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Burt v. Burt : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
FOR THE STATE OF UTAH

DAVID BURT,)	
)	BRIEF OF APPELLANT
Plaintiff/Respondent,)	
)	
vs.)	CASE NO: 890190-CA
)	
BETTY MAE BURT,)	
)	PRIORITY: 14b
Defendant/Appellant.)	

An Appeal from a Judgment of the Second
Judicial District Court of
Weber County, State of Utah
Honorable Stanton M. Taylor, Presiding

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David Burt, Plaintiff and Respondent.

Betty May Burt, Defendant and Appellant.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal by virtue of the Constitution of the State of Utah, Article VIII, Section 1, et seq., and the Judicial Code of the Utah Code Annotated, in particular § 78-2a-3 entitled "Court of Appeals Jurisdiction", which states as follows:

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

(h) appeals from district court involving domestic relations cases, including but not limited to divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

This appeal is from the District Court of Weber County and involves a domestic relations case including those issues delineated in the Utah Code Annotated § 78-2a-3(2)(h). Therefore, this Court has appellate jurisdiction.

STATEMENT OF NATURE OF THE PROCEEDINGS

This is an action wherein the Plaintiff/Respondent, who is the husband, brought an action for divorce against the wife, who is the Defendant/Appellant, in the Second Judicial District Court of Weber County, wherein ultimately a Decree of Divorce was granted to the parties with a division of the marital property and an award of alimony. There were minor children born of the parties who were all emancipated as of the time of the divorce so that there are no issues concerning child support, child custody or visitation, but the issues essentially evolve around a division of property and an award of alimony.

STATEMENT OF THE ISSUES

The issues presented by this appeal are:

1. Did the Trial Court abuse its discretion in making a final property division for the following reasons:

(a) Did the Trial Court abuse its discretion in failing to make an award of survivor annuity benefits of the Respondent to the Appellant.

(b) Did the Trial Court abuse its discretion in failing to consider the Respondent's retirement as part of the property division when it essentially awarded to the Respondent his entire retirement.

(c) Did the Trial Court abuse its discretion in failing to consider the pre-marital money the Appellant had paid into the marital home of the parties, and in failing to award one-half of that marital home to the Appellant, which home was fully paid for by March of 1973.

(d) Did the Trial Court abuse its discretion in finding that the monies obtained when the Respondent sold the boat, Toyota truck and snowmobile and were included in the bank accounts when no testimony was given to indicate that that is where the monies had gone from the sales.

(e) Did the Trial Court abuse its discretion in its property division by considering the non-co-mingled and traceable separate inheritance properties of the parties.

2. Did the Trial Court abuse its discretion in awarding to the Appellant the sum of \$300.00 as and for alimony after finding an \$851.00 difference between the income of the Appellant and the Respondent.

3. Is the Appellant entitled to attorney's fees and costs on appeal.

STATEMENT OF THE CASE

The Appellant and Respondent were married on the 5th day of March, 1947, in Idaho Falls, State of Idaho, with a marriage at the time of their divorce of almost 42 years. (See TR p. 1).

The parties had two children born as issue of their marriage, both of whom had reached the age of majority by the time of the trial and were emancipated. (See TR p. 1, Trans. p. 58).

The parties had jointly acquired real estate and personal property. The Defendant/Appellant had up to 1984 at various times received an inheritance of approximately \$71,600.00, which the Appellant continually maintained, as acknowledged by the Respondent at the time of trial, as her separate property with no co-mingling with the marital assets of the parties. (See Trans. pp. 94-98, 127, 178, 244-241).

The Respondent worked as an employee of the Federal government to the point of obtaining a net federal retirement by the time of the divorce of \$1,350.00 per month, with an additional income of \$616.00 for a total of \$1,966.00 per month. (See Trans. pp. 61, 72, 73, 76, 107, 111, 116-119).

The Appellant received \$415.00 from Social Security, \$515.00 from interest and dividends, and \$185.00 a month from an Individual Retirement Account, with a total monthly

earning of \$1,115.00 per month. (See Trans. p. 111, Defendant's Exhibit 15).

The Appellant filed a divorce Complaint as the Plaintiff on April 24, 1987, and three days thereafter the Respondent filed a divorce Complaint as the Plaintiff on April 27, 1987. Thereafter the two cases were consolidated with the Appellant being listed as the Defendant and the Respondent being listed as the Plaintiff. (See TR. pp 1-8).

Thereafter, an Order to Show Cause was brought with a Recommended Order, with Objections to the Recommended Order, with eventually a Recommended and Stipulated Order on Order to Show Cause being entered granting temporary orders to the parties. (See TR pp. 21-38).

A pre-trial settlement conference was held between the parties with Financial Declarations being submitted, proposed settlements, a Recommended Pre-Trial Order and Objections to the Recommended Pre-Trial Order being entered and this case was set for trial. (See TR pp. 41-78).

The parties went to trial on January 20, 1988, exactly one year after their separation of January 20, 1987. (See Trans. p. 64 & TR pp. 83-94).

The Trial Court took the matter under advisement and rendered a Memorandum Decision on February 8, 1989. (See TR pp. 96-98).

Based upon the Memorandum Decision, Findings of Fact and Conclusions of Law and a Decree of Divorce were prepared by Respondent's counsel, approved as to form by Appellant's counsel with some changes, and ultimately signed by the Trial Judge on March 2, 1989. (See TR pp. 99-105).

A comparison between the parties incomes would show a disparity of \$851.00 a month between the parties with the Trial Court awarding to the Appellant the sum of \$300.00 per month as and for alimony. (See TR p. 102).

Numerous exhibits were presented and admitted and testimony was given as to the real and personal property of the parties and their values, including the inheritances of the Appellant and of the Respondent and the inheritance values as monies separate and apart from those used for ordinary family living expenses. Exhibits and testimony were also given as to each of the parties respective earnings and employment, including a survivor annuity benefit of the Respondent's retirement, (See Exhibits 4, 11-19, Trans. pp. 74-85, 94-97, 106, 119, 127, 240-245, 252, & 257).

The Trial Court found that the Respondent had sold the boat, snowmobile and Toyota truck, and determined that the money obtained from those sales were included in the bank accounts which were ultimately awarded to the Respondent, yet no testimony was offered as to the monies of the sale

of the Toyota or boat or snowmobile going into the savings accounts ultimately awarded to the Respondent. (See Trans. pp. 191-193, 249-251, Exhibit #18).

The Appellant filed her Notice of Appeal on the 28th day of March, 1989, to this Court. (See TR pp. 105-119).

SUMMARY OF ARGUMENTS

1. The Trial Court has abused its discretion in its division of the marital property of the parties.

(a) The Trial Court abused its discretion in failing to make an award of survivor annuity benefits of the respondent to the Appellant.

(b) The Trial Court abused its discretion in failing to consider the Respondent's retirement as part of the property division by essentially awarding to the Respondent his entire retirement.

(c) The Trial Court abused its discretion in failing to consider the pre-marital money the Appellant had paid into the marital home and in failing to award one-half of that marital home to the Appellant.

(d) The Trial Court abused its discretion in finding that the monies obtained from the Respondent's sale of a boat, Toyota truck and snowmobile were included in his bank accounts when no testimony was given to indicate that that is where the monies had gone from the sales.

(e) The Trial Court abused its discretion and its property division by considering the non-co-mingled and traceable separate inheritance properties of the parties.

2. The Trial Court abused its discretion in awarding to the Appellant the sum of \$300.00 as and for alimony after finding an \$851.00 difference between the income of the Appellant and the Respondent.

3. The Appellant is entitled to attorney's fees and costs on appeal.

ARGUMENTS

POINT I.

THE TRIAL COURT HAS ABUSED ITS DISCRETION IN ITS DIVISION OF THE MARITAL PROPERTY OF THE PARTIES.

In a divorce proceeding, "determining and assigning values to marital property is a matter for the Trial Court and this Court will not disturb those determinations absent a showing of clear abuse of discretion." Talley v. Talley, 739 P.2d 83, 84 (Utah Ct. App. 1987). In making such orders, the Trial Court is permitted broad latitude, and its judgment is not to be likely disturbed, so long as it exercises its discretion in accordance with the standards set by this Court. Newmeyer v. Newmeyer, 745 P.2d 1276, 1277 (Utah 1987). The Appellant bears the burden of establishing that the Trial Court violated those standards "or

that the Trial Court's factual findings upon which the property division is grounded are clearly erroneous under Utah Rule of Civil Procedure 52(a)". Additionally, assessing the weight and credibility of expert witness testimony is a matter for the trier of fact. Yelderman v. Yelderman, 669 P.2d 406, 408 (Utah 1983) "[I]t is within the providence of the fact finder to believe those witnesses or evidence it chooses". Id., at 408

The Trial Court did abuse its discretion in making a division of the marital property concerning those issues as delineated in the following arguments.

POINT I(a).

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO MAKE AN AWARD OF SURVIVOR ANNUITY BENEFITS OF THE RESPONDENT TO THE APPELLANT.

The Trial Court in this matter was requested by the parties due to their failure with the limited exception of a few personal property items, to make an equitable division of the property acquired during the marriage. Pursuant to Talley v. Talley, cited above, in a divorce proceeding the Trial Court is to determine and assign values to marital property and to make a division according to its discretion entering factual findings upon which the property division is grounded under Utah Rules of Civil Procedure, Rule 52(a).

In this case, after testimony by the Plaintiff that he had retired from Hill Air Force Base with 30 years of credit towards Civil Service Retirement in 1976, the Trial Court failed to enter any Findings of Fact pursuant to Rule 52(a) as to its consideration of survivor annuity benefit and a designation by the Plaintiff for that Civil Service Retirement benefit to the Defendant or whether the Trial Court Judge was simply denying that benefit to the Defendant/Appellant herein. There is no factual finding in either the Memorandum Decision nor the Findings of Fact prepared by Respondent's counsel as to the Trial Court's consideration of the survivor annuity benefit. The Trial Court failed to consider that marital asset under the property division, essentially all of which had been acquired during the parties' 42 year marriage with the exception of a year or two this constitutes a clear abuse of discretion on behalf of the Trial Court and requires that the case be remanded for entry of appropriate Findings of Fact in regards to the survivor annuity benefit. See Barker v. Francis, 741 P.2d 548 (Utah Ct. App. 1987) wherein this Court held that under the Utah Rules of Civil Procedure an appellant Court can set aside the factual findings if they are clearly erroneous and that it was irrelevant whether the case was one in equity or one at law.

POINT I (b) .

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER THE RESPONDENT'S RETIREMENT AS PART OF THE PROPERTY DIVISION BY ESSENTIALLY AWARDING TO THE RESPONDENT HIS ENTIRE RETIREMENT.

The Utah Supreme Court in the now oft cited case of Woodward v. Woodward, 656 P.2d 431 (Utah 1982), specifically held, citing an earlier case of Englert v. Englert, 576 P.2d 1247 (Utah 1978) as follows:

...We emphasize the equitable nature of proceedings dealing with the family, pointing out that the court may take into consideration all of the pertinent circumstances. These circumstances encompass "all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived; and that this includes any such pension fund or insurance". Id. at 1276. To the extent that Bennett v. Bennett, supra, may limit the ability of the court to consider all of the parties' assets and circumstances, including retirement and pension rights, it is expressly overruled.

In the immediate case at hand, the Appellant based on the transcript as resisted by the Respondent, did specifically ask for a division of the retirement he was currently receiving as a part of property distribution. A review of the Memorandum Decision and the Findings of Fact, as in the previous argument fails to disclose any consideration by the Trial Court of the retirement benefits or a consideration of a division of that property as a marital asset accrued

during the parties' marriage of 42 years. The Court did find the income of the Plaintiff/Respondent including his retirement to be \$1,966.00 and did address the retirement as income to the Plaintiff, but failed to make any distribution of that retirement as a marital asset or marital property in the distribution thereof. It rather considered the retirement income of approximately \$1,300.00 in the Plaintiff's income and ordered the payment of alimony of \$300.00 per month. Under Utah Code Annotated § 30-3-5(5) the alimony would automatically terminate upon the remarriage of the Appellant or would terminate under Utah Code Annotated § 30-3-5(6) upon establishment by the Respondent that the Appellant was residing with a person of the opposite sex, or upon Appellant's death.

The retirement accumulated should be treated as a marital asset and as personal property to be considered by the Court in its division of the property rather than as income with a possible, although the Findings of Fact failed to indicate this, award of part of that retirement to the Appellant through an alimony award that can terminate upon remarriage, death or cohabitation, conditions which are not applicable to a property division of a marital asset.

Based upon the above and foregoing points of law, the fact that the retirement is a marital asset and should be

distributed equitably and the Trial Court's failure to delineate through its findings of fact as required by Rule 52 of the Utah Rules of Civil Procedure the Court's treatment of that marital asset, the findings should be vacated or at least better delineated and the case remanded for further consideration by the Trial Judge.

POINT I(c).

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER THE PRE-MARITAL MONEY THE APPELLANT HAD PAID INTO THE MARITAL HOME AND IN FAILING TO AWARD ONE-HALF OF THAT MARITAL HOME TO THE APPELLANT.

As cited earlier in Point I(b), Englert v. Englert, at 1276, the law essentially requires in a divorce action that all of the assets of every nature possessed by the parties whenever obtained and from whatever source derived, should be considered by the divorce Court or Trial Court in arriving at an equitable distribution of the parties.

Additionally, the Utah Code Annotated § 30-3-5(1) indicates that when a Decree of Divorce is rendered the Court may include in it equitable orders relating to the ... property,...

In the immediate case at hand, testimony was given by both parties as to the purchase in 1953 of a marital home located at 3502 Polk which was the second home purchased by

the parties, having previously purchased a home in which the Defendant/Appellant had invested \$2,500.00 and the Plaintiff/Respondent had invested \$800.00. When the first home was sold that money was converted to the second home along with other assets that were joined by the parties and some assistance from the parties' parents. The second home was paid for in full in 1973 and continued to be the marital home of the parties until their separation January 20, 1987.

This marital home was stipulated by the parties to a value of \$65,000.00, with payments over a 20 year mortgage of approximately \$100.00 a month which were paid by the Respondent while the Appellant made numerous improvements, including painting, recarpeting, structural additions and other refurbishing.

The Trial Court in making its division of the "marital assets" failed to consider the Respondent's investments and contributions to the marital home and literally awarded the marital home free and clear to the Respondent with an offset of a \$65,000.00 home which the Appellant had purchased in 1987 from inheritance money.

It is a clear abuse of discretion on the Trial Court's part to award to the Appellant no interest in the marital home acquired over a 20-30 year time period with capital improvements and other investments by both parties toward

the upkeep of the marital home and to offset that against the home purchased after separation by the Appellant out of inheritance income that was entirely separate and apart from any marital assets. The inheritance issue and the Court's abuse of discretion in that matter are further delineated in Point I(e)

Accordingly, this Court should remand the case for reconsideration of the marital home as a marital asset and for better delineation as to its consideration in the final property division as an asset acquired during the marriage to which the Appellant is entitled to one-half, or better factual findings as to why the Trial Court felt, if in fact it did, that she was not entitled to one-half of that marital asset, or in the alternative as this Court has done on occasion, to propose its own resolution.

POINT I(d).

THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE MONIES OBTAINED FROM THE RESPONDENT'S SALE OF A BOAT, TOYOTA TRUCK AND SNOWMOBILE WERE INCLUDED IN HIS BANK ACCOUNTS WHEN NO TESTIMONY WAS GIVEN TO INDICATE THAT THAT IS WHERE THE MONIES HAD GONE FROM THE SALES.

The Trial Court did consider in its Memorandum Decision and did specifically find that the Respondent did sell a Toyota truck for the sum of \$2,250.00, a 16 foot Bellboy

cabin boat with a 75 horsepower outboard motor, and snowmobile for \$650.00 for a total of \$2,900.00. The Trial Court did fail to address assessed values pursuant to the Appellant's exhibit for the boat of \$1,100.00 and the snowmobile for \$150.00, and failed to enter findings as to those values which constitutes an abuse of discretion.

Further, the Trial Court in its Memorandum Decision specifically found that there were additional items of value sold by the Plaintiff, including the boat, Toyota truck, etc., and found the value included in the bank accounts. A careful review of the transcript and documentary evidence submitted to the Court would not support a finding that the sums of money received from those marital assets were included in the bank accounts awarded to the Respondent. When a finding is against the weight of the evidence or if the Court is otherwise definitely and firmly convinced that a mistake has been made, which is the case in regards to these personal property items, then the finding is clearly erroneous and the case should be remanded for further consideration. See State v. Walker, 743 P.2d 191 (Utah 1987); Western Kane County Special Service District No. 1 v Jackson Cattle Company, 744 P.2d 1376 (Utah 1987) and T.R.F. v. Felan, 760 P.2d 906 (Utah Ct. App. 1988).

The Trial Court further finds in its Memorandum Decision which was not included in the Findings of Fact ultimately submitted and signed, that if the sums of money were not included in those accounts, meaning the savings accounts, awarded to the Respondent, then there should be an equal division of those sums of money. Again, no finding was entered as to what the sums of money would constitute other than there was an agreement as to the \$2,250.00 for the Toyota truck, and no findings were made as to the value of the boat and the snowmobile valued by the Appellant at \$1,250.00 but sold by the Respondent for \$650.00.

Accordingly, due to a clear abuse of discretion on behalf of the Trial Court, the issue as to the boat, Toyota truck and the snowmobile should be remanded for the entry of property Findings of Fact and a determination by the Court as to whether or not those sums were actually included in the bank accounts when the record is void as to their inclusion in those accounts. Presumably they were not included but were monies simply received by the Respondent which should be awarded equally as marital assets.

POINT I(e).

THE TRIAL COURT ABUSED ITS DISCRETION IN
ITS PROPERTY DIVISION BY CONSIDERING THE
NON-CO-MINGLED AND TRACEABLE SEPARATE

INHERITANCE PROPERTIES OF THE PARTIES IN
ITS FINAL AWARD OF PROPERTY.

The Trial Court found that "the marital financial arrangement of the parties was unique with the Defendant becoming employed part-time with minimal salary and the Plaintiff paying all of their living expense and the Defendant spending her money as she pleased with her money to be offset by the Plaintiff's use of the watch repair money for his private use." The Trial Court further found that the arrangement continued on through the marriage even after the Defendant was working full time and in some years equalled his income, and after she had inherited a substantial sum from her parents. The Trial Court did give credit to the Defendant in finding that she had contributed to the household by making improvements to the house and buying furniture, but further found that it did create a situation of what was hers was hers and what was his was theirs. The Court ultimately found that since "the support by Plaintiff allowed Defendant to invest, etc., without encroachment into the funds, the Court considers it only fair to allow Plaintiff to share in that increase." Accordingly the Trial Court awarded to the Plaintiff the family residence at a value of \$65,000.00, his two savings account at a value of \$28,509.00, and the personal property at a value of \$8,644.00 for a total value in property of \$102,153.00 less

his inheritance of \$7,400.00 for a net award of \$94,753.00. Respondent was also awarded the interest that the parties held in the Respondent's mother's home, which was also an inheritance, valued at \$50,000.00 to which he was entitled to a one-half interest with his brother for a total value in his mother's home of \$25,000.00.

The Court went awarded to the Appellant, her home with a value of \$65,000.00, a violin with an agreed value of \$6,500.00, a coin collection with an agreed value of \$1,250.00, and personal property items with a value of \$6,590.00 with a total value of property awarded to the Plaintiff of \$195,340.00 of which \$71,600.00 was deducted as separate property not subject to division for a net award of \$123,740.00.

Mathematical calculation comparing the figures would indicate a figure of \$44,400.00 as a value of personal property not delineated. With an award of \$65,000.00 for the home, \$14,340.00 for personal property items specifically mentioned, \$71,600.00 for an inheritance, for a total figure of \$195,340.00, a difference of \$44,400.00 remains as property interest awarded to the Appellant but not delineated nor spelled out in the Memorandum Decision nor the Findings of Fact. These awards constitute in essence a total consideration by the Trial Court of the personal

property awarded to the parties with the exception of the three items mentioned in Argument Point I(d).

A review of the 20 Exhibits, a majority of which represent documentary evidence as to the marital assets and inheritances of the parties, would indicate assets other than those considered by the Court in its Memorandum Decision. The Trial Court obviously did not address any assets for the Respondent other than those specifically delineated in the Memorandum Decision. As relates to the Appellant due to a lack of adequate findings of fact, neither the parties nor this Court can ascertain what the \$44,400.00 represents.

Other marital assets not considered by the Court consist of a share account of \$2,300.00 for the Appellant, an IRA account of \$36,000.00, both of which assets are separate and apart from any inheritance and are actually assets acquired during the marriage. The voluminous Exhibits would indicate an inheritance, including the home purchased by the Appellant for \$65,000.00 in 1987, and numerous other assets consisting of the \$71,600.00 originally acquired, and approximately \$103,000.00 in interest for a total of \$174,600.00, while the testimony of the Defendant would indicate an increase of \$108,000.00. Nowhere does the Memorandum Decision or Findings of Fact address the amount of \$174,000.00 or \$179,000.00, although a calculation of the

home purchased by the Defendant and the as yet undetermined sum of \$44,400.00 would indicate an amount of \$109,000.00 as inheritance money. But if this was the finding of the Court, what of the share account and the \$36,000.00 Individual Retirement Account which were not inheritance but rather marital assets. Sidelining the confusion and the failure of adequate Findings of Fact in addressing these monetary amounts in the Memorandum Decision, the Trial Court further abused its discretion in awarding to the Respondent a portion of the Appellant's inheritance by denying her an interest in the marital home and the marital savings accounts and the retirement of the Respondent by offsetting those amounts presumably against the inheritance and/or inheritance interest of the Defendant accumulated in 1969 and various other years.

The Utah Supreme Court in the case of Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988) recently considered the issue of an equitable property division pursuant to a divorce concerning property acquired by one spouse by gift and/or inheritance during the marriage.

In Mortensen v. Mortensen, supra, the parties were married on June 18, 1959, when they were 18 and 19 years of age, neither bringing any substantial assets into the marriage. Approximately 10 years later in 1969, the

husband's parents who owned a farm, organized a corporation to which they conveyed the farm and issued 50% of the stock to their five children in equal shares such that a Certificate of Stock bearing Mr. Mortensen's name alone was issued to him for his 10% of the outstanding shares. Mrs. Mortensen had had no involvement with the corporation except that she served as its secretary for six months during which time she performed some nominal secretarial work.

The Plaintiff brought an action for divorce and at the end of the trial the Court suggested to counsel for both parties that they attempt to agree on a division of the property and on the amount of child support and alimony, if any. Counsel agreed to do so, requesting the Court to guide them by deciding whether the shares of stock should be considered by them in their negotiation. The Trial Court in Mortensen ruled that the stock was property of the marriage and should be taken into consideration in dividing the marital property in a fair and equitable basis. Thereafter the parties stipulated to a division of property which gave all of the shares of stock to Mr. Mortensen but gave about two-thirds in value of the remaining property to Mrs. Mortensen, including the major asset of the home and lot which had been fully paid for. The stipulation was made subject to the right of the Defendant to appeal to the

Supreme Court the Trial Court's ruling concerning the shares of stock.

The Utah Supreme Court then cites to the Utah Code Annotated § 30-3-5 cited earlier which "tersely provides: 'when a decree of divorce is granted, the court may include in it equitable orders relating to the children, property, and parties'." The Supreme Court further found that property was nowhere defined in the Divorce Code.

The Supreme Court then goes through an extensive and exhaustive review of the issue citing to numerous earlier decisions.

The Utah Supreme Court cites to the case of In Re Marriage of Metcalf, 598 P.2d 1140 (Mont. 1979) by stating that:

The rules that property acquired by gift or inheritance by one spouse should be awarded to that spouse on divorce unless the other spouse has, by his or her efforts with regard to the property, acquired an equity in it, does not apply when the property thus acquired is consumed, such as when a gift or an inheritance of money is used for family purposes.

Further citation to Agent v. Agent, 604 P.2d 862 (Okla. Ct. App. 1979) indicates:

When the property completely loses its identity and is not traceable because it is co-mingled with other property then the rule should not be followed.

and further, citing to Hussey v. Hussey, 312 S.E.2d 267 (S.C. Ct. App. 1984) as follows:

Or when the acquiring spouse places title in their joint names in such a manner as to evidence an intent to make it marital property.

In reviewing the current case at hand, testimony by both parties indicated the property of the Appellant was not consumed nor used for family purposes nor co-mingled, nor was its identity or traceability lost, nor was it placed in joint names in such a manner as to evidence an intent to make it marital property such that the rule of property acquired by gift or inheritance by one spouse should be awarded to that spouse on divorce should apply.

The Utah Supreme Court at page 308 in Mortensen following the other cases cited above dealing with inherited property or property given by gift held as follows:

...We conclude that in Utah, trial courts making "equitable" property divisions pursuant to § 30-3-5 should, in accordance with the rule prevailing in most other jurisdictions and with the division made in many of our own cases, generally award property acquired by one spouse by gift and inheritance during the marriage (or property acquired in exchange thereof) to that spouse, together with any appreciation or enhancement of its value, unless (1) the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it, cites omitted, or (2)

the property has been consumed or its identity lost through co-mingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse. cites omitted. An exception to this rule would be where part or all of the gift or inheritance is awarded to the non-donee or non-heir spouse in lieu of alimony as was done in Weaver v. Weaver. The remaining property should be divided equitably between the parties as in other divorce cases, but not necessarily with strict mathematical equity. cites omitted. However, in making that division the donee or heir-spouse should not lose the benefit of his or her gift or inheritance by the trial court's automatically or arbitrarily awarding the other spouse an equal amount of the remaining property which was acquired by their joint efforts to offset the gifts or inheritance. Any significant disparity in the division of the remaining property should be based on an equitable rationale rather than on the sole fact that one spouse is awarded his or her gifts or inheritance. The fact that one spouse has inherited or donated property, particularly if it is income producing, may properly be considered as eliminating or reducing the need for alimony by that spouse or as a source of income for the payment of child support or alimony (where awarded) by that spouse... These rules will preserve and give effect to the right that married persons have always had in this state to separately own and enjoy property. It also accords with the normal intent of donors or deceased persons that their gifts and inheritances should be kept within their family and succession should not be deferred because of a divorce.

The Utah Supreme Court then goes on to find that the stipulated division of property exclusive of the inheritance was an equitable division for reasons distinguishable from the immediate case at hand. Mr. Mortensen was granted all of the stock interest and one-third of the property division while Mrs. Mortensen was given none of the stock interest but two-thirds of the marital assets. The Utah Supreme Court found this to be an equitable division due to the fact that the gross salary of Mr. Mortensen was \$2,560.00 compared to the salary or income of Mrs. Mortensen which was \$1,300.00, and based on the fact that there were still three minor children living at home with Mrs. Mortensen and that she had not been awarded any of Mr. Mortensen's retirement and she had specifically despite the disparity in their educational achievement and earnings waived all right to alimony and agreed to a payment of \$150.00 per month as and for child support for each of the three minor children in her custody.

The immediate case at hand has facts distinguishable from those of Mortensen. There are no minor children to be considered, Mrs. Burt has not waived her right in interest to alimony, there is a disparity in their incomes of \$851.00, Mr. Burt is the party actually receiving a portion of Mrs. Burt's inheritance and/or interest earned on

inheritance, while he has the greater income. A careful review of the transcript and the Exhibits would indicate that the parties essentially agreed that the inheritance assets acquired by the Appellant were never co-mingled, they were specifically maintained in separate personal checking account of Mrs. Burt, the original property interest or monies obtained were by inheritance directly to Mrs. Burt, and any enhancement or maintenance or protection of the property was strictly by Mrs. Burt without any assistance by Mr. Burt.

The Trial Court found that the Plaintiff did pay mortgage payments, utility payments and grocery payments, but also found contrary to the weight of the evidence that the Defendant expended her money as she pleased. The Trial Court did find that the money as demonstrated by the Exhibits which the Respondent earned from his watch repair business was used in his private use and was totally unaccounted for. The Appellant gave a full accounting on the use and traceability of her inheritance and the interest earned thereon.

The great weight of the evidence as testified to by the Appellant would demonstrate her contributions to the home in its upkeep and structural additions and repairs in replacing carpeting, in painting, and maintenance. Those

contributions by the great weight of the evidence should be equivalent to the payments made by the Respondent if such an equalization is even necessary based on the generally greater and rarely equal income of the Respondent and the greater potential for contribution by the Respondent to the living expenses of the parties. The Appellant resisted co-mingling inheritance assets to maintain their separate status as obviously was the intent of those giving the inheritance to maintain the sanctity and normal intent of donors or deceased persons that these gifts or inheritances be kept within the family and through that succession that they not be diverted because of a divorce.

Admittedly the economic and financial arrangement of the parties was somewhat unique but only because the intent of the Appellant due to difficulties in the past with obtaining monies from the Respondent was to adequately, respectfully and admittedly maintain any and all inheritance and its enhancement as a separate non-marital asset which actions are now being used to penalize the Appellant with an award to the Respondent of 100% of the marital home, 100% of the marital savings accounts and all as an offset against the Appellant's purchase of a home in 1987 for an equivalent value of \$65,000.00 and other earnings.

Interestingly enough, the Respondent was awarded 100% of his interest in his mother's home as an inheritance or one-half of that home as shared with his brother with no offset allowed against the property awarded to the Appellant when in fact based on the testimony given by the Respondent the interest of the Respondent's mother's home had been awarded to the two brothers and their wives as joint tenants, such that that property through co-mingling or an exchange was actually one-half a marital asset.

The only exception according to Mortensen to the rule of awarding property acquired by one spouse by gift and inheritance during the marriage to that spouse together with any appreciation or enhancement of its value other than contributions by the non-inheriting spouse or a co-mingling or exchange of its identity as if part or all of the gift or inheritance is awarded to the non-donee or non-heir spouse in lieu of alimony, as was done in Weaver. This does not constitute the facts in the immediate case at hand but actually quite to the contrary. The donee or heir rather than the non-donee or non-heir was awarded alimony after a portion of the Appellant's inherited properties were awarded to the non-donee or non-heir spouse. Mortensen indicates that the fact that one spouse has inherited or donated property, particularly if it is income producing, may

properly be considered as a eliminating or reducing the need for alimony by that spouse or as a source of income for the payment of child support or alimony (where awarded) by that spouse. Again, such is not the case in the immediate case at hand. The facts would indicate that inherited property was taken away or at least offset against obvious marital assets and an award of alimony made payable to the heir-spouse making contrary to the intent of Mortensen.

Based on the above and foregoing case law and the facts as applied in this case, the Trial Court did abuse its discretion in its property division by considering the non-co-mingled and traceable separate inheritance properties of the parties in its final award or division of property.

POINT II.

THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING TO THE APPELLANT THE SUM OF \$300.00 AS AND FOR ALIMONY AFTER FINDING AN \$851.00 DIFFERENCE BETWEEN THE INCOME OF THE APPELLANT AND THE RESPONDENT.

This Court in Stevens v. Stevens, 754 P.2d 952 (Utah App. 1988) considered once again the issue of alimony and its purpose where it held at page 958:

The purpose of alimony is to "equalize the standard of living for both spouses, to maintain them at their present standard as much as possible, and avoid the necessity of one spouse receiving public assistance". cites

omitted. In setting an award of alimony, the trial court may exercise considerable discretion, and an award will not be overturned absence showing a clear and prejudicial abuse of discretion. Paffel v. Paffel, 732 P.2d 97, 100 (Utah 1986); Eames v. Eames, 735 P.2d 395, 397 (Utah Ct. App. 1987)

Stevens further held:

In exercising its discretion in determining the amount of alimony to be awarded, the trial court must consider the financial condition and needs of the spouse claiming support, the ability of that spouse to provide sufficient income for him or herself, and the ability of the responding spouse to provide the support. cites omitted. Failure to consider these factors constitutes an abuse of discretion.

This Court further found that "the Utah Supreme Court has clearly held that the Trial Court must make findings on all material issues." See Acton v. Deliran, 737 P.2d 996 (Utah 1987). "These findings 'should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached'." Quoting Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah 1979).

In the immediate case at hand, the Memorandum Opinion of the Trial Judge stated "the Court finds the income of the Plaintiff to be \$1,966.00; the Defendant's income is \$1,115.00, a disparity of \$851.00 to the favor of the Plaintiff. In order to equalize both the disparity in

property and income, the Court awards the Defendant an alimony of \$300.00."

Sidelining the issue of the retirement which is a marital asset and counted as the income of the Plaintiff, the Trial Court must first consider the financial condition and needs of the spouse claiming support. The Court failed to make any findings of fact concerning the needs of the spouse claiming support and simply found her income to represent \$1,115.00.

Secondly, the Trial Court must consider the ability of the Appellant to provide sufficient income for herself. Although the Trial Court did consider the income of the Appellant to be that of \$1,115.00, the Court did fail to assess or make findings as to her ability to provide sufficient income for herself. Thirdly, the Trial Court must consider the ability of the responding spouse to provide the support. The Court did find the income of the Plaintiff to be \$1,966.00 which was a disparity compared with the Defendant's income of \$851.00 and awarded \$300.00 in alimony to equalize the disparity in both the property award and the income.

Taking into consideration the arguments concerning the abuse of discretion of the Trial Court in awarding property division, this could interplay and in and of itself require

a reconsideration and reanalysis of the award of alimony, as it was based in equalization on both the disparity in property and income and on that basis alone should be reconsidered. Further analysis would indicate that the Court did abuse its discretion in not following the three factors required in Paffel, supra, and as considered by this Court in Stevens, supra, and should remand this case for further consideration of those factors and appropriate findings of fact regarding those three factors.

Accordingly, this Court by its own authority as done in earlier cases, should remedy the abuse or in the alternative remand this case for further findings of fact and reanalysis, especially in light of the abused discretion in entering the property division.

POINT III.

THE APPELLANT IS ENTITLED TO ATTORNEY'S
FEES AND COSTS ON APPEAL.

This Court in the recent case of Rasband v. Rasband, 752 P.2d 1331 (Utah App. 1988) found that under the Utah Code Annotated § 30-3-3 that on remand the Trial Court should also determine the Appellant's need for Respondent's payment of her attorney's fees incurred in the appeal and that if a financial need were adequately shown that the

Trial Court could take evidence regarding a reasonable fee in making such an order pursuant to that statute.

Under Utah Code Annotated § 30-3-3 and Heltman v. Heltman, 511 P.2d 720 (Utah 1973) this Court should consider and assess attorney's fees and costs incurred in bringing this appeal and so order.

CONCLUSION

The Trial Court did abuse its discretion in its division of the marital assets with an inclusion of inheritance assets and in its award of \$300.00 a month as and for alimony by failing to enter adequate findings of fact, failing to follow mandates of this Court and the Utah Supreme Court, and by finding facts contrary to the weight of the evidence as cited above. Accordingly the case should be remanded for additional findings of facts and for guidelines from this Court with evidence allowed as to attorney's fees and costs incurred in bringing this appeal.

RESPECTFULLY SUBMITTED this 2 day of November, 1989.



PETE N. VLAHOS
Attorney for
Defendant/Appellant

FEB 1 1989

IN THE DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH

DAVID BURT,)
)
 Plaintiff,) MEMORANDUM DECISION
)
 vs.)
)
 BETTY MAE BURT,)
)
 Defendant.) Case No. 99018

The Court finds facts for the defendant and grants her a divorce upon the grounds of irreconcilable differences to become final upon entry.

The Court awards to each party their personal effects and the personal property in their possession, and finds values in accordance with the appraisal with a few exceptions.

In addition, the Court awards the violin (value \$6,500) and the coin collection (value \$1,250), to the defendant for a total personal property award of \$14,340.

The Court finds plaintiff's personal property value to be \$6,694, plus the Oldsmobile (value \$1,800), and an outboard motor (value \$150) for a total award of \$8,644.

The Court finds the value of the plaintiff's watch repair equipment to offset the value of the collectibles of the defendant.

The Court finds there were additional items of value sold by the plaintiff: the boat, Toyota truck, etc., but finds their value included in the bank accounts. If they are not included in those accounts, the Court orders an equal division.

There appears to be no substantial debts beyond normal living expenses; and the Court accordingly orders each to pay their own obligations.

The marital financial arrangement of the parties was unique. It began somewhat innocently with the defendant becoming employed part time with minimal salary. The plaintiff would pay all of their living expense and she would spend her money as she pleased. This money was to be offset by his use of the watch repair money for his private use.

The arrangement continued on through the marriage, even after the defendant was working full time, and, in some years, equaling his income; and after she had inherited a substantial sum from her parents. While it is true she did contribute to the household by making improvements to the home and buying furniture, etc., it did create a situation of what was hers was hers and what was his was theirs.

Since this support by plaintiff allowed defendant to invest, etc., without encroachment into the funds, the Court considers it only fair to allow plaintiff to share in that increase.

The Court awards to plaintiff the family residence (value \$65,000), his accounts (value \$28,509) and the previously discussed personal property for a total value of \$102,153, less \$7,400 (an inheritance), for a net award of \$94,753. He is also awarded as his separate property a one-half interest in his mother's home (also an inheritance).

The Court awards defendant her home and all assets presently in her possession as her separate property free of any interest by the plaintiff. The Court finds the total value of that property to be \$195,340. The Court deducts \$71,600 as her separate property not subject to division for a net award of \$123,740.

The difference in values is \$28,987 to the favor of the defendant.

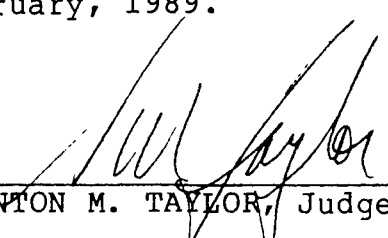
The Court finds the income of the plaintiff to be \$1,966; the defendant's income is \$1,115, a disparity of \$851 to the favor of the plaintiff.

In order to equalize both the disparity in property and income, the Court awards the defendant alimony of \$300 per month.

Each party to bear their own costs and attorney's fees.

Plaintiff to prepare findings, conclusions and decree in accordance herewith.

DATED this 8 day of February, 1989.


STANTON M. TAYLOR, Judge

Page 4
Memorandum Decision
Case No. 99018

CERTIFICATE OF MAILING

I hereby certify that on this 9 day of February, 1989, a true and correct copy of the foregoing Memorandum Decision was mailed to the following:

John T. Caine
Attorney for Plaintiff
2568 Washington Boulevard
Ogden, Utah 84401

Pete N. Vlahos
Attorney for Defendant
2447 Kiesel Avenue
Ogden, Utah 84401



PAULA CARR, Secretary

JOHN T. CAINE #0536 of
RICHARDS, CAINE & ALLEN
Attorney for Plaintiff
2568 Washington Boulevard
Ogden, Utah 84401
Telephone: 399-4191

IN THE DISTRICT COURT
COUNTY OF WEBER, STATE OF UTAH

DAVID BURT,	:	
	:	FINDINGS OF FACT AND
Plaintiff,	:	CONCLUSIONS OF LAW
	:	
vs.	:	
	:	
BETTY MAE BURT,	:	Civil No. 99018
	:	
Defendant.	:	

The above entitled matter came on regularly for hearing on the 20th day of January, 1989, before the Honorable Stanton M. Taylor, one of the Judges of the above entitled Court, sitting without a jury, and the Plaintiff appearing in person and being represented by counsel, John T. Caine and the Defendant appearing in person and being represented by counsel, Pete N. Vlahos, the Court having heard testimony of the parties and other witnesses, together with arguments of counsel and being otherwise fully advised in the premises, now makes the following:

FINDINGS OF FACT

1. That the Plaintiff is an actual and bona fide resident of Weber County, State of Utah and has been for more than three (3) months prior to the commencement of this action.
2. That Plaintiff and Defendant are husband and wife, having been married on March 5, 1947 in Idaho Falls, State of

Idaho.

3. That the parties have developed irreconcilable differences, thus rendering the continuance of this marriage an impossibility.

4. That there have been two (2) children born as issue of this marriage, both of whom have reached the age of majority.

5. That the value of the real estate and personal property of the parties acquired during the marriage was either stipulated to by the parties or submitted by an appraisal and the Court finds the values in accordance with the appraisals with some exceptions. The Court find that by stipulation, the violin is awarded to the Defendant at a value of \$6,500 and the coin collection at a value of \$1,250 for a total personal property award of \$14,340. The Court finds that by stipulation, the Oldsmobile is awarded to the Plaintiff at a value of \$1,800 and outboard motor at a value of \$150 for a total personal property award of \$8,644.

6. That the watch repair equipment is awarded to the Plaintiff and is found to be of equal value to the collectibles which is a term used to define dolls, porcelain figurines and other objects de art collected by the Defendant over a number of years which are awarded to the Defendant. These items have offsetting values.

7. That the Court finds that the Plaintiff sold a boat and a Toyota truck, but determines that the money obtained from said sales are included in the bank accounts which will be awarded to him as set forth in Paragraph 10.

8. The Court finds no substantial debt beyond normal living expenses and orders each party to pay their own obligations.

9. The Court finds that the marital financial arrangement of the parties was unique, in that the Plaintiff worked on a full time basis during the course of the marriage and paid all of the parties' living expenses. That initially, the Defendant worked part-time and would spend her money as she pleased. The Plaintiff also had the availability of an additional income from watch repair which he used as his separate money. As the marriage progressed, the Defendant began to work on a more full time basis and as the children were raised and left the home, then began to earn income at an equal amount of the Plaintiff. That the Defendant did contribute somewhat to the household by making some improvements to the home and buying furniture, but Plaintiff continued to pay the basic household expenses, including the home mortgage, utilities and food for the family.

10. In 1969 and again in 1975 the Defendant inherited \$3,000.00 and in 1976 inherited \$3,000, and in 1984 inherited \$19,600.00 from her parents estate. That during the remaining years of the marriage the Defendant invested this money and she was allowed to do so without encroachment from the Plaintiff. That because Plaintiff's efforts in effect allowed Defendant to invest free from any other financial responsibilities, Plaintiff is entitled to share in the increased, occasioned by such investment. Based upon this finding, the Court awards to the Plaintiff the family home located at 3502 Polk Avenue, Ogden,

Utah, valued at \$65,000, his bank accounts valued at \$28,509 and the personal property discussed above for a total value of \$102,153, less \$7,400 as an inheritance from his parents, for a net award of \$94,753. Plaintiff is also awarded as his separate property his one-half interest in his mother's home.

11. The Court awards the Defendant the home which she purchased and all assets presently in her possession, free and clear from any claim of the Defendant and finds the total value of this property to be \$195,340, less \$71,600 as an inheritance from her parents, for a net award of \$123,740, which gives a differences in value in favor of the Defendant of \$28,987.

12. The Court finds a difference in value of the real and personal property awarded to the parties of \$28,987 in favor of the Defendant.

13. That the Court considers this disparity in property award in analyzing the Plaintiff's and Defendant's present financial situation as follows. The Court finds the income of the Plaintiff, including his retirement, to be \$1,966 and the Defendant's income to be \$1,115 for a disparity of \$851 in favor of the Plaintiff. In an effort to equalize incomes and to take into account the aforesaid advantage in the property division to

14. The Court finds that each party is financially able to bear their own costs and attorney's fees and each should assume and discharge the same and hold the other harmless therefrom.

From the foregoing Findings of Fact, the Court concludes as follows:

CONCLUSIONS OF LAW

1. That a Decree of Divorce be granted in favor of the Defendant and against the Plaintiff based on the grounds of irreconcilable differences, the same to become absolute and final upon entry.

2. That the violin is awarded to the Defendant at a value of \$6,500 and the coin collection at a value of \$1,250 for a total personal property award of \$14,340. That the Oldsmobile is awarded to the Plaintiff at a value of \$1,800 and outboard motor at a value of \$150 for a total personal property award of \$8,644.

3. That the watch repair equipment is hereby awarded to the Plaintiff which is found to be of equal value to the collectibles which is a term used to define dolls, porcelain figurines and other objects de art collected by the Defendant over a number of years is hereby awarded to the Defendant.

4. That it is hereby ordered that each party pay their own obligations.

5. That the Plaintiff is hereby awarded the family home located at 3502 Polk Avenue, Ogden, Utah, valued at \$65,000, his bank accounts valued at \$28,509 and the personal property discussed above for a total value of \$102,153, less \$7,400 as an inheritance from his parents, for a net award of \$94,753. Plaintiff is also hereby awarded as his separate property his one-half interest in his mother's home.

6. That the Defendant is hereby awarded the home which she purchased and all assets presently in her possession, free

and clear from any claim of the Defendant and finds the total value of this property to be \$195,340, less \$71,600 as an inheritance from her parents, for a net award of \$123,740.

7. That the Plaintiff is hereby ordered to pay to Defendant the sum of \$300 per month as and for alimony.

8. That each party is financial able to bear their own costs and attorney's fees and each should assume and discharge the same and hold the other harmless therefrom.

DATED this _____ day of February, 1989.

STANTON M. TAYLOR
DISTRICT COURT JUDGE

Approved as to form:

PETE N. VLAHOS
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Findings of Fact and Conclusions of Law, to counsel for the Defendant, Pete N. Vlahos, Attorney at Law, 2447 Kiesel Avenue, Ogden, Utah 84401, postage prepaid this 7th day of February, 1989.



PAM PONTIUS, Secretary

JOHN T. CAINE #0536 of
RICHARDS, CAINE & ALLEN
Attorney for Plaintiff
2568 Washington Boulevard
Ogden, Utah 84401
Telephone: 399-4191

IN THE DISTRICT COURT
COUNTY OF WEBER, STATE OF UTAH

DAVID BURT,	:	
	:	DECREE OF DIVORCE
Plaintiff,	:	
vs.	:	Civil No. 99018
BETTY MAE BURT,	:	
Defendant.	:	

The above entitled matter came on regularly for hearing on the 20th day of January, 1989, before the Honorable Stanton M. Taylor, one of the Judges of the above entitled Court, sitting without a jury, Plaintiff personally present and represented by counsel, John T. Caine and Defendant personally present and represented by counsel, Pete N. Vlahos, and the Court having heard testimony of the parties and other witnesses, together with arguments of counsel, and the Court being otherwise fully advised in the premises and heretofore signed and entered its Findings of Fact and Conclusions of Law, NOW ORDERS AS FOLLOWS:

1. That the Defendant is hereby awarded a Decree of Divorce from the Plaintiff on the grounds of irreconcilable differences, the same to become absolute and final upon entry.

2. That the violin is hereby awarded to the Defendant at a value of \$6,500 and the coin collection at a value of \$1,250

for a total personal property award of \$14,340. That the Oldsmobile is hereby awarded to the Plaintiff at a value of \$1,800 and outboard motor at a value of \$150 for a total personal property award of \$8,644.

3. That the watch repair equipment is hereby awarded to the Plaintiff is found to be of equal value to the collectibles which is a term used to define dolls, porcelain figurines and other objects de art collected by the Defendant over a number of years which is hereby awarded to the Defendant.

4. The Court finds no substantial debt beyond normal living expenses and orders each party to pay their own obligations.

5. That the Plaintiff is hereby awarded the family home located at 3502 Polk Avenue, Ogden, Utah, valued at \$65,000, his bank accounts valued at \$28,509 and the personal property discussed above for a total value of \$102,153, less \$7,400 as an inheritance from his parents, for a net award of \$94,753. Plaintiff is also hereby awarded as his separate property his one-half interest in his mother's home.

6. That the Defendant is hereby awarded the home which she purchased and all assets presently in her possession, free and clear from any claim of the Defendant and finds the total value of this property to be \$195,340, less \$71,600 as an inheritance from her parents, for a net award of \$123,740, which gives a differences in value in favor of the Defendant of \$28,987.

7. That Plaintiff is hereby ordered to pay to Defendant,

as and for alimony, the sum of \$300 per month.

8. That each party is hereby ordered to bear their own costs and attorney's fees and each should assume and discharge the same and hold the other harmless therefrom.

DATED this 2 day of ^{March} February, 1989.

STANTON M. TAYLOR
STANTON M. TAYLOR
DISTRICT COURT JUDGE

Approved as to form:

Pete N. Vlahos
PETE N. VLAHOS
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Decree of Divorce to counsel for the Defendant, Pete N. Vlahos, Attorney at Law, 2447 Kiesel Avenue, Ogden, Utah 84401, postage prepaid this 23rd day of February, 1989.

Pam Pontius
PAM PONTIUS, Secretary

LEON ARONBERG, SUITE 200
2568 WASHINGTON BOULEVARD
OGDEN UTAH 84401
(801) 399-4191

STATE OF UTAH }
COUNTY OF WEBER } ss:

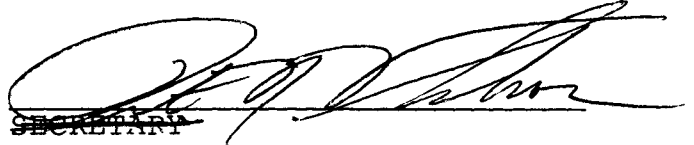
IT IS A True Copy
of the original of
LAWYER
CLERK OF THE COURT

BY [Signature] DEPUTY

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2 day of November, 1989, I mailed four (4) true and correct copies of the above and foregoing BRIEF OF APPELLANT by placing same in the U.S. Mail postage prepaid and addressed to the following:

John T. Caine
Attorney for Plaintiff/Respondent
2568 Washington Blvd
Ogden, Utah 84401


~~SECRETARY~~