

1988

Mary Munns v. Lowell Shirley Munns : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Munns v. Munns*, No. 880585 (Utah Court of Appeals, 1988).
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88-0585

IN THE UTAH COURT OF APPEALS

MARY MUNNS,

Plaintiff/Appellant,

vs.

LOWELL SHELLEY MUNNS,

Defendant/Respondent

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No. 880585-CA

CATEGORY NO. 14(b)

BRIEF OF RESPONDENT

APPEAL FROM THE FIRST JUDICIAL
DISTRICT COURT, BOX ELDER COUNTY
JUDGE GORDON J. LOW

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STATE OF UTAH

AUG 16 1990

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August 2, 1989

FILED

AUG 3 1989

Clerk of the Court
Utah Court of Appeals
400 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102

OF APPEAL

Re: Munns vs Munns, #880585-CA

Dear Clerk:

This letter is submitted pursuant to Rule 24(j) of the Rules of the Utah Court of Appeals. At pages 25 and 26 of the Respondent's Brief, respondent requested that he be awarded his costs and attorney's fees on appeal. Respondent's counsel has subsequently located two very recent authorities which are on point.

"Attorney fees on appeal may be granted in the discretion of the court in conformance with statute or rule." Management Services Corp. v. Development Assocs, 617 P.2d 406, 408 (Utah 1980). Utah Code Ann. §30-3-3 (1984) provides that either party to a divorce action may be ordered to pay the adverse party to prosecute or defend the action. This includes attorney fees incurred on appeal....In view of our affirmance and the record evidence of...financial need, we exercise our discretion and award...attorney fees on appeal." Maughn v. Maughn 102 Utah Adv. Rep. 44 770 P.2d 157, 162 (Utah App. 1989).


The second authority is an opinion filed by the Court of Appeals July 12, 1989.

"Because it is obvious from the record that the trial court's findings were not clearly erroneous, we are convinced that Annette's appeal is frivolous. In such circumstances, Rule 33(a) of this court requires that we

award attorneys fees in a reasonable amount to the respondent." Fife v. Fife, 112 Utah Adv. Rep. 45, 46 (Utah App. 1989).

These authorities are submitted in support of respondent's position that he should be awarded attorney's fees and costs as an offset against a payment due and owing from respondent to appellant on August 1, 1990.

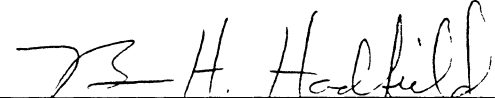
Respectfully submitted,



Ben H. Hadfield
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Attorneys for Defendant-Respondent

CERTIFICATE OF MAILING

I hereby certify that on the 2 day of August, 1989, I mailed a copy of the foregoing to Kelly G. Cardon, Attorney for Plaintiff-Appellant at 3856 Washington Blvd., Ogden, Utah 84403.



Ben H. Hadfield

IN THE UTAH COURT OF APPEALS

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Plaintiff/Appellant,

vs.

LOWELL SHELLEY MUNNS,

Defendant/Respondent

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STATEMENT OF THE ISSUES

1. Did the trial court's decision not awarding attorney's fees to the plaintiff constitute an abuse of discretion?

2. After considering all required factors for an alimony award, did the trial court's decision so vary from the evidence as to constitute a clear abuse of discretion?

3. After considering all of the proper factors in a property division, did the trial court's actual division so vary from the evidence as to constitute a clear abuse of discretion?

4. Are the plaintiff's contentions on appeal so frivolous or in contradiction to the evidence, that attorney's fees should be assessed on appeal against the plaintiff?

STATEMENT OF FACTS

(Respondent differs with some of the statements of fact set forth in the Appellant's Brief. The additional facts are set forth below. Paragraph numbers correspond to the numbers in Appellant's Statement of the Facts.)

5. Plaintiff testified that she had experienced various health problems. On cross-examination, she conceded that her claimed ulcer, hearing loss, and hand problems were not of sufficient magnitude as to affect her employability in the school lunch program. (T. 11/24/87 a.m. p.101).

6. Defendant's ability to earn additional income through overtime decreased dramatically beginning in 1988. During the first five months of that year, the defendant had a total of 20 hours overtime. (6/7/88 T. p. 2).

15. During the marriage the parties acquired a homestead at Elwood consisting of a house on .82 acres with an adjacent unimproved lot of .79 acres. Plaintiff's expert valued the home and .82 acre lot at between \$28,000.00 to \$31,000.00, taking into consideration the repairs that needed to be completed. (Pls. Ex. #2.).

Appellant's reliance on the claimed appraisal by Reed Willis is unfounded and outside of the record. At the conclusion of the November 24th trial, the court ordered that the only additional evidence allowed would be limited to the valuation of the farm property and the "junk". (11/24/87 T. p.m. p. 191, 192; 6/7/88

T. p. 7).

16. The only evidence offered by the plaintiff concerning the value of the Bear River mobile home and property indicated a value of between \$20,000.00 and \$37,000.00. (11/24/87 T. a.m. p. 45). Defendant's expert valued the same property at \$26,000.00. (11/24/87 T. p.m. p. 7, 15.) The evidence cited by plaintiff on appeal as to the appraised value of the Bear River property by Reed Willis was inadmissible and is not a part of the evidence in this case. (11/24/87 p.m. T, pp. 191, 192; 6/7/88 T. p. 7).

17. The trial judge personally viewed and inspected the farm property consisting of two parcels of 154 acres and 148.6 acres respectively. The judge further viewed the Carl Hansen and Curtis Christensen parcels and also the properties cited by appraiser Reed Willis as comparables 1 and 2 in his appraisal. (6/7/88 T. pp.48-49).

18. Evidence of values appraised by Reed Willis for household furniture and appliances was inadmissible and not accepted nor reviewed by the court. (11/24/87 p.m. T. pp. 191, 192; 6/7/88 T. p. 7).

20. The defendant was ordered to assume marital debts totalling \$58,594.49. The monthly debt service obligation on these amounts was \$1,082.48. Additionally, a commercial note

with a balance of \$10,844.52 was due in its entirety in January, 1988. (R. 216 Def. Exhibits Nos. 17 and 18).

SUMMARY OF THE ARGUMENT

1. A portion of the plaintiff's attorney's fees was paid from joint funds leaving a balance of approximately \$1600. Using the court's valuations in its property division, the plaintiff was awarded a total of \$79,888.00 and defendant was awarded \$77,406.00. This creates a difference in favor of the plaintiff in the amount of \$2,482.00. Part of the plaintiff's property is in the form of two substantial cash payments to be made to her from the defendant. The court's decision to classify this as property division which favors the plaintiff rather than as an award of attorney's fees, does not constitute an abuse of discretion.

2. The Findings, Memorandum Decision, and evidentiary records show that the court seriously weighed and considered the required three factors in formulating its alimony award. The order formulated by the court was carefully crafted to ensure the economic survival of both parties. The amount of alimony awarded to the plaintiff was adequate and fair under all of the circumstances presented by the evidence.

3. The trial court divided the property in such a way as to award the plaintiff nearly \$80,000.00 in debt free assets,

which were the assets of the marriage most easily convertible to cash. It was reasonable to allow the defendant a two-year period in which to pay offsetting value to the plaintiff, because the farm property is in imminent danger of foreclosure and there are no funds immediately available.

4. The defendant should be awarded his costs and attorney's fees on appeal. The appellants contentions are not supported by the record and in fact contradict her own testimony and that of her expert witnesses.

DETAIL OF THE ARGUMENT

I.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN NOT AWARDING ATTORNEY'S FEES TO EITHER SIDE.

The Utah Supreme Court has repeatedly stated:

"The decision to make such an award (attorney's fees), together with the amount thereof, rests primarily with the sound discretion of the trial court." Kerr v. Kerr, 610 P.2d 1380, 1384 (Utah 1980). See also Adams v. Adams, 593 P.2d 147 (Utah 1979); Bader v. Bader, 18 Utah 2d 407, 424 P.2d 150 (1967).

On this point as well as in the other issues raised on appeal, plaintiff seems to be taking the position that merely because the trial court did not do as she requested, it abused its discretion.

The trial court found as of January 11, 1988, that the plaintiff had incurred attorney's fees of approximately \$1700.00, a portion of which was paid from joint funds accrued during the marriage, and that the defendant had incurred attorney's fees in excess of \$2,000.00. (R 139, 142, 147, 226 and 233). It appears the only issue which is raised is whether the plaintiff's need for an award of attorney's fees was so great that the court's decision constituted an abuse of discretion.

In considering the issue of need, it is appropriate to consider not only the income of the plaintiff but also the nature and value of assets awarded to her. Based upon the court's findings of value, the plaintiff was awarded \$70,800.00 in property plus cash payments from the defendant totalling \$9,000.00. The property awarded to plaintiff is virtually debt free, whereas defendant was ordered to assume over \$58,000.00 in debts. The time delay making \$4,500.00 due in 1989 and an additional \$4,500.00 payable in 1990 was reasonable under the circumstances.

The court awarded plaintiff real and personal property and a substantial cash payment in a manner that produced a \$2,482.00 surplus or excess to the plaintiff. This amount is substantially more than the attorney's fees which plaintiff sought to be awarded. The fact that the court did not call this differential

an award of attorney's fees does not diminish the fact that the court fashioned an equitable solution.

II.

THE TRIAL COURT, AFTER CONSIDERING ALL REQUIRED FACTORS, MADE A PROPER AND EQUITABLE ALIMONY AWARD.

Numerous Utah appellate cases hold that the trial judge must be allowed wide latitude of discretion in matters relating to alimony, and the court's judgment should not be disturbed unless the facts show it works a manifest inequity. Whitehead v. Whitehead, 16 Utah 2d 179, 397 P.2d 987. See also Gill v. Gill, 718 P.2d 779 (Utah 1986); Bushell v. Bushell, 649 P.2d 85 (Utah 1982).

A. The Trial Court Considered the Proper Factors in Fixing the Alimony Award.

This court in Lee v. Lee, 744 P.2d 1378 (Utah App. 1987) held that the same three factors must be considered in fixing alimony as appellant has cited in her brief. Appellant's brief tacitly acknowledges that the trial court considered these factors, but appellant argues the court's decision manifest a clear abuse of discretion. When considered in light of the evidence presented to the court, these factors show that the court's decision was both reasonable and fair.

1. Plaintiff's Financial Condition and Needs.

Plaintiff's testimony at trial was that her monthly living expenses for herself and her two minor children were \$1,090.00. This excludes the \$259.00 house payment, which appellant acknowledges has now been eliminated. The court awarded the plaintiff \$197.00 per month child support for the minor child, Sharla Munns, which support will continue through May, 1990. The court additionally awarded the plaintiff \$197.00 per month child support in behalf of the minor child, Sheldon Munns, which support shall continue through September, 1993 (R 138, 139, and 230). The court additionally ordered the defendant to pay to plaintiff the sum of \$300.00 per month alimony. (R 231).

There was considerable testimony at trial that the double-wide mobile home located in Bear River City had rented out at \$250.00 to \$300.00 per month and could be so rented in the future. (T. 11/24/87 p.m. p. 115.)

The plaintiff presumably has or will receive \$5500.00 from the sale of the unrecorded interest in the building lot in Elwood. Additionally, the plaintiff is awarded a building lot next to the home which could be sold for \$6,000.00 to \$10,000.00. Finally, the plaintiff will receive during the next two years the sum of \$9,000.00 in cash payments as a property settlement.

These three assets, which easily could be converted to cash, have a value of at least \$20,000.00. Assuming the stability of present interest rates, the plaintiff could place this \$20,000.00 in a federally insured savings institution and earn an interest income of approximately \$150.00 per month.

The mathematical result of these figures is as follows:

\$ 394.00	child support
\$ 300.00	alimony
\$ 250.00	rental income
<u>\$ 150.00</u>	interest income
\$1,094.00	Total Income

Thus Judge Low was more than justified in fixing the alimony award at the sum of \$300.00. An analysis of the plaintiff's needs shows that this amount will provide her with all of the income which she testified she needed, even if she were not to receive any income from her own employment.

2. The Ability of the Party Seeking Alimony to Produce a Sufficient Income for Herself.

The plaintiff's ability to produce sufficient income for herself includes the ability of assets owned by her to generate income. Thus the court was entitled to conclude that the assets awarded to the plaintiff could reasonably generate approximately \$400.00 per month income without dissipating any of the principal. When this figure is added to the amount of child

support as fixed by the child support schedule, it shows that the remaining amount needed by plaintiff to reach her stated income needs of \$1,090.00 per month is \$296.00. The \$300.00 per month alimony award is therefore directly on target.

The evidence at trial was undisputed that the plaintiff is capable of part-time employment. Appellant's brief made numerous references to health problems of the plaintiff. The claims in appellant's brief overstated the extent of the problems and did not conform to the evidence. The following excerpt from the transcript is useful on this point. Defendant's counsel is cross-examining the plaintiff.

"Q: Counsel asked you if you could go to work for the school lunch program. In reference to the school lunch program, does your hearing affect your job?

A: No.

Q: Does your ulcer affect your job?

A: I don't think it would.

Q: Do your hands?

A: Well this one that I just got operated on, it was pretty sore, but they're getting better."
(T. 11/24/87 p.101, lines 14-22).

Concerning her part-time employment with the school lunch program, the plaintiff admitted under cross-examination that if

she were hired as a regular employee, it may generate as much as \$250.00 or \$300.00 per month. (T. 11/24/87 a.m., pp. 86 and 87).

The trial court would clearly have been justified in finding that the plaintiff has the ability to produce approximately \$300.00 per month income, and that therefore her alimony need was actually lower than the \$300.00 per month awarded.

3. The Ability of the Other Spouse to Pay Support.

The defendant's Exhibit No. 18 as well as his testimony at trial (T. 11/24/87 p.m. p. 114-118) demonstrate that the defendant's base take-home pay is \$1935.00 per month. At the time of trial, the debts which were ordered assumed by the defendant plus the child support and alimony obligations left the defendant with the sum of \$258.52 for his monthly living expenses. This sum of \$258.52 was to cover his housing, food, clothing, fuel, insurance and personal expenses. The Bronco payment has now been completed, but the defendant's alimony obligation was increased to \$300.00, the net effect of these developments is that the defendant now has a total of \$410.83 from his base take-home on which he must live. The defendant works overtime whenever possible to create additional income in order to survive. However, the most recent evidence showed that

his income from overtime had been practically eliminated. (T. 6/7/88 p. 7).

Throughout the proceedings the plaintiff contended she was seeking \$850.00 per month alimony. No basis or justification for this figure was ever provided. When added with the child support obligation it substantially exceeds the monthly financial needs to which she testified. Yet plaintiff, on appeal, claims the defendant has the ability to pay her \$850.00 per month alimony. Such an assertion is outrageous and indefensible. In light of the evidence presented to the court it is clear that the District Judge properly considered each of the three factors relevant to the computation of an alimony award, and crafted an award which was both fair and reasonable. If anyone suffers economic hardship as a result of the court's alimony award, it is certainly the defendant and not the plaintiff.

B. Terminating the Alimony When Social Security and Retirement Pension Income Become Available Was Reasonable.

Addendum H of the appellant's brief clearly demonstrates that upon attaining her 62nd birthday, the plaintiff will be entitled to receive social security benefits in an amount of at least \$204.00 per month. That is a projected amount using today's figures. The actual amount could increase due to the defendant's earnings and contributions to the social security

system during the next three years, or due to simple cost of living adjustments in the benefits.

The plaintiff was additionally awarded a one-half interest in all retirement benefits accrued during the marriage in the Morton-Thiokol Pension Plan. Neither of plaintiff's attorneys has yet submitted a Qualified Domestic Relations Order to the court, although paragraph 7 of the Decree specifies that the court will enter such an order once it is prepared by plaintiff's counsel (R. 231). Once such an order has been entered, the plaintiff would be free to select from among several methods of distribution authorized under the retirement plan. She would not be restricted, even though the defendant may choose a different method of distribution or may continue employment after she commences receiving benefits. IRC § 414(p)(3). (Full text Addendum A). Attached to this brief as Addendum B is a copy of a letter from the Morton-Thiokol, Inc. Pension Plan computing the defendant's retirement benefits as of September 8, 1988, the date of the final Divorce Decree. The computation shows that the plaintiff would receive the sum of \$626.93 per month at age 65. The plaintiff's one-half of this amount would be \$313.00 per month. Assuming a discount due to the plaintiff beginning to draw her benefits at age 62, the plan can still be reasonably expected to yield her at least \$250.00 per month.

The criteria to be considered by the court in fixing an alimony award are at that point in time sufficiently changed to justify the termination of further alimony. When the plaintiff reaches age 62 in calendar year 1991, her needs will decrease as one of the minor children obtains majority. The \$1,090.00 per month need to which she testified at trial, might conceivably reduce to approximately \$970.00 per month for her and the remaining one minor child.

Secondly, in 1991, the plaintiff's ability to produce a sufficient income for herself increases. A scenario of the plaintiff's 1991 monthly income is as follows:

\$ 197.00	child support
\$ 0	alimony
\$ 250.00	rental income
\$ 150.00	interest income
\$ 204.00	Social Security (estimate)
<u>\$ 250.00</u>	Morton-Thiokol Pension (estimate)
\$1,051.00	Total Income
plus (?)	Any income earned by plaintiff from part-time employment

The plaintiff incorrectly argues that alimony should supplement her income during her retirement. The Utah Supreme Court has previously addressed this issue as to whether alimony should continue during retirement and has stated:

"Here, the thrust of defendant's testimony is that she needs this alimony in order to augment her retirement income...

one of the functions of alimony is not to provide retirement income. We do not want to confuse alimony with annuity." Dehm v. Dehm, 545 P.2d 525, 528, 529 (Utah 1976)

In this present case the plaintiff will clearly receive two separate annuities in the form of social security and the Morton-Thiokol, Inc. Pension Plan. All of the evidence indicates that at age 62 the plaintiff will be able to provide for her financial needs.

III

THE TRIAL COURT MADE A FAIR AND EQUITABLE PROPERTY DIVISION

The appellant's brief contains the following summary and observations concerning review of property divisions.

"The Utah Supreme Court has also stated that the duty of the trial court is to 'make a distribution of property and income so that the parties may readjust their lives to their new circumstances as well as possible.' Gardner vs. Gardner 748 p. 2d 1076, 1078. Obviously, in order to meet this goal, the trial court must have considerable flexibility in its distributions.

The trial court in this case has carefully crafted a property distribution plan which appears to benefit the parties equally." (Appellant's brief, pp. 35-36).
(Emphasis Added)

Appellant concedes that the factors which should be considered by a trial court when it allocates property and debts were, in fact, considered by the District court in this case.

Appellant asserts, however, that the District court should have ordered all of the property and assets sold and the proceeds divided evenly between the parties. This specious proposal overlooks the very root of the litigation. These two parties simply do not agree on things. It would be impossible to get both sides to agree on a price at which any particular item would be sold. The trial court would become the referee for literally hundreds of disputes over individual sales.

Appellant argues that the court had insufficient evidence concerning the value of the various assets. Trial courts must decide matters on the evidence which is presented to them. If there was any inadequacy in the evidence of values, the fault lies with the plaintiff and her counsel. Plaintiff and her attorney had several months advance notice that the divorce trial would be held on November 24, 1987. On that date she and her attorney came to court with numerous documents, including two written "appraisals". It was obvious that no effort had been made to have the individuals who prepared those appraisals present in court to testify. Plaintiff and her attorney spent much of the day trying to introduce into evidence documents which were plainly hearsay. Near the end of the trial on November 24, the following exchange occurred.

"Mr. Vlahos: My only concern is values, and I will be honest with you, your Honor. Mr. Munns won't even give us--not even on a gun--he won't even give me a value.

The Court: No, but he's given more values than your client has today. I think it cuts both ways." (T. 11/24/87 p.m. p. 184, lines 5-11).

At the conclusion of the November 24 trial, plaintiff's attorney asked the court for a further hearing at which to present evidence. The following exchange occurred.

"The Court: ...if Mr. Vlahos had rested his case--I don't believe he ever had.

Mr. Vlahos: No.

The Court: --then I would deny the motion. It may seem like a technical matter, but I think it has to turn on technical matters..." (T. 11/24/87 p.m. pp. 186-187).

A review of the record reveals that, in fact, Mr. Vlahos had rested his case. (T. 11/24/87 p.m. p. 93, lines 1-2). It is obvious that the trial court bent over backwards to allow the plaintiff and her attorney to present evidence on the issue of values so long as such information met the requirements of the rules of evidence.

The evidence concerning the various assets is summarized as follows:

1. The family home located on a lot of .82 acres with an adjoining lot of .79 acres was valued by the court at \$30,000.

The only evidence presented by the plaintiff was Plaintiff's Exhibit 2, which was a letter from a realtor fixing the value at \$28,000 to \$31,000 for the home and .82 acres. The defendant's expert witness, Troy Miller, fixed the value for the home and .82 acres at \$32,000. At the conclusion of the November 24, 1987 trial, counsel for the plaintiff agreed that there had been sufficient evidence concerning the home and that there was no dispute concerning its value.

"Mr. Hadfield: "...appraisals should be limited to the junk and to the farm. We did have a real estate broker appraisal on the house and the Bear River City home and I don't know that we have a dispute on that, do we?

Mr. Vlahos: No.

The Court: I agree." (T. 11/24/87 p.m. pp. 191-192)

When the parties were next in court, over six months later, the plaintiff attempted to have her expert, Reed Willis, provide evidence concerning the value of the home.

"Mr. Hadfield: ...I want to interpose an objection and I'll just do it once so that we can save time. I think I already read Mr. Vlahos and the court from the transcript of the conclusion of the trial where I said we're limiting this to the farm. We don't have a dispute on the home, the Bear River property. Mr. Vlahos said 'No, I don't have any dispute on those.' The court said 'That's right, we don't.' If we could limit this to the farm property, that's what we--

The Court: I think that's right, Mr. Vlahos."

Appellant's brief relies almost entirely on the value placed on the home by Reed Willis. This value and any evidence concerning it, were never a part of the evidence in this action. Appellant's arguments in that regard are totally misdirected.

2. The defendant valued the farm at \$75,650 based on two sales which were very close to the time of the trial and located adjacent to the subject property. The defendant further testified that approximately 60 acres of the farm was nonproductive and non-usable. (T. 11/24/87 p.m. p. 96).

At the further hearing on June 7, 1988, the plaintiff produced Reed Willis as an expert real estate appraiser. Under cross-examination, Mr. Willis' opinion as to the value of the farm property went from \$190,000 down to \$122,500 and then down to \$112,000 in a period of less than ten minutes. (T. 06/07/88, pp. 15, 16, & 20). This type of performance by an expert witness is not likely to inspire confidence that his opinion is accurate.

Mr. Willis based his appraisal on what he claimed were three comparable sales of property. His comparable No. 3 was a parcel of land near the Chesapeake Duck Club which was sold for use as a duck hunting club.

"The Court: ...you have reminded me of something I wanted to ask Mr. Willis. That is, regarding this duck club. If

agricultural land is sold to a duck club for duck hunting purposes, and the highest and best use of that land is duck hunting and agricultural as opposed to land for which is not duck hunting, but simply agricultural, wouldn't that increase the value of the duck hunting club or duck hunting land?

The Witness: Yeah. But what's happened is out in those areas, they buy whatever parcels come up. And they're not all contiguous.

The Court: Still, they buy land out there that is usable for duck hunting, where this land, I suppose, the ducks aren't quite as plentiful.

The Witness: Right." (T. 6/7/88, p. 35, lines 6-19).

"The Court: If I were hunting ducks, I would hunt near the sloughs and Chesapeake Duck Club as opposed to the Munns property.

The Witness: Right." (T. 6/7/88, p. 37, lines 8-11).

It is obvious from the foregoing exchanges that the trial court felt that this was a rather unreliable and bizarre "comparable".

At the June 7, 1988 hearing, rather than present any further evidence, the defendant simply requested the court to physically view the Munns farm property and those parcels identified by Mr. Willis as comparables No. 1 and 2. Plaintiff's counsel did not object to this arrangement. Both parties and their attorneys, along with the trial judge, then traveled to the location of the

farm property. Because the Curtis Christensen and Carl Hansen parcels adjoin the Munns' property, they were also viewed by the court. The court obviously used the observations which it made at this time in determining the value of the Munns' farm property as it related to the Christensen and Hansen properties and to comparables No. 1 and 2 of Mr. Reed Willis' appraisal.

3. The junk vehicles and scrap metal, including inoperable farm equipment, etc. was valued by the court at \$10,000. The defendant testified that a representative from Atlas Steel had viewed the material and had made a bid of \$10,000 for the lot. Plaintiff's expert, Reed Willis, valued the cars, trucks, and farm implements as scrap metal at \$7,500. He did not place a value on the Thiokol scrap metal other than to assert that since it was originally purchased for approximately \$21,000, it must now have a value of at least \$21,000. Under cross-examination Mr. Willis was asked if a family which purchased \$5,000 worth of groceries in a year would at the conclusion of the year have \$5,000 worth of groceries in the pantry. Mr. Willis conceded that this method of valuation was somewhat ludicrous. (T. 6/7/88, p. 22). Mr. Willis further conceded that he had no idea how much of the metal had been sold since the \$21,000 purchase. (T. 6/7/88 p. 23).

Appellant's brief at page 43 states:

"Plaintiff's records show that defendant spent in excess of \$20,000 purchasing scrap metal from Thiokol, and plaintiff believes that none of this scrap metal has been sold." (Emphasis added)

This assertion is in flat contradiction to the evidence presented at trial by the plaintiff.

"Q: Do you know whether that scrap has even been sold?

A: He probably sold some of it to different people that would come and want some scrap.

Q: There isn't that much metal out there now as far as you know?

A: He's just sold the better part of it.

Q: The better part of it is sold?

A: Right...." (T. 11/24/87 a.m. p. 66, lines 12-20).

The defendant, himself, testified at trial concerning the Thiokol scrap metal as follows:

Q: The scrap metal that was shown on one of the plaintiff's exhibits from Morton Thiokol was something like 920,000 pounds. Has most of that been sold over the years?

A: Yes, sir.

Q: Do you have any idea what portion would still remain?

A: Well, the bad portion, I suspect. A lot of the good stuff people has already had their pick and took it.

Q: But that's included in this \$10,000 figure.

A: Yes, sir." (T. 11/24/87 p.m. p. 110 lines 5-17).

4. Concerning the household furnishings, the defendant testified that their present value was approximately \$5,000, including virtually everything in the family home in the way of personal property. (T. 11/24/87 p.m. p. 105). The plaintiff claimed that the personal property had a value of approximately \$780 based upon a short list containing only six items. (Plaintiff's Exhibit #4, p. 15). The plaintiff admitted under cross-examination that she had omitted significant items of personal property from her list of the property in the home. (T. 11/24/87 a.m. pp. 88-89). Based upon the evidence presented to the court at trial, the court was certainly justified in fixing the value of the household furnishings and assets at \$3,000.

5. Appellant's brief claims that a review of the exact items distributed reveals that the plaintiff has received properties which are not easily converted to cash. Again, appellant's assertions are in direct contradiction to the testimony presented by her own expert, Reed Willis.

Q: Over on page 11 again, you made an observation that I just want to direct the court's attention to. You feel that in order for marketability of the three properties, the mobile home in Bear River City would sell easiest, the single home in Elwood would sell

next, and the farmland would be hardest to sell. Is that correct?

The Witness: That--that would probably be right." (T. 6/7/88, p. 23).

Appellant additionally claims in her brief that used farm machinery sells better than new farm machinery and the defendant may be able to sell some of the used farm machinery and easily generate cash. (Appellant's brief, p. 45). The plaintiff called Brent Baugh as an expert witness concerning the value of used farm equipment. The following excerpt is from his testimony under cross-examination.

Q: Things have been real tough the past few years as far as selling agricultural equipment?

A: Yes.

Q: In fact, if Mr. or Mrs. Munns would be to place items for sale at the value listed, they may sit there for a year looking for a buyer, wouldn't they?

A: They very well could." (T. 11/24/87 p.m. p. 27).

In both of the above instances the excerpts quoted are evidence presented by plaintiff's own witnesses. One other item worthy of note is that over ten percent of the plaintiff's property award is in the form of actual cash. The plaintiff's argument that the particular items awarded to her work a hardship for her simply is not supported by any of the evidence.

6. The trial court did not abuse its discretion in allowing the defendant two years in which to make the payments for adjusting the property values. A review of the entire transcript and all of the exhibits makes clear that there was absolutely no cash available for either of the parties. The loans which were ordered assumed by the defendant were delinquent and the farm is in danger of foreclosure. (T. 11/24/87 p.m. p. 34). (See Addendum C, letter of December 21, 1988 from respondent's counsel to appellant's counsel). The defendant is living on approximately \$410 per month plus whatever he can make on the side. (T. 11/24/87 p.m. pp. 114-118, Defendant's Exhibit #18). Under these circumstances the party suffering a hardship as a result of the court's order is the defendant, not the plaintiff. Producing the two required payments of \$4,500 each will, at best, be very difficult. To argue that the cash should have been made payable immediately is to ignore the entire evidentiary record.

IV

**THE DEFENDANT RESPONDENT SHOULD BE AWARDED HIS COSTS
AND ATTORNEY'S FEES ON APPEAL.**

The appellant concedes that the trial court weighed all of the required considerations on the issues of (1) attorney fees,

(2) alimony, and (3) property division. Appellant argues that despite these proper considerations, the trial court abused its discretion in the awards which it made.

Appellant fails to tie her claims of abuse of discretion to the actual evidentiary record. There are numerous claims and assertions in appellant's brief which are in direct contradiction to the evidence provided by the plaintiff and her experts at trial. Appellant quotes liberally from those portions of the Reed Willis appraisal which were not even allowed into evidence. (Specifically, his valuations concerning the home, Bear River property, and the home furnishings). The only trace of those aspects of his appraisal to be found anywhere in the transcripts are the excerpts quoted by respondent in this brief wherein the trial court acknowledged that it would not receive evidence on those issues.

Rule 33(a) of the Rules of the Court of Appeals provides that:

"If the court determines ... an appeal taken under these rules is...frivolous...it shall award just damages and single or double costs, including reasonable attorney's fees, to the prevailing party."

Further, a frivolous appeal has been defined as:

"one having no reasonable, legal or factual basis as defined in Rule 40(a)". O'Brien v. Rush, 744 P.2d 306, 310 (Utah App. 1987);

Brigham City v. Mantua Town, 754 P.2d 1230,
1236 (Utah App. 1988).

Defendant-Respondent has no desire to harm plaintiff, but this appeal threatens the defendant with financial ruin. A foreclosure of the farm property would take approximately 80% of all of the property which the defendant was awarded from the marriage. The defendant is living on \$410.00 per month. The defendant must produce two payments to the plaintiff in the amount of \$4500.00 each during the next 18 months. Due to the total lack of any basis in the trial record for the allegations made by appellant, respondent requests that he be awarded his costs and attorney's fees on this appeal, said amount to be offset against the first \$4500.00 payment due to the plaintiff pursuant to the Decree.

CONCLUSION

The trial court heard and viewed all of the evidence, and the court's findings and decision are amply supported by the record. The appellant's "version" of facts does not find support from the record or the trial court's findings.

Therefore, this court should affirm the district court's decision, dismiss the above-captioned appeal, and award

respondent's costs, and remand to the district court for a determination of attorney's fees awarded on appeal.

RESPECTFULLY SUBMITTED this _____ day of May, 1989.

MANN, HADFIELD & THORNE

By _____
Ben H. Hadfield
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) copies of this Respondent's Brief to the following:

Kelly G. Cardon, Judy Dawn Barking
Attorneys for Appellant
3856 Washington Blvd.
Ogden, Utah 84403

this _____ day of May, 1989.

Ben H. Hadfield

requirements listed in paragraph (3) are met for periods after the close of the 1-year period referred to in paragraph (2); except that years of service for the recipient shall be determined by taking into account the entire period for which the leased employee performed services for the recipient (or related persons).

(5) **SAFE HARBOR.**—This subsection shall not apply to any leased employee if such employee is covered by a plan which is maintained by the leasing organization if, with respect to such employee, such plan—

(A) is a money purchase pension plan with a nonintegrated employer contribution rate of at least 7½ percent, and

(B) provides for immediate participation and for full and immediate vesting.

(6) **RELATED PERSONS.**—For purposes of this subsection, the term “related persons” has the same meaning as when used in section 103(b)(6)(C).

Source: New.

Amendments:	Sec. as amended effective:	
P.L. 98-369, § 526(b)(1), 713(i)		preceding subparagraph (A) and inserting in lieu thereof “any person who is not an employee of the recipient and”.
P.L. 97-248, § 248(a)		The above amendment applies to tax years beginning after December 31, 1983.
		P.L. 97-248, § 248(a):
P.L. 98-369, § 526(b)(1), 713(i):		Added new subsection (n) as shown above.
Act Secs. 526(b)(1) and 713(i) amended Code Sec. 414(n)(2) by striking out “any person” in the material		The above amendment is effective for tax years beginning after December 31, 1983.

[Sec. 414(o)]

(o) **REGULATIONS.**—The Secretary shall prescribe such regulations (which may provide rules in addition to the rules contained in subsections (m) and (n)) as may be necessary to prevent the avoidance of any employee benefit requirement listed in subsection (m)(4) or (n)(3) through the use of—

- (1) separate organizations,
- (2) employee leasing, or
- (3) other arrangements.

Source: New.

Amendments:	Sec. as amended effective:	P.L. 98-369, § 526(d)(1):
P.L. 98-369, § 526(d)(1)		Act Sec. 526(d)(1) added Code Sec. 414(o), above.
		The above amendments are effective on July 18, 1984.

[Sec. 414(p)]

(p) **QUALIFIED DOMESTIC RELATIONS ORDER DEFINED.**—For purposes of this subsection and section 401(a)(13)—

(1) IN GENERAL.—

(A) **QUALIFIED DOMESTIC RELATIONS ORDER.**—The term “qualified domestic relations order” means a domestic relations order—

(i) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(ii) with respect to which the requirements of paragraphs (2) and (3) are met.

(B) **DOMESTIC RELATIONS ORDER.**—The term “domestic relations order” means any judgment, decree, or order (including approval of a property settlement agreement) which—

(i) relates to the provision of child support, alimony payments, or marital property rights to a spouse [, former spouse], child, or other dependent of a participant, and

(ii) is made pursuant to a State domestic relations law (including a community property law).

(2) **ORDER MUST CLEARLY SPECIFY CERTAIN FACTS.**—A domestic relations order meets the requirements of this paragraph only if such order clearly specifies—

(A) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(B) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(C) the number of payments or period to which such order applies, and

(D) each plan to which such order applies.

(3) **ORDER MAY NOT ALTER AMOUNT, FORM, ETC., OF BENEFITS.**—A domestic relations order meets the requirements of this paragraph only if such order—

(A) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(B) does not require the plan to provide increased benefits, (determined on the basis of actuarial value), and

(C) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(4) **EXCEPTION FOR CERTAIN PAYMENTS MADE AFTER EARLIEST RETIREMENT AGE.**—

(A) **IN GENERAL.**—In the case of any payment before a participant has separated from service, a domestic relations order shall not be treated as failing to meet the requirements of subparagraph (A) of paragraph (3) solely because such order requires that payment of benefits be made to an alternate payee—

(i) on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(ii) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of the benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(iii) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of clause (ii), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(B) **EARLIEST RETIREMENT AGE.**—For purposes of this paragraph, the term "earliest retirement age" has the meaning given such term by section 417(f)(3), except that in the case of any defined contribution plan, the earliest retirement age shall be the date which is 10 years before the normal retirement age (within the meaning of section 411(a)(8)).

(5) **TREATMENT OF FORMER SPOUSE AS SURVIVING SPOUSE FOR PURPOSES OF DETERMINING SURVIVOR BENEFITS.**—To the extent provided in any qualified domestic relations order—

(A) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of sections 401(a)(11) and 417, and

(B) if married for at least 1 year, the surviving spouse shall be treated as meeting the requirements of section 417(d).

A plan shall not be treated as failing to meet the requirements of subsection (a) or (k) of section 401 which prohibit payment of benefits before termination of employment solely by reason of payments to an alternate payee pursuant to a qualified domestic relations order.

(6) **PLAN PROCEDURES WITH RESPECT TO ORDERS.**—

(A) **NOTICE AND DETERMINATION BY ADMINISTRATOR.**—In the case of any domestic relations order received by a plan—

(i) the plan administrator shall promptly notify the participant and any other alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(ii) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(B) **PLAN TO ESTABLISH REASONABLE PROCEDURES.**—Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders.

(7) **PROCEDURES FOR PERIOD DURING WHICH DETERMINATION IS BEING MADE.**—

(A) **IN GENERAL.**—During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall segregate in a separate account in the plan or in an escrow account the amounts which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(B) **PAYMENT TO ALTERNATE PAYEE IF ORDER DETERMINED TO BE QUALIFIED DOMESTIC RELATIONS ORDER.**—If within 18 months the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (plus any interest thereon) to the person or persons entitled thereto.

(C) **PAYMENT TO PLAN PARTICIPANT IN CERTAIN CASES.**—If within 18 months—

(i) it is determined that the order is not a qualified domestic relations order, or

(ii) the issue as to whether such order is a qualified domestic relations order is not resolved,

then the plan administrator shall pay the segregated amounts (plus any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(D) **SUBSEQUENT DETERMINATION OR ORDER TO BE APPLIED PROSPECTIVELY ONLY.**—Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period shall be applied prospectively only.

(8) **ALTERNATE PAYEE DEFINED.**—The term “alternate payee” means any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(9) **CONSULTATION WITH THE SECRETARY.**—In prescribing regulations under this subsection and section 401(a)(13), the Secretary of Labor shall consult with the Secretary.

Source: New.

Amendments:

**Sec. as amended
effective:**

P.L. 98-397, § 204(b)

P.L. 98-397, § 204(b):

Added Code Sec. 414(p), above.

The above amendment is effective on January 1, 1985, except that in the case of a domestic relations order entered before such date, the plan administrator—

(1) shall treat such order as a qualified domestic relations order if such administrator is paying benefits pursuant to such order on such date, and

(2) may treat any other such order entered before such date as a qualified domestic relations order even if such order does not meet the requirements of such amendments.

Special rules appear in the notes for H.R. 4280 following Code Sec. 401(a).

[Sec. 415]

SEC. 415. LIMITATIONS ON BENEFITS AND CONTRIBUTION UNDER QUALIFIED PLANS.

[Sec. 415(a)]

(a) **GENERAL RULE.**—[*]

[*] § 2004(d), P.L. 93-406, provides as follows:

“(d) **Effective Date.**—

“(1) **General rule.**—The amendments made by this section shall apply to years beginning after December 31, 1975. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the provisions of this paragraph.

“(2) **Transition rule for defined benefit plans.**—In the case of an individual who was an active participant in a defined benefit plan before October 3, 1973, if—

“(A) the annual benefit (within the meaning of section 415(b)(2) of the Internal Revenue Code of 1954) payable to such participant on retirement does not exceed 100 percent of his annual rate of compensation on the earlier of (i)

October 2, 1973, or (ii) the date on which he separated from the service of the employer,

“(B) such annual benefit is no greater than the annual benefit which would have been payable to such participant on retirement if (i) all the terms and conditions of such plan in existence on such date had remained in existence until such retirement, and (ii) his compensation taken into account for any period after October 2, 1973, had not exceeded his annual rate of compensation on such date, and

“(C) in the case of a participant who separated from the service of the employer prior to October 2, 1973, such annual benefit is no greater than his vested accrued benefit as of the date he separated from the service.

[The next page is 4383-23.]

Internal Revenue Code

Sec. 415(a)

MORTON THIOKOL, INC. PENSION PLAN**ABOUT YOU**

Name LS MUNNS # 11735
Social Security Number 528-32-0689 Birth Date 8-9-28
Benefit Service Date 1-1-84 Vesting Service Date 4-1-74
Accrued Benefit Calculated as of 9-8-88

**ACCRUED
BENEFIT
INFORMATION**

The amount of your Accrued Benefit per month payable as a Life Annuity commencing at age 65 is \$ 626.⁹³

- ☒ You are 100% Vested in this Accrued Benefit
☐ You are 0% Vested in this Accrued Benefit and will be 100% vested on _____

This Accrued Benefit assumes that you will not choose to have 50% of your reduced pension payment continued to your spouse after your death. The amount of benefit which you may receive under the Plan will depend on when your pension payments begin and the method of payment you elect. If you die after you are 100% Vested but before your pension payments begin and you do not have an eligible surviving spouse your survivor will not be entitled to a benefit. You should refer to the Pension Plan section of your Employee Benefits Hand Book for more details on this plan.

Although every effort has been made to assure the accuracy of this statement, it is subject to correction for any errors and benefits will be paid in accordance with the provisions of the Retirement Plan Document. If any statement does not appear correct or if you wish to review the Plan records, you should contact the Personnel Department.

**COMPANY
USE ONLY**

Prepared By

Connie Morgan
(Business Unit Personnel Department)

Date

Apr 26, 19

REED W HADFIELD
JEFF R THORNE
BEN H HADFIELD

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P O BOX 7
BRIGHAM CITY, UTAH 84302-0906
(801) 723-3404

WALTER G MANN RETIRED

December 21, 1988

Mr. Kelly G. Cardon
427 27th Street
Ogden, Utah 84401

Re: Munns vs Munns

Dear Kelly:

I am writing in response to your letter of December 12, 1988, wherein you requested that Shelley Munns consent to the proposed sale of the Bear River City property which was awarded to your client.

The Bear River City property is presently titled in the name of Shelley Munns. I have an executed quit-claim deed in my file transferring title to your client pursuant to the divorce decree. Mr. Pete Vlahos was provided quit-claim deeds on the farm property which the decree awarded to Shelley. We would very much like to see the deeds exchanged so that both parties can do whatever they find necessary to preserve these assets or utilize them as needed. The farm is in danger of foreclosure because of arrearages on the trust deed. Shelley cannot refinance so long as the appeal is pending.

If you can persuade Mary to drop at least that portion of the appeal disputing the property division and allocation of debts, we would be more than happy to provide you with quit-claim deeds to all of the real estate which was awarded to Mary. In exchange, of course, we would require quit-claim deeds on the real estate which was awarded to Shelley. If Mary refuses this proposal, her present sale may be lost, the farm may be lost, and everyone, including Mary, will suffer. Would you please try to reason with her on this.

Very truly yours,

MANN, HADFIELD & THORNE

By _____

BHH/pj
cc: Shelley Munns