

1997

Madsen v. Madsen : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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CKET NO. 97-1680 CA

IN THE UTAH COURT OF APPEALS

SCOTT EUGENE MADSEN,	:	
	:	
Plaintiff/Appellant,	:	No. 97-1680 CA
	:	
vs.	:	
	:	Priority No. <u>15</u>
SHAUNA MARIE BULLOCK MADSEN,	:	
	:	
Defendant/Appellee.	:	
	:	

BRIEF OF APPELLANT

Appeal from the Judgment of the Second Judicial District Court,
Davis County, The Honorable Michael G. Allphin, presiding,
District Court Case No. 96-4702009 DA,

D. MICHAEL NIELSEN
Session Place
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Bountiful, Utah 84010

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ORAL ARGUMENT REQUESTED

FILED

FEB 27 1998

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

SCOTT EUGENE MADSEN,	:	
	:	
Plaintiff/Appellant,	:	No. 97-0680 CA
	:	
vs.	:	
	:	
SHAUNA MARIE BULLOCK MADSEN,	:	Priority No. <u>15</u>
	:	
Defendant/Appellee.	:	
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IN THE UTAH COURT OF APPEALS

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BRIEF OF APPELLANT

Appeal from the Judgment of the Second Judicial District Court,
Davis County, The Honorable Michael G. Allphin, presiding,
District Court Case No. 96-4702009 DA,

I.

JURISDICTION OF THE COURT

Because this is a domestic relations matter, the Utah Court of Appeals has original appellate jurisdiction. See Utah Code Ann. § 78-2a-3(2)(h)(1996).

II.

STATEMENT OF THE ISSUES

ISSUE #1. Did the trial court err by awarding Mrs. Madsen \$550.00 per month in alimony when Mr. Madsen's expenses are such

that he does not have the ability to pay alimony?

The standard of review for this issue involves a challenge to a finding of fact that will be overturned only if clearly erroneous. See Barnes v. Barnes, 857 P.2d 257, 259 (Utah Ct. App. 1993) (quoting Riche v. Riche, 784 P.2d 465, 467 (Utah Ct. App. 1989)).

Preservation of Issue in the Trial Court: This issue was presented by Mr. Madsen's counsel in his closing argument before the trial court on July 10, 1997, (Tr. at 172), during the testimony of Mr. Madsen before the trial court on July 10, 1997, (Tr. at 13-14), and in Plaintiff's Exhibit #1, (R. at 100).

Marshalling of Evidence: The trial court received the following evidence regarding the award of alimony:

a. At the time of trial, Mr. Madsen's gross income from his job at Crysen Refining, Inc., was \$2,716.44 per month. (Tr. at 11-13; R. at 100.)

b. At the time of trial, Mr. Madsen had rental income of \$225.00 per month. (Tr. at 13; R. at 100.)

c. Prior to trial, Mr. Madsen had received additional income from work as an ice hockey and roller hockey referee, but had discontinued the roller hockey officiating because he had been assaulted by a player in the league. (Tr. at 14-15, 42-56, 70.)

d. In 1994 (the parties' year of marriage), Mrs. Madsen's annual income was \$19,519.14, (R. at 131). At the time of trial, she was unsure of her income but it was between \$18,000.00 per year, (Tr. at 84), and \$22,000.00 per year, (Tr. at 144). Her sworn Financial Declaration asserted a gross monthly income of \$1,840.00, or \$22,080.00 annually. (R. at 92.)

e. That Mrs. Madsen was owed child-support payments of \$600.00 per month by her husband from a prior marriage. (Tr. at 97-98, 145-46.)

f. That Mrs. Madsen's total monthly expenses were \$2,493.00, (Tr. at 134-35; R. at 99). Mrs. Madsen's testimony regarding individual expense items is found at Tr. 94-117.

g. That Mr. Madsen had been arrested for domestic violence on two (2) occasions, and that Mrs. Madsen believed the domestic violence to have contributed to the end of the marriage. (Tr. at 135-40, 152-54.)

h. That Mrs. Madsen believed her income to be insufficient to meet her needs. (Tr. at 118.)

i. That Mrs. Madsen believed her standard of living to have fallen during the time that she had been separated from Mr. Madsen. (Tr. at 118.) Mrs. Madsen presented no evidence that she gave up an alimony award to marry plaintiff or that her income at the time of trial was less than it had ever been.

j. That between the time she filed for bankruptcy in 1991 and the time she married Mr. Madsen in 1994, Mrs. Madsen supported herself and her three children (3) on the same salary she earned at the time of the divorce. (Tr. at 144-45.)

The evidence before the trial court regarding Mr. Madsen's expenses was the direct testimony of Mr. Madsen, (Tr. at 13-14), a reduction in the sum of \$246.80, stipulated to by the parties' counsel, (Tr. at 75-76), and Plaintiff's Exhibit #1, (R. at 100). This uncontradicted evidence demonstrated that Mr. Madsen's total monthly expenses were \$3,048.20. Counsel for Mrs. Madsen only cross-examined Mr. Madsen regarding his expenses for mortgage and rent payments, (Tr. at 56-57), and never argued that Mr. Madsen's other expenses, as testified to, were inaccurate, excessive or otherwise inappropriate.

The trial court received the following evidence of Mr. Madsen's contractual duties and obligations regarding the home:

a. That Mr. Madsen had assumed the obligation of paying the \$557.00 monthly payment on the home remodeling loan. (Tr. at 56.)

b. That Mr. Madsen was obligated to pay property taxes, homeowner's insurance, and residential maintenance costs in the amount of \$147.00 per month. (Tr. at 13-14; R. at 100.)

c. That Mr. Madsen's mother, Evalyn Madsen, executed a Quit-Claim deed in May, 1996, which made Mr. Madsen and his

mother legal joint tenants of the home located at 136 East 1200 South, Bountiful, Utah. (Tr. at 32-33; R. at 166-67.)

d. That Mr. Madsen described the property as being his mother's property. (Tr. at 36.)

e. That Mr. Madsen had his name placed upon the deed, via the Quit-Claim deed, in order to reflect his investment of \$20,000.00 in proceeds received from a premarital home sale. (Tr. at 65-66.)

f. That Mr. Madsen's mother continued to pay approximately an additional \$100.00 per month so as to accelerate a reduction in the principal on the home remodeling loan. (Tr. at 56-57.)

g. That despite signing the Quit-Claim deed, Mr. Madsen's mother believed that she owned the property and did not intend to give it to Mr. Madsen until her death. (Tr. at 78-79.)

ISSUE #2. Did the trial court err in its Conclusion of Law that Mrs. Madsen was entitled to alimony for thirty-five (35) months without making any findings of fact as to the basis for an award for that duration?

This issue is solely a question of law, with no deference to be given to the trial court's decision, and is reviewed for correctness. See State v. Ramirez, 817 P.2d 774, 782 (Utah 1991); Barnes v. Barnes, 857 P.2d 257, 262 (Utah Ct. App. 1993);

Allred v. Allred, 797 P.2d 1108, 1111 (Utah Ct. App. 1990).

Preservation of Issue in the Trial Court: This issue was presented by Mr. Madsen's counsel in his closing argument before the trial court on July 10, 1997. (Tr. at 165.)

Marshalling of Evidence: Where the trial court's findings are insufficiently detailed to allow for meaningful review, an appellant is not required to engage in a futile marshalling exercise. See, e.g., Campbell v. Campbell, 896 P.2d 635, 638 (Utah Ct. App. 1995). No evidence was presented to the trial court to support or justify the duration of the alimony awarded by the trial court beyond the length of the marriage.

ISSUE #3. Did the trial court abuse its discretion by failing to consider restoring each party to their respective premarital circumstances, as provided in Utah Code Ann. §30-3-5(7)(f) (Supp. 1997)?

The standard of review for this issue is one that the Court will grant the trial court's decision some deference, reviewing it for an abuse of discretion. See Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986); Baker v. Baker, 866 P.2d 540, 546 (Utah Ct. App. 1993).

Preservation of Issue in the Trial Court: This issue was presented by Mr. Madsen's counsel in his closing argument before

the trial court on July 10, 1997, (Tr. at 163, 164-65, 172), and in Mr. Madsen's Trial Brief, submitted to the trial court on July 9, 1997, (R. at 83-84).

Marshalling of Evidence: The trial court received the following evidence regarding the parties' premarital circumstances:

a. Between 1991 and 1994, Mrs. Madsen supported herself and her three (3) children on approximately the same salary she was earning at the time of this divorce. (Tr. at 144-45.)

b. The parties' income during this marriage, and prior to separation, was as follows:

<u>Party</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>
Mr. Madsen	\$49,706.78	\$49,509.50	\$53,370.99
Mrs. Madsen	\$19,865.15	\$17,103.45	\$18,814.30

(R. at 120.)

c. That Mrs. Madsen believed her standard of living to have fallen during the time that she had been separated from Mr. Madsen. (Tr. at 118.) Mrs. Madsen presented no evidence that she gave up an alimony award to marry plaintiff or that her income at the time of trial was less than it had ever been.

ISSUE #4. Did the trial court use "fault" in awarding alimony so as to punish Mr. Madsen?

This issue is solely a question of law, with no deference to be given to the trial court's decision, and is reviewed for correctness. See State v. Ramirez, 817 P.2d 774, 782 (Utah 1991); Barnes v. Barnes, 857 P.2d 257, 262 (Utah Ct. App. 1993); Allred v. Allred, 797 P.2d 1108, 1111 (Utah Ct. App. 1990).

Preservation of Issue in the Trial Court: This issue was presented by Mr. Madsen's counsel in his closing argument before the trial court on July 10, 1997. (Tr. at 172.)

ISSUE #5. Did the trial court err by simply awarding alimony for the duration of the marriage without making any findings to support the duration of the alimony award?

This issue is solely a question of law, with no deference to be given to the trial court's decision, and is reviewed for correctness. See State v. Ramirez, 817 P.2d 774, 782 (Utah 1991); Barnes v. Barnes, 857 P.2d 257, 262 (Utah Ct. App. 1993); Allred v. Allred, 797 P.2d 1108, 1111 (Utah Ct. App. 1990).

Preservation of Issue in the Trial Court: This issue was presented by Mr. Madsen's counsel in his closing argument before the trial court on July 10, 1997, (Tr. at 162), and in Mr. Madsen's Trial Brief, submitted to the trial court on July 9, 1997, (R. at 84-85).

ISSUE #6. Did the trial court err in awarding \$2,000.00 in attorney's fees to Mrs. Madsen when the trial court did not analyze the reasonableness of the fees and no evidence was presented to support that award?

This issue is solely a question of law, with no deference to be given to the trial court's decision, and is reviewed for correctness. See State v. Ramirez, 817 P.2d 774, 782 (Utah 1991); Barnes v. Barnes, 857 P.2d 257, 262 (Utah Ct. App. 1993); Allred v. Allred, 797 P.2d 1108, 1111 (Utah Ct. App. 1990).

Preservation of Issue in the Trial Court: This issue was presented by Mr. Madsen's counsel in his closing argument before the trial court on July 10, 1997. (Tr. at 169, 173.)

Marshalling of Evidence: The trial court received the following evidence regarding Mrs. Madsen's attorney's fees:

a. Mrs. Madsen's testimony that she owed fees and was unable to pay them. (Tr. at 151.)

b. Mr. Nielson's assertion that an affidavit of attorney's fees had been prepared, although no such affidavit was made part of the record and apparently was not submitted to the trial court. (Tr. at 169-70.)

c. Mr. Nielson's proffer that the amount of attorney's fees was roughly \$3,900.00, representing nearly twenty-five (25) hours of work. (Tr. at 170.)

ISSUE #7. Did the trial court err in assessing legal fees against Mr. Madsen on the basis of his legal interest in real property when it also found that Mr. Madsen's monthly expenses could be reduced because his mother owned the real property?

This issue is solely a question of law, with no deference to be given to the trial court's decision, and is reviewed for correctness. See State v. Ramirez, 817 P.2d 774, 782 (Utah 1991); Barnes v. Barnes, 857 P.2d 257, 262 (Utah Ct. App. 1993); Allred v. Allred, 797 P.2d 1108, 1111 (Utah Ct. App. 1990).

Preservation of Issue in the Trial Court: This issue was presented during the testimony of Mr. Madsen before the trial court on July 10, 1997, (Tr. at 13-14), and in Plaintiff's Exhibit #1, (R. at 100).

III.

DETERMINATIVE PROVISIONS, STATUTES, ORDINANCES AND RULES

Interpretation of the following statutory provisions will be determinative of the outcome of this case.

1. Utah Code Ann. § 30-3-5(7)(a) (Supp. 1997)
2. Utah Code Ann. § 30-3-5(7)(b) (Supp. 1997)
3. Utah Code Ann. § 30-3-5(7)(c) (Supp. 1997)
4. Utah Code Ann. § 30-3-5(7)(f) (Supp. 1997)
5. Utah Code Ann. § 30-3-5(7)(h) (Supp. 1997)

Complete verbatim copies of the foregoing statutory provisions are set forth in the Addendum submitted herewith.

IV.

**STATEMENT OF THE CASE
NATURE OF THE CASE, COURSE OF THE PROCEEDINGS
AND DISPOSITION BELOW**

This is an appeal from the Second District Court's decision in a divorce proceeding following a short-term marriage. Mr. Madsen filed a Complaint for divorce on December 17, 1996, twenty-nine months and one day after the parties were married. The Court issued its Minute Entry requiring Mr. Madsen to pay temporary alimony in the amount of \$250.00 per month on April 21, 1997. Trial was held before the Honorable Michael G. Allphin on July 10, 1997. Judge Allphin signed the Findings of Fact and Conclusions of Law and the Decree of Divorce on October 28, 1997, wherein

1. Mr. Madsen was awarded the Decree of Divorce on the ground of irreconcilable differences;
2. Mr. Madsen was ordered to pay alimony to Mrs. Madsen in the amount of \$550.00 per month for 35 months, and
3. Mr. Madsen was ordered to pay Mrs. Madsen's attorney's fees in the amount of \$2,000.00.

Mr. Madsen timely filed this Notice of Appeal on November 21, 1997.

V.

STATEMENT OF FACTS

1. Mr. Madsen and Defendant/Appellee Shauna M. Madsen were

married on or about July 16, 1994. (Tr. at 9.)

2. During the marriage, the parties and their children lived in the home owned by Mr. Madsen's mother prior to the marriage. (Tr. at 24-25.) The home is located at 136 East 1200 South, Bountiful, Utah. (Id.)

3. On May 16, 1996, a Quit-Claim deed was executed by Mr. Madsen's mother that made Mr. Madsen and his mother legal joint tenants of the home. (Tr. at 32-33; R. at 166-67.) Mr. Madsen also co-signed on a mortgage obligation incurred with Fleet Mortgage in order that an apartment could be built for his mother in the residence. (Tr. at 26-27; R. at 164, 168-175.) Mr. Madsen's interest in the home was his own separate property. (R. at 193.) By virtue of the Trust Deed with Fleet Mortgage, Mr. Madsen was obligated to make payments of \$557.00 for the mortgage obligation, \$72.00 for real property taxes, \$25.00 for real property insurance, and \$50.00 for home maintenance, lawn care, and repairs. (Tr. at 13- 14; R. at 100, 168-175.)

4. In March, 1995, Mr. Madsen was arrested for domestic violence and pled no contest to the charges (Tr. at 138-39, 153-54.)

5. In November, 1996, there was a physical confrontation involving Mr. Madsen, Mrs. Madsen, and the sons of Mrs. Madsen. (Tr. at 136-38.) Mr. Madsen was arrested for domestic violence

and pled guilty to assault. (Tr. at 152-53.)

6. In early December, 1996, the parties separated. (Tr. at 136.) Mr. Madsen subsequently filed a Complaint for divorce. (R. at 1-5.) Mrs. Madsen filed an Answer to Mr. Madsen's Complaint in which she admitted to irreconcilable differences as grounds for divorce. (R. at 9.) Mrs. Madsen also sought alimony "based upon the earning capacities and relative needs of the parties." (Id.)

7. The parties' respective incomes during the marriage, and prior to separation, were as follows:

<u>Party</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>
Mr. Madsen	\$49,706.78	\$49,509.50	\$53,370.99
Mrs. Madsen	\$19,865.15	\$17,103.45	\$18,814.30

(R. at 120.)

8. Trial was held before Judge Michael G. Allphin of the Second District Court on July 10, 1997. (R. at 191.)

9. Judge Allphin signed the Findings of Fact and Conclusions of Law on October 28, 1997. (R. at 200.)

10. Judge Allphin signed the Decree of Divorce on October 28, 1997. (R. at 203.)

11. Mr. Madsen timely filed his Notice of Appeal on November 21, 1997. (R. at 206.)

VI.

SUMMARY OF ARGUMENTS

The trial judge erred in finding that Mr. Madsen has the ability to pay alimony. Mr. Madsen's undisputed and unchallenged monthly expenses are only \$13.00 less than his net monthly income. By reducing, sua sponte, Mr. Madsen's monthly expenses in the sum of \$542.00, the trial judge improperly awarded alimony in the sum of \$550.00 per month.

The trial judge also improperly used Mr. Madsen's "fault" (i.e., two (2) incidents of domestic violence) to punish Mr. Madsen by awarding alimony that he cannot afford to pay. Further, the trial judge offered no analysis or explanation for awarding alimony for thirty-five (35) months beyond the fact that the marriage lasted thirty-five (35) months.

Finally, the trial judge did not have sufficient evidence before him to justify the attorney's fees awarded in this case. The trial judge also failed to analyze the factors set forth in caselaw that are necessary to justify an award of attorney's fees.

VII.

ARGUMENT

I

THE TRIAL COURT ERRED IN FINDING MR. MADSEN HAS THE ABILITY TO PAY ALIMONY.

A.

The Undisputed Evidence Demonstrated that Mr. Madsen's Automobile, Utility, Telephone, and Food and Household Expenses Were \$395 Higher than the Amount Found by the Court

Mr. Madsen testified that Plaintiff's Exhibit #1, (R. at 100), accurately reflected the following monthly expenses:

Food and Household Supplies	\$450.00
Utilities	200.00
Telephone	125.00
Auto Expenses	250.00

Those expenses were never questioned by Mrs. Madsen's counsel, nor was it ever argued those expenses were unreasonable in closing argument. In its Findings of Fact, however, the trial court, sua sponte and without explanation, determined that it would consider Mr. Madsen's expenses as follows:

Food and Household Supplies	\$350.00 (-\$100.00)
Utilities	100.00 (-\$100.00)
Telephone	30.00 (-\$ 95.00)
Auto Expenses	150.00 (-\$100.00)

=====

TOTAL NET DIFFERENCE -\$395.00

Where there is disputed evidence about expenses, it is clearly within the trial court's authority to "accept, modify, reduce, or

reject" a party's claimed expenses. Willey v. Willey, 333 Utah Adv. Rep. 8, 11 (Utah 1997). Here, however, the evidence was undisputed and unchallenged. Accordingly, the trial court's Findings of Fact, insofar as they reduced Mr. Madsen's undisputed and unchallenged expenses, are clearly erroneous. Accordingly, based on the record, this Court is obligated to order the trial court to reduce the alimony award by \$395.00 per month so as to properly reflect Mr. Madsen's ability to pay alimony.

B.

The Trial Court Erroneously Determined that Mr. Madsen had No Obligation to Pay Property Taxes, Homeowner's Insurance Premiums, and Residential Maintenance Costs in the Amount of \$147 per Month

Mr. Madsen testified that he was obligated to pay property taxes, homeowner's insurance, and home maintenance costs in the amount of \$147.00 per month. This testimony is further supported by the Trust Deed Mr. Madsen had signed in connection with the real property. Again, this evidence was undisputed and unchallenged. In its Findings of Fact, however, the trial court ignored this evidence, sua sponte and without explanation, and determined that

9. Because the Court finds plaintiff's mother, Evalyn Madsen, owns the real property located at 136 East 1200 South, Bountiful, Utah, she has an obligation to pay the property taxes of \$72.00 per month, the

homeowners insurance premium of \$25.00 per month and the residential maintenance costs of \$50.00 per month and does not give plaintiff credit for these expenses because he has no obligation to pay for those expenses.

(R. at 194-95.) While there is conflicting evidence regarding the ownership of the home (See Marshalling of Evidence following Issue #2), it was undisputed that Mr. Madsen had contractually agreed to pay these expenses, just as he had contractually agreed to make payments on the loan. The trial court's finding that Mr. Madsen had incurred no such obligation is clearly erroneous, as it controverts the only evidence before the court on this issue. This Court should therefore further reduce the alimony award by \$147.00 per month to reflect the reduction in Mr. Madsen's ability to pay alimony.

II

THE COURT ERRED IN AWARDING ALIMONY TO MRS.
MADSEN

A.

The Court Erred as a Matter of Law in Awarding Alimony for 35 Months Without Making Any Findings Supporting an Award of that Duration

The trial court was statutorily required to consider the length of the parties' marriage in determining alimony. See Utah Code Ann. § 30-3-5(7)(a)(iv) (Supp. 1997). This requirement is separate and distinct, however, from the prohibition that an

award of alimony can generally be for no longer than the length of the marriage. See Utah Code Ann. § 30-3-5(7)(h) (Supp. 1997). By enacting two (2) separate statutory provisions, the Legislature intended there to be a cap on the duration of an alimony award while also requiring trial courts to make findings justifying the duration of an alimony award. The Legislature did not intend that the length of the marriage automatically determine the duration for an award of alimony.

In this case, the trial court engaged in no analysis or findings to justify an award of alimony for thirty-five (35) months except for the fact that thirty-five (35) months is the duration of the marriage. Further, the trial judge only mentioned the length of the marriage subsequent to awarding alimony. In the Findings of Fact, the trial court "orders plaintiff to pay alimony to defendant in the sum of \$550.00 per month for a period of thirty-five (35) months, which was the length of the parties' marriage." (R. at 195.) In the Conclusions of Law, the trial court concluded that "the plaintiff should be ordered to pay to defendant, as and for alimony, the sum of \$550.00 per month, for a period of thirty-five months after entry of the Decree of Divorce herein, which time period equals the length of the parties' marriage." (R. at 199.) Moreover, the trial court's Minute Entry ignores the requirement

to make findings altogether: "The Court will order the plaintiff to pay \$550.00 per month for 35 months to the defendant in alimony."

It is clear from the record that the trial court failed to analyze how the length of the marriage had any relationship to the duration of the alimony award. Absent such analysis or Finding of Fact, Mr. Madsen asserts the trial court abused its discretion by awarding, carte blanche, alimony for the duration of the marriage. Unless this Court's determination of Mr. Madsen's ability to pay makes this issue moot, the trial court's error in this regard requires that this matter be remanded for consideration of the length of the marriage.

B.

The Court Awarded Alimony Against Mr. Madsen
To Punish Him For His "Fault."

The trial court failed to make sufficient findings as to how Mr. Madsen's fault affected Mrs. Madsen's need for alimony. The trial court also failed to find how Mr. Madsen's "fault" impacted his ability to pay alimony. The trial court simply stated that:

The Court has considered the issue of fault. Based upon the evidence presented of plaintiff's problems with domestic violence in assaulting defendant and her children, the Court finds that plaintiff's problems have been a major cause of the break-up of the parties' marriage. The Court finds that this case is one in which fault should be considered when the Court determines whether

or not alimony is appropriate. Given the fault of the plaintiff, the plaintiff's ability to pay alimony and the defendant's circumstances involving a lack of reliable transportation and her inability to provide for herself, the Court finds that plaintiff has the ability to meet some of defendant's needs and orders plaintiff to pay alimony to defendant in the sum of \$550.00 per month for a period of thirty-five (35) months, which was the length of the parties' marriage.

(R. at 195.)

It has long been a tenet of Utah law that alimony is not to be used to punish one of the parties. See English v. English, 565 P.2d 409, 411 (Utah 1977) ("The purpose of alimony is to provide support for the wife and not to inflict punitive damages on the husband. Alimony is not intended as a penalty against the husband nor a reward to the wife."); see also Noble v. Noble, 761 P.2d 1369, 1371-72 (Utah 1988) (husband's tortious shooting of wife created need for alimony).

In this case, the trial court made no findings that Mr. Madsen's fault had a direct impact on Mrs. Madsen's need for alimony. The inescapable conclusion is that the trial court used its award of alimony to punish Mr. Madsen for his "fault." This is clearly improper. If the trial court had found that Mr. Madsen's fault affected Mrs. Madsen's need for alimony, or lengthened the term for which an award might be necessary, then the award of alimony might have been properly supported. Here,

however, the trial court made no such finding.

Moreover, that the trial judge intended to punish Mr. Madsen can be inferred from his sua sponte reduction as to Mr. Madsen's undisputed and unchallenged monthly expenses. Why would the trial judge, without explanation, reduce a party's monthly expenses unless the intent was to punish that party? The answer is clear -- the trial judge wanted to, improperly, punish Mr. Madsen! Had the trial judge truly believed Mr. Madsen's undisputed and unchallenged expenses were unreasonable, then the trial judge could have made express findings supporting the unreasonableness of the same. That the trial judge made no express findings confirms his intent to improperly punish Mr. Madsen.

C.

The Court Erred in Determining its Award of Alimony Without Considering Restoring Each Party to the Condition that Existed at the Time of Their Marriage

When faced with a short-term marriage that has produced no children, two (2) separate statutory provisions give the trial court the discretion to consider restoring the parties to the standard of living they enjoyed at the time of the marriage. See Utah Code Ann. §§ 30-3-5(7)(f) and 30-3-5(7)(c) (Supp. 1997). In this case, Mr. Madsen's counsel urged the trial court to do so. The parties had been married less than three years, there were no

children born as issue of the marriage, and Mrs. Madsen's income had increased since the parties were married.

Although the trial court has discretion to consider (or not to consider) restoring Mrs. Madsen to her pre-marital circumstances, Mr. Madsen asserts the trial court abused its discretion by simply ignoring the issue. The issue was clearly argued before the trial court and the parties' circumstances completely mirror the situation contemplated by the statutory provisions. By not making a finding as to this disputed issue, the trial court abused its discretion. Accordingly, Mr. Madsen requests that, unless this issue is mooted by this Court's determination of other issues in this case, this matter be remanded to the trial court with instructions to consider restoring the parties to the position they were in at the time of the marriage.

III

THE COURT ERRED IN ITS AWARD OF ATTORNEY'S FEES

A.

The Court Erred in Awarding Attorney's Fees without Making Any Findings About the Services Performed or the Reasonableness of the Fees.

The trial court's Finding of Fact concerning the amount of attorney's fees is limited to the simple statement that "The

Court finds the sum of \$2,000.00 to be reasonable attorney's fees and costs incurred herein." (R. at 196). The Utah Supreme Court has held that awarding attorney's fees is a "highly fact-dependent process." Willey, 333 Utah Adv. Rep. at 11. In doing so, the court is required to consider the following factors:

"the difficulty of the litigation, the efficiency of the attorneys presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result obtained, and the expertise and experience of the attorneys involved."

Id. at 11-12 (quoting Salmon v. Davis County, 916 P.2d 890, 893 (Utah 1996) (quoting Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985))). The trial court's findings and conclusions completely fail to reflect any analysis of the required factors.

Moreover, the trial judge in the case at bar had less evidence before him than this Court has previously found insufficient in Talley v. Talley, 739 P.2d 83 (Utah Ct. App. 1987). In Talley, this Court reversed an award of attorney's fees based upon the proffer of counsel. This Court reversed the trial judge, even though the proffer included an itemization of time and costs for both the attorney and a clerk, as well as hourly rates, because the reasonableness of the fees was not established. Id. at 84. In contrast, the record herein does not reflect any itemization of the fees and costs incurred herein.

The trial judge thus made no legitimate finding that the fees were reasonable or necessarily incurred. Since defendant failed to carry her burden of proof so as to justify a claim for attorney's fees, this Court should remand for entry of an order directing each party to pay their own fees and costs incurred below.

B.

The Court Erred in Awarding Legal Fees Based on Mr. Madsen's Interest in Real Property

The trial court's findings on the issue of attorney's fees directly conflict with its findings related to another issue. The trial court's award of attorney's fees rested on the finding that

"based on plaintiff's legal interest in the real property located at 136 East, 1200 South, Bountiful, Utah, he has equity in said real property which defendant does not have and the Court therefore finds that plaintiff should be ordered to pay attorney's fees on behalf of defendant."

(R. at 196.) This finding is impossible to reconcile with the trial court's finding that

"Because ... plaintiff's mother, Evalyn Madsen, owns the real property located at 136 East, 1200 South, Bountiful, Utah, she has an obligation to pay the property taxes of \$72.00 per month, the homeowners insurance premium of \$25.00 per month and the residential maintenance costs of \$50.00 per month and [the court] does not give Mr.

Madsen credit for the expenses because he has no obligation to pay for these expenses."

(R. at 194-95.)

Taken together, the trial court appears to have found a second way to punish Mr. Madsen for his "fault" in this matter -- make Mr. Madsen pay attorney's fees by indirectly ordering him to borrow against his interest in real property, but refusing to permit him to claim the necessary expenses to preserve that interest as legitimate monthly expenses. What a "Catch 22!" Mr. Madsen has no obligation to preserve real property when it comes to analyzing his ability to pay alimony but that same "interest" justifies ordering attorney's fees. The logical inconsistency in the trial judge's analysis cannot be reconciled without concluding that he intended to again improperly punish Mr. Madsen.


CONCLUSION

This Court should remand for an entry of an Order directing that Mr. Madsen's monthly alimony obligation be reduced to properly reflect his undisputed and unchallenged monthly expenses. This Court should further direct the trial court to make sufficient findings to justify the duration of the alimony award. Lastly, the parties should be ordered to pay their own

attorney's fees and costs incurred.

Dated this 09th day of February, 1998.

Respectfully submitted,



Phillip W. Dyer
Kevin C. Timken
Attorneys for Plaintiff/Appellant

R\A:MADSEN.bri/DIV2H

ADDENDUM

(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 render the decree upon the evidence or, in the case of a decree after default of the respondent, upon the petitioner's affidavit.

(2) The court may accept the decree of divorce, may be sealed by order of the court upon the motion of either party. The sealed portion of the file shall be available to the public only upon 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 shall have full access to the entire record. This sealing does not apply to subsequent filings to enforce or amend the decree.

History: R.S. 1898 & C.L. 1907, § 1; 1909, ch. 60, § 1; C.L. 1917, § 2998; R.S. 1943, 40-3-4; L. 1957, ch. 55, § 1; 1960, ch. 59, § 1; 1969, ch. 72, § 2; 1970, ch. 116, § 1; 1985, ch. 151, § 1; 1987, ch. 104, § 1; 1990, ch. 230, § 1; 1991, ch. 35, § 1; 1992, ch. 98, § 1; 1992, ch. 290, § 1; 1995, ch. 62, § 1; 1997, ch. 47, § 2; 1997, ch. 157, § 1.

Amendment 1995. — The 1995 amendment, effective July 1, 1995, added the second sentence of subsection (1)(b) and in the second sentence of subsection (1)(d) substituted "shall enter the decree" for "shall make and file findings and decree" and added the language beginning "or, in the case of" at the end.

The 1997 amendment by ch. 47, effective July 1, 1997, substituted "petitioner" for "plaintiff" and "respondent" for "defendant" throughout the section.

The 1997 amendment by ch. 157, effective May 3, 1997, deleted "and the plaintiff filed an action in the judicial district as defined in Section 78-1-2.1 where the pilot program shall be administered" after "child or children" in the first sentence and made stylistic changes.

This section is set out as recommended by the Office of Legislative Research and the General Counsel.

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.

History: R.S. 1898 & C.L. 1907, § 1212; L. 1909, ch. 109, § 4; C.L. 1917, § 3000; R.S. 1933 & C. 1943, 40-3-5; L. 1969, ch. 72, § 3; 1975, ch. 81, § 1; 1979, ch. 110, § 1; 1984, ch. 13, § 1; 1985, ch. 72, § 1; 1985, ch. 100, § 1; 1991, ch. 257, § 4; 1993, ch. 152, § 1; 1993, ch. 261, § 1; 1994, ch. 284, § 1; 1995, ch. 330, § 1; 1997, ch. 232, § 4.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, deleted a provision from Subsection (3) for support and maintenance orders, deleted former Subsections (5) and (6), providing that alimony terminates upon remarriage, or cohabitation with a member of the opposite sex, by the payee, added

Subsections 7) to (9), renumbered former Subsections (7) and (8) as (5) and (6), and made stylistic changes

The 1997 amendment, effective July 1, 1997 substituted "Recovery Services" for "Parts 4 and 5" in Subsection (1)(d) and deleted Subsection (1)(e) which provided for an assesment against the obligor for a check handling fee

Compiler's Notes. — Laws 1995, ch 330 which amended this section, provides in § 2 that the Legislature does not intend that termination of alimony based on cohabitation, in accordance with Subsection (9), "be interpreted in any way to condone such a relationship for any purpose "

**SECOND JUDICIAL DISTRICT COURT IN AND FOR THE
COUNTY OF DAVIS, STATE OF UTAH**

SCOTT EUGENE MADSEN,

Plaintiff,

vs.

**SHAUNA MARIE BULLOCK
MADSEN,**

Defendant,

HON. MICHAEL G. ALLPHIN

MINUTE ENTRY

Date: July 10, 1997

Case No. 964702009 DA

Clerk: K.W. Elmore

Bailiff: D. Haygood

VIDEOTAPED

This matter comes before the Court for a DOMESTIC TRIAL.

The plaintiff is present and is represented by counsel Phillip W. Dyer. The defendant is present and is represented by counsel D. Michael Nielsen.

Mr. Nielsen makes opening statements.

Scott E. Madsen is sworn and testifies.

Plaintiff's exhibit # 2, 1, 7, 6, 4, 5, 3, 14, 9, 10, 12, 11 & 13 are offered and received. Plaintiff exhibit # 8 is offered but is rejected.

Evelyn S. Madsen is sworn and testifies.

Shauna Madsen is sworn and testifies.

Defendant's exhibit # 1, 2, & 3 are offered and received.

Mr. Dyer makes closing statements. He requests the Court to put the parties back to where they were before the marriage and not allow alimony to the defendant.

Mr. Nielsen makes closing statements. He requests the Court to order the plaintiff to pay alimony and attorney fees.

The Court find that it has jurisdiction over the parties and subject matter and that the plaintiff's testimony has substantially proven the allegations in the divorce complaint. The Court grants a divorce based on irreconcilable differences to become final upon entry by the judgment clerk. The Court also finds the home belonged to the plaintiff's mother, Evelyn S. Madsen, that the plaintiff co-signed the trust deed note with Evelyn Madsen and the parties only benefited from the mortgage payment. The Court finds the parties did not pay or work more while in the home and the home belongs to Evelyn Madsen and the plaintiff has a separate interest in the home. The Court will not award interest in the

property to the defendant. On the issue of alimony, the Court finds the defendant has expenses in the amount of \$2760.00 a month which includes the cost of new transportation which she will need. The defendant has a net income of \$1380.00 a month and the defendant has a legal right to child support in the amount of \$600.00 a month from her previous husband. After that amount, the defendant is still in need of \$780.00 a month for expenses which she does not have. The Court finds the plaintiff has a net income of \$2911.00 a month plus hockey refereeing of \$150.00 a month. The Court finds the plaintiff has reasonable expenses in the amount of \$2506.00 a month which gives him an excess of \$550.00 a month. The Court finds it is Evelyn Madsen's responsibility to pay the maintenance, property tax and property insurance for the home. The Court finds that fault is an issue to the plaintiff. The Court will order the plaintiff to pay \$550.00 a month for 35 months to the defendant in alimony. The plaintiff will be responsible for the \$100.00 tax fee which was already paid. The plaintiff will also have a judgment for \$2,000.00 for the defendant's attorney fees. Mr. Dyer will prepare the order.

PHILLIP W. DYER (4315)
Attorney for Plaintiff
318 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
(801) 363-5000

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
DAVIS COUNTY, STATE OF UTAH

SCOTT EUGENE MADSEN,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
Plaintiff,)	
vs.)	
SHAUNA MARIE BULLOCK MADSEN,)	Civil No. 96-4702009 DA
)	Judge Michael G. Allphin
Defendant.)	

The above-entitled matter came on for trial before the Honorable Michael G. Allphin, District Court Judge presiding, on the 10th day of July, 1997, at the hour of 9:00 a.m., the plaintiff appearing in person with his counsel, Phillip W. Dyer, and the defendant appearing in person with her counsel, D. Michael Nielsen. Thereupon, the Court having heard the testimony presented from witnesses, having considered the exhibits received and all evidence before the Court, the parties having been sworn and testified, and good cause appearing therefore, the Court now makes and enters its

FINDINGS OF FACT

1. Pursuant to U.C.A. 30-3-1, et seq., the Court has subject matter jurisdiction over the above-entitled matter.

2. The Court finds that the plaintiff is, and was at all times mentioned herein, an actual and bona fide resident of Davis County, State of Utah, for more than three (3) months prior to the filing of the action herein.

3. The parties are husband and wife having been married on or about July 16, 1994, in Bountiful, Utah.

4. There are no (0) children born as issue of the parties' marriage, and none are expected.

5. The Court finds that there have arisen irreconcilable differences between the parties and the plaintiff is therefore entitled to a Decree of Divorce, the same to become final upon entry.

6. The Court finds that the real property located at 136 East 1200 South, Bountiful, Utah, belonged to Evalyn Madsen, plaintiff's mother, prior to the parties' marriage, and she owned the same free and clear at that time. After the parties' marriage, plaintiff co-signed a loan obligation with his mother in order that an apartment could be built for plaintiff's mother such that plaintiff and defendant would be able to live in plaintiff's mother's residence. The Court finds the parties

benefitted (at least to the extent of the mortgage payments they were paying) due to their possession and enjoyment of the property during the marriage. The Court finds that the parties did not pay more (nor work more) than what the benefit was to them. It was the intent of the parties that the property equitably belonged to Evalyn Madsen and the Court so finds. The Court finds that plaintiff had an expectation to inherit the real property, and after execution of a Quit-claim Deed, a legal joint tenancy was created between plaintiff and his mother, Evalyn Madsen, such that plaintiff obtained an interest in the property as his own separate property. The Court finds that no marital interest exists in the residence and defendant is therefore not entitled to receive any equity interest from said residence.

7. The Court finds that defendant has monthly living expenses of \$2,560.00 and is in need of reliable transportation at an expected cost of \$200.00 per month. The Court thus finds that defendant has monthly living expenses of \$2,760.00, which includes expenses for her minor children who are not children of this marriage. The Court finds that defendant's monthly net income is \$1,380.00, leaving her with a \$1,380.00 per month deficiency. The Court finds that defendant has a legal right to receive child support from the natural father of her minor children in the sum of \$600.00 per month. In considering

defendant's needs, the Court deducted the child support obligation from her monthly deficiency and the defendant's net monthly deficiency is \$780.00.

8. The Court finds that plaintiff has a net income of \$2,911.00 per month from his full-time employment plus \$150.00 per month generated as a hockey referee. The Court finds that plaintiff thus has \$3,061.00 per month in net income. The Court finds that plaintiff's reasonable monthly living expenses are \$2,506.20, calculated as follows:

<u>EXPENSE</u>	<u>AMOUNT</u>
Rent	\$ 557.00
Food and household goods	350.00
Utilities	100.00
Telephone	30.00
Laundry and cleaning	25.00
Clothing	50.00
Medical expense	25.00
Dental expense	25.00
Child support	433.20
Entertainment	75.00
Tithing	361.00
Automobile expense	150.00
Automobile payment	85.00
Installment debt	<u>240.00</u>
TOTAL	\$2,506.20

9. Because the Court finds plaintiff's mother, Evalyn Madsen, owns the real property located at 136 East 1200 South, Bountiful, Utah, she has an obligation to pay the property taxes of \$72.00 per month, the homeowners insurance premium of \$25.00 per month and the residential maintenance costs of \$50.00 per

month and does not give plaintiff credit for these expenses because he has no obligation to pay for those expenses. Based on the Court's finding concerning plaintiff's expenses, plaintiff has \$555.00 available to him beyond his living expenses.

10. The Court has considered the issue of fault. Based upon the evidence presented of plaintiff's problems with domestic violence in assaulting defendant and her children, the Court finds that plaintiff's problems have been a major cause of the break-up of the parties' marriage. The Court finds that this case is one in which fault should be considered when the Court considers whether or not alimony is appropriate. Given the fault of the plaintiff, the plaintiff's ability to pay alimony and the defendant's circumstances involving a lack of reliable transportation and her inability to provide for herself, the Court finds that plaintiff has the ability to meet some of defendant's needs and orders plaintiff to pay alimony to defendant in the sum of \$550.00 per month for a period of thirty-five (35) months, which was the length of the parties' marriage. The plaintiff's obligation to pay alimony automatically terminates at the end of the thirty-five (35) month period herein. Further, said alimony shall also terminate in the event defendant remarries or cohabitates with another person prior to the expiration of the thirty-five (35) month period herein.

11. Based upon plaintiff's ability to pay and plaintiff's actual payment of the same, the Court finds that plaintiff should be ordered to pay the tax fees incurred in the sum of \$100.00.

12. The Court finds that defendant cannot pay her attorney's fees in this case but plaintiff's ability to pay attorney's fees is also limited due to his income and the alimony obligation ordered herein. However, based on plaintiff's legal interest in the real property located at 136 East 1200 South, Bountiful, Utah, he has access to equity in said real property which defendant does not have and the Court therefore finds that plaintiff should be ordered to pay attorney's fees on behalf of defendant. The Courts finds the sum of \$2,000.00 to be reasonable attorney's fees and costs incurred herein. Judgment shall be entered in favor of defendant and against plaintiff in the sum of \$2,000.00.

13. The Court finds that there are no medical or counselling expenses currently outstanding. In the event that medical or counselling expenses arise in the future, the Court finds that defendant can file a lawsuit for such sums.

14. The Court finds the parties have agreed that each of the parties should be awarded, free and clear of any claim of the other, their respective retirement account(s) and all other personal property in their respective possession.

WHEREFORE, the Court having made its Findings of Fact, now makes and enters its

CONCLUSIONS OF LAW

1. The Court concludes that the subject matter jurisdiction and grounds for divorce requirements of U.C.A. 30-3-1, et seq., have been met such that plaintiff shall be awarded a Decree of Divorce, on the grounds of irreconcilable differences, dissolving the bonds of matrimony from the defendant, the same to become final upon entry.

2. The Court concludes that no marital interest exists in the real property and residence located at 136 East 1200 South, Bountiful, Utah, and defendant should not be awarded any interest in or to said real property and residence.

3. The Court concludes that defendant has monthly living expenses of \$2,560.00 and is in need of reliable transportation at an expected cost of \$200.00 per month. The Court concludes that defendant has monthly living expenses of \$2,760.00, which includes expenses for her minor children who are not children of this marriage. The Court concludes that defendant's monthly net income is \$1,380.00, leaving her with a \$1,380.00 per month deficiency. The Court also concludes that defendant has a legal right to receive child support from the natural father of her minor children in the sum of \$600.00 per month. In considering

defendant's needs, the Court deducted the child support obligation from her monthly deficiency. The Court concludes that defendant's net monthly deficiency is thus \$780.00.

4. The Court concludes that plaintiff has a net income of \$2,911.00 per month from his full-time employment plus \$150.00 per month generated as a hockey referee. The Court concludes that plaintiff thus has \$3,061.00 per month in net income. The Court concludes that plaintiff's reasonable monthly living expenses are \$2,506.20. The Court concludes that plaintiff has income available to him beyond his living expenses in the sum of \$555.00 per month.

5. The Court concludes that plaintiff should not be given credit for the property taxes of \$72.00 per month, the homeowners insurance premium of \$25.00 per month and the residential maintenance costs of \$50.00 per month, which are the sole obligation of Evalyn Madsen to pay and for which plaintiff has no obligation to pay.

6. The Court concludes that the issue of fault should be considered when the Court considers whether or not alimony is appropriate in this case.

7. The Court concludes that plaintiff has the ability to pay alimony in the sum of \$550.00 per month.

8. The Court concludes that defendant is in need of alimony

in, at least, the sum of \$550.00 per month.

9. The Court concludes that the plaintiff should be ordered to pay to defendant, as and for alimony, the sum of \$550.00 per month, for a period of thirty-five (35) months after entry of the Decree of Divorce herein, which time period equals the length of the parties' marriage. The plaintiff's obligation to pay alimony automatically terminates at the end of the thirty-five (35) month period herein. Further, said alimony shall also terminate in the event defendant remarries or cohabitates with another person prior to the expiration of the thirty-five (35) month period herein.

10. The Court concludes that plaintiff should be ordered to pay the tax fees incurred in the sum of \$100.00.


11. The Court concludes that plaintiff should be ordered to pay defendant's attorney's fees. The Court further concludes that the sum of \$2,000.00 constitutes reasonable attorney's fees and costs incurred herein and judgment should be entered in favor of defendant and against plaintiff in the sum of \$2,000.00 for the same.

12. Based on their agreement, the Court concludes that each of the parties should be awarded, free and clear of any claim of the other, their respective retirement account(s) and all other

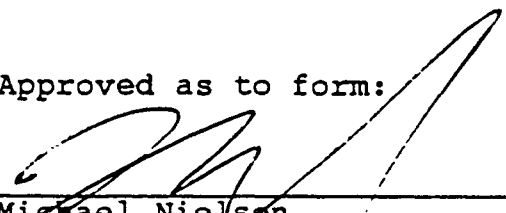
personal property in their respective possession.

MADE AND ENTERED this 28th day of Oct, 1997.

BY THE COURT:


HONORABLE MICHAEL G. ALLPHIN
District Court Judge

Approved as to form:


Michael Nielsen
Attorney for Defendant

10/27/97
Date

Pbg/Andsen.fin/DIVII
M145.00

PHILLIP W. DYER (4315)
Attorney for Plaintiff
318 Kearns Building
136 South Main Street
Salt Lake City, Utah 84101
(801) 363-5000

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
DAVIS COUNTY, STATE OF UTAH

SCOTT EUGENE MADSEN,)	DECREE OF DIVORCE
Plaintiff,)	
vs.)	
SHAUNA MARIE BULLOCK MADSEN,)	Civil No. 96-4702009 DA
Defendant.)	Judge Michael G. Allphin

The above-entitled matter came on for trial before the Honorable Michael G. Allphin, District Court Judge presiding, on the 10th day of July, 1997, at the hour of 9:00 a.m., the plaintiff appearing in person with his counsel, Phillip W. Dyer, and the defendant appearing in person with her counsel, D. Michael Nielsen. Thereupon, the Court having heard the testimony presented from witnesses, having considered the exhibits received and all evidence before the Court, the parties having been sworn and testified, the Court having made and entered its Findings of Fact and Conclusions of Law, and good cause appearing therefore,

PHILLIP W. DYER
BY KD

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The plaintiff be, and is hereby, awarded a Decree of Divorce, on the grounds of irreconcilable differences, dissolving the bonds of matrimony from defendant, the same to become final upon entry.

2. The defendant is not awarded any equitable interest in or to the real property and residence located at 136 East 1200 South, Bountiful, Utah.

3. The plaintiff is ordered to pay alimony to defendant in the sum of \$550.00 per month for a period of thirty-five (35) months after entry of the Decree of Divorce herein at which time plaintiff's alimony obligation shall automatically terminate. Said alimony shall also terminate in the event that defendant remarries or cohabitates with another person prior to the expiration of the thirty-five (35) month period herein.

4. The Court orders plaintiff to pay the tax fees incurred in the sum of \$100.00.

5. The Court orders plaintiff to pay the sum of \$2,000.00 as and for defendant's attorney's fees. Judgment shall be entered in favor defendant and against plaintiff in the sum of \$2,000.00 as and for the same.


6. The Court determines that there are no medical or counselling expenses currently outstanding. In the event that

medical or counselling expenses arise in the future, the Court orders that defendant can file a lawsuit for such sums.

7. The parties are each awarded, free and clear of any claim of the other party, their respective retirement account(s) and all other personal property in their respective possession.

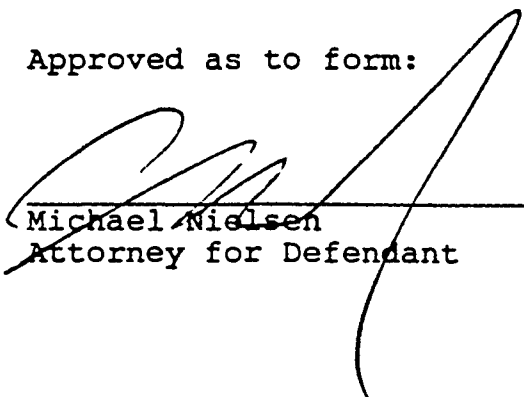
DATED this 28th day of Oct, 1997.

BY THE COURT:



HONORABLE MICHAEL G. ALLPHIN
District Court Judge

Approved as to form:



Michael Nielsen
Attorney for Defendant

10/27/97
Date

CERTIFICATE OF MAILING

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

Phillip W. Dyer, being duly sworn, deposes and says:

That he served BRIEF OF PLAINTIFF/APPELLANT SCOTT EUGENE
MADSEN upon the following parties by placing four (4) true
and correct copies thereof in an envelope addressed to:

D. Michael Nielsen, Esq.
Session Place
505 South Main Street
Bountiful, Utah 84010

and mailing the same, sealed, with first class postage prepaid
thereon, in the United States Mail at Salt Lake City, Utah, on
the 27th day of February, 1998.

[Handwritten signature]

SUBSCRIBED AND SWORN to before me this 27th day of
February, 1998.

Kathleen J. Gillman

Notary Public
Residing at:
Salt Lake County, Utah

My Commission expires:
12/23/99

