding or upon a request for modification of a divorce decree, an allegation of child abuse or child sexual abuse is made, implicating either party, the court shall order that an investigation be conducted by the Division of Child and Family Services within the Department of Human Services in accordance with Title 62A, Chapter 4a. A final award of custody or visitation may not be rendered until a report on that investigation is received by the court. That investigation shall be conducted by the Division of Child and

Family Services within 30 days of the court's notice and request for an investigation. In reviewing this report, the court shall comply with Section 78-7-9.

1996

### **30-3-5.5, 30-3-6. Repealed.**

1991, 1993

### **30-3-7. When decree becomes absolute.**

(1) The decree of divorce becomes absolute:

(a) on the date it is signed by the court and entered by the clerk in the register of actions if both the parties who have a child or children have completed attendance at the mandatory course for divorcing parents as provided in Section 30-3-11.3 except if the court waives the requirement, on its own motion or on the motion of one of the parties, upon determination that course attendance and completion are not necessary, appropriate, feasible, or in the best interest of the parties;

(b) at the expiration of a period of time the court may specifically designate, unless an appeal or other proceedings for review are pending; or

(c) when the court, before the decree becomes absolute, for sufficient cause otherwise orders.

(2) The court, upon application or on its own motion for good cause shown, may waive, alter, or extend a designated period of time before the decree becomes absolute, but not to exceed six months from the signing and entry of the decree.

1994

### **30-3-8. Remarriage — When unlawful.**

Neither party to a divorce proceeding which dissolves their marriage by decree may marry any person other than the spouse from whom the divorce was granted until it becomes absolute. If an appeal is taken, the divorce is not absolute until after affirmance of the decree.

1988

### **30-3-9. Repealed.**

1989

### **30-3-10. Custody of children in case of separation or divorce — Custody consideration.**

(1) If a husband and wife having minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the children and take into consideration the children's desires regarding the future custody, but the expressed desires are not controlling and the court may determine the children's custody otherwise.

(2) In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate.

(3) If the court finds that one parent does not desire custody of the child, or has attempted to permanently relinquish custody to a third party, it shall take that evidence into consideration in determining whether to award custody to the other parent.

(4) (a) A court may not discriminate against a parent due to a disability, as defined in Section 57-21-2, in awarding custody or determining whether a substantial change has occurred for the purpose of modifying an award of custody.

(b) If a court takes a parent's disability into account in awarding custody or determining whether a substantial change has occurred for the purpose of modifying an award of custody, the parent with a disability may rebut any evidence, presumption, or inference arising therefrom by showing that:

(i) the disability does not significantly or substantially inhibit the parent's ability to provide for the physical and emotional needs of the child at issue; or

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

- (a) administer the rotation and scheduling of panels;
- (b) act as liaison with the Supreme Court;
- (c) call and preside over the meetings of the Court of Appeals; and
- (d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court. 1988

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

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

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

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

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;
- (b) appeals from the district court review of:
  - (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
  - (ii) a challenge to agency action under Section 63-46a-12.1;
- (c) appeals from the juvenile courts;
- (d) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;
- (e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;
- (f) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;
- (g) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;
- (h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;
- (i) appeals from the Utah Military Court; and
- (j) cases transferred to the Court of Appeals from the Supreme Court.

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

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings. 1996

#### 78-2a-4. Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court. 1986

#### 78-2a-5. Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state. 1986

### CHAPTER 3

#### DISTRICT COURTS

##### Section

78-3-1 to 78-3-2. Repealed.

78-3-3. Term of judges — Vacancy.

78-3-4. Jurisdiction — Appeals.

78-3-5. Repealed.

78-3-6. Terms — Minimum of once quarterly.

78-3-7 to 78-3-11. Repealed.

78-3-11.5. State District Court Administrative System.

78-3-12. Repealed.

78-3-12.5. Costs of system.

78-3-13. Repealed.

78-3-13.4. Transfer of court operating responsibilities — Facilities — Staff — Budget.

78-3-13.5, 78-3-14. Repealed.

78-3-14.2. District court case management.

78-3-14.5. Allocation of district court fees and forfeitures.

78-3-15 to 78-3-17. Repealed.

78-3-17.5. Application of savings accruing to counties.

78-3-18. Judicial Administration Act — Short title.

78-3-19. Purpose of act.

78-3-20. Definitions.

78-3-21. Judicial Council — Creation — Members — Terms and election — Responsibilities — Reports.

78-3-21.5. Data bases for judicial boards.

78-3-22. Presiding officer — Compensation — Duties.

78-3-23. Administrator of the courts — Appointment — Qualifications — Salary.

78-3-24. Court administrator — Powers, duties, and responsibilities.

78-3-25. Assistants for administrator of the courts — Appointment of trial court executives.

78-3-26. Courts to provide information and statistical data to administrator of the courts.

78-3-27. Annual judicial conference.

78-3-28. Repealed.

78-3-29. Presiding judge — Associate presiding judge — Election — Term — Compensation — Powers — Duties.

78-3-30. Duties of the clerk of the district court.

78-3-31. Court commissioners — Qualifications — Appointment — Functions governed by rule.

78-3-1 to 78-3-2. Repealed.

1971, 1981, 1988

#### 78-3-3. Term of judges — Vacancy.

Judges of the district courts shall be appointed initially until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office for judges of the district courts is six years, and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. 1988

#### 78-3-4. Jurisdiction — Appeals.

(1) The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.

requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

#### **Rule 23.1. Derivative actions by shareholders.**

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complainant shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

#### **Rule 24. Intervention.**

(a) **Intervention of right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) **Permissive intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motions shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

(Amended effective Jan. 1, 1987.)

#### **Rule 25. Substitution of parties.**

##### **(a) Death.**

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. Unless the motion for substitution is made not later than ninety days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) **Incompetency.** If a party becomes incompetent, the court upon motion served as provided in Subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) **Transfer of interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in Subdivision (a) of this rule.

(d) **Public officers; death or separation from office.** When a public officer is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office, it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

### **PART V.**

#### **DEPOSITIONS AND DISCOVERY.**

#### **Rule 26. General provisions governing discovery.**

(a) **Discovery methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) **Discovery scope and limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:



(1) **In general.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in Subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Subdivision (c).

(2) **Insurance agreements.** A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) **Trial preparation: Materials.** Subject to the provisions of Subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) **Trial preparation: Experts.** Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of Subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to Subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result,

(i) The court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and

(ii) With respect to discovery obtained under Subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under Subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) **Protective orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) **Sequence and timing of discovery.** Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) **Supplementation of responses.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) **Discovery conference.** At any time after commencement of an action, the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

- (1) a statement of the issues as they then appear;
  - (2) a proposed plan and schedule of discovery;
  - (3) any limitations proposed to be placed on discovery;
  - (4) any other proposed orders with respect to discovery;
- and

(5) a statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than ten days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pre-trial conference authorized by Rule 16.

(g) **Signing of discovery requests, responses, and objections.** Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not

represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection and that to the best of his knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) **Deposition where action pending in another state.** Any party to an action or proceeding in another state may take the deposition of any person within this state, in the same manner and subject to the same conditions and limitations as if such action or proceeding were pending in this state, provided that in order to obtain a subpoena the notice of the taking of such deposition shall be filed with the clerk of the court of the county in which the person whose deposition is to be taken resides or is to be served, and provided further that all matters arising during the taking of such deposition which by the rules are required to be submitted to the court shall be submitted to the court in the county where the deposition is being taken.

(Amended effective Jan. 1, 1987.)

## **Rule 27. Depositions before action or pending appeal.**

### **(a) Before action.**

(1) **Petition.** A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in the district court of the county in which any expected adverse party may reside.

The petition shall be entitled in the name of the petitioner and shall show: (1) that the petitioner expects to be a party to an action cognizable in a court of this state but is presently unable to bring it or cause it to be brought, (2) the subject matter of the expected action and his interest therein, (3) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, (4) the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and (5) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) **Notice and service.** The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing

him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

(Amended effective Jan. 1, 1987.)

**Rule 37. Failure to make or cooperate in discovery; sanctions.**

(a) **Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) **Appropriate court.** An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) **Motion.** If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) **Evasive or incomplete answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) **Award of expenses of motion.** If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) **Failure to comply with order.**

(1) **Sanctions by court in district where deposition is taken.** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a)

to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) **Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was sub-

stantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) **Failure to participate in the framing of a discovery plan.** If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

(Amended effective Jan. 1, 1987.)

## PART VI.

### TRIALS.

#### Rule 38. Jury trial of right.

(a) **Right preserved.** The right of trial by jury as declared by the constitution or as given by statute shall be preserved to the parties.

(b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by paying the statutory jury fee and serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(c) **Same: Specification of issues.** In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party, within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) **Waiver.** The failure of a party to pay the statutory fee, to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(Amended effective Jan. 1, 1987.)

#### Rule 39. Trial by jury or by the court.

(a) **By jury.** When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. The trial of all issues so demanded shall be by jury, unless

(1) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or

(2) The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist, or

(3) Either party to the issue fails to appear at the trial.

(b) **By the court.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) **Advisory jury and trial by consent.** In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

#### Rule 40. Assignment of cases for trial; continuance.

(a) **Order and precedence.** The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts may deem expedient. Precedence shall be given to actions entitled thereto by statute.

(b) **Postponement of the trial.** Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

(c) **Taking testimony of witnesses present.** If required by the adverse party, the court shall, as a condition to such postponement, proceed to have the testimony of any witness present taken, in the same manner as if at the trial; and the testimony so taken may be read on the trial with the same effect, and subject to the same objections that may be made with respect to a deposition under the provisions of Rule 32(c)(1) and (2) [Rule 32(c)(3)(A) and (B)].

#### Rule 41. Dismissal of actions.

(a) **Voluntary dismissal; effect thereof.**

(1) **By plaintiff; by stipulation.** Subject to the provisions of Rule 23(c), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) **By order of court.** Except as provided in Paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) **Involuntary dismissal; effect thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall

(vi) any co-signors or indemnitors that will be required; and

(vii) the conditions under which the bond may be exonerated and the collateral returned.

**(6) Disqualification.**

(A) Informal resolution of complaints. Whenever it is alleged that a surety has engaged in unprofessional conduct, the Board shall notify the surety in writing of the allegations. The surety shall respond to the allegations in writing within ten days.

(B) Formal resolution of complaints. If the surety fails to respond to the notice provided pursuant to paragraph (6)(A), or if the Board determines that formal action is necessary, the Board shall require the surety to appear before the Board at a time and place certain to respond to the allegations. Both the initial notice and the notice of formal action shall be served upon the surety by mailing the same, via certified mail, return receipt requested, to the surety's last known address on file with the Board. No answer or other responsive pleading is required to the notice of formal action. Discovery is prohibited, but the Board may request production of documentary evidence. All parties to the proceeding shall have access to information contained in the file maintained by the Board and to all materials and information gathered in any investigation, to the extent permitted by law. The board shall conduct a hearing at the time and place set forth in the notice of formal action. The hearing shall be open to all parties to the proceeding. The surety may be represented by counsel and shall be permitted to testify, present evidence, and comment on the allegations. The Board may record the hearing, and any party, at its own expense, may have a transcriber approved by the Board prepare a transcript from the record. Within ten days after the close of the hearing, the Board shall issue a written decision which may be to continue the surety's qualification without change; to continue the surety's qualification subject to such restrictions, limitations or requirements as the Board deems appropriate; to suspend the surety's qualification pending compliance with specified criteria; or to disqualify the surety. The decision shall be based on the facts appearing in the file maintained by the Board and the facts presented in evidence at the hearing. The decision shall include the reasons therefore, notice of any right of review, and the time limit for filing for such a review. The decision shall be served upon the surety by mailing the same, via first class mail, to the surety's last known address on file with the Board. Any party aggrieved by the decision of the Board may file a petition for judicial review within thirty days after the date of the decision. Judicial review shall be governed by the procedures set forth in Utah Code Ann. § 63-46b-15.

(Repealed and reenacted effective November 15, 1995.)

**Rule 4-408. Locations of trial courts of record.**

**Intent:**

To designate locations of trial courts of record.

**Applicability:**

This rule shall apply to all trial courts of record.

**Statement of the Rule:**

(1) Each county seat and the following municipalities are hereby designated as locations of trial courts of record: American Fork; Bountiful; Cedar City; Layton; Murray; Orem; Park City; Roosevelt; Roy; Salem; Sandy; Spanish Fork; West Valley City.

(2) Subject to limitations imposed by law, any trial court of record may hold court in any location designated by this rule. (Added effective January 1, 1992; amended effective November 15, 1995.)

**Rule 4-408.01. Responsibility for administration of trial courts.**

**Intent:**

To designate the court locations administered directly through the administrative office of the courts and those administered through contract with local government pursuant to § 78-3-21.

**Applicability:**

This rule shall apply to the trial courts of record and to the administrative office of the courts.

**Statement of the Rule:**

(1) All locations of the juvenile court shall be administered directly through the administrative office of the courts.

(2) All locations of the district and circuit courts shall be administered directly through the administrative office of the courts, except the following, which shall be administered through contract with county or municipal government pursuant to § 78-3-21: Beaver, Castle Dale, Coalville, Fillmore, Junction, Kanab, Loa, Manila, Manti, Morgan, Panguitch, Park City, Randolph, and Salem. (Added effective November 15, 1995.)

**ARTICLE 5.**

**CIVIL PRACTICE.**

**Rule 4-501. Motions.**

**Intent:**

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for requesting and scheduling hearings on dispositive motions.

To establish a procedure for expedited dispositions.

**Applicability:**

This rule shall apply to motion practice in all district courts except proceedings before the court commissioners and small claims cases. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

**Statement of the Rule:**

**(1) Filing and service of motions and memoranda.**

(a) **Motion and supporting memoranda.** All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(b) **Memorandum in opposition to motion.** The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum

in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(d) of this rule.

(c) **Reply memorandum.** The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(d) **Notice to submit for decision.** Upon the expiration of the five-day period to file a reply memorandum, either party may notify the Clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

**(2) Motions for summary judgment.**

(a) **Memorandum in support of a motion.** The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(b) **Memorandum in opposition to a motion.** The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

**(3) Hearings.**

(a) A decision on a motion shall be rendered without a hearing unless ordered by the Court, or requested by the parties as provided in paragraphs (3)(b) or (4) below.

(b) In cases where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(c) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(d) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(e) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(f) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(g) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the Court.

(4) **Expedited dispositions.** Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) **Telephone conference.** The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

(Amended effective January 15, 1990, April 15, 1991, November 1, 1996.)

**Rule 4-502. Discovery procedures in civil cases.**

**Intent:**

To establish a procedure for the filing of discovery documents.

To establish a limitation on discovery procedures within 30 days of trial.

**Applicability:**

This rule shall apply to the District and Juvenile Courts.

**Statement of the Rule:**

(1) Parties conducting discovery under Rules 33, 34 and 36 of the Utah Rules of Civil Procedure shall not file discovery requests with the clerk of the court, but shall file only the original certificate of service stating that the discovery requests have been served on the other parties and the date of service. The responding party shall file a similar certificate with the clerk of the court.

(2) The party serving the discovery request shall retain the original with a copy of the proof of service affixed to it and serve a copy of the discovery request and proof of service upon the opposing party or counsel. The party responding to the discovery request shall retain the original with a copy of the proof of service affixed to it, and serve a copy of the responses and the proof of service upon the opposing party or counsel. The discovery requests and response shall not be filed with the clerk of the court unless the court on motion and notice and for good cause shown so orders.

(3) Any party filing a motion to compel compliance with a discovery request or a motion which relies upon the discovery response shall attach a copy of the discovery request or response which is at issue in the motion.

(4) Depositions taken pursuant to the Rules of Civil Procedure shall not be filed with the clerk of the court except as provided in this Code or upon order of the court for good cause shown.

(5) All parties shall be entitled to conduct discovery proceedings in accordance with this rule. All discovery proceedings shall be completed, including all responses thereto and all depositions and other documents filed with the court no later than thirty (30) days before the date set for trial of the case. The right to conduct discovery proceedings within thirty (30) days before trial shall be within the discretion of the court. Motions to conduct discovery within thirty (30) days before trial shall be presented to the judge assigned to the case upon notice to the other parties in the action. In exercising its discretion, the court shall take into consideration the neces-



sity and reasons for such discovery, the diligence or lack of diligence of the parties seeking such discovery, whether permitting such discovery will prevent the case from going to trial on the scheduled date, or result in prejudice to any party. Nothing herein shall preclude or limit the voluntary exchange of information or discovery by stipulation of the parties at any time prior to the date set for trial, but in no event shall such exchanges or stipulations require a court to grant a continuance of the trial date.

(Amended effective January 15, 1990; April 15, 1991; November 1, 1996.)

#### **Rule 4-503. Requests for jury instructions.**

##### **Intent:**

To establish a uniform procedure for submitting and requesting jury instructions.

##### **Applicability:**

This rule shall apply to the District and Justice Courts.

##### **Statement of the Rule:**

(1) All jury instruction requests shall be presented to the court five days prior to the scheduled trial date unless otherwise ordered by the court. The court, in its discretion, may allow the presentation of jury instructions at any time prior to the submission of the case to the jury. At the time of presentation to the court, a copy of the requested instructions shall be furnished to opposing counsel.

(2) Jury instruction requests must be in writing and state in full the instruction requested. Each request shall be upon a separate sheet of paper, the original and copies of which shall be free from red lines and firm names and shall be entitled:

"Instruction No. —"

The number of the request shall be written in lead pencil.

(3) If case citations are used in support of a requested instruction, at least one copy of the requested instruction furnished to the court shall be submitted without the citations. Citations may be provided upon separate sheets attached to the particular instruction to which the citation applies.

(Amended effective January 15, 1990; November 1, 1996.)

#### **Rule 4-504. Written orders, judgments and decrees.**

##### **Intent:**

To establish a uniform procedure for submitting written orders, judgments, and decrees to the court. This rule is not intended to change existing law with respect to the enforceability of unwritten agreements.

##### **Applicability:**

This rule shall apply to all civil proceedings in courts of record except small claims.

##### **Statement of the Rule:**

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(3) Stipulated settlements and dismissals shall also be reduced to writing and presented to the court for signature within fifteen days of the settlement and dismissal.

(4) Upon entry of judgment, notice of such judgment shall be served upon the opposing party and proof of such service shall be filed with the court. All judgments, orders, and decrees, or copies thereof, which are to be transmitted after signature by the judge, including other correspondence requiring a reply, must be accompanied by pre-addressed envelopes and pre-paid postage.

(5) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered upon the stipulation of counsel, the motion of counsel or upon the court's own initiative and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made.

(6) Except where otherwise ordered, all judgments and decrees shall contain, if known, the judgment debtor's address or last known address and social security number.

(7) All judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court. Orders not constituting judgments or decrees may be made a part of the documents containing the stipulation or motion upon which the order is based.

(8) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

(9) In all cases where judgment is rendered upon a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, the plaintiff or plaintiff's counsel shall attach to the new complaint a copy of all previous judgments based upon the same written obligation.

(10) Nothing in this rule shall be construed to limit the power of any court, upon a proper showing, to enforce a settlement agreement or any other agreement which has not been reduced to writing.

(Amended effective January 15, 1990; April 15, 1991; April 15, 1995.)

#### **Rule 4-505. Attorney fees affidavits.**

##### **Intent:**

To establish uniform criteria and a uniform format for affidavits in support of attorney fees.

##### **Applicability:**

This rule shall govern the award of attorney fees in the trial courts.

##### **Statement of the Rule:**

(1) Affidavits in support of an award of attorney fees must be filed with the court and set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorney fees are claimed, and affirm the reasonableness of the fees for comparable legal services.

(2) The affidavit must also separately state hours by persons other than attorneys, for time spent, work completed and hourly rate billed.

(3) If the affidavit is in support of attorney fees for services rendered to a person or entity who has been assigned an interest in a claim for the purpose of collection or hired by the obligee to collect a debt, the affidavit shall also state that the attorney is not sharing the fee or any portion thereof in violation of Rule of Professional Conduct 5.4.

(4) If judgment is being taken by default for a principal sum which it is expected will require considerable additional work to collect, the following phrase may be included in the judg-

## **ADDENDUM B**



# FACSIMILE

HENRIOD, NIELSEN & CHRISTENSEN

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Date	8/12/97
Fax No.	295-2393
Total Pages	(including this cover sheet)
To	Terry Cathcart
From	S. Christensen
Message	

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August 12, 1997

Terry L. Cathcart  
Attorney at Law  
380 North 200 West, #103  
Bountiful, Utah 84010

Re: *Rehn v. Rehn*  
Civil No. 964300048 DA

Dear Terry:

I do not believe I have received the last pay stub from my client yet. It does show a pay increase to \$82,000.00 annually. I will try to get that to you tomorrow.

The last offer was my client's best and last offer. I plan to call the following witnesses at trial in addition to the parties:

1. Cory Webster, C.P.A. to testify on tax issues affecting support; and
2. Jim White, Assistant Director of the Career Services Dept. at the University of Utah to establish the reasonable income potential for a person with Mary's background.

August 12, 1997

Page 2

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I expect the testimony of the two experts to each be less than an hour. If you have any questions on any of these issues, please call.

Very truly yours,

HENRIOD, NIELSEN & CHRISTENSEN



Steve S. Christensen

cc: Charlie Rehm