

1998

# Oletta Cummings v. Clyde Kay Cummings : Brief of Appellant

Utah Court of Appeals

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981307

UTAH COURT OF APPEALS

OLETTA CUMMINGS,	)	
	)	
Appellee,	)	Case No. 981307
	)	
vs.	)	
	)	Priority No.
CLYDE KAY CUMMINGS,	)	
	)	
Appellant,	)	
	)	

**BRIEF OF APPELLANT**

Appeal from the Ruling of the Third District Court, Salt Lake County, State of Utah  
The Honorable Glenn K. Iwasaki, Presiding

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## JURISDICTION

Pursuant to section 78-2a-3(i) of the Utah Code, this Court has jurisdiction of this case which is an appeal of a domestic relations case from the district court.

### STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Are the trial court's Findings of Fact and Conclusions of Law, based on the record evidence before it, clearly erroneous and unjust in that they are unsupported by evidence in the record and contrary to the Court's express intended equal division of the marital assets of the parties?

#### Standard of Review:

(a) "[T]he findings must embody sufficient detail and include enough subsidiary facts to clearly show the evidence upon which they are grounded. *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah App. 1991);

(b) "[W]e reverse a trial court's finding of fact only if, after marshaling all relevant evidence from the record, the appellant demonstrates that the finding was clearly erroneous. *Fife v. Fife*, 777 P.2d 512 (Utah App. 1989);

(c) "Our standard of review in divorce proceedings allows us to disturb the action of the trial court only when the evidence clearly preponderates to the contrary or the trial court has abused its discretion or misapplied principles of law. *Wiese v Wiese*, (Utah 1985);

2. Does the trial court's division of the marital estate demonstrate a clear and prejudicial abuse of discretion?

Standard of Review: "Trial courts have considerable discretion in determining alimony and property distribution in divorce cases, and will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated. *Howell v. Howell*, 806 P.2d 1209 (Utah App. 1991).

### DETERMINATIVE PROVISIONS

There are no determinative provisions that control the outcome of this case.

## STATEMENT OF THE CASE

### NATURE OF THE CASE

Clyde Kay Cummings and Oletta Cummings were married for approximately 40 years. Mrs. Cummings initiated these divorce proceedings in August 1992. A Decree of Divorce was entered April 7, 1995 an Appeal was taken before this Court Case No. 950504. In decision rendered December 19, 1996 this Court remanded the case to the trial court for further findings. The trial court determined to hold a trial on the issues remanded. Following trial the Court entered its Amended Finding of Fact and Conclusions of Law upon remand, May 27, 1998.

The principal focus of this case is the division of marital assets, including the business land and building. The division of assets between the parties was changed significantly by the trial court on remand. The trial court amended its previous findings. Instead of awarding all of the business building and land to plaintiff, the trial court awarded 75% of the building and land value to Mrs. Cummings and awarded 25% of the building and land value to Mr. Cummings. The trial court's division of marital assets was specifically expressed and intended to achieve a 50/50 division of the marital estate. However, the court's division of property did not achieve its expressed purpose. The Court without any findings, facts, reasoning or explanation as to why the trial court deviated from a 50/50 division of marital assets awarded to Mrs. Cummings 66% of the marital assets and Mr. Cummings received 34% of the marital assets.

### COURSE OF PROCEEDINGS

The genesis of this case began in late 1992 when Mrs. Cummings filed for divorce from her husband of thirty-eight years and attempted to take over the family business its property and

building.

The original Findings of Fact and Conclusions of Law were signed by the trial court on April 7, 1995. Issues concerning the division of assets were appealed by Mr. Cummings.

The Utah Court of Appeals in its decision rendered December 19, 1996, remanded the case for further findings as to the Court's valuation of certain assets. The trial court elected to have a trial as to those values and upon completion of trial entered its Amended Findings of Fact distributing the marital assets substantially different than was done in the original decree the substantial change in distribution was based upon the evidence adduced at trial. In its Amended Finding of Fact the Court specifically expressed its intent to divide the marital assets equally between the parties. The Court made no findings as to why any divergence from an equal division of marital assets was equitable and proceeded to divide the marital assets 66% to Mrs. Cummings and 34% to Mr. Cummings.

#### **DISPOSITION IN COURT BELOW**

The trial court entered Amended Findings of Fact and Conclusions of Law and Amended Decree of Divorce, which materially and substantially altered and changed the distribution of marital assets.

#### **STATEMENT OF FACTS**

##### **General Background**

1. Mrs. Cummings filed for separate maintenance or in the alternative for divorce on September 1, 1992. (tr. 1 p.1)
2. Mr. and Mrs. Cummings were married on July 1, 1954 and had seven children, all of

whom were emancipated adults at the time Mrs. Cummings filed for divorce. Complaint ¶ 2 & 4.

3. During the course of their marriage, the parties experienced irreconcilable differences which made the continuation of the marriage impossible. Complaint ¶ 16.

4. Mrs. Cummings' Complaint lists a general statement of her ex-husband's property, along with an estimate of its value. Complaint ¶ 20.

5. Findings of Fact and Conclusions of Law were entered April 7, 1995, (tr. 4 p. 1295) which specifically provides as a Finding of Fact that the Court's intent was to divide the marital assets equally between the parties. The Court's language was to achieve a 50/50 division of marital assets. "37) With an eye to dividing the marital assets of ;the parties in a way which would allow the business to continue in operation and which is most nearly and equitable and 50/50 division . . ." (tr. 4 p. 1308).

6. The Court awarded the business to defendant (tr. 4 p. 1309) and the business land and building to plaintiff (tr. 4 p. 1308 and 1309)

7. The decision of this Court on appeal was to remand this case for further findings concerning the valuation of the closely held business and any amendments to the distribution of marital assets that such reevaluation would require. (tr. 6 p. 2152-2153)

8. The trial court elected to hold a trial on remand as to that evaluation of the business and the division of marital assets. (tr. 6. p. 2165) Upon completion of trial the Court entered its Amended Findings of Fact on May 27, 1998, significantly and substantially changing the division of marital assets between the parties. (tr. 7 p. 2608)

9. The trial court in its Amended Findings of Fact reiterated its express intent to divide the

marital assets equally between the parties on a 50/50 basis. (tr. 7 p. 2623)

10. Without any findings, facts, reasoning or explanation the Court refused to divide the marital assets equally between the parties. The trial court awarded Mrs. Cummings 66% of the marital assets and awarded Mr. Cummings 34% of the marital assets. (See Exhibit "A" Addendum)

11. The inequitable distribution of marital assets is clearly shown on Addendum "A" attached hereto and incorporated herein by reference. Addendum "A" references each paragraph of the Amended Findings of fact and the unequal division of marital assets which occurred.

#### **SUMMARY OF ARGUMENT**

This appeal is taken to seek a determination that the trial court abused its discretion in failing to meet it's own stated purpose of dividing the marital assets equally between the parties and failing to provide any findings, facts, reasoning or explanation as to why an equal division of marital assets was not achieved. The case should be remanded for this court to make such findings as to the reasons for not achieving an equal division of marital assets or to divide the marital assets in the equal division as intended by the court.

#### **ARGUMENT**

##### **I. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO DIVIDE THE MARITAL ASSETS EQUALLY BETWEEN THE PARTIES AS SPECIFICALLY PROVIDED IN FINDINGS OF FACT**

###### **A. Issue**

Whether it is reversible error when the trial court specifically stated that it would divide the marital estate 50/50 between the parties, but in fact divided the marital estate 66% to 34% without

providing any findings, facts, reasoning or justification therefore.

## B. Analysis

### i. Standard Of Review

In divorce proceedings, the trial court is traditionally given considerable discretion in fashioning an equitable property distribution. *Jones v. Jones*, 700 P.2d 1072, 1074 (Utah 1985); *Sampinos v. Sampinos*, 750 P.2d 615, 618 (Utah Ct. App. 1988). Absent an abuse of discretion, the court's findings will not be disturbed unless they are clearly erroneous, that is, against the clear weight of evidence, or unless the court determines that a mistake has been made. *Weston v. Weston*, 773 P.2d 408, 410 (Utah Ct. App. 1989); *Rothe v. Rothe*, 787 P.2d 534, 535-36 (Utah Ct. App. 1990); *Dunn v. Dunn*, 802 P.2d 1314 (Utah Ct. App. 1990). In review of numerous divorce appeals a 66% to 34% distribution is not uncommon nor so outlandish to merit automatic review by an appeals court.

To permit appellate review of the property distribution, the distribution must be based upon adequate factual findings and must be in accordance with the trial courts expressed intent and within the standards set by the state's appellate courts. *Haumont v. Haumont*, 793 P.2d 421, 424 (Utah Ct. App. 1990); *Munns v. Munns*, 790 P.2d 116, 118 (Utah Ct. App. 1990). The property division must be in accord with the courts expressed intent. Several court decisions have required that the failure to make findings on all material issues, constitutes reversible error "unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.'" *Acton v. J.B. Deliran*, 737 P.2d 996, 999 (Utah 1987) (quoting *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983))

In addition, the findings must be sufficiently detailed and consist of enough subsidiary facts to reveal the steps the court took to reach its conclusion on each factual issue presented. *Carlton v. Carlton*, 756 P.2d 86 (Ct. App. 1988); *Acton*, 737 P.2d at 999; *Lee v. Lee*, 744 P.2d 1378, 1380 (Utah Ct. App. 1987). There is a significant lack of factual findings in the present case as to the disparity of the distribution of marital assets. The failure of the trial court to provide any Findings, reasoning, facts, explanation, or justification for the property division contrary to the court's own expressed intent is reversible error.

## ii. Findings

Recent case law is clear that if the trial court failed to enter specific, detailed findings supporting its financial determinations, then the court abused its discretion. In cases tried in equity to the bench, the court is required to 'find the facts specially' and thus ground its decision on findings of fact which resolve the material factual uncertainties and are expressed in enough detail to enable a reviewing court to determine whether they are clearly erroneous." *Erwin v. Erwin*, 773 P.2d 847, 848-49 (Utah App. 1989) (quoting Utah R. Civ. P. 52(a)). "To ensure the court acted within its broad discretion, the facts and reasons for the court's decision must be set forth fully in appropriate findings and conclusions." *Painter v. Painter*, 752 P.2d 907, 909 (Utah App. 1988) (citations omitted); accord *Linam v. King*, 804 P.2d 1235, 1237 (Utah App. 1991). These findings must be adequate to ensure on appeal "that the trial court's discretionary determination was rationally based." *Painter*, 752 P.2d at 909 (quoting *Martinez v. Martinez*, 728 P.2d 994, 994 (Utah 1986)). *Roberts v. Roberts*, 835 P.2d 193 (Ct. App. 1992).

In the present case this court stated,

With an eye to dividing the marital assets of the parties in a way which would allow the business to continue in operation and which is most nearly an equitable and 50/50 division, the court finds a division of the marital assets should be as follows:

(Amended Findings of Fact and Conclusions of Law, ¶36, tr. 7 p. 2623)

Then the court proceeded to divide the marital assets 66% to Mrs. Cummings and 34% to Mr. Cummings. (See Addendum "A" attached hereto). The Amended Findings of Fact are completely void of any explanation as to why the trial court refused divide the marital estate 50/50 as was expressly its intent. Defendant meets his burden as required in *Moon v. Moon*, 361 Utah Adv. Rep. 15 (Jan. 22, 1999), see Exhibit A.

Findings are adequate only if they are "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Allred v. Allred*, 797 P.2d 1108, 1111 (Utah Ct. App. 1990) (quoting *Stevens v. Stevens*, 754 P.2d 952, 958 (Utah App. 1988)). See also *Sukin v. Sukin*, 842 P.2d 922, 924 (Utah App. 1992). Detailed findings are necessary to determine whether the trial court has exercised its discretion in a rational manner. When the Court fails to justify by detailed findings its deviation from its stated intent this Court must reverse and remand the case for entry of sufficient findings to support the Court's deviation from that expressed intention. *Rehn v. Rehn*, 363 Utah Adv. Rep. 8 (Utah App. Feb. 19, 1999).

Under Utah law, there is a presumption that the marital property will be divided equally. Therefore, when the court decided to divide the property 66% to 34% between the parties, as it did in this case, the trial court must be required to make findings of facts and provide some reasoning and justification for its ruling determining that its stated intent of a 50/50 division of assets as the

court specifically intended was not equitable or was not be realized in its distribution of marital assets.

For example, in *Burt v. Burt*, 799 P.2d 1166 (Utah App. 1990), the court observed that trial courts must distribute property between the parties to a divorce in a fair, systematic fashion. See *Id.* at 1172 & n.10. The trial court is required to categorize the parties' property as part of the marital estate or as the separate property of one or the other. The presumptive rule is that each party is entitled to all of his or her separate property and fifty percent of the marital property. See *Id.* at 1172.

Later, in *Hall v. Hall*, 858 P.2d 1018 (Utah App., 1993), the appeals court held the absence of findings that would justify departure from the presumptive rule of equal distribution is grounds for reversal:

[T]he court's division of the estate cannot stand undisturbed when we are not presented with sufficient findings to demonstrate that the court's ruling comports with established law. The trial court made no findings as to any exceptional circumstances which took this case out of the presumptive rule of *Burt* . . . an unequal distribution of the parties' marital property makes no sense in the absence of findings justifying the decision, especially since appellee did not seek this result . . . Absent findings that would justify departure from the presumptive rule of equal distribution, we reverse and remand.

*Id.*, 858 P.2d 1018 (Ct. App. 1993).

The only exception to this rule is where the facts in the record are so clear and uncontroverted that the trial court did not need to make any special findings. "Failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.'"

*Andersen v. Andersen*, 757 P.2d 476, 478 (Utah Ct. App. 1988); *Howell v. Howell*, 806 P.2d 1209

(Ut. Ct. App. 1991).

### iii. Division of Property

The Utah Supreme Court has long held that there “is no fixed formula which a trial judge must follow in making a division of properties.” *Cox v. Cox*, 532 P.2d 994 (Utah 1975). It is the prerogative of the court to make whatever disposition of property it deems fair, equitable and necessary for the protection and welfare of the parties, See *Hamilton v. Hamilton*, 562 P.2d 235 (Utah 1977). However, the overriding consideration is that the ultimate division be equitable—that property be fairly divided between the parties given their contributions during the marriage and their circumstances at the time of the divorce. See *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987). In the present case the trial court specifically stated its intent to divide the marital assets 50/50.

The trial court is not without guidance in reaching an equitable division of marital property. The Utah courts have defined the factors for the trial court to consider in fashioning an equitable property division. The amount and kind of property to be divided; whether the property was acquired before or during the marriage; the source of the property; the health of the parties; the parties' standard of living, respective financial conditions, needs, and earning capacity; the duration of the marriage; the children of the marriage; the parties' ages at time of marriage and of divorce; what the parties gave up by the marriage; and the necessary relationship the property division has with the amount of alimony and child support to be awarded. *Burke v. Burke*, 733 P.2d 133, 135 (Utah 1987) (footnote omitted). The Courts are required to “follow the systematic approach set forth in *Burt*.” *Dunn v. Dunn*, 802 P.2d 1314 (Utah Ct. App. 1990). That is, the court

should first “properly categorize the parties' property as part of the marital estate or as the separate property of one or the other. Each party is then presumed to be entitled to all of his or her separate property and fifty percent of the marital property.” *Id.*, 802 P.2d at 136. If the court then divided the marital estate in a division less than an equal division the court must justify such action by making findings of fact, which provide rationale for the action taken.

#### **iv. Conclusion**

The trial court in this case failed to make any findings as to why a 50/50 division of marital assets would not be provided as the court failed to explain in any finding why a 66% to 34% division of marital assets was warranted or equitable.

A trial court cannot make an uneven property distribution, which departs from its own expressed intent and the presumptive rule that marital assets are to be divided equally, without providing detailed findings and facts to disclose the steps that the court took to arrive at the ultimate decision of an unequal division of marital property. Otherwise, it is impossible for an appellate court to determine whether trial court has exercised its discretion in a rational manner.

The remedy sought on appeal is to vacate the Amended Decree of Divorce and remand the case to the trial court with instructions to either divide the marital estate equally as stated was the express intent of the trial court or to provide a substantive set of findings and facts which would justify an unequal division of those marital assets.

## **II. THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW FAILED TO PROVIDE ANY REASONING OR JUSTIFICATION FOR FAILING TO DIVIDE THE MARITAL ASSETS EQUALLY BETWEEN THE PARTIES**

This Court has noted that in divorce proceedings the trial court has considerable discretion

in adjusting the financial and property interests of the parties. *Lee v. Lee*, 744 P.2d 1378, 1380 (Utah App. 1987). However, an appellate court only grants deference to the trial court "when [its] findings of fact are sufficiently detailed to disclose the evidentiary basis for the court's decision." *Woodward v. Fazio*, 823 P.2d 474, 477 (Utah App. 1991); accord *State v. Lovegren*, 798 P.2d 767, 771 (Utah App. 1990) (trial court decision afforded no deference when findings are inadequate). Therefore, for an appellate court "to determine whether the evidence adduced at trial supports the trial court's findings, the findings must embody sufficient detail and include enough subsidiary facts to clearly show the evidence upon which they are ground. *Woodward*, 823 P.2d at 477 (citing *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987)).

Defendant recognizes that he has the burden of marshaling the evidence supporting the trial court's findings and then demonstrating to this Court that the evidence is inadequate to sustain the findings.<sup>1</sup> *Woodward*, 823 P.2d at 477; accord *Hardy v. Hardy*, 776 P.2d 917, 923 (Utah App. 1989). However, if the trial court's findings are insufficiently detailed to disclose the evidentiary basis or factual basis for the court's decision, an appellate court will not grant the usual deference to the trial court's findings. *Id.*

In the present case, there was a brief post-default evidentiary hearing. The court's findings must still be adequately supported and must "clearly show the evidence upon which the Findings are grounded." *Id.* Accordingly, unless the evidentiary hearing contains sufficient evidence supporting the trial court's findings, they are inadequate and this Court need not grant any

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<sup>1</sup> To help meet this burden, Defendant has set out in Addendum "A" each of the court's findings and conclusions as to the division of marital assets and has cited to the evidence in the record, if any, supporting each specific finding. As even a cursory review of Addendum "A" reveals, many of the findings are unsupported by any evidence and the

deference to the trial court's ruling.

Accordingly, the case should be remanded for the taking of further evidence, to be presented by both sides, regarding the valuation of the marital estate and sufficient findings as to why the expressed intent of the court to divide the marital assets equally was not followed.

### III. CONCLUSION

The trial court erred in failing to provide any findings, facts, reasoning or justification for its departure from its stated purpose of dividing the marital assets 50/50 between the parties. The Amended Decree of Divorce should be vacated and the case remanded for the trial court to enter such findings which justify the division of assets set forth in its Amended Findings of Fact or should take such evidence in trial to determine a 50/50 equal division of the marital assets as stated in its express intent.

DATED this 26<sup>th</sup> day of March, 1999.



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Attorneys for Appellant

---

remaining findings are inadequately supported. Even based upon unsupported evidence the division of marital assets does not divide the marital estate 50/50 between the parties.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26<sup>th</sup> day of March, 1999, I caused to be hand delivered a true and correct copy of the foregoing BRIEF OF APPELLANT, to:

David A. McPhie, Esq.  
McPHIE & NELSON  
2105 East Murray-Holladay Road  
Salt Lake City, Utah 84117

*M. Byron Fisher*

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**ADDENDUM "A"**

**ANALYSIS OF DISTRIBUTION OF MARITAL ASSETS**

**ADDENDUM "A"**

**ANALYSIS OF DISTRIBUTION OF MARITAL ASSETS**

<u>Amended Findings of Fact Paragraph #</u>	<u>Asset</u>	<u>Value</u>	<u>Wife</u>	<u>Husband</u>
21	Home	127,000	127,000	
24	Paintings	8,194	8,194	
25	Stocks	227,918	113,959	113,959
	(additional taken from stocks temporary Order)	10,000	10,000	
26	1993 Oldsmobile	25,000	25,000	
27 & 36(e)	Personal Property		25,000	5,000
36(b)	75%/25% of land	105,000	78,750	26,250
36(c)	75%/25% of building	692,748	519,561	173,187
36(a)	Business	481,816		481,816
37	Loan against the property			(260,000) <sup>2</sup>
If the land and the Building are divided equally:				
	Overpaid Rent, rate of Decree through Oct., 1997		<u>46,500</u>	<u>(46,500)</u>
	Total of assets to each party		<u>953,964</u>	<u>493,712</u>

<sup>2</sup> The balance due at the date of original Decree of Divorce was \$260,000.

**ADDENDUM "B"**  
**AMENDED FINDINGS OF FACT**

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MAY 27 1995  
SALT LAKE COUNTY  
By Earl Spafford Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---oo0oo---  
OLETTA CUMMINGS, :  
Plaintiff, : AMENDED FINDINGS OF FACT  
 : AND CONCLUSIONS OF LAW  
 : UPON REMAND  
 :  
 vs. :  
 :  
 :  
 CLYDE KAY CUMMINGS, : Civil No. 92 490 3713 DA  
 :  
 Defendant. : Judge Glenn K. Iwasaki  
 : Commissioner Michael S. Evans  
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This matter came on for hearing before the Honorable Judge Glenn K. Iwasaki in his Courtroom located at 240 East 400 South, Salt Lake City, Utah, on the 6th day of March, 1995, at the hour of 8:30 o'clock a.m. The Plaintiff appeared in person and through her attorney of record, David A. McPhie. The Defendant appeared personally and through his attorney of record, Earl Spafford.

The court noted that the Default of the Defendant had been previously entered, and his answer stricken as part of the court's previous order signed on the 17th day of February, 1995.

The Plaintiff testified concerning jurisdiction and grounds, and in support of the other allegations of her complaint, and in some detail, concerning substantive matters.

This was done in an effort by the court, to provide the Defendant with a fair and equitable

outcome in these divorce proceedings, even though he had only a limited right to participate in them, having previously had his answer stricken and his default entered.

The court considered the testimony of the Plaintiff, and the testimony of the accountant Stephen F. Petersen. A Motion to publish all volumes of the depositions of C. Kay Cummings was granted. The Court considered the testimony of the Defendant as contained therein, and documents submitted to the court in connection with those proceedings, and as attached to the deposition. The Court having considered the file, and good cause appearing therefore, the Court published its original Findings of Fact and Conclusions of Law, and signed the original Decree of Divorce on the 7th day of April, 1995.

The Defendant appealed the decision of the trial court to the Court of Appeals. The Court of Appeals remanded the matter back to the District Court for further proceedings on specific issues, on December 19, 1996.<sup>1</sup>

This matter came on for hearing before the Honorable Judge Glenn K. Iwasaki upon remand from the Court of Appeals on the 11th day of August, 1997, and again on the 22nd day of September, 1997. At the hearing on remand, the parties were present, and were represented by their legal counsel of record, David A. McPhie attorney for the Plaintiff, and M. Byron Fisher attorney for the Defendant.

The court received testimony and reports and exhibits from the court appointed expert witness David T. Posey. Plaintiff and Defendant examined the witness David Posey through counsel, and subsequently the Court published its Amended Findings concerning the fair market

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<sup>1</sup> A copy of the Court's Order on Remand is attached to these Findings as Exhibit A.

value of the business known as C. Kay Cummings Candy, Inc.

This matter came on for further hearing on the 19th day of November, 1997, at the hour of 1:30 o'clock p.m., where the court heard proffers of fact, and argument from counsel concerning the effect the Court's new Findings concerning the value of the business C. Kay Cummings Candy, Inc. should have on the overall distribution of property, and to consider the objections each party had filed to the other's proposed new Amended Findings.

The Court having considered the arguments of counsel, and the proffers made, overruled the objections of the Defendant to the Plaintiff's proposed Amended Findings of Fact and Conclusions of Law.

The Court noted at the hearing on November 19, 1997, that it had previously, at the time of the original Decree, left open for further consideration the question, as to what the fair monthly rental or lease value of the building and real estate located at 2057 East 3300 South, Salt Lake City, Utah, was.

The question of the fair monthly lease or rental value of the subject building came on for evidentiary hearing before the Honorable Judge Glenn K. Iwasaki on the 13th day of April, 1998, at the hour of 2:00 o'clock p.m. The Plaintiff appeared in person and through her attorney of record David A. McPhie. The Defendant appeared personally and through his attorney of record M. Byron Fisher.

The Court, after having heard the testimony, the arguments of counsel, and having received the stipulation of the parties, and good cause therefore, made its Finding concerning the fair market

lease value of said building and real estate located at 2057 East 3300 South, Salt Lake City, Utah.<sup>2</sup>

Having now conducted all hearings necessary to, and in connection with the issues on remand, and those issues which were previously reserved for further hearing, the Court now, publishes the following:

#### AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND

(1) The parties are husband and wife having been married on the 1st day of July, 1954, in Salt Lake City, State of Utah.

(2) The parties have been married continuously ever since, or for a period of forty (40) years.

(3) The parties were both residents of Salt Lake County for the three month period immediately prior to the filing of this Divorce Complaint.

(4) During the course of this marriage the parties had children born to them children. All of their children are now emancipated adults. Therefore the court need not make findings concerning custody, child support, visitation, or an Order to Withhold and Deliver.

(5) The parties began a candy company which was known as C. Kay Cummings Candy in approximately 1965. The parties have operated that candy company since that date, and it has grown substantially in terms of physical size, and volume of business since then.

(6) The Plaintiff, Oletta Cummings, played a major role over the years in the building

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<sup>2</sup> A copy of the separate Findings and Order from that hearing is attached as Exhibit B.

of the candy company by both working there a great deal of the time and by taking care of the children at home and in taking care of the home.

(7) The court finds that in 1984, the parties incorporated the candy company (which had previously been their partnership) and the company became known as C. Kay Cummings Candy, Incorporated. The court however, also finds that the parties have essentially run the corporation as though it were a partnership ever since its incorporation. The candy company has always been a closely held family business with family members and principally the parties holding all of the stock, and all of the executive positions in the corporation. The court further finds that the Defendant has had, and continues to have, total control of the business, regardless of its corporate form.

(8) The court further finds that the parties have ignored corporate formalities to a large extent through the years. As one example, they have had few regular meetings of the board of directors. Only a few sets of minutes of meetings of the Board of Directors exist. Two of the sets of minutes were created by the Defendant subsequent to the commencement of this divorce action.

(9) The court finds that C. Kay Cummings Candy, Inc. is the alter ego of C. Kay Cummings personally. The court also finds however, that there is no advantage to either party, and it has not been requested by either party, that this court make an order concerning the legality, viability, or integrity of that corporation. The court does however, find that the it must make some decisions concerning the parties respective rights in the corporations assets, and that to protect the marital assets, the court must make some determinations as to the parties' respective offices and positions of control with regard to the corporation. Failure to do so on the court's part at this time would lead to allowing one party or the other, to eviscerate the court's proposed decree in this matter, and allow one party or the other to gain an unfair advantage or control over the other in post decree

disagreements, which the court finds are likely to arise.

(10) The court finds that Oletta Cummings served as a corporate officer in the corporation, and was only recently, and after the commencement of these divorce proceedings, removed as a corporate officer by the Defendant. The court further finds that the removal of Oletta Cummings as an officer and member of the board of said corporation was not with proper notice and violated other corporate law formalities. The court further finds that all appointments of others as officers and directors of C. Kay Cummings Candy to have been without proper notice to the Plaintiff and in violation of corporate law.

(11) The court makes these findings for purposes of allowing the Plaintiff to protect her interests in the corporate assets which the court intends to give her as part of the Decree in this matter. The court further finds that should these steps be inadequate to give both parties equal power and authority over corporate assets further post Decree of Divorce steps may need to be taken. The court further finds that the parties are each one-half owners of all the stock of C. Kay Cummings Candy, Inc.

(12) The court finds that the business, which originally was commenced by the parties in Sugar House, grew and that in approximately 1984, the parties purchased land located at 2057 East 3300 South, Salt Lake City, Utah. The court further finds that the parties later, through an industrial revenue bond, obtained a loan and built a building on the land located at 2057 East 3300 South, Salt Lake City, Utah, and that they subsequently moved the C. Kay Cummings Candy business into that building.

(13) The court finds that the building, the land, and all the equipment, and assets, have been appraised by a court ordered appraiser, one David Posey, who is an accountant, who has relied

on sub-appraisers as to the value of the real estate. The building has been appraised as being worth \$587,748.00 and the land as being worth \$105,000.00. The court further finds that these values are in some question but that neither party has objected thereto. On the other hand, the court finds that neither party agrees that \$397,000.00 is the earning capacity of the business. This matter of the value of the business itself has been appealed by the Defendant and the question has been remanded to this court for further consideration. The court has elected to take evidence on the issue, and an evidentiary hearing was held on August 11, 1997, and again on September 22, 1997.

A. At said hearing, the Court received the testimony of the witness David Posey, a Certified Public Accountant, who was previously appointed by the Court to do an appraisal of the subject business. Mr. Posey was called and sworn. Mr. Posey was examined and cross examined by counsel at some length. Mr. Posey identified Defendant's exhibits 1, 2, and 3, and the same were admitted in evidence.

B. The court finds that David Posey is an independent Certified Public Accountant, and is not an employee of the Defendant, nor does the witness share any interest in the outcome of these proceedings.

C. The Court finds that the evaluation of the business by the Court appointed expert included consideration of the value of any good will of the business. The Court also finds that the valuation given by David Posey is based on unaudited factual data reported to him by Mr. Cummings. The court further finds that the appraisal done by Mr. Posey was based on generally accepted business accounting practices used in evaluating businesses.

D. The court finds that the value of the business without the building or the real

estate at the time of the divorce, was \$481,816.00. The court further finds that this amount takes into account previously taxed but undistributed income, and that paragraph #21 of its previous Findings should be deleted.

(14) The court finds that the real estate on which the candy company building is built and where the business is transacted is in the name of the parties as joint tenants and always has been. The court further finds that the parties have leased that land to the business over the years, and that at one time they had a written lease agreement. Said land lease agreement provided that each of the parties would be paid \$500.00 per month. The court further finds that in recent years, the parties have orally agreed to a land lease payment from the business to them personally at \$1,500.00 each per month (\$3,000.00 per month total). The court makes no finding as to what the fair lease value of the land and/or building to the business is, but finds that by the course of conduct, \$1,500.00 each per month from C. Kay Cummings, Inc. to the Plaintiff and Defendant has become the agreement of the parties.

(15) The court finds that during the course of the litigation in this case which extended originally over a period of approximately two and one-half years, (and by the time the Court heard the matter on remand nearly five years), the Defendant has totally controlled the business, C. Kay Cummings Candy, Inc. The court further finds that C. Kay Cummings Candy, Inc. is currently behind in its land lease obligation to Oletta Cummings for the months of September 1992 through December 1992, January 1993 through December 1993, January 1994 through May 1994, and December 1994 through September 1995, for a total arrearage spanning twenty-four (24) months and a total arrearage in the amount of \$36,000.00.

(16) The court further finds that the Defendant was ordered to pay Oletta Cummings

\$1,663.00 per month as and for temporary alimony early in these proceedings. This has been the order of the court for a period of approximately two and one-half years. The court further finds that the Defendant has tried during the divorce proceedings to get credit against his monthly temporary alimony obligation by sending checks to the Plaintiff marked land lease payment, and not sending a separate alimony check to her in the \$1,663.00 per month amount. The court further finds that the Plaintiff has obtained on two separate occasions judgments against the Defendant including attorney's fees arrearages in the alimony obligation and that the court on two prior occasions found that the temporary alimony obligation, and the land lease obligation of the Defendant to the Plaintiff are separate obligations, and that the Defendant is not entitled to credit for one against the other.

(17) The court finds that the parties discussed the idea of a Family Trust in 1984 when candy business was incorporated. The court further finds that the notion of a family trust was referred to in some of the documents surrounding the financing of the building and that the parties signed a stock certificate at the time the business was incorporated which purported to transfer the stock of the corporation to a family trust. The court finds however, that no trust existed at the time of that transfer and that therefore the purported stock transfer was null and of no effect. The court further finds that at the time the stock transfer document was executed by the parties, it was anticipated that a subsequent family trust which was yet to be formed, would contain provisions jointly agreed on by the parties. The Court finds that there was no subsequent agreement or formation of a joint trust. The court further finds that the Defendant, by himself, subsequent to the incorporation and the document purporting the transfer of each of the parties corporate stock to a trust, created his own trust. The court finds that the Defendant could not or did not obtain the signature of his wife on that trust agreement. The court further finds that the Defendant then

attempted to create a trust by himself by being the sole trustor and trustee. The court also finds that although the Defendant had the power to create and fund a trust by himself, he did not by himself have the power to put his wife's share of marital assets into his own personal trust.

(18) The court further finds that it must make findings with regard to the validity of the purported Cummings Family Trust referred to immediately above in that the Defendant has, since a relatively early time in these proceedings, maintained that a family trust exists, and that much of the marital property of the parties is in that trust, and that it is therefore outside the reach of the court. The court further finds that in the fall of 1993, while this divorce was pending, and after nine years of ignoring the claimed trust, the Defendant unilaterally and without notice to anyone, after nine years of being the sole "trustee" of the "trust," attempted appoint two co-trustees, had trust letterhead printed, and opened a trust account. All of these activities were the first interest shown by the Defendant in the trust that the Defendant in nine years time, and only after the divorce action was commenced. The court further finds that in the fall of 1993, when this divorce had been pending for approximately one year, the Defendant then had his purported newly appointed co-trustees file an action through separate counsel to try and intervene in this divorce action to protect the assets of the so called trust. The court notes that this matter of intervention was heard first by the court's commissioner for domestic matters, Michael S. Evans, and that pursuant to the rules concerning intervention, the Commissioner made a recommendation that the trustees not be allowed to intervene. That recommendation was appealed to this court and subsequently sustained. In so doing the court then found and now finds that the Defendant, as the original trustee, and a continuing "trustee" under the Defendant's alleged trust, could adequately represent the interest of the trust in the divorce litigation, reserving to the Defendant the right to call his alleged co-trustees, or other

witnesses at the time of trial. The court further finds that the Defendant had no bank account of any kind for the trust for approximately nine years from 1984 to 1993. That there was no trust letterhead, and that no trust business was conducted. That the trust filed no tax returns until 1993 when the Defendant began to realize the weakness of his trust claim, at which time he opened trust account, had letterhead printed, and began to file trust returns.

(19) The court further finds that the Defendant, established or attempted to establish another trust like entity in the late 1980's or early 1990's, giving a new trustee, namely one Frank Pond Reese, control over aspects and assets of the candy company, which the Defendant has claimed were transferred earlier into the 1984 trust. That the court finds this behavior is inconsistent with the notion that the 1984 trust ever existed, even in the mind of the Defendant. The court finds that no other non-business related, non-marital assets, were ever put into the "trust." The court finds that the Cummings Family Trust does not now exist, specifically that the trust that the Defendant purported to try and establish by himself in 1984 never existed, and that none of the assets of the candy company or the parties are now, or ever were, transferred from the control of the shareholders, or owners of C. Kay Cummings Candy, Inc. The court further finds that each of the parties hereto each own one-half of the C. Kay Cummings Candy, Inc. stock and that they each own personally one-half of the land, building, and business located at 2057 East 3300 South, Salt Lake City, Utah, which serves as the premises of the Candy Company.

(20) The court further finds that each of the parties personally own one-half of all other assets of the C. Kay Cummings Candy, Inc. including investment accounts, bank accounts, motor vehicles, equipment, stock, materials, accounts receivable and contracts, and any other property of any description wheresoever situated located at the 33rd South location or at the foothill store.

(21) The court finds that the parties acquired a home and real estate during the marriage located at 1134 E. Herbert Ave, Salt Lake City, Utah, which is currently paid for. The court further finds that said home and real estate is worth approximately \$127,000.00. Further, the court finds that said home was purchased by the parties from the Plaintiff's parents on favorable terms due to the relationship existing between the Plaintiff, Defendant, and the Plaintiff's parents.

(22) The court further finds that the parties have been separated for more than two years, and that the Plaintiff has resided in the home since the date of the parties separation. The court finds that the parties have largely divided between them the personal property that was located in the house in a manner which should be confirmed by the court, awarding to each of the parties those items of personal property currently in their possession as their sole and separate property, free and clear of any claim of the other party subject only to exceptions which are otherwise specified herein.

(23) The court finds that the coin collection (silver coins) and the stamp collection, have values of \$422.00 and \$1,129.80, respectively and that these should be awarded to the Defendant who collected them.

(24) The court finds that the art work (paintings) of the parties have a value of \$8,194.00 and should be awarded to Plaintiff.

(25) The court finds that the parties should each be awarded one-half of all stocks, bonds, and other investments acquired during the course of the marriage by the parties or either of them currently held or administered by Smith Barney, or First Western Financial Advisors, or elsewhere regardless of the name the account may be in. These accounts currently have total market value of \$237,918.00 and each of the parties should be awarded \$118,959.00 worth. The court finds that the known investments may be described as and have the values as listed on Exhibit C attached hereto.

(26) The court further finds that the Plaintiff should be awarded the 1993 Oldsmobile as her sole and separate property free and clear of any claim of the Defendant.

(27) The court further finds that each of the parties should be awarded approximately one-half of all other personal property acquired during the course of the marriage not otherwise herein provided for.

(28) The court finds that determining the Defendant's income is problematic. The business, C. Kay Cummings Candy, Inc., has had gross sales in 1992 and 1993 of \$1,125,388.00 and \$1,281,404.00 respectively. Although the Cummings personal tax returns show joint income of \$151,064.00 and \$205,760.00 for 1992 and 1993, the Defendant has chosen for the parties to live austere, and has during the last two years of the divorce, while this divorce has been pending chosen to live in a small office at the candy store and to shower at a local gymnasium. In doing this, the Defendant has chosen for the parties, instead of taking income, to plow both parties share of the income back into the business as previously taxed and retained income as referred to in paragraph twenty-one above.

(29) The court finds that the Defendant's stated income at the time of deposition was unusually low. The court finds that this stated salary is artificially low, and is not reasonably or realistically connected to the amount of money that the Defendant could or would but for these divorce proceedings, be taking out of the business income. The court further finds that determining income for support purposes may be different than for IRS purposes (*Utah Code Anno. §7-45-7.5*). The court further finds that a reasonable amount to attribute to the Defendant as income, including a salary from the business without putting the cash flow and needs of the business at risk is \$160,000 per year or \$13,330.00 per month gross. The court makes this finding based on the testimony of

Stephen F. Petersen who reviewed the tax returns of the business for 1992 and 1993, and the parties for 1992 and 1993.

(30) The court further finds that this finding in paragraph thirty immediately above is unnecessarily difficult to make because the Defendant has refused to participate in the discovery process in ways and to an extent which is documented elsewhere in the file and which ultimately led to his answer being stricken and his default entered.

(31) The court further finds that the Defendant has provided little information over the two and one-half year span of this case concerning his expenses. What little information the court does have was provided early in the divorce process during a time when the Defendant was living at the candy store, apparently the Defendant has continued to live at the candy store during these divorce proceedings, obtaining his meals commercially, and showering at a local gymnasium. The court finds that the Defendant cannot reasonably continue to live at the candy store, buy all his meals commercially, and shower at a gymnasium, and that he will ultimately choose, post decree of divorce, to live under less than such austere circumstances, and with no other information available from him but his original declaration of expenses on file, that his monthly expenses are, or will reasonably be, \$1,500.00 per month.

(32) The court finds that the Plaintiff is employable but all her experience is at the candy company where she has developed experience in all phases of the candy business over a period of thirty plus years, the court finds that the Plaintiff at age sixty-four is not likely to be retrained in another field or find a job that will pay her more than near minimum wage.

(33) The court finds that the Plaintiff is entitled to both the \$1,500.00 per month land lease payment for her one-half share of the real estate on which the business is located, and alimony in the

amount of \$1,663.00 per month which has been the temporary order of the court for two and one-half years. In making this finding the court notes that both parties need for support has contracted to meet the money available based on the Defendant's unilateral decision to put the parties in an austerity mode during these divorce proceedings. That the Defendant has been under court order to pay \$1,663.00 per month in alimony and under a contractual obligation to pay \$1,500.00 per month additionally in land lease payments. The court further specifically finds that the \$3,000.00 a month that the business has been paying for the land, (\$1,500.00 to each party) is not the fair monthly lease or rental value of the land and building, and that the fair monthly lease value of the land and building as of April 13, 1998, was the amount of \$7,414.00 per month triple net, meaning with the lessee or tenant paying this amount plus all taxes and insurance on the building, etc.

(34) The court further finds that the Plaintiff is unemployed She has historically had expenses of \$1,663.00 per month during these proceedings. The court finds that it is difficult to set an appropriate alimony amount in this case because of the Defendant's failure to participate in the discovery process. The court notes that in making this alimony finding that the Defendant argued on more than one occasion that his temporary alimony obligation should be lowered but in each instance the temporary alimony of \$1,663.00 was upheld. The Defendant, with some prodding, has paid this amount for two and one-half years. The court finds that Mrs. Cummings is entitled to receive, on a permanent basis, \$1,663.00 per month as alimony and the income she will receive from the ownership of the land and building, which the court intends to award her as her one-half of share of the marital assets. The court further finds that C. Kay Cummings can, and has had in the past, the power to pay said alimony and to make sure that C. Kay Cummings Candy, Inc. pays Oletta Cummings a lease payment on the building and real estate, and that said lease payment should be

in an amount equal to 75% of the fair market lease value. The court finds the fair market lease value to be \$7,414.00 per month. The Defendant should be ordered to pay or cause to be paid to the Plaintiff 75% of said fair market value per month, or the amount of \$5,560.00, commencing on the 1st day of May, 1998.

(35) The court finds that the best thing for both parties would be to preserve the business, C. Kay Cummings Candy, as an ongoing concern operated by the Defendant. A sale of the business assets is not an attractive alternative because the income producing capacity and blue sky of the business is closely tied to the Defendant operating the business himself, and because of the specialty nature of the business.

(36) With an eye to dividing the marital assets of the parties in a way which would allow the business to continue in operation and which is most nearly an equitable and 50/50 division, the court finds a division of the marital assets should be awarded as follows:

**TO THE PLAINTIFF:**

a. The home and real estate located at 1134 Herbert Ave., Salt Lake City, Utah,  
in align with the value; Value: \$127,000.00

b. A 75% interest in the ground located at 2057 East 3300 South, Salt Lake City,  
Utah, which is the real estate on which the business building is located and the business is operated;  
Value: \$78,750.00

c. A 75% interest in the building located at 2057 East 3300 South on the above  
described land on which the business is located;  
Value: \$440,811.00

d. One half of the Smith Barney and First Western Advisors investment accounts with values totaling \$227,918.00, or \$113,959.00 to her.

e. All personal property currently located in the home and real estate at 1134 Herbert Avenue, including the jewelry in the Defendant's possession (the collateral), with the exception of the stamp collection and coin collection.

Estimated value at the time of hearing: \$ 25,000.00

TOTAL TO PLAINTIFF \$785,520.00

**TO THE DEFENDANT:**

a. All of the equipment, materials, stock, accounts receivable, and other personal property of C. Kay Cummings Candy, Inc., including Blue Sky, the van, and the ongoing right to operate the business in the name of C. Kay Cummings Candy, Inc. plus the previously taxed income retained by the business.

Business Value: (without real estate) \$481,816.00

b. All the Defendant's clothing and personal effects and personal property currently in his possession including the stamp and coin collections; but not the jewelry referred to above;

Value: \$ 5,000.00

c. One half of Smith Barney and First Western Advisors stock and retirement accounts;

Value: \$113,959.00

d. A 25% interest in the real estate and building located at 2057 East 3300 South, Salt Lake City, Utah.

Value: \$178,187.00

TOTAL TO DEFENDANT: \$778,962.00

(37) The court further finds that the business C. Kay Cummings Candy has in addition to paying the \$1,500.00 per month to each party as a land lease payment, been making the payment to Helen Rappaport and Alan S. Cohen for the financing on the land and/or building (which had a balance owing on March 17, 1998 of \$321,684.00). The court finds that the Defendant should assume and pay debt on the land and building as his sole and separate debt, and hold the Plaintiff harmless thereon.

(38) The court finds each of the parties should execute all documents needed to carry out the intent of these findings and decree based thereon

(39) The court finds that the plaintiff has asked the court for and received from the court prior judgments for temporary attorney's fees, which have been paid by the Defendant. The court further finds that in addition to the fees which have been previously awarded and paid, the Plaintiff has reasonably incurred the sum of \$2,920.00 in additional attorney's and paralegal fees, and \$300.00 in additional costs of court for professional witnesses who testified at the time of the default hearing, namely Stephen F. Petersen.

Having published the above findings of fact the court now makes the following:

#### CONCLUSIONS OF LAW

(1) The Plaintiff should be awarded a Decree of Divorce dissolving the bonds of matrimony previously existing between the parties. The same to become final upon the signing and entry thereof.

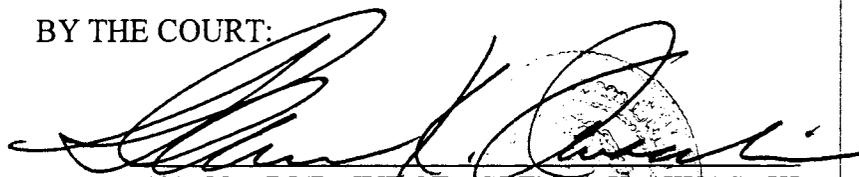
(2) The Decree of Divorce should adopt and be congruent with the Findings of Fact outlined above.

(3) The trust the Defendant attempted to create in 1984 does not now exist, never existed, and was never funded with marital assets or otherwise.

(4) Oletta Cummings is the Vice President and a member of the Board of Directors of C. Kay Cummings Candy, Inc., having never been removed from those offices.

DATED this 27<sup>th</sup> day of May, 1998.

BY THE COURT:

  
HONORABLE JUDGE GLENN K. IWASAKI