

1979

Margaret Fletcher v. William I. Fletcher : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MARGARET FLETCHER,)	
Plaintiff-Respondent,)	
v.)	Case No. 16407
WILLIAM I. FLETCHER,)	
Defendant-Appellant.)	

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BRIEF OF RESPONDENT

Appeal from the Judgment of the First District Court
in and for Cache County
Honorable Ted S. Perry, Presiding

B. L. Dart
John D. Parken
DART & STEGALL
430 Ten Broadway Building
Salt Lake City, Utah 84101

with

Bruce L. Jorgensen
OLSON, HOGGAN & SORENSON
56 West Center
Logan, Utah 84321

Attorneys for Plaintiff-
Respondent

Lyle W. Hillyard
HILLYARD, LOW & ANDERSON
175 East 100 North
Logan, Utah 84321

Attorney for Defendant-
Appellant

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Appeal from the Judgment of the First District Court
in and for Cache County
Honorable Ted S. Perry, Presiding

Attorney for Defendant-
Appellant

TABLE OF CONTENTS

	Page
NATURE OF CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	5

POINT I

THE CAREFULLY CONSIDERED AWARDS AND ORDERS OF THE TRIAL COURT ARE PRESUMED PROPER AND SHOULD NOT BE MODIFIED ABSENT A CLEAR SHOWING BY THE APPELLANT THAT THE TRIAL COURT ABUSED HIS DISCRETION OR WAS MISTAKEN AS TO THE APPLICABLE LAW	5
--	---

POINT II

APPELLANT HAS ENTIRELY FAILED TO MEET HIS BURDEN OF DEMONSTRATING SOME ABUSE OF DISCRETION OR MISAPPLICATION OF LAW; THEREFORE, THE ORIGINAL DECREE SHOULD BE AFFIRMED IN ITS ENTIRETY	10
A. Mr. Fletcher's retirement fund was reasonably valued by the trial court.	11

B.	The property distribution fashioned by the trial court is fair and should be affirmed	16
C.	The trial court appropriately determined the value of the Mendon house, and the parties' other assets, as of the date of the trial, not the separation. . . .	24
D.	The custody and visitation arrangements entered by the trial court after a meticulous and detailed consideration of the parties and the testimony is clearly supported by the evidence and warranted by the circumstances .	28
E.	The trial court's findings justify continued support through age nineteen	36

POINT III

THE ATTORNEYS FEES AWARDED ARE APPROPRIATE, BUT RESPONDENT IS ENTITLED TO AN ADDITIONAL AWARD REPRESENTING THE FEES INCURRED IN THIS APPEAL	39
---	----

CONCLUSION	42
----------------------	----

CASES CITED

	Page
<i>Aldredge v. Aldredge</i> , 195 P.2d 504, 229 P.2d 681 (1951)	40-41
<i>Baker v. Baker</i> , 511 P.2d 1263 (Utah 1976)	10, 42
<i>Bjork v. Bjork</i> , 1 Utah 2d 351, 266 P.2d 1018 (1954) . . .	23
<i>Carlson v. Carlson</i> , 584 P.2d 864 (Utah 1978)	37-38, 39
<i>Carruthers v. Carruthers</i> , 577 P.2d 773 (Colo. App. 1978)	25
<i>Carter v. Carter</i> , 19 Utah 2d 183, 429 P.2d 35 (1967) . . .	10
<i>Christensen v. Christensen</i> , 31 Utah 2d 263, 444 P.2d 511 (1968) . . .	8-9
<i>Christensen v. Christensen</i> , 18 Utah 2d 315, 422 P.2d 534 (1967) . . .	41
<i>Copeland v. Copeland</i> , 91 N.H. 409, 575 P.2d 99 (1978)	12-13
<i>Cox v. Cox</i> , 532 P.2d 994 (Utah 1975)	30-31
<i>Dahlman v. Dahlman</i> , 503 P.2d 909 (Or. App. 1975)	33
<i>DuBois v. DuBois</i> , 503 P.2d 1375, 504 P.2d 1380 (1973) . . .	18
<i>Eaton v. Eaton</i> , 511 P.2d 514 (Utah 1976)	7
<i>Feininger v. Feininger</i> , 503 P.2d 1104 (Utah 1977)	13-14, 41-42

	Page
Englert v. Englert, 576 P.2d 1274 (Utah 1978)	14
English v. English, 565 P.2d 409 (Utah 1977)	9, 15, 22
Eppley v. Eppley, 341 N.E. 2d 212 (Indiana 1976)	24
Ferguson v. Ferguson, 578 P.2d 1274 (Utah 1978)	37
Gribble v. Gribble, 583 P.2d 64 (Utah 1978)	35
Griffiths v. Griffiths, 3 Utah 2d 82, 278 P.2d 983 (1955)	41
Hansen v. Hansen, 537 P.2d 491 (Utah 1975)	10
Harris v. Harris, 585 P.2d 45 (Utah 1978)	38-39
Iverson v. Iverson, 526 P.2d 1126 (Utah 1974)	10
Johnson v. Johnson, 7 Utah 2d 263, 323 P.2d 16 (1958)	32-33
Lindsay v. Lindsay, 115 Ariz. 322, 565 P.2d 199 (Ariz. App. 1977)	25
Michelsen v. Michelsen, 14 Utah 2d 328, 383 P.2d 932 (1963)	10
Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974)	10
Naylor v. Naylor, 563 P.2d 184 (Utah 1977)	10
Pearson v. Pearson, 561 P.2d 1080 (Utah 1977)	10

	Page
Rice v. Rice, 564 P.2d 305 (Utah 1977)	31
Sampsel v. Holt, 115 Utah 73, 202 P.2d 505 (1949)	29
Smith v. Smith, 564 P.2d 307 (Utah 1977)	31
Spangler v. Spangler, 561 P.2d 1076 (Utah 1977).	10
Steiger v. Steiger, 4 Utah 2d 273, 293 P.2d 418 at 420 (1956).	31
Tremayne v. Tremayne, 116 Utah 483, 211 P.2d 452 (1949).	20-21
Wilson v. Wilson, 5 Utah 2d 79, 296 P.2d 977 (1956).	7

AUTHORITIES CITED

§ 15-2-1, Utah Code Annotated (1953 as amended)	37, 39
--	--------

IN THE SUPREME COURT OF THE STATE OF UTAH

MARGARET FLETCHER,)
Plaintiff-Respondent) BRIEF OF RESPONDENT
v.)
WILLIAM I. FLETCHER,) Case No. 16407
Defendant-Appellant)

NATURE OF THE CASE

This is a divorce action in which the defendant husband appeals from the alimony award, property distribution, and custody and visitation arrangements entered by the trial judge.

DISPOSITION IN THE LOWER COURT

Following a four-day trial, a divorce was granted to the plaintiff wife. The wife was also given approximately one-third of the parties' property, a modest fixed-term alimony award, and custody of and a support award for the three youngest children.

RELIEF SOUGHT ON APPEAL

Plaintiff-respondent Margaret Fletcher respectfully requests that this Court affirm in its entirety the awards and arrangements fashioned by the trial court and, additionally, order an award to her of such additional sum as will reasonably compensate her

for the additional attorneys fees incurred in the defense of this appeal.

STATEMENT OF FACTS

Plaintiff-respondent (hereinafter "Mrs. Fletcher") deems it necessary to present a concise statement of the facts of this case since the statement presented by defendant-appellant (hereinafter "Mr. Fletcher") fails accurately to reflect all of the relevant facts and circumstances at issue.

Following an extensive hearing relating to temporary custody on November 16, 1978, and a four-day trial in January, 1979, the Honorable Ted S. Perry entered a decree of divorce on March 16, 1979, thereby dissolving a marriage that had existed between the parties for nearly eighteen years. Six children were born to the parties during their marriage; these children now range from five to sixteen years of age.

At the time of his marriage, Mr. Fletcher had just completed his sophomore year of college. Since his marriage to Mrs. Fletcher, however, he has gained "almost" two bachelor's degrees and a master's degree, and has risen to a fully tenured Associate Professor of Electrical Engineering at Utah State University. Tr. at 64-66. Mr. Fletcher's gross yearly salary from Utah State

University was \$28,426 at the time of the trial, (Tr. at 7), exclusive of fringe benefits, which include health, accident, and life insurance (Tr. at 63). Additionally, in 1978 Mr. Fletcher received at least \$13,275 in wages from his close corporation (Tr. at 30), although Mr. Fletcher experienced considerable difficulty recalling this income while testifying. Tr. at 12-30. During 1978, the year immediately preceding the trial and decree, Mr. Fletcher also received \$7,500 in "loans" from his corporation. Tr. at 30.

Throughout the marriage, Mrs. Fletcher has worked as a nurse when necessary to supplement the family's income, fund Mr. Fletcher's education, or make downpayments on the family's real property. Tr. at 161-63. Mrs. Fletcher's employment averaged net earnings of \$613.00 per month during 1978. Tr. at 160.

In his property distribution, the trial judge awarded the bulk of the parties' substantial assets to Mr. Fletcher. Mrs. Fletcher was awarded the parties' River Heights home, which had a net equity value of \$25,292; a Dodge stationwagon; some furniture; and her personal belongings. In all, Mrs. Fletcher was awarded property having a value of approximately \$31,200.

R. at 106 and 122. In contrast, Mr. Fletcher was awarded all of the parties' interest in 10 acres of undeveloped land, having an equity value in excess of \$26,000; the parties' Mendon house; his gun collection and retirement fund; all of his tools, books and miscellaneous property; a Dodge Charger; and a substantial portion of the furniture from the parties' River Heights home. In all, Mr. Fletcher was awarded property valued in excess of \$63,000. R. at 106 and 123. The Court also awarded Mrs. Fletcher alimony in the amount of \$300 per month to continue for not more than 162 months and terminable upon either her remarriage or Mr. Fletcher's death. R. at 123.

The care and painstaking thoroughness with which the trial court considered the custody of the parties' six children is most accurately reflected by the lengthy Memorandum Decision entered. R. at 106-09. The court decided that while neither parent was unfit to have custody of the children (R. at 118), Mrs. Fletcher's attributes coincided more closely with the characteristics held by this Court and designated by the legislature to be beneficial and desired in a custodial parent. R. at 120. The court was faced, nevertheless, with the prudent realization that in view of Mr. Fletcher's conduct in

embroiling the older children in the custody fight and his successful attempts to alienate these children against their mother, it would have been counterproductive and not in the best interests of these older children to award their custody to Mrs. Fletcher. R. at 121. Accordingly, custody of the older children was awarded to Mr. Fletcher, with whom they had become allied, while custody of the five, seven and nine year old children was awarded to their mother. R. at 121. The trial court also ordered that Mr. Fletcher support his three younger children (R. at 121-22), and that he contribute \$5,000 toward Mrs. Fletcher's attorneys fees (R. at 124). In an attempt to shield the children from the high level of emotions existing between the parties, the court ordered that visitation be arranged two weeks in advance. R. at 121.

ARGUMENTS

I. THE CAREFULLY CONSIDERED AWARDS AND ORDERS OF THE TRIAL COURT ARE PRESUMED PROPER AND SHOULD NOT BE MODIFIED ABSENT A CLEAR SHOWING BY THE APPELLANT THAT THE TRIAL COURT ABUSED HIS DISCRETION OR WAS MISTAKEN AS TO THE APPLICABLE LAW.

It is apparent from appellant's brief that Mr. Fletcher is not pleased with Judge Perry's distribution of the parties' property, custody award, and collateral orders. However, the fact that one of the parties to a divorce proceeding is dissatisfied with the trial court's rulings is not indicative either of the propriety or of the merit of those rulings; nor are such remonstrances unusual in the aftermath of the inherently emotional and psychologically traumatic divorce process. Being dissatisfied with the outcome of the trial and hearings held over a total of a full week before Judge Perry, Mr. Fletcher now seeks to commence anew these proceedings.

This Court has on innumerable occasions held that while a divorce action is equitable in nature, the ruling of the trial judge is favored with a presumption of propriety and accuracy. It is only in those few instances in which the appellant can clearly demonstrate a manifest abuse of discretion or misapplication of law that the decree fashioned by the trial judge will be disturbed. Such a position is logically grounded upon the advantaged position of the trial court, who has observed the witnesses, heard the testimony, and become acquainted at least to a limited degree with the parties, their problems, and their properties.

In a tacit recognition of the fact that the Findings of Fact entered by Judge Perry are supported by sufficient credible evidence, Mr. Fletcher relies upon the equitable nature of divorce proceedings in his invitation to this Court to revamp the original decree. A similar invitation was refused in Eastman v. Eastman, 558 P.2d 514 (Utah 1976), with the observation that:

We have many times stated that even though proceedings in divorce cases are equitable, in which this Court may review the evidence, due to the prerogatives and advantaged position of the trial court, we give considerable deference to his findings and judgment; and we do not disturb them unless the evidence clearly preponderates to the contrary, or he has abused his discretion, or misapplied principles of law.

558 P.2d at 516 (footnote citations omitted). It is, therefore, incumbent upon the appellant in a divorce case to demonstrate some clear abuse of discretion or misapplication of law before this Court will act to revise any aspect of the original decree.

This Court has long held that its inherent power to supplant the trial judge's discretion is to be exercised only judiciously and infrequently. For example, in Wilson v. Wilson, 5 Utah 2d 79, 296 P.2d 977 (1956), it was held that:

The more recent pronouncements of this court, and the policy to which we adhere, are to the effect that the trial judge has considerable latitude of discretion in such matters and that his judgment should not be changed lightly, and in fact, not at all, unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion.

296 P.2d at 931 (footnote omitted).

In view of the amount of discretion accorded to the trial judge and this Court's requirement that a clear abuse of that discretion or misapplication of law be demonstrated as a condition precedent to any modification of the trial judge's ruling, the cases have frequently noted that the mere fact that a majority of the members of the reviewing court might, themselves, have reached a different plan of distribution or ruling than did the trial court, is insufficient to justify any modification of the original decree. This Court emphasized this principle in Christensen v. Christensen, 21 Utah 2d 263, 444 P.2d 511 (1968), noting:

Whether we as individual judges would or would not have arrived at the exact same formula as to what the most practical and just treatment of the economic aspects [sic] of this situation is not the question on this appeal. Even though it is the established rule that divorce cases being in equity, it is the duty of this court to review and weigh the evidence, it is equally

true that we have invariably recognized the advantaged position of the trial judge and given deference to his findings and judgment, declaring that they should not be upset unless the evidence clearly preponderates against them, or unless the decree works such an injustice that equity and good conscience demand that it be revised. An important consideration in this regard is "the elimination or minimizing of frictions or difficulties in the future"

444 P.2d at 512-13 (emphasis added, footnote omitted).

Since the plan of distribution and decree fashioned by the trial judge will be modified only if the result of a clearly demonstrated abuse of discretion or a manifest misapplication of relevant law, the burden is upon the party dissatisfied with the trial court's decision to demonstrate such error. The most recent of the many cases so holding is English v. English, 565 P.2d 409 (Utah 1977), in which the principles applicable to this appeal were concisely summarized by this Court:

The trial court, in a divorce action, has considerable latitude of discretion in adjusting financial and property interests. A party appealing therefrom has the burden to prove there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or the evidence clearly preponderated against the findings; or such a serious inequity has resulted as to manifest a clear abuse of discretion.

565 P.2d at 410 (footnote citation omitted). Essentially

identical statements of this principle can be found in many other Utah cases, including Baker v. Baker, 551 P.2d 1263 (Utah 1976); Hansen v. Hansen, 537 P.2d 491 (Utah 1975); and Mitchell v. Mitchell, 527 P.2d 1359 (Utah 1974).

Under the standards of review traditionally applied by this Court, the plan of distribution, custody award, and collateral orders entered in this case are presumed valid and will be affirmed unless Mr. Fletcher has demonstrated that Judge Perry has so clearly abused his discretion as to result in substantial prejudice or has misapplied the relevant law of this state to such a degree that the decree entered is manifestly unfair and inequitable. Naylor v. Naylor, 563 P.2d 184 (Utah 1977); Spangler v. Spangler, 561 P.2d 1076 (Utah 1977); Pearson v. Pearson, 561 P.2d 1080 (Utah 1977); Iverson v. Iverson, 526 P.2d 1126 (Utah 1974); Carter v. Carter, 19 Utah 2d 183, 429 P.2d 35 (1967); Michelsen v. Michelsen, 14 Utah 2d 328, 383 P.2d 932 (1963).

II. APPELLANT HAS ENTIRELY FAILED TO MEET HIS BURDEN OF DEMONSTRATING SOME ABUSE OF DISCRETION OR MISAPPLICATION OF LAW; THEREFORE, THE ORIGINAL DECREE

SHOULD BE AFFIRMED IN ITS ENTIRETY.

Although appellant's brief makes clear Mr. Fletcher's subjective dissatisfaction with the decree and award entered by Judge Perry, it wholly fails to delineate a single instance in which the trial judge either abused his discretion or misapplied the relevant law of this state. Under the sub-headings which follow, respondent will reply to the Points raised by Mr. Fletcher.

A. Mr. Fletcher's retirement fund was properly and reasonably valued by the trial court. Mr. Fletcher charges in his brief that Judge Perry "gave full future value to Appellant's retirement pension." App. Br. at 5. Such an assertion is entirely without merit. Judge Perry's Memorandum Decision, Findings of Fact, and Decree each placed a value of \$16,939 upon Mr. Fletcher's Utah State University retirement fund. R. at 106; 123; 128.

Clark England, manager of employee benefits at Utah State University, was called by Mr. Fletcher to testify concerning Mr. Fletcher's USU benefits, specifically including this retirement fund. Tr. at 128-40. It was Mr. England's testimony that, as of December 31, 1977, the vested value of Mr. Fletcher's retirement fund account was \$16,939.14. Tr. at 133. Accordingly, the value ascribed to this fund by Judge Perry not only is

not the "full future value" but is, instead, limited to the present value which the fund had some twelve months prior to the trial. The actual present value of the fund at the time of the divorce would have been, if anything, more than the value set by Judge Perry. Any inaccuracy in Judge Perry's figures, therefore, would benefit Mr. Fletcher, not the respondent.

Appellant sites the New Mexico case of Copeland v. Copeland, 91 N.M. 409, 575 P.2d 99 (1978), as being the "best statement as to valuation of pension rights" available. App. Br. at 7. This case, like more than half of the cases cited by Mr. Fletcher, is the decision not only of a foreign jurisdiction, but of a community property state. Such cases are of dubious applicability and of little persuasion in this action. Nevertheless, the Copeland case does not support Mr. Fletcher's assertion that Judge Perry's valuation of his vested USU retirement fund was inappropriate. The method suggested by the New Mexico Supreme Court in Copeland, is that "a determination should be made . . . of the present value of the husband's retirement pay based upon his life expectancy and discounted for present value. This is generally done on the basis of actuarial

tables." 575 P.2d at 103. In other words, a determination would be made as to the anticipated total amount of benefits to be paid to the husband during his lifetime as a result of contributions made to the fund during the marriage. The total of these future payments is then reduced to present value. Such a process would, at current interest rates, result in a larger figure than the method utilized by Judge Perry--the simpler process of taking the current present value of the husband's vested interest. The actual future value of Mr. Fletcher's vested \$16,939 interest, at an interest rate of 12 percent over the 25 year period noted in his brief, is \$287,964.09; and, even at 8 percent over that period, the actual future value is in excess of \$116,000.

Mr. Fletcher's assertion that the trial judge utilized a future value figure in evaluating his USU retirement fund is clearly erroneous. It may be, nevertheless, that what Mr. Fletcher is really concerned about is the mere inclusion of his retirement fund, the ultimate benefit of which he may not realize until his retirement. The propriety of the consideration of such a retirement fund as part of the assets available for distribution was upheld by this Court in Ehninger v. Ehninger,

569 P.2d 1104 (Utah 1977). In that case, the dissatisfied husband contended that "the trial court erred in placing a value upon and making a division of . . . the defendant's profit-sharing plan, the purpose of which [was] for his retirement" and the benefit of which would be available to him only upon retirement.

569 P.2d at 1104. This Court held that the inclusion of the husband's vested, but not immediately available, interest in his retirement fund was appropriate. 569 P.2d at 1106.

Moreover, this Court recently upheld a property distribution which considered as a family asset the husband's accrued interest in a retirement fund. In Englert v. Englert, 576 P.2d 1274 (Utah 1978), it was noted that the husband contended that

his retirement fund is not "property" within the meaning of our statutes and should not be so considered in determining the rights of the parties under the divorce decree. He reasons that because that fund was accumulated as a result of his service and tenure, it is inequitable to permit [his wife] to participate therein.

576 P.2d at 1275. The husband's contentions were rejected and this Court approved the inclusion of the fund at its accrued value at the time of the trial--precisely the process utilized by Judge Perry in this case.

Contrary to Mr. Fletcher's assertions, the trial judge did not utilize a "future" value in connection with his USU retirement fund; rather, the court, in accordance with procedure recently authorized by this Court, included the retirement fund at the value of Mr. Fletcher's interest therein at the time of the trial. Had Mr. Fletcher desired to present evidence sufficient to support some other basis upon which to calculate the value of this asset, he could have done so. It was, in fact, he who called Clark England to testify concerning the value of this asset. Having failed to produce testimony sufficient for an alternate valuation of this asset, Mr. Fletcher is not now in a position to complain. Such was the holding of this Court in English v. English, 565 P.2d 409 (Utah 1977), in response to the contention on appeal that the trial court had failed to discount the value of notes receivable by the husband in computing the property distribution. It was held:

The record does not indicate defendant brought this matter to the attention of the trial court prior to its determination: the claim is now untimely.

565 P.2d at 410. Likewise in this case, having failed to present testimony upon which an alternate valuation could be based, Mr. Fletcher's claims in regard to the

valuation of his pension plan are not only ill-founded but also untimely.

B. The property distribution fashioned by the trial court is fair and should be affirmed. Appellant's brief contends that Mrs. Fletcher could earn approximately \$15,000 per year if she would seek daily employment. This contention entirely ignores the fact that, under Judge Perry's custody award, she will have the responsibility for the rearing of three young children, five, seven and nine years of age. The difficulties created by forcing a single parent with three young children to work full time or more, when coupled with the fact that during her marriage Mrs. Fletcher has not been required to work full time, is a sufficient answer to this contention. It is not an appropriate function of the divorce court to force a woman to go to work full time after eighteen years of married life, particularly when there are three young children at home in need of her attention. None of the cases cited by Mr. Fletcher so holds.

Moreover, appellant's quotation of language from Judge Perry's Memorandum Decision (App. Br. at 9-10) is taken drastically out of context. The quoted language was intended by Judge Perry to constitute an

explanation of the difficulties encountered between the parties and has absolutely no relevance to Mr. Fletcher's present contention that his wife should engage in at least full time work. The statement that "[t]he rational [sic] expressed by the acting judge indicates his attitude toward women as a generally deprived sex in need of the court's protection and preferance" (App. Br. at 10) is a non-sequitur supported neither by the quoted language itself nor by the judge's ruling.

The assertion that "Judge Perry failed to take into account the tax implications of his decree" (Id.) is likewise unsupported. The mathematical razzle-dazzle attempted by appellant is mathematically incorrect (e.g., annual support is \$5400 not \$9000), overlooks elementary tax principles (e.g., alimony in this case is deductible), and wholly ignores the \$13,275 received annually by Mr. Fletcher as wages from his close corporation. Moreover, the comparison attempted between Mr. Fletcher's actual salary and Mrs. Fletcher's conjectural and hypothetical full-time salary--for some reason increased by taxes she would never have to pay--makes no sense whatsoever, and is as misleading and ill-founded as the statement that both Mr. Fletcher (a fully tenured associate professor and government

consultant in Electrical Engineering) and Mrs. Fletcher (a nurse) are both "employed as professionals."

Mr. Fletcher also contends that the decree is "unfair" in that it includes as family property subject to distribution a gun collection and certain improvements allegedly paid for with money inherited from his family. In support of this complaint DuBois v. DuBois, 29 Utah 2d 75, 504 P.2d 1380 (1973), is cited. That case fails to support Mr. Fletcher's position, and in fact underscores the propriety of Judge Perry's ruling. In DuBois, the parties had accumulated an estate in excess of \$500,000. "The greater part of the nucleus of this estate" had come from the wife's relatives. 504 P.2d at 1381. Notwithstanding that "the greater part" of this property had come from the wife's family by inheritance, this Court affirmed the trial judge's property distribution which transferred 40 percent of this inherited property to the husband. In this case, the inherited property of which Mr. Fletcher complains constitutes a much smaller proportion of the property of the parties and its distribution reflects no abuse of discretion.

Mr. Fletcher, who had earned income during the year immediately preceding the trial of this action

of over \$40,000, suggests that Mrs. Fletcher, who had earned income during that period of less than one-quarter that amount, should be responsible for the support of the three children whose custody was awarded to her. The mere statement of this proposition is sufficient argument against it.

It is further suggested that the trial court erred in failing to consider the indebtedness of the parties in distributing their property. App. Br. at 13-15. In fact, the trail court imposed upon Mrs. Fletcher the mortgage obligation against the house which was awarded to her. Likewise, the court imposed upon Mr. Fletcher only the mortgage obligations outstanding upon the Mendon home and the unimproved land awarded to him. R. at 123; 128-29.

By engaging in some creative mathematics, Mr. Fletcher attempts to demonstrate, at page 14 of his Brief, that the property distribution has left him with a negative net worth. His error is that he has deducted the outstanding mortgage obligations on the two major real property assets awarded to him from the value of his equity in those properties, not from their market values. The resulting figure is an accounting absurdity, since the effect is to subtract the obligations twice.

Moreover, he includes at its full value potential future alimony, which is terminable upon the remarriage of Mrs. Fletcher. The court did not order that Mr. Fletcher pay \$48,600 in a lump sum; rather, the court carefully drafted a decree which required this amount to be paid at the modest rate of \$300 per month. It is meaningless to take the total of these payments, which will be made over the next thirteen and one-half years, and include that total as a current obligation. Even if this contingent installment alimony award is treated as part of the property distribution, at the legal interest rate of 8 percent the present value of the award is only \$29,651.14. Finally, the court ordered Mr. Fletcher to pay \$5000 attorneys fees (R. at 124), not \$12,600 as stated. (App. Br. at 14).

In this case, Mr. Fletcher also complains he was awarded merely two-thirds of the assets of the parties. However, property distributions much more favorable to the wife have been routinely upheld by this Court. For example, in Tremayne v. Tremayne, 116 Utah 483, 211 P.2d 452 (1949), the trial court awarded approximately four-fifths of the parties' property to the wife. In upholding that distribution, this Court

noted that the matter of the distribution of property

is in the discretion of the trial court which will not be disturbed unless the court abuses its discretion. The facts of each divorce case are different and each must be determined on what is equitable to the parties under the facts of the case. . . .

Through schooling, appellant's earning capacity has been substantially increased during the marriage period and respondent's earning capacity has not been proportionately increased during that time. To make this schooling and their savings possible, she worked practically throughout their married life. Without her working the bulk of the property which they have, would not have been accumulated, and he probably could not have accumulated it had he been single and had he followed the same course which he did. How far either one would have gone without the other is largely a matter of conjecture. The facts and circumstances amply justified the court in dividing the property as it did even if treated as a division of the property but does not require that she be awarded a larger portion thereof. The court acted well within its discretion and we will not disturb its decision thereon.

211 P.2d at 454 (numerous citations omitted). The foregoing language is directly applicable to circumstances of this case.

Finally, Mr. Fletcher contends that Judge Perry erred in awarding to him approximately \$6,000 in "SNI funds and other stocks", which he claims are being

accumulated as education and missionary funds only for the three older children, whose custody he was awarded. Actually, Mr. Fletcher's complaint appears to be not so much that he was awarded these funds, as that the trial court considered these funds to be his in calculating the "one-third to Mrs. Fletcher and two-thirds to Mr. Fletcher" property distribution. It is important to note that it has been Mr. Fletcher, not his wife or children, who has received, and who will continue to receive, the tax benefits incidental to these funds, which are legally held solely in his name. Tr. at 41-43.

The court's award of these funds to Mr. Fletcher was the only decision possible. In English v. English, 565 P.2d 409 (Utah 1977), this Court held that the trial court "may not, under a decree of divorce, attempt to transfer any property of either parent to the children for the purpose of creating an estate for their permanent benefit." 565 P.2d at 412. Accordingly, it would have been an abuse of discretion for Judge Perry to have awarded these funds directly to the children, even if he had believed Mr. Fletcher's testimony. It might also have been an abuse of discretion for the Judge to have awarded these funds to Mrs. Fletcher, since he had awarded to Mr. Fletcher the custody of the children for

whose benefit these funds are allegedly being held. These funds were, therefore, awarded in the only manner reasonably possible. Moreover, even if these funds are excluded from the value of the property awarded to Mr. Fletcher, he still has been awarded 64.7 percent of the net assets of the parties. Such an award is certainly not an abuse of discretion and cannot in good faith be characterized as "inequitable" or "unjust".

In distributing property, the trial court is entitled to consider the standard of living enjoyed by the wife prior to the divorce as compared with that which she may look forward to thereafter. In making such a consideration, the court held in Blotter v. Blotter, 1 Utah 2d 351, 266 P.2d 1018 (1954):

Although the bulk of the property goes to [the wife], she and the children still will not be as well provided for under the separation as they would have been had the divorce been denied and the parties maintained their home and family life together. We find no abuse of discretion in this disposition of the property and award of alimony and support money.

266 P.2d at 1018-19. Likewise in this case, the property distribution fashioned by the trial court after diligently considering the needs of the parties and their problems should not be disturbed.

C. The trial court appropriately determined the value of the Mendon house, and the parties' other assets, of the date of the trial, not the separation. Appellant complains because the trial judge included in the assets of the family the Mendon house, which Mr. Fletcher had purchased as an element of his battle plan to acquire custody of the children. It is unquestioned that this house was purchased prior to the actual dissolution of the marriage, notwithstanding the assertion that the "act of filing for divorce finalized the division of the marriage." App. Br. at 16. Although Utah once had a so-called "no-fault" divorce statute (§1151 Comp. Laws of Utah, 1876), respondent feels quite certain that it has never been the law of this state that the filing of a complaint for divorce "finalizes the division of the marriage."

In support of his contention that the court should ignore the Mendon house, Mr. Fletcher cites Eppley v. Eppley, 341 N.E.2d 212 (Indiana 1976). That case holds that a valuation date should be selected which will not distort the true value of the parties property. Utilization of the filing date, as contended by Mr. Fletcher, would create, rather than prevent, distortion in this case since it would permit the husband to acquire with assets earned during his marriage

property for which he would not have to account to his wife in the property distribution.

In Carruthers v. Carruthers, 577 P.2d 773 (Colo. App. 1978), the trial court valued the parties' property as of the date of the property distribution hearing rather than the date on which the divorce complaint was filed. The specific property in question was a corn crop. The husband argued that, since the corn crop had not been in existence in the Spring when the divorce complaint was filed, and the wife had taken no active part in the farming operation after that date, it was error for the court to include the value of this crop in the property available for distribution. The court characterized the husband's contention as being "without merit." 577 P.2d at 775.

A trial court's failure to include in the property available for distribution funds received by the husband subsequent to the filing of a complaint for divorce but prior to the entry of the decree distributing the parties' assets was likewise held to be error in Lindsay v. Lindsay, 115 Ariz. 322, 565 P.2d 199 (Ariz. App. 1977). The court held that the trial court's refusal to consider such assets constituted an abuse of discretion. 565 P.2d at 206.

In this case, Judge Perry's decision to include the Menton house in the property available for distribution is further supported by Mr. Fletcher's deliberate attempt to conceal relevant facts concerning his purchase of this house from the court. During redirect examination by Mrs. Fletcher's counsel, Mr. Fletcher testified without reservation that none of the funds with which he had purchased the Mendon house came from Kathy Zollinger, with whom he admitted maintaining a "close relationship", evidenced by their correspondence (Exhibits 1 and 2):

MR. DART: Let me ask you this, Mr. Fletcher. Did any of the money, the downpayment money, that went into the [Mendon] home to make up the amount that was the downpayment before your loan with First Federal come from the Zollingers?

MR. FLETCHER: No.

Q: Not at all?

A: None. Why would you come up with that?

Transcript at 125.

Later that day, Fred Hunsaker, executive vice president of First Federal Savings & Loan in Logan, was called to testify and produced from his files copies of the checks constituting the downpayment on the Mendon house provided by Mr. Fletcher. One of the checks had

been drawn on the First National Bank of Logan in the amount of \$1,500, Exhibit 15:

MR. DART: With respect to the First National check, does it show who the--are all of these cashier's checks?

MR. HUNSAKER: They're all cashier's checks.

Q: Does it show who the purchaser of that check was?

A: There is a name in the corner of the check, Kathy Zollinger, in the lower left-hand corner.

Transcript at 142. Mr. Fletcher on further examination attempted to explain the discrepancy in his testimony.

Tr. at 149-150. This explanation was, however, unconvincing to the trial court:

In considering the testimony on the first day of the hearing when property matters were being discussed and when emotions were relatively calm, the Court found that the defendant was not as open and frank with the Court as the plaintiff has been. For example, the defendant's firm statement under oath that no Zollinger had helped with the purchase of the new [Mendon] home and when refreshed by the appearance of the cashier's check showing a Zollinger name as purchaser claimed it was for payment of the automobile which defendant had earlier testified was sold for \$1,750 with a \$400 down-payment and monthly payments of \$67 each which would leave a balance owing of less than the \$1,500 paid. The Court was also disturbed that the defendant was not open with the Court

in the previous temporary custody hearing with regard to the fact he was then purchasing a new home in Mendon.

Memorandum Decision, R. at 107.

In light of the circumstances of this case, the trial court's decision to value and determine the property of the parties as of the date of the trial, rather than the date the complaint was originally filed, can by no means be said to be either an abuse of discretion or a misapplication of law.

D. The custody and visitation arrangements entered by the trial court after a meticulous and detailed consideration of the parties and the testimony is clearly supported by the evidence and warranted by the circumstances. During the pendency of this action, Judge Perry presided over five days of hearings and trial at which the parties were present and during which the parties testified at length. There was testimony from both expert witnesses and lay persons as to the parties, their conduct, and their relationships with the children. The court also spoke with each of the children, privately in chambers. In short, the trial court has had an excellent opportunity to become acquainted with the parties, their children, and the problems which had developed between them. Judge Perry

utilized this information and insight in writing a detailed Memorandum Decision incorporating his findings, perception and reasoning.

Throughout his attack upon the Judge's decision, Mr. Fletcher fails to point to a single instance in which Judge Perry's decision or findings are not supported by the evidence. Mr. Fletcher cites Sampsel v. Holt, 115 Utah 73, 202 P.2d 505 (1949), for the proposition that this Court "may review the facts as well as the law" of this case. The court in that case, however, noted that the evidence before the trial court had been conflicting, and held:

On this conflicting evidence, the court found that it would be "for the best interest of said minor child to enjoy the society, counsel and advice of his father for the three summer months of June, July and August of each year". We are not disposed to upset that finding. The trial judge had the opportunity, as we do not, of seeing the parties and the witnesses, of observing their demeanor, and of forming opinions. On the record before us, it cannot be said that the finding of the trial judge is erroneous, and it is therefore sustained.

202 P.2d at 554 (emphasis added).

While Mr. Fletcher's disenchantment with and disappointment in Judge Perry's ruling is understandable,

it has long been the law of this jurisdiction that it is the interests of the children, and not of the parents, which are to be considered in custody matters. For example, in Cox v. Cox, 532 P.2d 994 (Utah 1975), the husband appealed from the trial court's award of custody to the wife. This court refused to modify the trial judge's decision, observing:

In addition to and quite beyond the rights of the parents, there is the important principle that the paramount consideration is the long-term welfare and adjustment of the children. That being so, we think there is wisdom in the traditional patterns of thought that the roles of the mother and father in the family are such that, all other things being comparatively equal, the children should be in the care of their mother, especially so children of younger years; and this may be true even where the divorce is granted to the father.

532 P.2d at 996 (footnotes omitted). The court then held, in language as applicable to this case as to the case then before it, that:

After giving what impresses us as careful attention to the problems involved, and consistent with the ideas hereinabove expressed, the trial court concluded that custody should be with the plaintiff, with generous visiting rights for the defendant. We appreciate the difficulties involved in such a decision for the trial court; and even more so, for the parties and the children, whose tolerance, forbearance and cooperation are demanded in this

situation. In harmony with the rule that in such matters the court's judgment will not be upset unless it is persuasively shown to be contrary to the best interests and welfare of the children and the family, we decline to intervene.

Id. (emphasis added).

In addition to the presumption that the trial court's determination is appropriate and will stand unless clearly shown to be an abuse of discretion, there is the presumption, which has been frequently recognized by this Court, that custody, particularly of younger children, should be given to the mother where possible:

[T]he policy of our decisions has been to give weight to the view that all things being equal, preference should be given to the mother in awarding custody of a child of tender years, notwithstanding the divorce is granted to the father. And this view is based upon the oft-stated purpose of the award of custody to provide for the child's best interests and welfare

Steiger v. Steiger, 4 Utah 2d 273, 293 P.2d 418 at 420 (1956) (citations omitted). This Court's continued adherence to this position is manifest by its recognition in recent cases of a natural presumption that a qualified mother should be awarded custody of her young children. Smith v. Smith, 564 P.2d 307 (Utah 1977); and Rice v. Rice, 564 P.2d 305 (Utah 1977).

In support of his plea for custody of the

children, Mr. Fletcher states that when the parties attempted to maintain custody of the children on alternate weeks in response to an earlier temporary order of Judge Perry, the week the children were with the father "went well", but when the children were to stay with the mother, "the children called a halt to the experiment." App. Br. at 24. Judge Perry also noted this problem, but reached the more obvious conclusion that the fault was that of Mr. Fletcher, not the mother:

[Mr. Fletcher] failed to properly instruct the children that they should obey the Court's order to spend alternate weeks with the parents.

Memorandum Decision, R. at 108.

Mr. Fletcher also relies upon Johnson v. Johnson, 7 Utah 2d 263, 323 P.2d 16 (1958), in support of his assertion that Judge Perry erred in not awarding custody of all six children to him. The Johnson case is readily distinguishable because of its vastly different factual circumstances. There, the father continued to live in the parties' former residence in their old hometown, while the mother had moved away to the unfamiliar metropolitan environment of Salt Lake City where she was attempting to live in an apartment. The applicability of a case decided under such facts to the circumstances

of these parties is remote. Of greater importance to this situation is the recognition of the great discretion that is to be accorded to the trial judge:

Due to the equitable nature of [custody] proceedings, the proper adjudication of which is highly dependent upon personal equations which the trial court is in an advantaged position to appraise, he is allowed considerable latitude of discretion and his orders will not be disturbed unless it appears that there has been a plain abuse thereof. We cannot say that he did so here, but rather are impressed with the wisdom in which he handled the difficult situation.

323 P.2d at 19 (emphasis added).

Likewise, the facts of the Oregon case of Dahlman v. Dahlman, 531 P.2d 909 (Or. App. 1975), are also readily distinguishable. The award of custody to the father in that case was based upon the indiscreet, immoral conduct of the mother:

While it is true that the mother's extramarital actions and relationship with her late paramour would not permanently disqualify her from being awarded custody . . . moral transgressions must be considered together with other relevant factors in determining what is in the best interests of the children.

531 P.2d at 911 (citation omitted). Such a case is of little relevance to this situation where it is the father who appears to have found an individual whose company he prefers to that of his wife. Unfortunately,

Mr. Fletcher also chose to interject this association into the childrens' lives by allowing Kathy Zollinger to go with him and the children to Salt Lake for shopping and to ride the Alpine Slide at Park City (Tr. 400); painting the new house in Mendon (Tr. at 416); and even putting her in a position to be a "confidant" to the children (Tr. at 412), all while the issue of custody was before the trial court.

It is asserted by Mr. Fletcher in his brief that the trial court never addressed the issue of whether placing the younger children in the care of their mother rather than of their father was in their best interest. App. Br. 26-27. Such an assertion is wholly untenable in light of the comprehensive Memorandum Decision painstakingly entered by the court detailing which of the two parents was the better suited to rear the children.

Likewise without any support whatsoever is the assertion that "the custody order of the three younger children to Appellee [sic] was not made to further their best interests, but rather to punish Appellant." App. Br. 27. Understandably, Mr. Fletcher's brief does not mention that Judge Perry devoted some fourteen paragraphs of his Memorandum Decision to

detailing which of the parties he felt could best care for the children.

Mr. Fletcher complains that "restricting visitation rights of the parents to arrangements made two weeks in advance was a clear abuse of discretion on the part of the Judge." App. Br. at 19. In support of this conclusory allegation, the Utah case of Gribble v. Gribble, 583 P.2d 64 (Utah 1978), is cited. The Gribble decision held that step-parents, in circumstances where they stand in loco parentis, may be entitled to visitation rights. The decision in no way restricts the customary latitude of the trial judge to fashion such orders as he reasonably believes to be in the best interests of the children.

In this case, Judge Perry's requirement that visitation be arranged two weeks in advance reflects a sensitivity to the tensions existing between the parties and a desire to shield the children from this conflict to the greatest extent possible. Judge Perry's order, however, grants each parent virtually unlimited visitation with the three children in the other's custody. The requirement of advance arrangements will operate merely to prevent "last minute" arrangements and arguments of which the trial judge was justifiably apprehensive.

Inasmuch as both parties will continue to reside within a few miles of each other, it is apparent that this minor restriction will not cause any undue hardship to either party; rather, it will merely shield the children from any continued turmoil between the parties. Accordingly, the visitation arrangements do not constitute an abuse of discretion; they reflect the same high degree of practical sensitivity demonstrated by the remainder of Judge Perry's decision.

It is extremely significant that Mr. Fletcher never delineates a single specific reason why he is better able to care for the children than their mother. In view of the absence of any such demonstration of error by the trial court, the presumptions that the trial court's award is correct and that the mother is best able to care for young children stand, and Judge Perry's custody order should be affirmed.

E. The trial court's findings justify continued support through age nineteen. In his Memorandum Decision, Judge Perry specifically found that "the children must be supported through high school and should have some support to give them a start on a college or some other career after high school." R. at 109. The formal Findings of Fact entered by the trial

judge also state that "the Court finds that the children must be supported through high school and should have some support to give them a start on to college or some other career after high school." R. at 122.

Section 15-2-1, Utah Code Annotated (1953 as amended), clearly provides:

The period of minority extends in males and females to the age of eighteen years; but all minors obtain their majority by marriage. It is further provided that courts in divorce actions may order support to age 21.

This Court has construed this statute on three occasions. In the first of these, Ferguson v. Ferguson, 578 P.2d 1274 (Utah 1978), it was held that the decision to order support beyond age eighteen was in the sound discretion of the trial court and, therefore, the trial court's election not to order such continued support would not be reversed on appeal.

In Carlson v. Carlson, 584 P.2d 864 (Utah 1978), the trial court had ordered continued support beyond age eighteen. The trial court had not, however, made any finding that such continued support was necessary:

The significant and controlling proposition here is that a search of the findings of the trial court fails to disclose any finding of any special or unusual circumstances which would

justify the order compelling the defendant to support the children beyond the age of 18, when they attain the age of majority and are thus emancipated. In the absence of such a finding, the order cannot properly stand.

. . . .

In view of the fact that under our law the court has continuing jurisdiction to deal with problems relating to the support and custody of children, on remand, if the parties so desire, and upon proper invocation of the court's attention thereto, it should allow the presentation of evidence of both sides and make a finding of one way or the other on . . . the disputed issues discussed herein.

The order is vacated and the case remanded for such further proceedings as may be deemed necessary

558 P.2d at 866 (footnote omitted).

The most recent of these cases is Harris v. Harr. 585 P.2d 45 (Utah 1978). In Harris, the trial judge again ordered continued support beyond age eighteen, but failed to make any finding whatsoever in support of his order:

In the instant matter the court made no findings of any special or unusual circumstances to justify continued support after age 18, but based his order solely upon his belief that in this case the children do not obtain majority until age twenty-one.

The order is reversed and the case remanded for a determination of whether or not circumstances are

such as to justify a further order of support to the eighteen year old daughter.

585 P.2d at 437.

Both Carlson and Harris are distinguishable from the present case in that Judge Perry specifically found that the circumstances of the parties and of the younger children necessitated an order of continued support through age nineteen. Such findings appear both in Memorandum Decision (R. at 109) and in his formal Findings of Fact (R. at 122). Accordingly, Judge Perry has complied with the now firmly established requirement that in the exercise of his discretion under section 15-2-1, the trial judge make a specific determination as to the necessity of the continued support award.

III. THE ATTORNEYS FEES AWARDED ARE APPROPRIATE, BUT RESPONDENT IS ENTITLED TO AN ADDITIONAL AWARD REPRESENTING THE FEES INCURRED IN THIS APPEAL.

The trial judge found that the sum of \$5000 was a reasonable contribution by Mr. Fletcher to the fees for the services rendered to Mrs. Fletcher by her attorneys through the time of the trial and awarded this sum to her. R. at 124. Judge Perry expressly took

the award of this amount into consideration when setting the modest alimony award of \$300 per month:

The Court further finds that this [alimony award] results in a lower figure than would be the result if a cash settlement for the difference was imposed to be repaid at \$300 per month at eight percent interest, but the Court has taken into consideration the court costs and attorney's fees Defendant must pay.

Findings of Fact, R. at 123 (emphasis added).

Although Mrs. Fletcher was granted custody of the three youngest children, Mr. Fletcher's income is approximately four times as great as hers. (See, supra at 18-19.) In such circumstances, this Court has repeatedly held that an award of attorneys fees to the wife is appropriate. For example, in Alldredge v. Alldredge, 119 Utah 504, 229 P.2d 681 (1951), it was pointed out that this Court had traditionally adhered to the policy that

the awarding of counsel fees as well as alimony was in the discretion of the trial court, and that a finding of the trial court would not be set aside in the absence of an abuse of such discretion.

. . . .

It was error for the court to deny the [wife] counsel fees which are a part of her costs pendente lite and which

could have been required before the suit was concluded.

229 P.2d at 686-87. The trial court's failure to award attorneys fees to the wife was, likewise, reversed in Christensen v. Christensen, 18 Utah 2d 315, 422 P.2d 534 (1967); and Griffiths v. Griffiths, 3 Utah 2d 82, 278 P.2d 983 (1955).

In support of his complaint that Judge Perry should not have awarded attorneys fees, Mr. Fletcher cites cases from Alaska, Washington, Colorado and Montana; he cites no Utah cases whatsoever. Moreover, much of Mr. Fletcher's argument is based upon the misapprehension that the property settlement favors Mrs. Fletcher. (Supra at 16-23.) Once this misapprehension is dispelled, Mr. Fletcher's arguments evaporate along with it.

Due to Mr. Fletcher's dissatisfaction with Judge Perry's rulings, respondent has been burdened with the costs of this appeal. This Court has frequently held that, in such circumstances, a further award is appropriate to cover the added costs necessitated by the dissatisfied party's appeal. For example, in Ehninger v. Ehninger, 569 P.2d 1104 (Utah 1977), the husband, disenchanted with the trial judge's award, appealed with the usual contention that the property distribution was unfair and inequitable. The original

decree was affirmed and the case remanded to the trial court for the assessment of the additional attorneys fees incurred by the wife as a result of the appeal:

Inasmuch as the plaintiff has been put to the necessity of defending this appeal, which we have found to be without merit, it is our opinion that she is justified in her request for a further award of attorney's fees in addition to the modest amount of \$200 allowed her in the trial court.

569 P.2d at 1106. To the same effect is Baker v. Baker, 551 P.2d 1263 (Utah 1976).

The only aspect of Judge Perry's decree with which Mr. Fletcher does not quibble is the granting of the divorce itself. As a result of this appeal, Mrs. Fletcher has incurred substantial additional expense. It is, therefore, appropriate that she be reimbursed for those additional expenses necessitated by this appeal.

CONCLUSION

After presiding at a four-day trial and a full-day temporary custody hearing, Judge Perry entered his decree in this action. The care and deliberation which he gave to this matter is apparent from the detailed Memorandum Decision entered. In divorce cases, this Court has invariably held that the decision of the trial judge is to be respected unless it clearly

appears that he has abused his discretion or manifestly misapplied relevant law. This standard of review appropriately grants deference to the advantaged position of the trial judge, who has seen the parties, listened to their testimony, and had a personal opportunity to perceive their problems and circumstances. Nowhere in his brief does appellant isolate a single instance in which Judge Perry's findings are not supported by the evidence; rather, Mr. Fletcher states and restates his dissatisfaction with the trial judge's ruling--such is neither an appropriate nor a sufficient ground for reversal or modification.

Mr. Fletcher charges that Judge Perry valued his USU retirement fund at its "full future value." This allegation is, very simply, erroneous. The value utilized by the trial judge was the 1977 present accrued value. Under the decisions of this Court, such was an appropriate method of evaluating the assets of the parties.

The property distribution fashioned by Judge Perry awards approximately one-third of the property to Mrs. Fletcher, with the remaining two-thirds going to Mr. Fletcher. Through some creative accounting, Mr. Fletcher attempts to show that he has been left with a

negative net worth. Again, this assertion is clearly erroneous, because the mortgage indebtedness has, in effect, been deducted from the gross value on two separate occasions. In addition, the alimony award has been lumped in at its full future value for no apparent reason. Mr. Fletcher also alleges that the value of the "education funds" of the three older children has erroneously been charged to him. It is appropriate that these funds should be awarded to him, since he has custody of these children. Additionally, it is Mr. Fletcher who has enjoyed, and will continue to enjoy, the tax benefits associated with these funds. Whether or not the present value of these funds is properly to be included on Mr. Fletcher's side of the ledger when comparing the value of the property distributed to him as opposed to the value of that distributed to Mrs. Fletcher is not meaningful since the value of these funds is so small compared to the overall assets of the parties that the net result would, in any case, be well within the sound discretion of the trial court.

Mr. Fletcher complains because the trial court included as an asset of the family the Mendon house which he had purchased subsequent to the filing

of the divorce complaint. Although this Court appears never to have reached this precise question, other jurisdictions have and clearly hold that the date upon which the parties' assets are to be determined is the time of the trial or entry of the decree, not the earlier filing of the original complaint. Again, the inclusion of this asset was fully supportable and entirely within the sound discretion of the trial court.

The custody and visitation arrangements fashioned by the trial court are also the object of Mr. Fletcher's dissatisfaction. The time, effort, and consideration given these matters by the trial court is apparent from the Record. The trial court made a detailed assessment of the beneficial and detrimental characteristics displayed by both of the parties, spoke with the children, evaluated the evidence, and determined that the best interests of the children would be served by placing them in the custody of their mother. The court was, nevertheless, forced to take into consideration the alienation of the three older children against their mother caused by Mr. Fletcher's decision to embroil his children in his marital difficulties. Accordingly, the trial court awarded custody of the

younger children to the mother, but permitted the father to take custody of the older children, who, the trial court believed, had been irreparably alienated from Mrs. Fletcher. Liberal visitation was encouraged, but only by prior arrangement to shield the children from the possibility of becoming "pawns" should the difficulties between the parties continue. Far from being an abuse of discretion, Judge Perry's decision reflects an admirable degree of thought, compassion and wisdom.

Support was ordered for the three younger children through age nineteen, the court having specifically found that support for an additional year beyond age eighteen was necessary in order to allow them to complete high school and move toward a college or career education. Such a decision, supported by a specific finding of necessity, is in strict compliance with the statutes of this state as construed by this Court.

Judge Perry ordered Mr. Fletcher, whose income is approximately four times that of Mrs. Fletcher, to contribute the sum of \$5,000 towards the attorneys fees incurred by her to the date of the trial. In recognition of this substantial attorneys fee award, Judge Perry ordered only a modest amount of alimony. The award of attorneys fees to the wife is, of course,

appropriate in general and, in this case, particularly so, since the trial judge integrated the attorneys fee award with the remaining aspects of his support orders. Due to this appeal, which results solely from Mr. Fletcher's disenchantment with Judge Perry's decisions, Mrs. Fletcher has incurred further significant expense. Under the decisions of this Court, it is appropriate that she be awarded such further sum as will reasonably compensate her for the attorneys fees incurred in the defense of this appeal.

The decree and orders entered by Judge Perry reflect careful, wise and judicious consideration of the parties, their problems, and their properties. Those orders, carefully fashioned by the trial judge who has had an opportunity to observe and come to know the parties, should not be disturbed absent a showing of a clear abuse of discretion or manifest injustice. No such showing has been made in this case and Judge Perry's decision should be affirmed in its entirety.

RESPECTFULLY SUBMITTED this 16th day of September, 1979.

DART & STEGALL

By B. L. Dart
B. L. Dart
By John D. Parken
John D. Parken
Attorneys for
Plaintiff-Respondent

OLSON, HOGGAN & SORENSON

By BRUCE L. JORGENSEN
Bruce L. Jorgensen

MAILING CERTIFICATE

I certify that I mailed postage prepaid two copies of the foregoing Brief to Lyle W. Hillyard, HILLYARD, LOW & ANDERSON, 175 East 100 North, Logan, Utah 84321, and two copies to Bruce L. Jorgensen, OLSON, HOGGAN & SORENSON, 56 West Center, Logan, Utah 84321, this 6th day of September, 1979.

15