

1987

Kathleen Clontz v. Harvey Clontz : Petition for Writ of Certiorari

Utah Supreme Court

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870473

IN THE SUPREME COURT FOR THE

STATE OF UTAH

KATHLEEN CLONTZ,

/

Plaintiff/Respondent,

/

vs.

/

HARVEY CLONTZ,

/

Case No. 870473

Defendant/Appellant/Petitioner

/

Priority No. 13

/

PETITION FOR WRIT OF CERTIORARI

From the Affirmation of the Utah Court of Appeals of the
Judgment of the Second Judicial
District Court of Weber County, State of Utah
THE HONORABLE DAVID E. ROTH
DISTRICT COURT JUDGE

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FILED

DEC 14 1987

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IN THE SUPREME COURT FOR THE

STATE OF UTAH

KATHLEEN CLONTZ,	/	
Plaintiff/Respondent	/	PETITION FOR WRIT OF CERTIORARI
vs.	/	
HARVEY CLONTZ,	/	Case No.
Defendant/Appellant/Petitioner	/	Priority No. 13
_____	/	

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

QUESTION NO. 1

The trial court's non-award of alimony to the defendant, and the Court of Appeals confirmation of this Order is a manifest injustice contrary to Sections 30-3-5 of the Utah Code Annotated, (1953) as amended and constitutes an abuse of discretion. Other Appellate decisions appear to be in conflict with this decision, in that the appellate court has upheld awards of alimony in the same circumstances that Petitioner is in. It is the Petitioner's position that the contrary, (upholding a non-award) would be an abuse of discretion.

QUESTION NO. 2

The trial court's distribution of the plaintiff's retirement found, that being that the Petitioner was not awarded any of the plaintiff's government retirement and the

Appellate Court affirmation of this distribution, is a manifest injustice and contrary to other appellate holdings where the Court of Appeals found that retirement funds are a marital asset and should be subject to division.

CITATION OF RELEVANT CASE LAW OF OPINIONS RENDERED BY THE
COURT OF APPEALS

Boyle v. Boyle, 55 Utah Adv. Rep. 51, (April 15, 1987).

Eames v. Eames, 55, Utah Adv Rep 49, (April 9, 1987)

Petersen v. Peterson, 58 Ut. Ad. Rep. 28, (May 18, 1987).

Rayburn v. Rayburn, 59 Utah Adv Rep 42, (May 29, 1987).

Talley v. Talley, 61 Ut. Ad. Rep, 31, (July 2, 1987).

Lee v. Lee, 69 Utah Adv. Rep. 51, (November 10, 1987).

Canning v. Canning 68 Ut. Ad. Rep. 16, (October 16, 1987).

Claus v. Claus 727 P.2d 184 (Utah, 1986)

Paffel v. Paffel, 732 P.2d 96 (Utah, 1986)

JURISDICTIONAL AUTHORITY

This petition for a Writ of Certiorari is being sought pursuant to the Rules of the Utah Supreme Court, Title VI, JURISDICTION ON WRIT OF CERTIORARI TO COURT OF APPEALS, Rule 42 and 43.

The Court of Appeals affirmation of the trial court judgment was filed on October 16, 1987, and an extension for

Enlargement of Time, was filed and entered on November 13, 1987, thus enlarging the time for filing of this Petition for Writ to December 16, 1987.

It is believed that Rule 43 (1), (2), and (3) confer the review of the appellate court decision upon the Utah Supreme Court.

CONTROLLING PROVISIONS

Utah Code Annotated, Sections 30-3-5, (1953) as amended.

STATEMENT OF THE CASE

This is a complaint by plaintiff/respondent and an answer and counterclaim, by defendant/appellant/petitioner, each seeking a decree of divorce and an equitable distribution of property and alimony rights. Plaintiff alleged in her complaint, and defendant in his answer and counterclaim, that each treated the other cruelly, causing mental anguish and distress.

The Honorable David E. Roth, on March 25, 1986, sitting without a jury, granted plaintiff a decree of divorce based upon the grounds of mental cruelty. The District Court entered an Order regarding the distribution of property and defendant's rights to an alimony award.

This Order was appealed to the Utah Supreme Court on August 19, 1986. This case was then transferred to the Utah

Court of Appeals and the Utah Court of Appeals affirmed the trial court's decision on October 16, 1987.

STATEMENT OF THE FACTS

Plaintiff and Defendant were married on the 7th day of March, 1959, in Sunset, Davis County, Utah. There have been five (5) children born as issue of this marriage, but all children are now emancipated. (TR 106)

Plaintiff is employed at Hill Air Force Base and her gross income is over Two thousand dollars (\$2,000.00) per month. (TR 103) Plaintiff has accumulated Fifteen thousand eight hundred fifty-six dollars and eighty-three cents (\$15,856.83) in retirement. (TR 106)

Defendant is medically disabled and receives Civil Service disability in the amount of Six Hundred Fifty-Five dollars and forty-eight cents (\$655.48) per month and has no other source of income. (TR 106)

That in 1960 a home was built by the parties upon property given to the defendant. Presently, the property is unencumbered and the appraised value of the property is sixty-one thousand five hundred dollars (\$61,500.00). (TR 96 to 108) The appraised value of the land itself is Sixteen thousand dollars (\$16,000.00). (TR 117)

SUMMARY OF ARGUMENT

It is defendant/petitioner's position that the trial court abused its discretion contrary to the Utah Code Annotated, Section 30-3-5. Defendant was not awarded alimony nor a portion of plaintiff's retirement fund which would have been equitable in view of defendant's financial situation and the length of the parties' marriage. When the effect of the inequity is combined with the payment of the Court awarded equity in the sum of Twenty three thousand, five hundred (\$23,500.00) dollars to plaintiff within six (6) months from the date of the Order, the effect is evaluated and this abuse of discretion rises to a level requiring a modification of the trial court's order to insure that a manifest injustice does not occur.

The Utah Court of Appeals upheld the trial court's Order and the defendant/appellant is petitioning the Utah Supreme Court for a Writ of Certiorari. This Petition is brought pursuant to several recent opinions by the Utah Court of Appeals which appear to be in conflict with the decision issued in this case, as well as prior Supreme Court holding, thus invoking a review of this matter pursuant to Rule 43, (1), (2), and (3) of the Utah Supreme Court Rules of Procedure.

ARGUMENT

Point I

RECENT OPINIONS BY THE UTAH COURT OF APPEALS ARE IN CONFLICT WITH THE DECISION RENDERED IN THE INSTANT CASE, AND ALSO WITH PRIOR OPINIONS RENDERED BY THIS COURT.

In the case at hand, petitioner was not awarded any alimony. The Findings of Fact and Conclusions of Law recognize that the petitioner receives approximately six hundred and fifty dollars (\$650.00) per month in disability income. The Findings also indicate that the Plaintiff is employed and in the trial transcript it is indicated that she earns over two thousand dollars (\$2,000.00) per month. There was also testimony regarding the defendant/petitioner's ill health, his lack of a job, and that his expenses were over one thousand dollars (\$1,000.00) per month. Despite the fact that the defendant/petitioner had been medically disabled since 1977, the trial court indicated that if he needed more money "he would have to go out and find a job". It is evident from the record that the trial court realized that the defendant could not meet his expenses without additional income. This abuse of discretion arises because alimony was not granted at least until the defendant/petitioner could secure employment to help meet his financial obligations.

In a recent decision, this Court found no abuse of discretion where alimony had been provided to "cushion" the recipient spouse until a return to a self-sustaining status. Claus v. Claus, 727 P.2d 184 (1987) Also in another matter, the Court found that an award of only one hundred (\$100.00) dollars per month alimony was an abuse of discretion because it would not afford the wife a standard of living close to the standard of living enjoyed by the parties during the marriage. This was a thirty-year marriage and the husband's gross income was twenty four thousand, three hundred fifty-six dollars and eighty/100 (\$\$24,356.80) per year. The Court found that the husband had the ability to provide permanent support in the amount greater than one hundred dollars (\$100.00) per month, and secondly, this Court found that although a defendant does have another source of income besides plaintiff's salary, the fact that the divorced wife has some property or other means to support herself should not preclude an allowance of alimony if the husband has far superior resources. Frank v. Frank 58 P.2d 453 (Utah, 1978).

A recent appellate decision, Peterson v. Peterson, 58 Utah Advance Reporter 28 (1987), affirmed alimony awarded by the trial court. The parties had been married since 1963,

the husband a doctor and the wife a school teacher, although she had not worked in some time. The appellate court considered the wife's previous lifestyle and the fact that she now had to make mortgage payments and pay ordinary expenses such as food, clothing, and transportation, and lastly they considered that she had no outside income. In its decision, the Court of Appeals considered the wife's ability to provide sufficient income and that this income would probably be only one-fourth of her husband's. However, most importantly, the Court of Appeals mentioned that it would be unreasonable to assume that she would immediately be able to enter the job market and support herself in a style which she had been living before the divorce.

The Peterson case is analogous to the defendant/petitioner's case because now he needs to go out into the job market and pay for all the ordinary expenses of every day life and the evidence in the trial record that he could not do this indicates an abuse of discretion by the trial court when alimony was not awarded.

Also, in Talley v. Talley 61 Utah Advance Report, 31 (1987), the appellate court again upheld an award of alimony. The Talley's were married for approximately 15 years. At the time of the divorce, the plaintiff-wife net over nine hundred and fifty-three dollars (\$953.00) per

month, while the defendant-husband net over two thousand dollars (\$2,000.00) per month. The appellate court awarded alimony of two hundred and fifty dollars (\$250.00) per month for two years and one hundred and fifty dollars (\$150.00) per month for three years to the plaintiff-wife. The Court of Appeals indicated that they had considered the required factors outlined in Eames v. Eames 55, Utah Advance Report 49, (1957) and found that there was not an abuse of discretion. But again, in the defendant's case, the defendant was married for 27 years as opposed to the Talley 15 year marriage; that a disparity in the incomes are present because the husband in Talley makes approximately the same amount of money per month as the defendant/petitioner's wife and defendant/petitioner is making less than the wife in Talley. Interestingly however, the appellate court affirmed the trial court's Order in Talley, but not in the defendant/petitioner's case.

The Court of Appeals mentions the Eames in several different opinions. The Court of Appeals mentions the factors to consider in awards of alimony are:

- "... 1. The financial condition and needs of the spouse claiming support.
- 2. The ability of that spouse to provide sufficient income for him or her self, and
- 3. The ability of the responding spouse to provide the support..."

The Court of Appeals affirmed the award of alimony in Eames. The facts of this case are that the parties were married for 30 years and had three grown children. The plaintiff-wife grossed approximately ten thousand dollars (\$10,000.00) per year and the defendant-husband's gross income was approximately thirty four thousand dollars (\$34,000.00) per year. Plaintiff was to receive three hundred dollars (\$300.00) of alimony per month until she was 65 years of age. Because the above factors were set forth in the Findings of Fact, the Court of Appeals found no abuse of discretion. However, it is interesting to note, in Judge Orme's decision (which was dissenting in part but affirming as to alimony) points out that the defendant's major gripe in Eames is that he did not think any alimony should be awarded because his former wife was able-bodied and gainfully employed and the Judge further indicates that he found that the alimony awarded by the trial court was on the low-ebb of what was appropriate under the doctrine reiterated Paffel v. Paffel 48 Utah Advance Report 12 (1986) in view of the parties ages and education as well as the length of their marriage and substantial despairity in incomes. Again, this is the defendant/petitioner's case

exactly on point. A long marriage and a substantial disparity in incomes. Still, the Court of Appeals upheld the trial court's judgment.

It would not be fair to omit Boyle v. Boyle 55 Utah Advance Reporter 51 (1987), a case wherein the appellate court affirmed a decision of a non award of alimony to a plaintiff-wife. However, it is easy to see the difference in Boyle and the defendant/petitioner's matter. This was a 7 year marriage with no children. The trial court refused the plaintiff-wife's request to include a finding that she was unable to work, but did find that "the marriage was not a long term marriage, and that each party was restored to the condition each was in at the time of the marriage, and therefore no alimony should be awarded." But, the Court of Appeals did recognize that the purpose of the alimony is to equalize the standard of living for both spouses, and to maintain them at their present standard as much as possible.

In Boyle the appellate court found that the trial court properly considered the length of the marriage, and the recipient spouse's employability but most importantly, the appellate court found that the plaintiff-wife had previously received several months of temporary alimony to give her an opportunity to rehabilitate. In the defendant/petitioner's

case, he did not receive any type of alimony to rehabilitate himself or even to help him along until he did find the employment which he needs to make ends meet as the trial court well realized.

Also, on the other side of the coin, in Lee v. Lee 69 Utah Advance Reporters 51 (1987) the wife appealed because she was awarded only one dollar (\$1.00) of alimony per year. The parties were married for 9 years.

The Court of Appeals again cited the three factors in Eames and stated that after careful review of the records there was no explanation for the one dollar (\$1.00) per year award. The Court of Appeals stated that the wife, at that time was unemployed, and despite looking for work she must incur the expense of moving a mobile home that she was awarded in the divorce and in addition to ordinary living expenses. The husband in Lee earned approximately eighteen hundred dollars (\$1,800.00) per month and the trial court record indicates that his income had been declining. The appellate court remanded this case to the trial court to fix alimony in light of the three factors articulated in Eames.

It is evident that in defendant/petitioner's case, that the appellate court did not consider the factor one (1) of Eames; the financial condition and the needs of the spouse claiming support. In this case, the facts show that the

husband, defendant/petitioner, although possibly could work, had not found work at that time and the trial court did not award him any alimony to keep him until he was able to find employment.

Again, in Canning v. Canning 68 Utah Advance Report 16, (1987), the appellate court found that a non-award of alimony was clear abuse of discretion because the record did not reveal that the trial court considered or made any findings of the wife's current or future ability to work. The Court of Appeals indicated that the trial record contemplated that the plaintiff would obtain work and earn income sufficient to support herself, but pointed out that there were specific findings and she is left without a remedy if she does not find work. This case is identical to the defendant/petitioner's case. What becomes of him if he is unable to secure employment?

Point II

THE TRIAL COURT'S DISTRIBUTION OF THE PLAINTIFF'S RETIREMENT MANIFESTS INJUSTICE CONTRARY TO SECTION 30-35-5 OF THE UTAH CODE ANNOTATED (1953) AND CONSISTS AN ABUSE OF DISCRETION. THE COURT OF APPEALS AFFIRMATION OF THIS DISTRIBUTION IS CONTRARY TO OTHER APPELLATE HOLDINGS WHERE THE COURT OF APPEALS FOUND THAT RETIREMENT FUNDS ARE MARITAL ASSETS AND SHOULD BE SUBJECT TO DIVISION

In this divorce action, the trial court did not consider plaintiff's retirement fund as a marital asset to be divided between the parties. This is in direct conflict

with this Courts, in Dogu v. Dogu, 62 P.2d 1308 (Utah, 1982), the Court cited Englert v. Englert, 576 Pacific 2nd 1279, Utah (1978), and held that the trial courts duty to make an equitable division of property in a divorce action:

"...encompasses 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."

The trial court should have awarded a portion of plaintiff's retirement to the defendant as a marital asset, although plaintiff is not yet retired and her actual enjoyment of this benefit is purely prospective.

The trial court found that the value of plaintiff's retirement is fifteen thousand eight hundred fifty-six dollars and eighty-three cents (\$15,856.83). It is the defendant/petitioner's contention that he should be entitled to one-half of this amount and that the equitable thing to do would have been to award the defendant/petitioner his share of plaintiff's retirement benefits and off-set this amount against plaintiff's share of the trial court's determined equity of the marital home. In several appellate court decisions, particularly in Marchant v. Marchant, 66 Utah Advanced Reports, 45 (1987), the Court of Appeals held that retirement funds were a marital asset and also quoted Englert. Although the emphasis in Marchant is the way the asset is divided, the defendant/petitioner in the instant

case has no problem with the division, only the lack of division, hence different types of division will not be discussed here.

Again, in Bailey v. Bailey, 70 Utah Advance Reports 20, (1987), the appellate court upheld a division of a retirement fund. Again, the issue in Bailey was the distribution and not the actual award. This case was remanded for the trial court to consider the proper division.

In Rayburn v. Rayburn 59 Utah Advance Reports 42 (1987) a trial court distributed a retirement fund between the husband and wife. The appellate court accepted the trial court's finding of the retirement funds present value and found no abuse of discretion in court's awarding the plaintiff one-half interest in the retirement fund.

In the trial court's summation in the defendant/petitioner's matter, the trial court appeared to find that defendant's right to receive civil service disability income off-sets his entitlement to plaintiff's retirement as a marital asset. The flaw in this reasoning is the fact that defendant's right to receive his disability income would be most appropriately considered monthly income as he is only entitled to this benefit as long as he is disabled. Further, the defendant/petitioner is not accruing

any retirement benefit while receiving this civil service disability. He has no retirement fund which is growing as he receives this income, as the plaintiff does.

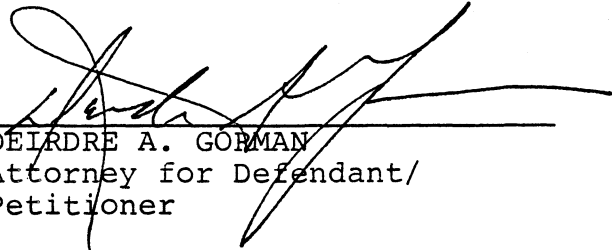
Lastly, the trial court found that the plaintiff's right to receive disability income has a value of "upwards around fifty thousand dollars (\$50,000.00)", further, the trial court indicated that it would not charge defendant this valued amount and would off-set the parties rights to each other's retirements. Again, this reasoning is not accurate because the plaintiff is earning three (3) times what the defendant is earning and accruing a retirement at the same time. It would take defendant/petitioner six and one-half years to receive fifty thousand dollars (\$50,000.00) and the trial court has not taken into consideration what would happen if he was no longer able to receive the disability income. (The plaintiff would have earned more than One Hundred Fifty Thousand (\$150,000.00) Dollars during this time .as well as accrued additional retirement benefits on top of that).

CONCLUSION

This Petition for Writ of Certiorari is submitted to the Supreme Court pursuant to Rule 42 and 43, in that the decision of the appealed Court of Appeals appears to be in

conflict with their other holdings and also holdings of this Court when affirming the decision of the trial court. It is respectfully requested that this matter be reviewed by the Utah Supreme Court.

RESPECTFULLY SUBMITTED this 11th day of December, 1987.


DEIRDRE A. GORMAN
Attorney for Defendant/
Petitioner

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the foregoing Writ of Certiorari to the plaintiff/Respondent's attorney, PETE N. VLAHOS, at Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah 84401 on this 14 day of December, 1987.


SECRETARY

§30-3-5. U.C.A.

Disposition of property - Maintenance and healthcare of parties and children - Court to have continuing jurisdiction - Custody and visitation - Termination of alimony - Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, and parties. The Court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children; and

(b) if coverage is available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance to the dependent children.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the non-custodial parent to provide the day care for the

dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property as is reasonable and necessary.

(4) In determining visitation rights of parents, grandparents, and other relatives, the court shall consider the welfare of the child.

(5) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(6) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

(7) When a petition for modification of child custody or visitation provisions of a court order is made and denied, the

court may order the petitioner to pay the reasonable attorney's fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted in good faith.

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

Kathleen Clontz,)	
)	
Plaintiff and Respondent,)	ORDER OF AFFIRMANCE
v.)	
)	
Harvey James Clontz,)	Case No. 860200-CA
)	
Defendant and Appellant.)	

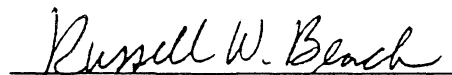
Before Judges Davidson, Bench and Orme (On Rule 31 Hearing).


Pursuant to Rule 31 of the Rules of the Utah Court of Appeals,
the judgment of the Second District Court in the above-captioned
appeal is affirmed.

DATED this ____ day of October, 1987.

FOR THE COURT:


Richard C. Davidson, Judge


Russell W. Bench, Judge


Gregory E. Orme, Judge

FILED

OCT 16 1987

Timothy M. Shea
Clerk of the Court
Utah Court of Appeals

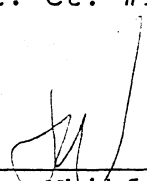
CERTIFICATE OF MAILING

I hereby certify that on the 16th day of October, 1987, a true and correct copy of the foregoing Order of Affirmance was mailed to each of the following:

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Hon. David E. Roth.
Second District Court
Weber County
Dist. Ct. #92534



Julia Whitfield
Case Management Clerk

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IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

KATHLEEN CLONTZ,	/	
Plaintiff,	/	FINDINGS OF FACT AND
vs.	/	CONCLUSIONS OF LAW
HARVEY JAMES CLONTZ,	/	Civil No. <u>92534</u>
Defendant.	/	

This matter having come on regularly for trial on the 25th day of March, 1986, before the Honorable David E. Roth, one of the Judges of the above entitled Court sitting without a jury, and the Plaintiff appearing in person and with her attorney, Pete N. Vlahos, and the Defendant appearing in person and with his attorney, John Blair Hutchison, and it having been shown that the Defendant was duly served with a copy of a Complaint and a copy of the Summons, and wherein the Defendant filed his responsive pleadings, and each of

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

James O. Murphy
ATTORNEYS AT LAW
LEGAL FORUM BUILDING
2447 KIESEL AVENUE
OGDEN, UTAH 84401

the parties having been sworn and testifying in their own behalf, proffers of proof having been made to the Court in chambers concerning several items, that exhibits having been offered and received, and the Court being fully cognizant of all matters pertaining therein, enters the following:

FINDINGS OF FACT

1. That Plaintiff has been a resident of Weber County, State of Utah for at least three (3) months prior to the commencement of this action.

2. That Plaintiff and Defendant were married in Sunset, Utah on the 7th day of March, 1959, and ever since said time have been and still are husband and wife; that there has been born as issue of this marriage five (5) children, and that all five (5) children are now emancipated.

3. That the Defendant has treated the Plaintiff cruelly, causing her great mental distress and anguish, in that the Defendant has been argumentative, has threatened the Plaintiff, and that the Plaintiff is fearful of the Defendant.

4. That during the course of the marriage, the parties herein have acquired an equity in a home located at 3867 West 2700 South in Syracuse, Utah, and the Court finds that

the land and home have a value of \$61,500.00; that the Court finds that the land was given to the Defendant and can be traced, and at the time of the giving back in 1962, had a value of \$600.00, that the present value of the land is \$16,000.00, but there has been \$1,000.00 worth of improvement on the land.

5. That the parties, during the course of the marriage, have acquired personal property as evidenced by the exhibit introduced in Court, and in addition, the Plaintiff has a 1983 Mercury automobile, which has a fair market value of \$7,500.00, with a mortgage balance of \$3,100.00, having a net equity of \$4,400.00; that the Defendant has a 1985 GMC 4x4 truck having a value of \$10,000.00, with a mortgage balance of \$7,632.00, leaving an equity of \$2,368.00; and that the Plaintiff has purchased a mobile home since the parties separated, and that the mobile home has an equity of approximately \$300.00.

6. That during the course of the marriage, the parties herein have incurred certain debts, to-wit: Approximately \$18,500.00 due and owing on the trailer Plaintiff purchased since the parties separated, approximately \$3,100.00 due and owing on the 1983 Mercury automobile, approximately \$7,632.00 due and owing on the 1985 GMC truck, and that the

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parties have incurred debts and obligations since they separated.

7. That the Plaintiff is employed at Hill Air Force Base and has a retirement; and that the Defendant is presently retired and receives income in excess of \$650.00 per month, and the Court finds that the vested retirement of the Plaintiff and the present value of the Defendant's right to receive the retirement is far in excess of the \$15,000.00 that the Plaintiff has vested; that the Court believes that if a present value was placed on the Defendant's retirement, it would be somewhere around \$50,000.00.

8. That the Court finds that the Defendant is employable, in fact, the Defendant has been employed in the past, that he is presently looking for work and will have to find employment if he needs more than the \$650.00 retirement.

9. That during the course of the marriage, the parties herein have also acquired thirteen (13) \$25.00 face value U.S. Savings Bonds.

10. That the Court finds that each of the parties has submitted lists showing the value of items of property, which are drastically different in valuation, including the drastic difference in the diamonds and miscellaneous jewelry that Plaintiff has, and the Court finds that the value of

Plaintiff's jewelry is equivalent to the value of the Defendant's guns, and the Court finds there is about \$600.00 or \$700.00 valuation on each side concerning those items.

11. That the Court finds that in comparing the two (2) lists, the only real item that appears to be in dispute is the Zenith television set requested by the Plaintiff.

12. That the Court finds that the Plaintiff received money from her inheritance, which she has kept in a separate account and also has a joint account with her mother, which is not a marital asset, and that the Defendant had a savings account in his name, which was depleted from approximately \$6,000.00 down to about \$400.00.

13. That the Defendant has incurred attorney fees and costs in the sum of \$800.00.

14. That the Plaintiff will maintain health and accident insurance for the Defendant if it is available through her place of employment.

From the above and foregoing Findings of Fact, the Court arrives at the following:

CONCLUSIONS OF LAW

1. That the Plaintiff, Kathleen Clontz, is entitled to a Decree of Divorce from the Defendant, Harvey James Clontz, said divorce to become final upon the signing and entry.

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2. That the Plaintiff shall be awarded a lien in the family home in the sum of \$23,250.00, said lien is determined by the Court as follows: That the Defendant shall be awarded the first \$15,000.00 from the total value of the home, which is \$61,500.00, which was from the Defendant's father and had a value of \$600.00 when it was given to the Defendant back in 1962, and the \$1,000.00 has been improvements, so that the appraised value of the land, which was \$1,600.00 will be reduced to \$1,500.00, leaving a net equity of \$46,500.00, with Plaintiff to receive \$23,250.00.

3. That Plaintiff is entitled to receive her money from the home within six (6) months and he must either mortgage the home to pay the Plaintiff or sell it, but must cash her out within six (6) months.

4. That each of the parties are awarded their own individual retirements.

5. That neither party is awarded any alimony.

6. That Plaintiff is awarded her house trailer, subject to the existing mortgage; the 1983 Mercury automobile, subject to the mortgage balance; and those checking and savings accounts in her name and in the name of Plaintiff's mother.

7. That the Defendant is awarded his 1985 GMC 4x4 truck, subject to the indebtedness and those savings and checking accounts in his name.

8. That Plaintiff is to receive those items set forth in her exhibit, plus those additional items that Defendant in his exhibit is willing to give to the Plaintiff, and the Defendant shall receive those items on his list, plus those additional items that Plaintiff is willing to give him.

9. That the items awarded to the Plaintiff are as follows: Zenith television, old poster bed with dresser, five (5) Big O tires, two (2) snow tires on rims, wrought iron bed belonging to Plaintiff's grandmother, cedar chest, rain lamp, antique sewing machine, cream separator, milk can belonging to grandparents, portapote, round mirror, swan mirror belonged to grandparents, stereo-record combination, one-half ($\frac{1}{2}$) of the dishes, macrame, suitcases, hair dryer, rug with Indian dolls, crafts that Plaintiff has made, two (2) statues, toy box made by Plaintiff's father, personal belongings, cuckoo clock and/or cocker clock given to Plaintiff by her sister, bug killer, knick-knacks, three (3) drawer cabinet, stereo-record player combination, one-half ($\frac{1}{2}$) of the picture albums of the children, diamonds and miscellaneous jewelry, glue gun, lamp, rocking chair, micro-

wave oven and stand, kitchen utensils in Plaintiff's possession, couch sold by Plaintiff to the parties' daughter, computer and those items of property she has in her possession.

10. That the Defendant shall be awarded the 1985 GMC 4x4 truck, 16 horse power garden tractor, caterpillar, landscaping trailer, tent trailer, fishing boat with motor, the inoperative Zenith television with the operative Zenith television awarded to the Plaintiff, clothes washer and dryer, fan and kitchen appliances, kitchen utensils in possession, kitchen dining room set, rifles and rounds of ammunition, deep freeze, refrigerator, couch, wood burning stove, RCA television, camp trailer and supplies, blond bedroom set, waterbed, extra dresser and chest of drawers, kitchen set hardwood or maple, Defendant's tools, telescope, power head to Rainbow vacuum and his personal belongings.

11. That the Plaintiff shall be awarded the thirteen (13) U.S. Savings Bonds, however they are to be divided equally in value, with Plaintiff to determine the value of the bonds and one-half ($\frac{1}{2}$) the value to be awarded to the Defendant, and that the total value of the thirteen (13) bonds is \$410.06, of which the Defendant is entitled to \$205.03.

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12. That the Plaintiff is entitled to pick up the items awarded to her on Saturday, April 12, 1986, at 10:00 a.m.

13. That Plaintiff is ordered to pay Defendant's attorney, John Blair Hutchison, the sum of \$800.00, and said sum has been paid in full.

DATED this _____ day of April, 1986.

DAVID E. ROTH,
District Court Judge

APPROVED AS TO FORM:



JOHN BLAIR HUTCHISON,
Attorney for Defendant

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

PETE N. VLAHOS, ESQ., #3337
VLAHOS & SHARP
Attorney for Plaintiff
Legal Forum Building
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Ogden, Utah 84401
Telephone: 621-2464

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

KATHLEEN CLONTZ,	/	
Plaintiff,	/	DECREE OF DIVORCE
vs.	/	
HARVEY JAMES CLONTZ,	/	Civil No. <u>92534</u>
Defendant.	/	

This matter having come on regularly for trial on the 25th day of March, 1986, before the Honorable David E. Roth, one of the Judges of the above entitled Court sitting without a jury, and the Plaintiff appearing in person and with her attorney, Pete N. Vlahos, and the Defendant appearing in person and with his attorney, John Blair Hutchison, and it having been shown that the Defendant was duly served with a copy of a Complaint and a copy of the Summons, and wherein the Defendant filed his responsive pleadings, and each of

the parties having been sworn and testifying in their own behalf, proffers of proof having been made to the Court in chambers concerning several items, that exhibits having been offered and received, and the Court being fully cognizant of all matters pertaining therein, and having made its Findings of Fact and Conclusions of Law, separately stated in writing, NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the Plaintiff, Kathleen Clontz, is granted a Decree of Divorce from the Defendant, Harvey James Clontz, said divorce to become final upon the signing and entry.

2. That the Plaintiff is awarded a lien in the family home in the sum of \$23,250.00, said lien is determined by the Court as follows: That the Defendant is awarded the first \$15,000.00 from the total value of the home, which is \$61,500.00, which was from the Defendant's father and had a value of \$600.00 when it was given to the Defendant back in 1962, and the \$1,000.00 has been improvements, so that the appraised value of the land, which was \$1,600.00 will be reduced to \$1,500.00, leaving a net equity of \$46,500.00, with Plaintiff to receive \$23,250.00.

3. That Plaintiff is entitled to receive her money from the home within six (6) months and he must either

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mortgage the home to pay the Plaintiff or sell it, but must cash her out within six (6) months.

4. That each of the parties are awarded their own individual retirements.

5. That neither party is awarded any alimony.

6. That Plaintiff is awarded her house trailer, subject to the existing mortgage; the 1983 Mercury automobile, subject to the mortgage balance; and those checking and savings accounts in her name and in the name of Plaintiff's mother.

7. That the Defendant is awarded her 1985 GMC 4x4 truck, subject to the indebtedness and those savings and checking accounts in his name.

8. That Plaintiff is to receive those items set forth in her exhibit, plus those additional items that Defendant in his exhibit is willing to give to the Plaintiff, and the Defendant shall receive those items on his list, plus those additional items that Plaintiff is willing to give him.

9. That the items awarded to the Plaintiff are as follows: Zenith television, old poster bed with dresser, five (5) Big O tires, two (2) snow tires on rims, wrought iron bed belonging to Plaintiff's grandmother, cedar chest, rain lamp, antique sewing machine, cream separator, milk can

belonging to grandparents, portapote, round mirror, swan mirror belonged to grandparents, stereo-record combination, one-half ($\frac{1}{2}$) of the dishes, macrame, suitcases, hair dryer, rug with Indian dolls, crafts that Plaintiff has made, two (2) statues, toy box made by Plaintiff's father, personal belongings, cuckoo clock and/or cocker clock given to Plaintiff by her sister, bug killer, knick-knacks, three (3) drawer cabinet, stereo-record player combination, one-half ($\frac{1}{2}$) of the picture albums of the children, diamonds and miscellaneous jewelry, glue gun, lamp, rocking chair, microwave oven and stand, kitchen utensils in Plaintiff's possession, couch sold by Plaintiff to the parties' daughter, computer and those items of property she has in her possession.

10. That the Defendant is awarded the 1985 GMC 4x4 truck, 16 horse power garden tractor, caterpillar, landscaping trailer, tent trailer, fishing boat with motor, the inoperative Zenith television with the operative Zenith television awarded to the Plaintiff, clothes washer and dryer, fan and kitchen appliances, kitchen utensils in possession, kitchen dining room set, rifles and rounds of ammunition, deep freeze, refrigerator, couch, wood burning stove, RCA television, camp trailer and supplies, blond

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bedroom set, waterbed, extra dresser and chest of drawers, kitchen set hardwood or maple, Defendant's tools, telescope, power head to Rainbow vacuum and his personal belongings.

11. That the Plaintiff is awarded the thirteen (13) U.S. Savings Bonds, however they are to be divided equally in value, with Plaintiff to determine the value of the bonds and one-half ($\frac{1}{2}$) the value to be awarded to the Defendant, and that the total value of the thirteen (13) bonds is \$410.06, of which the Defendant is entitled to \$205.03.

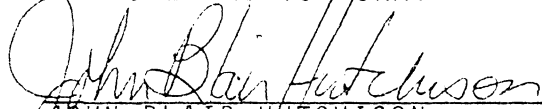
12. That the Plaintiff is entitled to pick up the items awarded to her on Saturday, April 12, 1986, at 10:00 a.m.

13. That Plaintiff is ordered to pay Defendant's attorney, John Blair Hutchison, the sum of \$800.00, and said sum has been paid in full.

DATED this _____ day of April, 1986.

DAVID E. ROTH,
District Court Judge

APPROVED AS TO FORM:


JOHN BLAIR HUTCHISON,
Attorney for Defendant

appropriate, the court erred in providing that alimony continue until age 65 without regard to the possibility of remarriage, cohabitation, or other changed circumstance. Finally, he complained that although the trial court awarded him 50% of the equity in the marital home, it permitted plaintiff the right to live in the home for five years without any provision that interest would accrue on the equity share - the substantial investment -- he had in the home.

As to the first issue, the alimony awarded by the trial court is really on the low end of what is appropriate under the doctrine reiterated in *Paffel* in view of the parties' ages and education, as well as the length of their marriage and the substantial disparity in their incomes. It is a modest award and defendant cannot have reasonably thought there was any remote possibility of it being disturbed on appeal.

The second issue is equally frivolous. Although the decree recited that alimony would continue until defendant's former wife reached 65 and did not expressly refer to earlier termination upon her remarriage or other change of circumstance, defendant's concern is allayed by statute. Utah Code Ann. §30-3-5(5) (1986) provides that unless a decree of divorce "specifically provides otherwise," an award of alimony terminates upon remarriage. Section 30-3-5(6) provides that alimony also terminates upon cohabitation unless the arrangement is free of sexual contact. At oral argument, defendant asserted that his concern was that the "until age 65" language might be deemed to mean the decree had "specifically provide[d] otherwise" and required alimony be paid until age 65 regardless of whether plaintiff remarried. Taking an appeal to obtain clarification and reassurance on that point is clearly overkill. Plaintiff immediately conceded that under the statute alimony would of course terminate before age 65 should the plaintiff remarry or take on a male roommate. Timely objection to the phraseology of the decree, motion for clarification, or even a letter to opposing counsel would have readily elicited all the comfort defendant desired on this score. And as the majority points out, the continuing jurisdiction provision of §30-3-5(3) precludes the conclusion that, even absent remarriage or cohabitation, defendant would be obligated to keep paying alimony until his ex-wife reached age 65 regardless of changes in the parties' circumstances.

It is the third issue which, in my judgment, keeps defendant's appeal outside the realm of frivolousness. When a residence is a major marital asset, it has become quite common to order it sold and the net proceeds divided. When the needs of the parties or their children require, it is equally common to defer the time of sale. In the latter situation, however, and

especially for a period as long as five full years, it is to be expected that the equity share of the spouse who does not have the pre-sale use of the home will accrue interest at some reasonable rate, even though that interest might not be payable until the sale proceeds are available. Such a provision is necessary to compensate the spouse who has to find someplace else to live without access to his or her substantial investment which remains tied up in his or her former home. Failure to include a provision for interest would, in my judgment, ordinarily constitute an abuse of discretion where the period during which sale is deferred is of more than incidental duration. Although I, like the majority, believe no abuse was committed in this particular case, chiefly because the alimony award as such was quite meager, I believe defendant was entitled to our review of that issue to make sure this was indeed one of those rare situations where a "no interest" provision would pass muster.

Gregory K. Orme, Judge

Cite as
55 Utah Adv. Rep. 51

IN THE
UTAH COURT OF APPEALS

Vanza Eckersley BOYLE,
Plaintiff and Appellant,

v.

Mark K. BOYLE,
Defendant and Respondent.

Before Judges Garff, Greenwood, and Bench.

No. 860004-CA
FILED: April 15, 1987

THIRD DISTRICT
Hon. Scott Daniels

ATTORNEYS:

Bruce E. Coke, Larry A. Kirkham for
Plaintiff and Appellant.

Paul H. Liapis, Kent M. Kasting for
Defendant and Respondent.

OPINION

GREENWOOD, Judge:

Plaintiff appeals from a Decree of Divorce which distributed property and debts between the parties, cancelled pre-marital note executed by defendant in favor of plaintiff, denied plaintiff alimony, and granted a divorce to both parties.

The parties married in 1974 when plaintiff was 56 years old and defendant 63. Both had prior marriages. They separated in 1981 and

had no children born of their marriage. Prior to the marriage plaintiff owned a home and had substantial savings. Defendant borrowed \$8,000 from plaintiff for payment of taxes prior to the marriage and executed a note reflecting that loan. Some repayment occurred after the marriage. Plaintiff's assets were partially depleted during the marriage by purchase of a home and automobiles. Plaintiff also provided funds to defendant for payment of gambling debts. Defendant, an attorney, contributed his income during the marriage to the couple's living expenses. Plaintiff deposited \$9,300 of her pre-marital assets in a joint Merrill Lynch account with an initial total balance of \$20,000. After the parties separated they each withdrew funds from the Merrill Lynch account, creating an overdraft of approximately \$10,000.

After three days of trial the trial court awarded plaintiff the home of the parties subject to the mortgage obligation, the household furnishings, a 1975 Cadillac, a savings account in her name, and various personal items. Plaintiff and defendant were each ordered to repay one-half of the Merrill Lynch overdraft balance. Defendant was awarded his Keogh plan, a country club membership, a 1975 Blazer, his pension plan, and various personal items. Defendant was also ordered to pay plaintiff's medical bills and all back taxes owed through 1981.

Plaintiff asserts that the trial court abused its discretion by (1) refusing to order defendant to pay to plaintiff the balance of the \$8,000 note and other sums advanced by plaintiff to defendant during the marriage for payment of gambling debts; (2) ordering plaintiff to pay one-half of the Merrill Lynch overdraft; (3) failing to award plaintiff alimony; and (4) granting a divorce to defendant as well as to plaintiff. We disagree and affirm the decision of the trial court.

This Court will refrain from disturbing findings of the trial court in a divorce action unless a clear abuse of discretion is shown. *Searle v. Searle*, 522 P.2d 697 (Utah 1974). The trial court is clearly in the best position to weigh the evidence, determine credibility and arrive at factual conclusions. In this case the trial judge considered all evidence presented as to the marital assets and debts as they existed prior to and during the marriage, and subsequent to the separation of the parties. It would be inappropriate for this Court to reverse on an isolated item of property or debt distribution. Rather, this Court must examine the entire distribution to determine if the trial court abused its discretion.

The findings of fact do not include dollar values for most of the property and debts distributed, nor does the record indicate any effort by plaintiff's counsel, who drafted those pleadings for court approval, to have such amounts delineated. In *Jones v. Jones*,

700 P.2d 1072 (Utah 1985), appellant claimed that the trial court had improperly distributed property. The Utah Supreme Court stated that findings of fact must include valuation of assets in order to permit appellate review. In *Jones*, as here, counsel for the party seeking such review had prepared the findings of fact, conclusions of law and decree of divorce and had not included, nor attempted to include, values in those pleadings. The Supreme Court declined to disturb the property distribution, stating that such claim had been waived because the party seeking reversal failed to attempt to include property values in the findings of fact. *Jones* at 1074-75. We agree that a failure to include property valuations in divorce actions may, in some cases, constitute an abuse of discretion sufficient to require remand for determination of values. However, when the lack of valuation results from the complaining party's own draftsmanship and no clear abuse of discretion is otherwise proven, we will defer to the trial court's property distribution. Those factors exist in the case before us and we therefore affirm as to property and debt division.

Plaintiff claims the court further abused its discretion by failing to award her alimony. Medical testimony was received regarding plaintiff's asthma condition and the adverse effect on her ability to be employed. Cross-examination indicated that plaintiff was able to golf frequently despite the asthma, and had been the runner-up in a competition held at Willow Creek Country Club in 1982. Defendant testified that income from his law practice had diminished dramatically. His area of practice, motor carrier transportation law, had suffered from the deregulation of that industry. Also, his major client had terminated their relationship. Defendant anticipated a continued reduction of his salary for those reasons. The court refused plaintiff's request to include a finding that plaintiff was unable to work. The findings, however, do include the following language:

That this was not a long term marriage, and the court feels that each party is being restored to the condition which existed at the time of the marriage, and therefore no alimony should be awarded. (Findings of Fact No. 18).

The Utah Supreme Court has held that the purpose of alimony is to equalize the standard of living for both spouses, maintain them at their present standard as much as possible, and avoid the necessity of one spouse receiving public assistance. *Higley v. Higley*, 676 P.2d 379 (Utah 1983). In *Jones*, the Court reiterated the factors to be examined in determining alimony as including:

- [1] the financial conditions and needs of the wife;
- [2] the ability of the wife to produce a sufficient income for herself; and
- [3] the ability of the husband to provide support. *Jones* at 1075.

These criteria were previously adopted in *English v. English*, 565 P.2d 409, 411-12 (Utah 1977). In *Jones* the Court examined the record for an analysis of the criteria, and considered, among other things, the length of the marriage and the recipient spouse's education and employability. The *Jones* analysis process made it clear that the three pronged criterion does not preclude considering factors such as the length of the marriage in awarding alimony.

In *Paffel v. Paffel*, 732 P.2d 96 (Utah 1986) the Utah Supreme Court recently listed the same three factors and stated that "[f]ailure to consider these factors constitutes an abuse of discretion." In *Paffel* the trial court's findings did not specifically address all of the required factors. This Court concurs in the Supreme Court's reflection that more detailed findings on each required factor would assist in the appellate process. However, we find, as did the Supreme Court in *Paffel*, that "the evidence in this case supports the lower court's order and appellant has made no showing to rebut the presumption that the trial court did consider respondent's income, expenses, and need for support." *Id* at 102. The third factor, defendant's ability to provide support, was also considered by the trial court in this case. Appellant was awarded most of the marital estate as well as the residue of her premarital assets. She had received several months of temporary support to give her an opportunity to rehabilitate. Evidence was received and disputed as to plaintiff's ability to obtain employment, given her health conditions. Plaintiff had worked up to eight years prior to the marriage of the parties. Defendant testified that his income had decreased and was not likely to increase, because of the change in the nature of his law practice. The short marriage of the parties resulted in diminution of both plaintiff's assets and defendant's earning abilities. The trial court considered all proffered evidence and rendered a decision to equalize, as far as possible, the adverse impact of the divorce on both. All three of the factors required by *Paffel* were considered by the court. This court finds no abuse of discretion in the denial of alimony.

There is no merit in plaintiff's contention that defendant should not have been granted a divorce. Both parties testified on their grounds for divorce and it was within the sound discretion of the trial judge to grant a divorce to both.

Affirmed. Costs to defendant.

Pamela T. Greenwood, Judge

WE CONCUR:

R. W. Garff, Judge

Russell W. Bench, Judge

Cite as
55 Utah Adv. Rep. 53

IN THE UTAH COURT OF APPEALS

Walter M. KATZENBERGER and Ruth
C. Katzenberger,

Plaintiffs and Appellants,

v.

STATE of Utah, Salt Lake City Corporation,
Utah State Department of Transportation, and
Western Utility Contractors, Inc., dba
Westcon,

Defendants and Respondents.

Before Judges Bench, Garff and Greenwood.

No. 860020-CA

FILED: April 15, 1987

THIRD DISTRICT

Hon. J. Dennis Frederick

ATTORNEYS:

John S. Adams, Mark S. Swan for Plaintiffs
and Appellants.

David L. Wilkinson, Steven C. Ward, Roger
F. Cutler, Ray L. Montgomery, Jackson
Howard, Leslie W. Slaugh for Defendants
and Respondents.

OPINION

BENCH, Judge:

Plaintiffs Walter and Ruth Katzenberger appeal from a summary judgment dismissing their action for reformation of a deed and from a judgment against them for trespass and intentional interference with contractual relations. We reverse the summary judgment and remand the case for trial.

In early September, 1970, plaintiffs contacted the then Utah Department of Highways, now defendant Utah Department of Transportation, to inquire about purchasing a small pie-shaped piece of property located between the eastern boundary of their property and the I-215 Belt Route fence. Letter and telephone negotiations ensued. The State indicated a willingness to sell the property, and quoted a price of \$25.00. On November 10, 1970, Ruth Katzenberger mailed a check in that amount to the State Road Commission. In a cover letter which accompanied the check, she indicated the check was "for [the] property we have

3. There is no indication of what disposition was made of that charge. *One Porsche*, 526 P.2d at 917.

4. Without legal analysis or authority, Honda contends that One Pontiac is not controlling because the decision post-dates the trial. We decline to enter into a detailed analysis of this issue, *State v. Amicone*, 689 P.2d 1341, 1344 (Utah 1984), except to say that Honda's contention is without merit. See *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). For cases construing similar statutory language see, e.g., *U.S. v. One (1) 1982 28' International Vessel*, 741 F.2d 1319 (11th Cir. 1984); *U.S. v. One 1975 Mercedes 280S*, 590 F.2d 196 (6th Cir. 1978); *U.S. v. One 1975 Ford Pickup Truck*, 558 F.2d 755 (5th Cir. 1977); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

Cite as

55 Utah Adv. Rep. 49

IN THE
UTAH COURT OF APPEALSJoan EAMES,
Plaintiff and Respondent,
v.Emerson EAMES,
Defendant and Appellant.

Before Judges Davidson, Orme and Garff

No. 860019-CA
FILED: April 9, 1987FIRST DISTRICT
Hon. Omer J. Call

ATTORNEYS:

George W. Preston for Defendant and
Appellant.

Gordon J. Low for Plaintiff and Respondent.

OPINION

DAVIDSON, Judge:

The trial court granted a divorce to plaintiff Joan Eames from defendant Emerson Eames. The Judgment and Decree provided for a distribution of property and an award of alimony to plaintiff. On appeal, defendant seeks a reversal of the trial court's judgment as it relates to alimony and distribution of property. We affirm.

The parties were married for thirty years with three children born to the union. At the time of trial in January, 1984, the youngest child was 18 years old and resided with plaintiff in the family home while she attended college. Defendant had moved to a different residence. Plaintiff was employed as a department manager and clerk for a large store and her gross income was approximately \$10,000

per year. She had been employed during most of the marriage in unskilled or untrained type positions. Mr. Eames was a manufacturing engineer with Morton-Thiokol and had worked with that corporation since 1962. His gross income was approximately \$34,000 per year. Because the parties placed widely varying valuations on their items of personal property, the trial judge made the division without finding specific values for each item. In addition to her share of the personal property, the plaintiff received her equity in a partnership consisting of members of her paternal family (Five Way Partnership), previous distributions from this partnership, her inherited property, gifts from her father, and a one-half interest in the family home. Plaintiff was given the right to live in the home until February 1, 1989, or until it was sold by agreement of the parties, whichever came first. While in the home, Mrs. Eames was responsible for payment of taxes, insurance, and mortgage installments. Defendant received his share of the personal property, his separate bank account, the inheritance from his parents, and an undivided one-half interest in the family home less the mortgage indebtedness at the time of trial. Each party received one-half of the other's retirement benefit, to be paid when it was received. This provision was subject to the approved formula which considers the number of years worked during the marriage. Defendant's retirement was vested while the plaintiff's was not, his being much more valuable than hers.

Plaintiff was awarded alimony in the amount of \$450.00 per month so long as the youngest child successfully pursued a full time college education, lived in the family home, remained single, or reached the age of 21 years. Then alimony was reduced to \$300.00 per month and would remain so until plaintiff reached the age of 65 years. At that time alimony would terminate.

Defendant claims error in the distribution of the real and personal property of the parties and in the award of alimony. The trial court has statutory authority to decree an equitable distribution of property in a divorce action under Utah Code Ann. § 30-3-5 (1986). In the case of *King v. King*, 717 P.2d 715 (Utah 1986), the Utah Supreme Court emphasized that it would accord considerable deference to the trial court's judgment and treat its findings with a presumption of validity. An appellant has the burden of showing that the trial court's award "works such a manifest injustice or inequity as to clearly be an abuse of that broad discretion [in adjusting the financial needs and property interests of the parties]."

The trial record exposes the disparities in education, income, and earning potential between the parties. The record also reveals that any future income from the Five Way

Partnership will be considerably less than defendant asserts. Defendant's claimed right to receive interest on his one-half interest in the home's equity for the period until February 1, 1989, is offset by the plaintiff's need to provide shelter and support for the parties' youngest child while she attends college. It is presumed the trial judge took these economic realities into consideration and, on balance, it can be said that he strove for an equitable distribution of the property.

A recent Utah Supreme Court opinion concerning alimony, *Paffel v. Paffel*, 732 P.2d 96, 100 (Utah 1986), states that the purpose of spousal support is to "enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage and to prevent the spouse from becoming a public charge." The appellate courts should not interfere with such an award without a showing of a "clear and prejudicial abuse of discretion". The Court in *Paffel* further set forth what must be considered by the trial court to avoid a challenge to the award as being an abuse of discretion. These factors are, (1) the financial condition and needs of the spouse claiming support, (2) the ability of that spouse to provide sufficient income for him or herself, and (3) the ability of the responding spouse [Mr. Eames] to provide the support. The trial record here shows that the court below carefully and properly considered the above factors. There was no abuse of discretion. Therefore, the award of alimony will not be disturbed.

Plaintiff requests attorney's fees on appeal. This issue is governed by R. Utah Ct. App. 33(a) in that this Court may award costs and attorney's fees to the prevailing party if we determine the appeal to be either frivolous or brought for delay. The instant appeal is without merit but the record must be examined to determine whether or not it is frivolous or brought for delay. In *Cady v. Johnson*, 671 P.2d 149, 151 (Utah 1983), the Court implied the awarding of attorney's fees required a finding that the suit was lacking in good faith and then defined "good faith" as:

- (1) An honest belief in the propriety of the activities in question;
- (2) no intent to take unconscionable advantage of others; and
- (3) no intent to, or knowledge of the fact that the activities in question will, [sic] hinder, delay or defraud others.

The Court recognizes the right of a party to argue in an attempt to correct what that party deems to be error in the court below. However, when there is no basis for the argument presented and when the evidence or law is mischaracterized and misstated, the Court must question the party's motives. The record shows the trial judge making Findings

of Fact, dividing the property, and awarding support after a careful consideration of all the evidence. Defendant ignores this. Mr. Eames claims the trial court erred in awarding alimony to his wife. This attempt at deprivation of alimony is contrary to the intent of *Fletcher v. Fletcher*, 615 P.2d 1218 (Utah 1980), which was cited in defendant's brief. Surely a wife of thirty years deserves something more than being cast adrift in the sea of economic uncertainty without some long term support from a husband with superior earning potential. Defendant refuses to accept the evidence presented concerning plaintiff's interest in the Five Way Partnership. He continues to argue that the interest is of great and increasing value. He refuses to acknowledge the uncontroverted evidence that past distributions resulted from the sale of assets. He incorrectly argues for a valuation based upon the past rather than a valuation at the time of trial. Defendant also fails to recognize that he was awarded his own inheritance and fails to consider any income potential from that source.

Defendant further misstates the law when he argues that the alimony award cannot be changed in the future. Utah Code Ann. §30-3-5 (1986) specifically reserves jurisdiction to the trial court to "make subsequent changes or new orders for the support and maintenance of the parties. ..."

The totality of defendant's argument compels this Court to find that he is attempting to take unconscionable advantage of his wife and that this appeal is frivolous. Therefore, it fails to meet the standards of good faith and R. Utah Ct. App. 33(a) applies.

We affirm the judgment of the trial court, award costs against the defendant, and remand to the trial court for a determination of plaintiff's attorney's fees which are ordered to be paid by the defendant.

Richard C. Davidson, Judge

I CONCUR:

Regnal W. Garff, Judge

ORME, Judge: (Dissenting in part)

I agree with the majority that the decision below must be affirmed. The trial court's disposition is well within the realm of reasonableness and no abuse of discretion has been demonstrated. While I agree the appeal is not well taken, I am not convinced it was frivolously taken and I dissent from the majority's imposition of attorney's fees against defendant.

Defendant had three major gripes with the trial court's decision. First, he did not think any alimony should have been awarded because his former wife is able-bodied and gainfully employed. Second, he contended that even if some award of alimony were

appropriate, the court erred in providing that alimony continue until age 65 without regard to the possibility of remarriage, cohabitation, or other changed circumstance. Finally, he complained that although the trial court awarded him 50% of the equity in the marital home, it permitted plaintiff the right to live in the home for five years without any provision that interest would accrue on the equity share - the substantial investment -- he had in the home.

As to the first issue, the alimony awarded by the trial court is really on the low end of what is appropriate under the doctrine reiterated in *Paffel* in view of the parties' ages and education, as well as the length of their marriage and the substantial disparity in their incomes. It is a modest award and defendant cannot have reasonably thought there was any remote possibility of it being disturbed on appeal.

The second issue is equally frivolous. Although the decree recited that alimony would continue until defendant's former wife reached 65 and did not expressly refer to earlier termination upon her remarriage or other change of circumstance, defendant's concern is allayed by statute. Utah Code Ann. §30-3-5(5) (1986) provides that unless a decree of divorce "specifically provides otherwise," an award of alimony terminates upon remarriage. Section 30-3-5(6) provides that alimony also terminates upon cohabitation unless the arrangement is free of sexual contact. At oral argument, defendant asserted that his concern was that the "until age 65" language might be deemed to mean the decree had "specifically provide[d] otherwise" and required alimony be paid until age 65 regardless of whether plaintiff remarried. Taking an appeal to obtain clarification and reassurance on that point is clearly overkill. Plaintiff immediately conceded that under the statute alimony would of course terminate before age 65 should the plaintiff remarry or take on a male roommate. Timely objection to the phraseology of the decree, motion for clarification, or even a letter to opposing counsel would have readily elicited all the comfort defendant desired on this score. And as the majority points out, the continuing jurisdiction provision of §30-3-5(3) precludes the conclusion that, even absent remarriage or cohabitation, defendant would be obligated to keep paying alimony until his ex-wife reached age 65 regardless of changes in the parties' circumstances.

It is the third issue which, in my judgment, keeps defendant's appeal outside the realm of frivolousness. When a residence is a major marital asset, it has become quite common to order it sold and the net proceeds divided. When the needs of the parties or their children require, it is equally common to defer the time of sale. In the latter situation, however, and

especially for a period as long as five full years, it is to be expected that the equity share of the spouse who does not have the pre-sale use of the home will accrue interest at some reasonable rate, even though that interest might not be payable until the sale proceeds are available. Such a provision is necessary to compensate the spouse who has to find someplace else to live without access to his or her substantial investment which remains tied up in his or her former home. Failure to include a provision for interest would, in my judgment, ordinarily constitute an abuse of discretion where the period during which sale is deferred is of more than incidental duration. Although I, like the majority, believe no abuse was committed in this particular case, chiefly because the alimony award as such was quite meager, I believe defendant was entitled to our review of that issue to make sure this was indeed one of those rare situations where a "no interest" provision would pass muster.

Gregory K. Orme, Judge

Cite as
55 Utah Adv. Rep. 51

IN THE
UTAH COURT OF APPEALS

Vanza Eckersley BOYLE,
Plaintiff and Appellant,

v.

Mark K. BOYLE,
Defendant and Respondent.

Before Judges Garff, Greenwood, and Bench.

No. 860004-CA
FILED: April 15, 1987

THIRD DISTRICT
Hon. Scott Daniels

ATTORNEYS:

Bruce E. Coke, Larry A. Kirkham for
Plaintiff and Appellant.

Paul H. Liapis, Kent M. Kasting for
Defendant and Respondent.

OPINION

GREENWOOD, Judge:

Plaintiff appeals from a Decree of Divorce which distributed property and debts between the parties, cancelled pre-marital note executed by defendant in favor of plaintiff, denied plaintiff alimony, and granted a divorce to both parties.

The parties married in 1974 when plaintiff was 56 years old and defendant 63. Both had prior marriages. They separated in 1981 and

covered by Airport's insurance issued by Home was a genuine issue of material fact that precluded summary judgment. Utah R. Civ. P. 56(c). Airport's limited concession of liability does not cure this problem; it was not a concession that Christiansen accepted. At oral argument on the motions, Christiansen maintained that Holiday was covered by the Home policy. Absent a resolution of that issue, the court could not determine whether Airport was liable at all. For this reason, summary judgment on the issue of damages was improper. Therefore, we reverse the trial court's grant of Airport's motion for summary judgment.

Christiansen also argues on appeal that the district court should have granted her motion for summary judgment against Airport and Home for the full amount of the stipulated judgment. There is no merit to this position. The court properly decided that Home's liability could not be determined because Home had not been joined as a party and, therefore, would not be bound by such a judgment. And, as indicated previously, there was a genuine issue of material fact that precluded any determination of the liability of either Home or Airport.

Christiansen counters that the failure to bring Home into the action is not a basis for denying her a judgment for the full amount of the tort award. She reasons that under Utah law, a plaintiff must direct any action against the tort-feasor and may not name the tort-feasor's insurer as a party to an action. Since she was precluded from naming Home, that fact cannot be used to deny her the full judgment to which she is entitled.

It is true that Home could not be a named party in Christiansen's original tort action against Holiday. *Christensen v. Peterson*, 25 Utah 2d 411, 483 P.2d 447 (1971); *Young v. Barney*, 20 Utah 2d 108, 433 P.2d 846 (1967). But once she settled with Holiday and began pursuing Holiday's assigned rights, which included Holiday's claims against both Airport and Home, nothing precluded her from bringing Home into the action for a determination of the coverage of its insurance policy and its liability for the tort judgment against Holiday. See Utah R. Civ. P. 20-21. However, as matters stand, due to plaintiff's failure to join Home, the issue of whether Holiday was covered by the Home insurance policy has yet to be resolved. We are therefore unmoved by Christiansen's argument and affirm the trial court's denial of her motion for a summary judgment.

The judgment below is reversed in part and affirmed in part.

WE CONCUR:

Gordon R. Hall, Chief Justice
I. Daniel Stewart, Associate Chief Justice
Richard C. Howe, Justice

Christine M. Durham, Justice

1. Christiansen asserts on appeal that Home's lawyer is actually conducting Airport's defense and that there has been collusion between Airport and Home in an attempt to deny Christiansen the benefits of the insurance policy. Specifically, she argues that Home is attempting to limit its potential exposure to \$15,000 by having Airport admit that it breached its agreement and by agreeing to pay any judgment based on that breach. Although there may be substance to Christiansen's charges, that fact does not alter our conclusion.

Cite as
58 Utah Adv. Rep. 28

IN THE UTAH COURT OF APPEALS

Gary V. PETERSEN,
Appellant,

v.

Julie A. PETERSEN,
Respondent.

Before Judges Orme, Jackson and Bench.

No. 860007-CA
FILED: May 18, 1987

SECOND DISTRICT
Hon. Calvin Gould

ATTORNEYS:

Paul M. Belnap for Appellant.
Pete N. Vlahos for Respondent.

OPINION

ORME, Judge:

The appellant seeks a reversal or readjustment of the property division and alimony awarded to his former wife upon their divorce. His challenge focuses on a \$120,000 property settlement given to his ex-wife to reflect her interest in his medical degree. We affirm the trial court's basic disposition, but require amendment of the decree insofar as the \$120,000 award is concerned.

FACTUAL BACKGROUND

The parties were married in September 1963 when they were both entering their senior year of college. Both graduated with Bachelor's degrees. Dr. Petersen continued his education and obtained a Master's degree, while Mrs. Petersen worked as an elementary school teacher to help finance her husband's education. After receiving his Master's degree, Dr. Petersen entered medical school. During medical school, Dr. Petersen earned approximately \$1,000 per year in income. The couple also took out a student loan and received

some money from Mrs. Petersen's parents. While her husband was in medical school, Mrs. Petersen worked one year on a full time basis and three years part time.

When Dr. Petersen began his internship, Mrs. Petersen stopped working to stay at home with their child. During the next fifteen years, Mrs. Petersen was not employed outside the home and her teaching certification expired.

By the time of their divorce, the parties had been married twenty years and had six children under the age of 18. The decree gave Mrs. Petersen custody of the six minor children, the family residence subject to the first mortgage, most of the family furniture, and two automobiles. She was awarded \$300 per month per child as child support, \$1,000 per month alimony, and the cash property settlement of \$120,000, which Dr. Petersen was to pay in installments of \$1,000 per month without interest.

Under the decree, Dr. Petersen received his professional corporation, the total interest in his pension and profit sharing plan, two condominiums, a boat, an undivided one-seventh interest in a cabin near Bear Lake, and other rental property. He also was given the right to claim all six children as dependents for income tax purposes.

The trial court explained the \$120,000 cash settlement as follows:

The Court believes that this case is classic, in that defendant is entitled to a property award reflecting an ownership interest of the defendant in plaintiff's medical degree. It is abundantly clear that defendant helped plaintiff earn that degree during their marriage, and that plaintiff's ability to earn is based upon that degree. Further, that following the earning of the degree and the entry into the medical practice, by mutual agreement, defendant undertook the raising and nurturing of the children as her responsibility to the marital partnership, while plaintiff practiced medicine. It is difficult to find in the evidence presented any system for the measurement of the value of the degree, and the Court must therefore deal with the case mostly upon an alimony basis. To deal with the case fully upon an alimony basis is not fair to the defendant, inasmuch as any effort to restructure her life by seeking to better her employment opportunities or to remarry will operate against her alimony rights. Defendant is therefore awarded \$1,000 per month permanent alimony and a lump sum

property award in respect to the medical degree in the amount of \$120,000, payable in installments of \$1,000 per month from the date of the decree.

On appeal, Dr. Petersen argues that the division of marital property was inequitable, particularly the \$120,000 property settlement given to his wife. Dr. Petersen argues that it was error to characterize "his" medical degree as marital property and require him to cash out Mrs. Petersen's interest therein over a 10-year period.

STANDARD OF REVIEW AND PRELIMINARY CONSIDERATIONS

Generally, the trial court is permitted considerable discretion in adjusting the financial and property interests of the parties to a divorce action and its determinations are entitled to a presumption of validity. *E.g.*, *Burnham v. Burnham*, 716 P.2d 781, 782 (Utah 1986). And although appellate courts may weigh the evidence and substitute their judgment for that of the trial court in divorce actions, as the Supreme Court stated in *Turner v. Turner*, 649 P.2d 6 (Utah 1982), "this court will not do so lightly and merely because its judgment may differ from that of the trial judge. A trial court's apportionment of property will not be disturbed unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion." 649 P.2d at 8.

In the present case, the trial court appropriately attempted to equalize the parties' respective standards of living. See *Olson v. Olson*, 704 P.2d 564, 566 (Utah 1985). Dr. Petersen was found capable of earning \$100,000 per year while Mrs. Petersen's ability to obtain recertification and secure a teaching contract was found to be speculative at best. Even if she succeeded, she would earn only one-fourth to one-fifth of what Dr. Petersen would earn annually. The trial court spoke of the difficulty of measuring the value of Dr. Petersen's degree. The court chose to balance the inequalities between the parties partly with the alimony award. However, the trial court did not want Mrs. Petersen to lose all of her entitlement upon remarriage, so the trial court provided for an additional \$120,000 as a property award, payable in \$1,000 monthly installments. Characterization of these payments as a property award created the main issue for appeal.

DEGREES AS PROPERTY

The question of whether an advanced degree is a property interest subject to division upon divorce is one of first impression at the appellate level in Utah.¹ However, the majority of jurisdictions that have considered the issue have held that advanced degrees or professi-

onal licenses are not property. *Wisner v. Wisner*, 129 Ariz. 333, 631 P.2d 115, 122 (Ariz. App. 1981)(husband's medical license and board certificate are not property subject to division, but education is a factor to be considered in arriving at equitable property division, maintenance, and child support); *In re Marriage of Aufmuth*, 89 Cal. App.3d 446, 152 Cal. Rptr. 668, 677 (1979)(legal education not a property right); *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75, 77 (1978)(MBA degree not marital property subject to division); *In re Marriage of Hortsmann*, 263 N.W.2d 885, 891 (Iowa 1978)(law degree is not a distributable asset upon divorce; future earnings are); *Olah v. Olah*, 135 Mich. App. 404, 354 N.W.2d 359, 361 (Mich. App. 1984)(medical degree not property or marital asset); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527, 536 (1982)(courts may not make any permanent distribution of the value of professional degrees and licenses, whether based on estimated worth or cost); *Ruben v. Ruben*, 461 A.2d 733, 735 (N.H. 1983)(graduate degree acquired by one spouse during the marriage is not an asset subject to division upon divorce); *Muckleroy v. Muckleroy*, 84 N.M. 14, 498 P.2d 1357, 1358 (1972)(medical license is not community property); *Hubbard v. Hubbard*, 603 P.2d 747, 750-751 (Okla. 1979)(medical license not property but wife entitled to compensation for her investment).²

These cases and others are consistent with our understanding of what "property" is and what an educational degree is. Property can be bought, sold, and devised. Bona fide degrees cannot be bought; they are earned. They cannot be sold; they are personal to the named recipient. Upon the death of the named recipient, the certificate commemorating award of the degree might be passed along and treasured as a family heirloom, but the recipient may not, on the strength of that degree, practice law or medicine. In this case, the court awarded the parties' home to Mrs. Peterson. But it might have awarded the home to Dr. Petersen or it might have ordered the home sold and the net proceeds divided. The court had no such alternatives with the medical degree, precisely because the degree is not property. Consideration of some of the cases cited above and others supports our fundamental conclusion and demonstrates the range of related problems.

In *Muckleroy v. Muckleroy*, 84 N.M. 14, 498 P.2d 1357 (1972), it had been argued that the husband's education was the product of the joint labor and industry of both parties, so that after their marriage it was community property. The New Mexico Supreme Court rejected this argument and concluded:

A medical license is only a permit issued by the controlling authority

of the State, authorizing the individual licensee to engage in the practice of medicine. The medical license may be used and enjoyed by the licensee as a means of earning a livelihood, but it is not community property because it cannot be the subject of joint ownership.

84 N.M. at 15, 498 P.2d at 1358.

The same issue arose as to an M.B.A. degree earned by the husband in *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978). Again, the concept of an advanced degree being property was rejected:

An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of "property." It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.

194 Colo. at 432; 574 P.2d at 77.

The wife in *Graham* had worked full time throughout the couple's six-year marriage, and had contributed 70 percent of the family income in addition to most of the household work while her husband was acquiring his degree. The trial court found that the degree was jointly owned property and had determined that the future earning value of the M.B.A. degree to Mr. Graham was \$82,836.00. Mrs. Graham was awarded \$33,134.00 of that amount. On appeal, the state supreme court affirmed the reversal of the trial court by the court of appeals. 574 P.2d at 76. The fact that the decision left Mrs. Graham with nothing to show for her six years of labor prompted a three judge dissent which strongly urged that the husband's increased earning power represented by the degree should be considered marital property, where there was no accumulated property and the spouse who subsidized the degree was ineligible for maintenance.³ 574 P.2d at 78-79.

The equitable concerns addressed in the *Graham* dissent are reflected in the few cases that have found an advanced degree or professional license to be marital property.

In *Daniels v. Daniels*, 185 N.E.2d 773 (Ohio

1961), the court held that the right to practice medicine was in the nature of a franchise and constituted property which the trial court had a right to consider in making an award of alimony. In *Daniels*, the parties to the action were married while students at a university. During the time of their marriage the wife received her degree in business administration and the husband received a degree in medicine one year later. Each contributed toward his or her own maintenance and education, the balance in financial support for the family coming from the wife's father, who contributed sizable sums to the marriage. At the time of their divorce, neither party had much in the way of tangible assets. The court awarded \$24,000 in lump sum alimony, but did not actually divide the value of the medical degree. 185 N.E.2d at 776.

Recently, in *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985), the New York Court of Appeals affirmed the trial court's holding that a license to practice medicine acquired during the marriage is marital property subject to division. In *O'Brien*, the wife was held entitled to a 40 percent interest in her husband's medical license. The wife had contributed approximately 76 percent of the couples' total income while the husband obtained his license. The breakdown of the marriage occurred shortly after the husband completed his schooling, and the only tangible asset existing after their nine-year marriage was the husband's medical license.

The New York court distinguished its analysis in *O'Brien* from that of other jurisdictions which have found a license or advanced degree not to be marital property. As the *O'Brien* court explained:

Plaintiff does not contend that his license is excluded from distribution because it is separate property; rather, he claims that it is not property at all but represents a personal attainment in acquiring knowledge. He rests his argument on decisions in similar cases from other jurisdictions and on his view that a license does not satisfy common-law concepts of property. Neither contention is controlling because decisions in other States rely principally on their own statutes, and the legislative history underlying them, and because the New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law.

66 N.Y.2d at 583, 489 N.E.2d at 715, 498 N.Y.S.2d at 746. New York's highest court acknowledged in *O'Brien* that their statute creates a new species of property previously

unknown at common law or under prior statutes. 66 N.Y.2d at 586, 489 N.E.2d at 719, 498 N.Y.S.2d at 748. Critical portions of the New York Equitable Distribution Law provide that in making an equitable distribution of marital property, the court shall consider the efforts one spouse made to the other spouse's career or career potential and the difficulty of evaluating an interest in a profession. 66 N.Y.2d at 584, 489 N.E.2d at 715-716, 498 N.Y.S.2d at 746-47. Thus, the analysis in *O'Brien*, although illustrative of the equitable concerns for the working spouse who supports the other through an advanced degree, 66 N.Y.2d at 585-588, 489 N.E.2d at 716-718, 498 N.Y.S.2d at 746-48, is limited in application because of the pivotal role of the unusual and expansive distribution statute enacted in New York.

We agree with the majority opinion in *Graham* that an advanced degree is or confers an intangible right which, because of its character, cannot properly be characterized as property subject to division between the spouses. No special statute, as in New York, permits us to treat the degree as though it were property. On the other hand, criteria for an award of support in Utah are not so rigid as in Colorado, preventing the harsh result of *Graham*. In this state, traditional alimony analysis is the appropriate and adequate method for making adjustments between the parties in cases of this type.⁴

AWARD IN THIS CASE

As indicated, the trial court was in error when it awarded Mrs. Petersen the \$120,000 cash settlement to reflect her share of the value of her husband's medical degree. Nonetheless, the court's basic disposition was fair and can be sustained if the \$1,000 monthly payments which Dr. Petersen was to make in satisfaction of that obligation are recharacterized as additional alimony, a result which is readily supported by the trial court's findings.

In reviewing the court's findings, we find ample evidence to affirm the property division aside from the \$120,000 cash settlement. As the Supreme Court stated in *Fletcher v. Fletcher*, 615 P.2d 1218 (Utah 1980), "[t]here is no fixed formula upon which to determine a division of properties, it is a prerogative of the court to make whatever disposition of property as it deems fair, equitable, and necessary for the protection and welfare of the parties." 615 P.2d at 1222. Although Dr. Petersen was awarded a smaller percentage of the marital assets, he received all but one of the income producing assets: his professional corporation, his pension and profit sharing plan, two condominiums, and other business interests. The parties were to share evenly in a \$10,000 investment corporation. We find the basic property division equitable.

As for the cash settlement payable in

monthly installments of \$1,000, it is properly affirmed as alimony, making Mrs. Petersen's entire alimony award \$2,000 per month. Criteria considered in determining a reasonable award of support must include the financial conditions and needs of the spouse in need of support, the ability of that spouse to produce sufficient income for his or her own support, and the ability of the other spouse to provide support. *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985).

In this case, then, the first factor to be considered is the financial condition and needs of Mrs. Petersen. For over ten years, Mrs. Petersen and her family enjoyed a very comfortable lifestyle. She now must make mortgage payments on the home and pay for the ordinary expenses of food, clothing and transportation. Other than the one-half interest in the investment corporation, Mrs. Petersen was awarded none of the income-producing assets. She has no outside income.

The second factor to be considered is Mrs. Petersen's ability to produce a sufficient income for herself. Although Mrs. Petersen is a college graduate with a Bachelor's degree and is trained as a school teacher, she is not currently certified. She would require additional training to become certified and, even if certified, her ability to produce income would be one fourth to one fifth of what Dr. Petersen's income has provided the family. The trial court found that the chance of her being able to secure a teaching contract was "speculative." During most of the marriage, Mrs. Petersen was not employed outside the home. She stopped working, primarily at the urging of her husband, and devoted her time to raising their six children. It is unreasonable to assume that she will be able immediately to enter the job market and support herself in the style in which she had been living before the divorce. See *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985).

The final factor to be considered is the ability of Dr. Petersen to provide support. This is the proper realm in which to consider advanced degrees or professional licenses. An advanced degree is ordinarily an indicator of potential future earnings. In addition, the attainment of a degree by one spouse often results in a disparity of income that is likely to last for a great time, particularly in cases like the present one. Dr. Petersen has a history of earning more than \$100,000 a year and Mrs. Petersen has not worked for the past fifteen. But it is the discrepancy in their earning power which is the basis for alimony, not the discrepancy in their educations. There is no logical reason, for example, for treating differently a self-trained artist without formal education who earns and will earn \$100,000 a year and a doctor with a medical degree who earns and will earn \$100,000 a year. Other things being equal, if such an artist divorces his or her

spouse, he or she should pay alimony comparable to that paid by such a doctor. Whether a spouse's ability to provide support is the result of an advanced degree or professional license is irrelevant to the analysis. The key is the spouse's ability.

In *Savage v. Savage*, 658 P.2d 1201 (Utah 1983), the Supreme Court explained:

Where a marriage is of long duration and the earning capacity of one spouse greatly exceeds that of the other, as here, it is appropriate to order alimony and child support at a level which will insure that the supported spouse and children may maintain a standard of living not unduly disproportionate to that which they would have enjoyed had the marriage continued.

658 P.2d at 1205. See *Jeppson v. Jeppson*, 684 P.2d 69 (Utah 1984).

In *Savage*, the parties had enjoyed a high standard of living during the marriage and the court upheld an award of \$2,000 per month alimony and child support of \$500 per month per child. 658 P.2d at 1205. In *Yelderman v. Yelderman*, 669 P.2d 407 (Utah 1983), the Supreme Court upheld an alimony award of \$2,500 per month as not excessive. 669 P.2d at 409. We agree that \$2,000 per month alimony to Mrs. Petersen is sufficient to help her maintain a standard of living not unduly disproportionate to that which she would have enjoyed if the marriage had continued.⁵

Accordingly, this case is remanded to District Court to amend the decree to provide that Mrs. Petersen receive \$2,000 per month alimony and, correspondingly, to delete the \$120,000 cash award. The decree is otherwise affirmed. Each party shall bear his or her own costs of appeal.

Gregory K. Orme, Judge

WE CONCUR:

Russell W. Bench, Judge

Norman H. Jackson, Judge

1. In *Dogu v. Dogu*, 652 P.2d 1308 (Utah 1982), the Utah Supreme Court dealt with the valuation of a professional corporation. In *Dogu*, the husband was awarded his professional corporation, and his wife was awarded property to offset its value. 652 P.2d at 1309. Although the proper characterization of a medical degree, as in the present case, and the valuation of a professional medical corporation, as in *Dogu*, may involve related questions, the legal issues regarding the two are distinct.

In *Tremayne v. Tremayne*, 116 Utah 483, 211 P.2d 452 (1949), the Supreme Court upheld the trial court's property division and award of alimony to the wife, referring to the wife's working to help her husband through school; the fact that, with the divorce, the wife was deprived of the benefits of his increased earnings; and the discrepancy in their earning capacities. *Tremayne* does not address the issue of whether an advanced degree or license is

marital property.

2. The question of whether an advanced degree or professional license is marital property subject to division upon divorce has attracted considerable attention from legal scholars. For one of the better reasoned discussions, see Note, *Property Distribution in Domestic Relations Law: A Proposal for Excluding Educational Degrees and Professional Licenses from the Marital Estate*, 11 Hofstra L. Rev. 1327 (1983).

3. In *Graham*, the wife did not request alimony because a Colorado statute, Colo. Rev. Stat. §14-10-114 (1973), restricted the court's power to award maintenance to cases where the spouse seeking it was unable to support himself or herself. 574 P.2d at 79.

4. In cases like the instant one, life patterns have largely been set, the earning potential of both parties can be predicted with some reliability, and the contributions and sacrifices of the one spouse in enabling the other to attain a degree have been compensated by many years of the comfortable lifestyle which the degree permitted. Traditional alimony analysis works nicely to assure equity in such cases.

In another kind of recurring case, typified by *Graham*, where divorce occurs shortly after the degree is obtained, traditional alimony analysis would often work hardship because, while both spouses have modest incomes at the time of divorce, the one is on the threshold of a significant increase in earnings. Moreover, the spouse who sacrificed so the other could attain a degree is precluded from enjoying the anticipated dividends the degree will ordinarily provide. Nonetheless, such a spouse is typically not remote in time from his or her previous education and is otherwise better able to adjust and to acquire comparable skills, given the opportunity and the funding. In such cases, alimony analysis must become more creative to achieve fairness, and an award of "rehabilitative" or "reimbursement" alimony, not terminable upon remarriage, may be appropriate. See, e.g., *Haugan v. Haugan*, 117 Wis. 2d 200, 343 N.W.2d 796 (1984); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982).

5. It is clear the court viewed the payments to Mrs. Petersen, both those it specifically called alimony and the additional \$1,000 monthly payments, as appropriate for her support. It utilized the "property" label in characterizing some of the monthly total as a means to preclude termination of the payments to Mrs. Petersen upon her remarriage. Although the court provided that the \$1,000 per month payments not called alimony would terminate in ten years, nothing in the court's findings establishes any particular significance to that point in time. We accordingly see no basis, now that the entire monthly payment is properly characterized as alimony, to require that half of the \$2,000 monthly total automatically and arbitrarily terminate at the end of ten years. Cf. *Olson v. Olson*, 704 P.2d 564, 567 (Utah 1985) (court modified divorce decree to delete provision that alimony would terminate after two years where monthly amount was reasonable but two-year limit was not). Of course, it would be proper for the district court to readjust the amount of alimony awarded to Mrs. Petersen if at any point in time there develops a material change of circumstances, such as Mrs. Petersen securing gainful employment or if Dr. Petersen's salary drops dramatically through no fault of his own. See, e.g., *Naylor v. Naylor*, 700 P.2d 707, 710 (Utah 1985);

Haslam v. Haslam, 657 P.2d 757, 758 (Utah 1982). The district court retains continuing jurisdiction in divorce actions to amend alimony. Utah Code Ann. §30-3-5 (1986). In addition, the alimony awarded to Mrs. Petersen automatically terminates under certain circumstances. *Id.*

Cite as

58 Utah Adv. Rep. 33

IN THE UTAH COURT OF APPEALS

Dawn W. HORNE,
Plaintiff and Respondent,

v.

W. Reid HORNE,
Defendant and Appellant.

Before Judges Billings, Greenwood, and
Orme.

No. 860060-CA

FILED: May 18, 1987

THIRD DISTRICT

Hon. Kenneth Rigtrup

ATTORNEYS:

Richard K. Crandall, Rodney R. Parker for
Appellant.

Dawn W. Horne, Pro Se.

OPINION

BILLINGS, Judge:

Defendant appeals from the trial court's entry nunc pro tunc of an order distributing property incident to a previously granted divorce. We reverse the district court.

The parties were divorced on January 27, 1984. The divorce action was bifurcated with the four day property division trial to begin on June 19, 1984. On the second day of the trial, June 20, 1984, the parties entered into an oral property settlement agreement on the record. The record reflects the property was to be transferred in order "to equalize the marital assets of the parties."

The court approved the agreement and requested plaintiff's counsel to prepare an order reflecting the oral stipulation. Defendant's counsel objected to the prepared order as it did not indicate the transfer was to "equalize the marital assets," language which was determinative as to the tax consequences of the agreement. The court therefore set a hearing on August 8, 1984 to consider the dispute over the tax language.

The dispute over the terms of the agreement is best understood with reference to federal tax law. Prior to July 18, 1984, taxation of marital property settlements depended on the terms of the court's order or the parties'

questions actually asked, we cannot determine if the trial judge's questions denied plaintiff the information necessary to challenge biased jurors for cause.

II

Mr. King assigns as error the trial court's dismissal of his claim against defendant for loss of consortium. The trial court dismissed this claim, holding that Mr. King had failed to state a cause of action. Our recent decision in *Hackford v. Utah Power & Light*, No. 20208 (Utah, June 9, 1987), disposes of this issue. The trial court properly dismissed Mr. King's claim.

We affirm.

WE CONCUR:

Gordon R. Hall, Chief Justice
Richard C. Howe, Justice
Michael D. Zimmerman, Justice

Stewart, Associate Chief Justice,
concur in the result.

1. Plaintiff has also challenged the jury verdict finding her one hundred percent negligent. In view of our holding on the judgment notwithstanding the verdict issue, we do not reach this portion of the jury's verdict.

Cite as
59 Utah Adv. Rep. 42

IN THE UTAH COURT OF APPEALS

Catherine RAYBURN,
Plaintiff and Respondent,

v.

Robert L. RAYBURN,
Defendant and Appellant.

Before Judges Orme, Bench and Jackson:

No. 860022-CA
FILED: May 29, 1987

THIRD DISTRICT
Hon. Dean E. Conder

ATTORNEYS:
Gaylen S. Young, Jr. for Appellant.
B. L. Dart for Respondent.

OPINION

ORME, Judge:

In this divorce action, defendant Robert L. Rayburn appeals the valuation and distribution of a retirement plan and an award of a \$45,000 property settlement to offset his medical degree. We affirm the trial court's basic disposition, but require amendment of the decree insofar as the \$45,000 award is

concerned.

FACTUAL BACKGROUND

Plaintiff Catherine Rayburn and Dr. Rayburn were married in Florida on June 20, 1972. Earlier that same day, Dr. Rayburn had obtained his medical degree from the University of Florida. At the time, Mrs. Rayburn had a masters degree in zoology and was employed as a research associate at the University of Florida. The couple moved to Houston, Texas where Dr. Rayburn completed a one year internship at Baylor University. Dr. Rayburn earned \$8,000 to \$9,000 during the internship. Mrs. Rayburn also worked during that year, earning approximately \$7,200. The couple returned to Florida where Dr. Rayburn completed a three year residency, earning approximately \$11,000 to \$13,500 per year. Mrs. Rayburn worked for a short time in Florida, but upon the birth of their first child, she stopped working full-time and worked only occasionally, and on a part-time basis, throughout the rest of the marriage.

After the residency, the family moved to San Antonio, where Dr. Rayburn completed two years of military service. During the five-year period of the internship, the residency, and his military service, Dr. Rayburn acted as the primary financial provider for the family. Mrs. Rayburn stayed at home, for the most part, to raise their eventual three children.

After military service, the family moved to Salt Lake City where Dr. Rayburn joined the staff of the Primary Children's Medical Center as a pediatric-anesthesiologist. In October 1982, Mrs. Rayburn filed for a divorce.

Trial was held on July 18 and 19, 1983. At the time of trial, Dr. Rayburn was earning approximately \$125,000 a year. After the two day trial, the court issued a memorandum decision. In the decision, the court determined to award custody of the three minor children, ages 9, 5, and 2, to Mrs. Rayburn and to order Dr. Rayburn to pay child support in the amount of \$400 per child per month. Apparently overlooking the exact sequence of events on the Rayburns' wedding day, the court found the husband's medical degree to be a marital asset and ordered Dr. Rayburn to pay Mrs. Rayburn \$45,000, payable at \$750 a month, as her share of the asset and to "maintain her lifestyle for a period of adjustment." The decision would have awarded Dr. Rayburn all of his retirement fund.

About two weeks later, the court issued a supplemental decision in which the court altered its earlier decision on the retirement plan. The court, "in order to make a more equitable division of property," ordered Dr. Rayburn to pay one-half the net present value of the retirement plan, \$56,850, to Mrs. Rayburn in five annual installments of \$11,370 plus interest. The court entered Findings of

Fact, Conclusions of Law, and a decree on September 15, 1983. The decree expressly awarded no alimony and set December 15, 1983, as the effective date of the divorce.

Dr. Rayburn promptly filed a motion for relief from judgment or for a new trial. Dr. Rayburn claimed the trial court failed to consider the drastic tax consequences of placing a present value on the retirement plan and awarding half of that to his wife. The court took Dr. Rayburn's motion under advisement. On December 9, 1983, the court issued another memorandum decision. This decision provided for amendment of the decree in such terms as would permit the five retirement plan payments to be treated as alimony for tax purposes. The court entered a second set of findings, conclusions, and decree on February 28, 1984. The second decree again awarded no alimony as such, made the embellishment for tax purposes, and set February 28 as the effective date of the divorce. Dr. Rayburn retained new counsel, who filed a motion for relief from the new judgment or a new trial. The court denied the motion and Dr. Rayburn appealed.

On appeal, Dr. Rayburn claims the court erroneously placed a high value on the retirement plan without considering the tax consequences. Dr. Rayburn also claims the court erred in finding the medical degree to be a marital asset and placing a value on it without any supporting evidence.

RECORD ON APPEAL

Dr. Rayburn ordered a transcript on appeal of only 30 pages, representing a tiny fraction of the testimony offered at trial. Under Rule 11(e)(2) of the Rules of the Utah Court of Appeals and the predecessor Utah Rules of Appellate Procedure, "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion." Since the transcript provided by the appellant is insufficient to allow a review of the evidence to determine the propriety of the findings, this court accepts the trial court's Findings of Fact as true¹ and only evaluates the legal correctness of the two disputed dispositions.² As indicated, the disputes concern the \$45,000 property settlement reflecting Mrs. Rayburn's "share" of her husband's medical degree and the payments for Mrs. Rayburn's one-half interest in the present value of the doctor's retirement plan.³

THE MEDICAL DEGREE

Recently this court held that an advanced degree or professional license is not marital property subject to division upon divorce. *Petersen v. Petersen*, 58 Utah Adv. Rep. 28 (Utah App. May 18, 1987). However, an

advanced degree often accompanies a disparity in earning potential that is appropriately considered as a factor in alimony analysis. See *id.*, at 32. We reaffirm our holding in *Petersen* and analyze the instant appeal under the same analysis employed in that case.

The cash settlement of \$45,000 payable in monthly installments of \$750 cannot be sustained under *Petersen* as a property settlement, but payments of \$750 per month for a 5-year period are properly affirmed as alimony.⁴ Criteria considered in determining a reasonable award of support must include the financial conditions and needs of the spouse in need of support, the ability of that spouse to produce sufficient income for his or her own support, and the ability of the other spouse to provide support. *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985). See *Paffel v. Paffel*, 732 P.2d 96, 100-101 (Utah 1986) (failure to consider these three factors constitutes an abuse of discretion). Although characterizing the monthly payments as a property settlement, the trial court expressly found factors that readily meet the criteria listed in *Jones*.

As for Mrs. Rayburn's need for support and her ability to produce sufficient income, the trial court found that Mrs. Rayburn was presently unemployed, but that she had been employed and was well-educated, having acquired bachelor's and master's degrees. However, with minor children residing at home and not yet in school, Mrs. Rayburn was reluctant to return immediately to the full-time workforce. In addition, the court accepted Mrs. Rayburn's testimony that in order to bring her employment skills to a satisfactory level, she needed to return to school and obtain further education "to complement her current education."⁵ As for Dr. Rayburn's ability to provide support, the trial court found that Dr. Rayburn was well-educated, having obtained an M.D. degree, and that he had a successful practice as a pediatric anesthesiologist, earning a projected \$125,000 for 1983.

In its first memorandum decision, the trial court characterized the monthly payments for Mrs. Rayburn as necessary "to maintain her life style for a period of adjustment." The 5-year period corresponded to the amount of time it would take for Mrs. Rayburn to complete her additional education on a part-time basis and until the parties' youngest child was in school all day.⁶

We acknowledge that there will be situations where an award of non-terminable rehabilitative or reimbursement alimony would be appropriate. See *Petersen v. Petersen*, 58 Utah Adv. Rep. 33. However, this is not such a case. Dr. Rayburn acquired his medical degree before the parties were married. Although Mrs. Rayburn worked periodically during the marriage, she did not endure substantial financial sacrifices or defer her own education to

help him obtain the degree. In addition, Mrs. Rayburn shared the financial rewards permitted by her husband's advanced degree for several years. Those rewards also resulted in the accumulation of considerable real and personal property during their marriage, which was equitably divided upon their divorce. The award of temporary alimony, at \$750 per month for a maximum of five years,⁷ adequately meets Mrs. Rayburn's support needs and is readily sustainable under the criteria outlined in *Jones*.

THE RETIREMENT PLAN

Dr. Rayburn's retirement fund was one of the valuable assets accumulated during the marriage and was of course subject to equitable division upon divorce. *Woodward v. Woodward*, 656 P.2d 431, 433 (Utah 1982). See *Englert v. Englert*, 576 P.2d 1274, 1276 (Utah 1978). We accept the trial court's finding that the retirement fund's present value was \$113,700. In its second memorandum decision, the trial court explained that it had considered several ways to distribute the wife's share of the retirement fund and found fixing a sum equal to one-half of the present value and distributing that to Mrs. Rayburn as a cash award to be the most equitable. By requiring Mrs. Rayburn's share in the retirement fund to be cashed out following divorce, the court avoided leaving the parties in a "financial entanglement that would continue for approximately twenty or thirty years and would probably result in further court hearings and cause future animosity between the parties."

However, the court went on to explain that "to require the defendant to pay the full sum at one time would have been an extra burden." By allowing Dr. Rayburn to make five annual payments, the court left him the option of paying his obligation out of current income or on some other basis, rather than having to liquidate the fund or sell other assets. The court additionally softened the impact by ultimately allowing the payments to be characterized in such terms as would permit them to be treated as "alimony" for tax purposes.⁸

There is admittedly some potential for confusion because of the measures taken by the trial court to massage the tax treatment of the payments to Mrs. Rayburn. However, these measures were the trial court's response to Dr. Rayburn's very own argument that the payments worked a financial hardship on him. The trial court allowed the payments to be considered "alimony" for tax purposes in order to give Dr. Rayburn the tax break of the alimony deduction while at the same time permitting Mrs. Rayburn to be cashed out within a few years. On appellate review, the trial court's apportionment of property will not be disturbed unless it works such a mani-

fest injustice or inequity as to indicate a clear abuse of discretion. *E.g.*, *Turner v. Turner*, 649 P.2d 6, 8 (Utah 1982). We find no abuse of discretion in the court's awarding Mrs. Rayburn a one half interest in the retirement fund, payable over five years with interest. On the contrary, and especially with the refinements which were made to address Dr. Rayburn's concerns about taxes, the trial court's approach was clearly fair and equitable.

Accordingly, this case is remanded to the district court to amend the decree to provide that Mrs. Rayburn receive \$750 per month alimony for five years and, correspondingly, to delete the \$45,000 cash award. The decree is otherwise affirmed. Each party shall bear his or her own costs of appeal.

Gregory K. Orme, Judge

WE CONCUR:

Russell W. Bench, Judge

Norman H. Jackson, Judge

1. See *Sawyers v. Sawyers*, 558 P.2d 607, 608 (Utah 1976) ("Appellate review of factual matters can be meaningful, orderly, and intelligent only in juxtaposition to a record by which lower courts' ruling and decisions on disputes can be measured."). In *Sawyers*, the Supreme Court presumed the findings of the trial court to have been supported by admissible, competent, substantial evidence. *Id.* See *Mitchell v. Mitchell*, 527 P.2d 1359, 1360-61 (Utah 1974).

2. At oral argument, Dr. Rayburn advised he did not really intend to question the findings in view of the evidence, only the propriety of the disposition in view of the findings.

3. On appeal, Dr. Rayburn also argues that the trial court erred in filing two separate Findings of Fact and Conclusions of Law and two separate decrees with different effective dates. In this regard he relies heavily on the failure of the second batch of documents to employ the term "amended," contending confusion will result about which decree controls. The second set of findings, conclusions, and decree was of course prompted by Dr. Rayburn's motion for relief from judgment. Although not expressly labeled as "amended," the second set of findings, conclusions, and decree clearly supercedes the first set and are the direct subject of this appeal.

4. The trial court quite clearly viewed those payments as necessary for support but utilized the property settlement label as a means to preclude their termination should Mrs. Rayburn remarry. While it is true that with alimony the receiving spouse may lose some of his or her award through certain changed circumstances, like remarriage, Utah Code Ann. §30-3-5 (1986), it is noted that with installments on a property award, the receiving spouse might lose some of the award if the paying spouse obtained a discharge in bankruptcy. By contrast, an alimony obligation would survive bankruptcy. 11 U.S.C.A. §523 (a)(5) (West Supp. 1987). Characterization of required future payments as in satisfaction of a marital property disposition, rather than as alimony, is not always in the best interest of the receiving spouse. *Cf. Beckmann v. Beckmann*, 685 P.2d 1045, 1050 (Utah 1984) (The fact that an inst-

rumment is labeled "property settlement agreement" does not necessarily determine whether debt is dischargeable. Court will look at underlying nature of the debt, including whether spouse would be inadequately supported without the "property settlement.")

5. This additional education was apparently in the field of computer science. No doubt computerization has mushroomed in importance in zoology, as in nearly every area of scientific endeavor, during the decade Mrs. Rayburn was unemployed. Computer literacy would greatly enhance Mrs. Rayburn's ability to obtain suitable employment.

6 This rational basis for limiting the payments to a five-year period of adjustment distinguishes the case from *Petersen*, where we declined to implement a ten-year cap on alimony otherwise payable where there was no articulated basis for automatically diminishing the award upon the elapse of ten years. See *Petersen v. Petersen*, 58 Utah Adv. Rep. 33. See also *Olson v. Olson*, 704 P.2d 564, 567 (Utah 1985).

7. The alimony obligation could terminate earlier under certain circumstances. Utah Code Ann. §30-3-5 (1986). In addition, the district court has "continuing jurisdiction" to change the alimony award "as is reasonable and necessary," *id.* (3), provided there develops a substantial change in the parties' circumstances. See, e.g., *Naylor v. Naylor*, 700 P.2d 707, 710 (Utah 1985).

8. The trial court did not stop here in tailoring the provision to make it as painless to Dr. Rayburn as possible under the circumstances. The Court stated in its Conclusions of Law: "In the event that the payments under this paragraph do not qualify as 'alimony' for tax purposes, this would constitute a change of circumstances entitling the defendant to come back before the Court and obtain a modification reducing this payment to the extent of the income tax which he is required to pay because of an inability to take a deduction of these payments as 'alimony'."

Cite as
59 Utah Adv. Rep. 45

IN THE
UTAH COURT OF APPEALS

Betty Verdell BERRY,
Plaintiff and Appellant,
v.

Lewis Dale BERRY, Wallace Berry, and Rial
Berry, dba Berry Brother's Farms, a
partnership,

Defendants and Respondents.

Before Judges Garff, Jackson and Billings.

No. 860014-CA
FILED: June 8, 1987

FOURTH DISTRICT
Hon. J. Robert Bullock

ATTORNEYS:
Richard B. Johnson for Appellant.

John B. Maycock for Respondents.

OPINION

GARFF, Judge:

In March, 1980, Lewis and Betty Berry were divorced. The trial court awarded appellant Betty, one-half of respondent Lewis' one-third partnership interest in Berry Brothers' Farms, a family partnership operated as such since 1957. The court valued this one-half portion of the partnership interest at \$42,000, and allowed Lewis, at his option, to repurchase that interest in monthly payments over ten years at 12 percent interest. Shortly after the divorce decree was entered, Betty moved for an amended decree, which was entered on May 20, 1980. It granted Betty a money judgment of \$42,000 for one-half of the one-third interest in Berry Brother's Farms, with an option to Lewis to pay this amount over a ten year period at 12 percent interest. In *Berry v. Berry*, 635 P.2d 68, 70 (Utah 1981), the Supreme Court reversed this amended decree, holding that because of the defendant's financial condition, "it is inequitable to award the plaintiff a judgment against the defendant for the value of the fractional partnership interest awarded to her, and that it is also inequitable to require him to purchase her interest on the terms imposed by the trial court."

The Supreme Court also stated:

Plaintiff suggests that the judgment and order of purchase imposed on the defendant should not create a hardship because he may be able to persuade the other partners to sever the real property of the partnership which consists of approximately 1100 acres of land, and sell the severed portion to satisfy the plaintiff's interest. We commend that suggestion to the defendant but cannot impose it upon him as an obligation inasmuch as under our partnership laws, §48-1-22(2)(b) and (c), U.C.A. 1953, neither plaintiff nor defendant can force a sale of specific partnership property.

Id. at 70.

Betty attempted, a second time, to force liquidation in August, 1981, when she moved to modify the decree, requesting the court to award a money judgment in the property of the family partnership or liquidate the partnership assets of the defendant's one-third interest. The trial court found no change of circumstances and refused to liquidate the partnership assets or enter a money judgment.

Betty brought this third independent action in July 1983, against Lewis, his partners Wallace and Rial Berry, and their partnership, Berry Brothers' Farms. The action was brought to enforce the divorce decree in which

native, to remand the matter with instructions to the trial court to enter specific findings of fact.

The Utah Supreme Court decision in *Jones v. Jones*, 700 P.2d 1072 (Utah 1985), which was followed by this Court in *Boyle v. Boyle*, 735 P.2d 669 (Utah App. 1987), is controlling in the instant case. In *Jones*, the findings of the trial court merely described the property awarded to each party and failed to assign any specific or cumulative values. The Utah Supreme Court held although the trial court has a broad latitude of discretion in orders concerning property distribution, "the trial court must exercise its discretion in accordance with the standards that have been set by this Court." *Jones*, 700 P.2d at 1074. One of those standards is the "findings of fact must include valuation of assets in order to permit appellate review." *Boyle*, 735 P.2d at 671.

The *Jones* Court attempted to compensate for the lack of findings by reviewing the record for evidence of the values. However, the Court noted such "examination reveals that the valuation of the most important assets was hotly disputed by the parties. If the trial court accepted one set of values, the wife was clearly awarded too little; if another set was adopted, it is possible that the trial court did not abuse its discretion." *Jones*, 700 P.2d at 1074.

In *Jones* and *Boyle*, the Utah Supreme Court and this Court both ruled that despite the requirement of specific findings, the appellants in both cases waived their claims since they were the parties who prepared the original findings. Failing to prepare the findings to include values, they therefore waived challenges on appeal. In the instant case, respondent plaintiff, not appellant defendant, prepared the findings. Therefore, the *Jones* exception does not apply.

In the instant case, as in *Jones*, the valuation of the most important assets is hotly disputed. If the trial court accepted one set of values, defendant was clearly awarded too little; if another set was adopted, the division could be equitable. Without specific findings of the values, we are unable to determine whether the trial court distributed the property equitably. We therefore remand for findings on the specific values of the assets.

On remand, one of the key assets to be valued is Diana, Inc., the family business awarded to defendant. At trial, both parties testified the amount of money earned by and deposited into the account of Diana, Inc. during 1983 was approximately \$750,000.00 to \$1,000,000.00. At about the time the parties separated, defendant closed all the corporate accounts and thereafter ceased all record keeping. Defendant testified that although Diana, Inc. was once a profitable business, at the time of trial, it had a net worth of negative \$50,400.00.¹ Plaintiff, unable to show

current value due to defendant's failure to keep records, did present some evidence of defendant's mismanagement and large expenditures of corporate funds. In its findings, the trial court expressed concern that defendant had failed to fully disclose the company's true value.

Assets are usually valued at the time of the divorce decree. *Berger v. Berger*, 713 P.2d 695, 697 (Utah 1985); *Fletcher v. Fletcher*, 615 P.2d 1218, 1223 (Utah 1980). However, where one party has dissipated an asset, hidden its value, or otherwise acted obstructively, the trial court may, under its broad discretion, value the property at an earlier date, i.e., separation. *In re Marriage of Priddis*, 132 Cal. App. 3d 349, 183 Cal. Rptr. 37, 39 (1982); *In re Marriage of Stallcup*, 97 Cal. App. 3d 294, 158 Cal. Rptr. 679, 682 (1979). In view of the evidence adduced at trial, the trial court might therefore value Diana, Inc. as of the time the parties separated in November, 1983.

Remanded. No costs awarded.

Russell W. Bench, Judge

WE CONCUR:

Pamela T. Greenwood, Judge

Gregory K. Orme, Judge

1. Defendant blamed the drastic reduction of value on recent repossessions and theft of most of his company vehicles and equipment, resulting in the loss of all major contracts.

Cite as

61 Utah Adv. Rep. 31

IN THE
UTAH COURT OF APPEALS

Donna S. TALLEY,
Plaintiff and Respondent,

v.

Glenn E. TALLEY,
Defendant and Appellant.

Before Judges Greenwood, Bench, and Orme.

No. 860085-CA
FILED: July 2, 1987

SECOND DISTRICT
Hon. Rodney S. Page

ATTORNEYS:
Stephen A. VanDyke for Respondent.
Paul H. Liapis, Kent M. Kasting for
Appellant.

OPINION

BENCH, Judge:

Defendant appeals the property division, alimony award, and attorney fees award in a

decree of divorce. We affirm the property division and the award of alimony, but we reverse the award of attorney fees.

Plaintiff Donna S. Talley and defendant Glenn E. Talley were married on June 14, 1968. On December 14, 1983, plaintiff filed a complaint for divorce.

At trial on August 27, 1984, the court received evidence in the form of testimony and exhibits regarding the value of the marital assets, alimony, and attorney fees. The court issued a memorandum of decision on September 4, 1984. In its decision the court assigned values and distributed the marital property by awarding plaintiff, among other items, the parties' home, her personal property, and a portion of the furniture and fixtures in the home. The court awarded defendant, among other items, a boat, various stock, his retirement plan, his personal property, and a portion of the furniture and fixtures in the home. The court also awarded alimony and attorney fees to plaintiff. The court filed its formal findings, conclusions and decree on November 14, 1984.

On appeal, defendant contends the trial court erred in disproportionately assigning values to marital assets with insufficient evidence.

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. *Yelderman v. Yelderman*, 669 P.2d 406 (Utah 1983); *Turner v. Turner*, 649 P.2d 6 (Utah 1982). While defendant has concededly shown that the trial court valued certain items of marital property either contrary to or in the absence of his testimony, he has failed to show how this constitutes an abuse of discretion. We therefore affirm the disposition of the marital property.

Defendant next argues the trial court erred in awarding alimony to plaintiff. Defendant argues the testimony and evidence at trial failed to demonstrate plaintiff's actual need for alimony.

The purpose of alimony is to "enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage and to prevent the spouse from becoming a public charge". *Eames v. Eames*, 735 P.2d 395, 397 (Utah App. 1987) (citing *Paffel v. Paffel*, 732 P.2d 96, 100 (Utah 1986)). This Court will not interfere with an award of alimony absent a showing of a clear and prejudicial abuse of discretion. *Id.*

In *Eames*, this Court reiterated the three factors, previously adopted by the Utah Supreme Court, that the trial court must consider in awarding alimony: 1) the financial condition and needs of the receiving spouse, 2) the ability of the receiving spouse to produce a sufficient income for himself or herself, and 3) the ability of the paying spouse to provide

support. *Id.*; see also *Boyle v. Boyle*, 735 P.2d 669 (Utah App. 1987).

In the instant case, the parties were married for fifteen years. At the time of the divorce, plaintiff netted approximately \$953.00 per month from her employment, while defendant earned approximately \$2,018.00 net per month. Plaintiff testified her monthly expenses totaled \$1,320.00. She asked for \$500.00 per month permanent alimony. The court awarded her \$250.00 per month for the first two years and \$150.00 per month for the following three years. The record is clear the court considered the required factors, and we therefore affirm the award of alimony.

Defendant finally argues the trial court's award of plaintiff's attorney fees was in error as the court failed to address the reasonableness of the fees requested by plaintiff's counsel.

"In divorce cases, an award of attorney fees must be supported by evidence that it is reasonable in amount and reasonably needed by the party requesting the award." *Huck v. Huck*, 734 P.2d 417, 419 (Utah 1986). Although plaintiff sufficiently demonstrated reasonable financial need, she failed to present evidence of the reasonableness of the fee requested. At the close of plaintiff's case, her counsel proffered testimony and produced an exhibit itemizing the time and costs expended by him, his associate, and his clerk, and the hourly rates charged for each. Conspicuously absent is any evidence "regarding the necessity of the number of hours dedicated, the reasonableness of the rate charged in light of the difficulty of the case and the result accomplished, and the rates commonly charged for divorce actions in the community" *Kerr v. Kerr*, 610 P.2d 1380, 1384-85 (Utah 1980).

Because plaintiff failed in her burden of establishing the reasonableness of the attorney fees requested, we reverse the award of attorney fees. *Beals v. Beals*, 682 P.2d 862 (Utah 1984); *Delatore v. Delatore*, 680 P.2d 27 (Utah 1984).

Affirmed in part, reversed in part. Parties to bear their own costs.

Russell W. Bench, Judge

WE CONCUR:

Pamela T. Greenwood, Judge

Gregory K. Orme, Judge

Cite as
69 Utah Adv. Rep. 52

IN THE
UTAH COURT OF APPEALS

Debbie A. LEE,
Plaintiff and Appellant,
v.
Dennis V. LEE,
Defendant and Respondent.

Before Judges Billings, Jackson, and
Davidson.

No. 860143-CA
FILED: November 10, 1987

SEVENTH DISTRICT
Honorable Boyd Bunnell

ATTORNEYS:
Michael A. Harrison for Appellant.
John E. Schindler for Respondent.

OPINION

BILLINGS, Judge:

The wife appeals from the property distribution and alimony provisions of the decree of divorce. She contends the trial court abused its discretion by not awarding her an equitable share of the marital assets, and in fixing alimony at \$1.00 per year. We agree, and, therefore, reverse and remand.

I.

FACTS

Debbie Lee ("the wife") and Dennis Lee ("the husband") were married for almost nine years, from December 9, 1976 until July 25, 1985. At the time of the marriage, the wife was employed, primarily performing clerical functions. Shortly after the marriage, the wife quit her job at her husband's request. The wife's premarital property was minimal. At the time of the marriage, the husband was the General Mine Foreman of Valley Camp Company.* Prior to the marriage, the husband and his brother established a garbage collection business, in which the husband made a substantial monetary investment from personal assets. Subsequent to the parties' marriage, the husband and his brother sold the garbage business and established D & D Equipment and Supply ("D & D"), a corporation involved in the coal industry. The husband owned 52 percent of the shares of D & D. The husband's premarital assets consisted of a D8 cat (tractor), a 1973 Buick automobile, a 1972 pickup truck, and an \$18,000 certificate of deposit.

During the marriage the parties had two children, purchased a mobile home and other minor assets, and continued the operation of

D & D, the primary income-producing asset of the marriage. The husband worked for D & D for the duration of the marriage. The wife performed clerical duties for D & D during the marriage, including paying monthly bills, answering phones, and typing. The wife was not compensated for her services for over three years.¹

At trial, the valuation of D & D and its distribution as a marital asset were the main issues. A financial statement, dated February 1, 1985, signed by the husband, and submitted by him to Zions First National Bank, was admitted into evidence. This statement listed the total assets of D & D as \$521,389, the total liabilities as \$65,966, for a net worth of \$455,423. The wife also testified that as of the Wednesday before the trial commenced, the balance in D & D's checking account was \$57,846. The husband called Marvin Mutz, a bookkeeper who prepared the year-end tax reports of D & D, to testify on the value of the company. A financial statement prepared by Mutz showed the total net worth of D & D as \$112,397.34. The husband testified that the real property of the business had a value of \$40,000, making the total net worth of D & D assets, according to the husband, \$152,397.34.

Mutz also estimated the value of the husband's 52 percent ownership of D & D stock to be \$33,528. Mutz's estimation of the value of the husband's 52 percent interest in D & D was based upon the husband's percentage of total authorized shares (100,000), and not upon total issued shares (40,000). If the value of the husband's 52 percent interest in D & D had been based upon issued shares, the value of his stock, according to his own expert's testimony, would be \$83,820.00.²

At the time of trial, the wife, had a high school education, and was currently unemployed despite her efforts at seeking employment.

The trial court awarded the wife assets valued at \$19,000. The court awarded the 52 percent interest in D & D exclusively to the husband, without assigning any value to the company, together with other assets valued at \$3,500. The wife was awarded \$1.00 per year in alimony.

Two issues are raised on appeal. First, did the trial court deny the wife her equitable share of marital assets by refusing to place a value on D & D to allow a cash distribution to the wife, or, if it was unable to assign a value, by failing to make an in-kind distribution of the stock to her? Second, did the trial court abuse its discretion in fixing the alimony award at \$1.00 per year?

II.

STANDARD OF REVIEW

In divorce proceedings, the trial court has considerable discretion in adjusting the fina-

ncial and property interests of the parties. *Argyle v. Argyle*, 688 P.2d 468, 470 (Utah 1984). The "determination of the value of the assets is a matter for the trial court which will not be reviewed in the absence of a clear abuse of discretion." *Turner v. Turner*, 649 P.2d 6, 8 (Utah 1982) (citations omitted). However, the trial court must make findings on all material issues, and its failure to do so constitutes reversible error unless the facts in the record are "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987). The findings must be sufficiently detailed and consist of enough subsidiary facts to reveal the steps the court took to reach its conclusion on each factual issue presented. *Id.*

III.

DISTRIBUTION OF MARITAL ASSETS

The wife contends the trial court erred in refusing to assign a value to the husband's 52 percent in D & D, a marital asset, and in awarding it exclusively to the husband. We agree. The lower court, in its findings, states that "[b]ased on the evidence presented to the court at trial the court refuse[s] to place a value on the parties['] share of the corporation [T]he market value of business cannot be determined from the evidence presented."

A wife is entitled to a fair and equitable share of the financial benefits accumulated by virtue of the parties' joint efforts during the marriage. See *Savage v. Savage*, 658 P.2d 1201, 1204 (Utah 1983). D & D was established after the parties' marriage, and its value was actualized during the marriage.

The wife assisted in the operation of the corporation by assuming clerical duties, including typing, answering the phones, and paying bills. Moreover, the wife also reared the parties' two children and performed domestic duties, allowing the husband to participate full-time in the business. Therefore, she is entitled to a fair and equitable share of D & D. The trial court's award of the 52 percent interest in D & D, the principal asset of the marriage, exclusively to the husband without any findings as to its value constitutes a clear abuse of discretion.

Alternative avenues were available to the trial court to award the wife her equitable share of D & D. First, the trial court could have valued the husband's 52 percent interest in D & D based on the financial statements and testimony submitted by the parties. The court could then have awarded the wife an equitable portion of D & D by way of offsetting property, or a cash distribution payable over a period of time. This alternative was sanctioned by the Utah Supreme Court in *Argyle v. Argyle*, 688 P.2d 468 (Utah 1984). In *Argyle*, the trial court awarded the wife one-

half of the husband's interest in a closely held family ranch. The trial court relied on recent financial statements prepared by the corporation for the Production Credit Administration to determine the value of the corporation. After deducting from that amount the value of a gift the husband received from his mother, the court halved the balance to determine the husband's interest and halved the figure again to reach the wife's marital cash share of the property. This approach was affirmed by the Utah Supreme Court, where it found that the value of stock can be measured by the net worth of the underlying assets. *Id.*; see *Johnson v. Johnson*, 674 P.2d 539, 544 (Okla. 1983) (value of stock could be computed based upon a financial statement).

Both parties introduced financial statements reflecting the total net worth of D & D's assets. The wife submitted a financial statement dated February 1, 1985, prepared for Zions First National Bank. This statement showed the net worth of D & D assets as \$455,423. The husband also submitted a financial statement through Marvin Mutz, a bookkeeper who prepared D & D's year-end tax reports. This statement showed the total net worth of D & D as \$112,397.34. The husband then testified that the value of the real property of D & D was \$40,000, making the total net worth of D & D, according to the husband, \$152,397.34. Further, Marvin Mutz testified that the value of the husband's 52 percent interest in D & D stock was \$33,528. In making this estimation, if Mutz had used the number of total issued shares (40,000), rather than total authorized shares (100,000), to calculate the value per share, the husband's 52 percent interest in D & D would be valued at \$83,820.00.

Applying *Argyle*, the trial court could have assigned a value to D & D. The trial court could then have determined 52 percent of the company as representing the husband's interest, subtracted any premarital contribution by the husband, and halved the remainder to reach the wife's marital cash share of the corporation.

If the trial court, because of the great disparity of testimony, was unable to assign a value to D & D, then the court could have made an in-kind distribution of D & D stock to the wife. This alternative was affirmed by the Utah Supreme Court in *Savage v. Savage*, 658 P.2d 1201 (Utah 1983).³ The supreme court, while acknowledging that whenever possible continued joint ownership by divorced spouses of closely held corporate stock should be avoided, agreed that the trial court had "virtually no alternative to an in-kind distribution of Savage stock" because of the widely conflicting valuations. *Savage*, 658 P.2d at 1204.

In the case at hand, the trial court decided not to award the wife a percentage of the

stock held by the husband because "D & D is controlled by the husband, and the possibility of ever receiving a dividend or establishing a market value for the stock would be extremely remote." While this observation may be true, we find that to award the wife nothing is patently unjust.

Due to the trial court's failure to value D & D stock or to award the wife her equitable share of the stock in D & D, a marital asset, we reverse and remand this case to the district court for further proceedings. On remand, the district court shall award the wife her equitable share of the corporation, whether it be a cash settlement or an in-kind distribution, set forth findings to support its decision, and enter judgment accordingly.

IV.

ALIMONY

The wife's second objection to the decree of divorce is that the trial court abused its discretion in determining the amount of alimony by failing to adequately consider the factors set forth in *Jones v. Jones*, 700 P.2d 1072, 1079 (Utah 1985). We agree.

The purpose of alimony is to "provide support for the wife as nearly as possible at the standard of living she enjoyed during marriage, and to prevent the wife from becoming a public charge." *English v. English*, 565 P.2d 409, 411 (Utah 1977). In fixing alimony awards, three factors must be considered: (1) the financial conditions and needs of the spouse; (2) the ability of the spouse to produce sufficient income for herself; and, (3) the ability of the paying spouse to provide support. *Jones v. Jones*, 700 P.2d 1072, 1079 (Utah 1985) (citations omitted). After a careful review of the record, we find no support or explanation for the \$1.00 per year alimony award.

The wife is currently unemployed. She was fired from her job at D & D. She has not found employment despite her persistent efforts. The wife was awarded no income-producing assets or cash. She now must incur the expense of moving the mobile home currently situated on the husband's mother's property, in addition to incurring her ordinary living expenses.

The wife was married at the age of 20 with a high school education and clerical skills. She terminated her former employment at her husband's request. During the marriage, the wife devoted her time to raising the couple's two children and working for D & D.

At trial the husband testified that he had made \$1,800 per month for the four years preceding the divorce. Moreover, the husband was awarded D & D, an income-producing asset. However, the record indicates that the income generated by D & D had been declining, given the depressed conditions of the

coal market.

The trial court made no findings of fact to support its award of \$1.00 per year alimony as required by *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987). Therefore, we reverse and remand for the trial court to fix the alimony award in light of the three factors articulated in *Jones*, in addition to distributing to the wife her equitable share of the marital assets.

Reversed and remanded. Costs awarded to appellant.

Judith M. Billings, Judge

WE CONCUR:

Norman H. Jackson, Judge

Richard C. Davidson, Judge

1. In a temporary order, entered July 30, 1984, the trial court, in ruling on temporary alimony, ordered the husband to maintain the wife as an employee of D & D, rather than have the husband pay the wife temporary alimony.

2. Computed as follows:

\$152,397.34 divided by 40,000 shares = \$3.81 per share

The husband has 22000 shares at \$3.81 per share = \$83,820.

3. As Justice Stewart states in his opposition to an in-kind distribution of stock in divorce actions: "a better approach than the distribution in kind ... would be to remand [the] case for a determination by the trial judge of the actual value of the corporation[.]" He believes "[t]hat task is no different, or more difficult, than the same task which must be performed in most tort cases, contract cases, and property cases where an award of damages is made." *Savage v. Savage*, 658 P.2d 1201, 1206 (Stewart, J. dissenting).

was not subject to exact determination, as was demonstrated by three experts who disagreed as to its size. Therefore, the judge erred in judicially noticing the size of the property and failing to submit that issue to the jury.

However, we must also consider whether or not the error was prejudicial. An "error or defect in any ruling or order or in anything done or omitted by the court" shall be disregarded unless it affects the substantial rights of the parties. Utah R. Civ. P. 61. Such error is harmless unless it probably would have had a "substantial influence in bringing about a different verdict." *Redevelopment Agency v. Tanner*, 740 P.2d 1296, 1303-04 (Utah 1987); *Hill v. Hartog*, 658 P.2d 1206, 1208 (Utah 1983); *Gillmor v. Gillmor*, 657 P.2d 736, 743 (Utah 1982). In reviewing such an error, the evidence is viewed in the light most favorable to the jury verdict. *Hill*, 658 P.2d at 1209.

In the case before this court one expert testified that the property was 33,129 square feet, another that it was between 33,000 and 34,000 square feet and a third that it was 31,423 square feet. The judge's estimate that the property was close to 32,000 square feet falls within the experts' estimates. Therefore, the jury's award could have been based on the experts' testimony as easily as that of the judge. Viewing the evidence in the light most favorable to the verdict, we find the judge's error in judicially noticing the size of the property rather than submitting the issue to the jury to be harmless error, as the evidence properly admitted at trial independently supports the jury verdict.

III.

Defendant's third claim on appeal is that the trial court erred in refusing to allow moving costs for defendant's business and family. Utah Code Ann. §11-19-23.9(2)(1986) provides that a jury may award a reasonable sum as compensation for the costs and expenses of relocating the owner whose property is acquired or a party conducting a business on the property. Since the statute is permissive, it is within the discretion of the jury to determine allowable compensation. We find the jury's award of \$18,300 to be reasonable and affirm that award.

IV.

Defendant's final claim is that under Utah Code Ann. §11-19-23.9 (1986) she is entitled to attorney fees. Section 11-19-23.9 states that a court may award attorney fees if the jury or trier of fact awards more to a property owner than the original offer of the condemning agency. Defendant claims that if the award of \$128,000 is calculated on a square footage basis, it is greater than the condemning agency's offer of \$150,000.

We find appellant's contention meritless. First, the statute is permissive. Second, the

award is not higher than the total amount actually awarded. We therefore reject defendant's claim for attorney fees.

Affirmed.

Pamela T. Greenwood, Judge

WE CONCUR:

Regnal W. Garff, Judge

Russell W. Bench, Judge

1. Keith S. Jones did not join in this appeal and did not request moving expenses at trial.

Cite as

68 Utah Adv. Rep. 16

IN THE UTAH COURT OF APPEALS

David L. CANNING,
Plaintiff and Respondent,

v.

Caleen S. CANNING,
Defendant and Appellant.

Before Judges Jackson, Davidson and
Greenwood.

No. 860016-CA

FILED: October 16, 1987

THIRD DISTRICT

Honorable Ernest F. Baldwin

ATTORNEYS:

Brian M. Barnard for Appellant.

Lewis B. Quigley for Respondent.

OPINION

JACKSON, Judge:

The parties herein were both granted a divorce in a June 28, 1983 decree that distributed only a few items of personal property. All other issues were taken under advisement. The proceedings were finalized by an amended judgment entered February 14, 1984. The assets of the parties were divided almost equally. Mr. Canning was ordered to pay about \$6,000.00 of personal and joint obligations and \$350.00 monthly for support of two minor sons (issue of a prior marriage of the parties). Alimony was denied. On appeal, Mrs. Canning challenges the distribution of property, the amount of child support, and the denial of alimony. We affirm the distribution of assets and obligations and the child support award. We reverse the amended judgment on the issue of alimony and remand for additional findings and possible modification.

ALIMONY

In this case, the denial of alimony was a clear abuse of discretion because the record

does not reveal that the court considered or made any finding of Mrs. Canning's current or future ability to work. *Higley v. Higley*, 676 P.2d 379 (Utah 1983). *Higley* was decided on December 19, 1983, while the Canning findings were being finalized; its ramifications were not addressed in the briefs of either party to this appeal. Here, the trial court found only that "Plaintiff [David Canning] had bi-weekly gross income of \$1,019.00, and Defendant [Caleen Canning] was unemployed" at the time of trial (Finding of Fact No. 3) and that "Defendant should be awarded no alimony" (Finding of Fact No. 7).

The purpose and objective of alimony have been described in a framework of several decisions. The cornerstone is language in *English v. English*, 565 P.2d 409 (Utah 1977), adopted from another jurisdiction:

The standard utilized by the trial court, viz., the length of the marriage and the contributions of each to their joint financial success, is not an appropriate measure to determine alimony. There is a distinction between the division of assets accumulated during marriage, which should be distributed upon an equitable basis, and the post-marital duty of support and maintenance.

The purpose of alimony is to provide support for the wife and not to inflict punitive damages on the husband. Alimony is not intended as a penalty against the husband nor a reward to the wife

....
In *Nace v. Nace*, [107 Ariz. 411, 489 P.2d 48, 50 (1971),] the court stated that the most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during marriage, and to prevent the wife from becoming a public charge. The court observed that criteria considered in determining a reasonable award for support and maintenance include the financial conditions and needs of the wife, the ability of the wife to produce a sufficient income for herself; [sic] and the ability of the husband to provide support.

Id. at 411-12 (citations omitted). See *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985); *Jeppson v. Jeppson*, 684 P.2d 69, 70 (Utah 1984).¹ Failure to consider the three factors enunciated in *English* constitutes an abuse of the lower court's discretion. *Paffel v. Paffel*, 732 P.2d 96, 101 (Utah 1986).

Mr. Canning earned almost \$28,000 annually as a Mountain Bell repairman during each

of the two calendar years prior to the divorce. He had seventeen years of tenure with his company. Mrs. Canning had earned about \$1,200 during the prior year. She had only a high school education and insignificant job skills to market. Her off-and-on work was always in the minimum wage category. Her ability to work was impaired by an ulcer and by the disabilities of their minor sons. Both were handicapped by learning dysfunctions; one was being treated by a psychologist for emotional problems. She was seeking a flexible work schedule so she could devote necessary time to their special needs. It is doubtful that she could find and keep a full-time job. Even if able to do so, her earnings would be minimal for an extended period.

Mr. Canning claimed necessary monthly living expenses amounting to \$350 more than Mrs. Canning claimed for herself and the two sons. We note that he was paying an identical amount, i.e. \$350, as child support under a temporary order, later made permanent by the decree. Mr. Canning's annual gross income will be about \$24,000 after deducting child support (assuming no increase in salary). The disparity between his annual income of \$24,000 and her \$1,200 plus \$4,200 child support is striking, even though he was ordered to pay \$3,306 of marital debts and \$3,212 of debts incurred by him after the parties separated.

The denial of alimony to Caleen Canning creates a great disparity in future annual incomes and the parties' respective standards of living, a situation remarkably similar to that created by the lower court's meager alimony award in *Higley*. David Canning's standard of living will be much closer to what it was during the marriage than will appellant's. When the above considerations are coupled with the absence of any finding about Mrs. Canning's ability to work or her earning capacity, the trial court's failure to award alimony is a clear and prejudicial abuse of discretion. Although this Court has the power to modify the decree accordingly, the lack of necessary findings in the record prevents us from doing so. *Higley v. Higley*, 676 P.2d at 382.

The decree appears to contemplate that appellant would obtain work and earn income sufficient to support herself and the parties' children. Without specific factual findings to that effect, she is left without a baseline for future modification purposes if she does not in fact obtain ongoing, income-producing work. See *id.* at 382 & n. 1. On the other hand, if she does obtain any such work (as long as the baseline is the present zero), that income will reflect improved circumstances to her detriment. She should not be thus penalized, at least until she exceeds the baseline amount which the decree contemplates she will earn, an amount which would have to be sufficient

to provide the necessities of life.

PROPERTY DISTRIBUTION

The trial court and counsel were perplexed about the effect of the first (almost seventeen year) marriage and divorce of the parties upon their second (twenty month) marriage and divorce. The proceedings became bifurcated to determine how the on-again off-again relationship of the parties should influence the distribution of property and the provisions for support and maintenance.

During this interim in the decision-making process, counsel submitted simultaneous memoranda to the court. Respondent's memorandum was submitted "in support of his position that for purposes of determining alimony and allocating [respondent]'s pension and stock benefits only the period of the parties' remarriage should be considered." Appellant's memorandum was submitted "regarding the effect of a re-marriage on the parties' rights and the [appellant]'s claim upon the plaintiff's retirement benefits." Respondent summarized that "only the period of the parties' second marriage (twenty months) should be considered for purposes of determining alimony or allocation of employment benefits." Appellant concluded that "this Court should consider the marriage relationship of these parties *in toto* and make a fair award of support and alimony and a division of all assets based upon a marriage of eighteen and a half years during which the parties acquired as substantial assets both a home and retirement benefits." The court thereafter recorded its oral ruling on a minute entry form with a handwritten sheet attached. The sheet contains the following paragraph:

Court finds the marriage to be considered in this action is only the marriage of *January 1981*. The pension and stock benefit rights come into the marriage as the sole property and rights of Mr. Canning. Wife has retained all she brought into the marriage. Value of pension/retirement fund Court finds is \$2,542.00 as of date of trial.

Four months later, the following typed minute entry was entered:

Memorandum ruling on divorce matters not previously ruled upon. In this case divorce has been granted and several other matters decided and ruled upon. As to the remaining matters for ruling:

1. Oral ruling as to pension is not binding upon the court and the court awards defendant 1/2 of the cash value of the pension plan; 1/2 of the cash value being \$1271.00, total cash value found to be \$2542.

2. Defendant having custody of the minor children, Plaintiff is to pay as support the sum of \$175.00 per month per child. Defendant may claim youngest child as dependent for tax purposes. Plaintiff may claim older child. Child support to be paid 1/2 by 5th day of each month and 1/2 by 20th day [sic] month.

3. Plaintiff to pay marital debts and obligations outstanding and his own debts and obligations and hold her harmless.

4. Life insurance on plaintiff to be in force and effect with children as beneficiaries until children attain their majority. Amount of insurance to be kept in effect need not exceed \$15,000 each child. (Court is aware that in event of death of father certain social security benefits would be available to children.)

5. Plaintiff to maintain health, dental, optical insurance as available through his employer, for children, and he is to pay 1/2 of costs that exceed the insurance benefits payable; cosmetic dental, etc., is not to be paid by either party unless they agree to share such cost.

6. The 1982 income tax refunds should be divided 50/50.

7. Balance of proceeds from sale of house to be divided equally. Note: marital obligations are to be paid by Mr. Canning, plaintiff, and he is to pay Credit Union and J. C. Penney bills he incurred.

8. Plaintiff awarded the stock share plan benefits.

9. Decree has been entered previously, awarding divorce.

10. Matter of child custody, visitation, previously ruled upon.

11. Distribution of personal property has previously been ruled upon.

12. Attorney's fees have been ruled upon.

The underlying premise of Mrs. Canning's appeal is that in "the final decree ... the Court considered only the second (21 month) marriage of the parties and did not consider the first (16+ year) marriage of the parties." We have searched both the decree of divorce and amended judgment in vain. Neither of those documents nor the final findings upon which they are based contain any such language or compel any such inference.

The subsequent action taken and final dis-

position made by the court also do not demonstrate that the court operated in a rigid compartment of time. Otherwise, there would not have been an award of child support since the minor sons were not issue of the marriage being dissolved. Furthermore, if the trial judge was only taking into account the parties' second, brief marriage, Mrs. Canning would not have been awarded 1/2 of the pension fund that had accrued primarily during their first marriage.

We recognize that a district judge faces a difficult task in almost every divorce action. "The court's responsibility is to endeavor to provide a just and equitable adjustment of their economic resources so that the parties can reconstruct their lives on a happy and useful basis." *Wilson v. Wilson*, 5 Utah 2d 79, 83, 296 P.2d 977, 979 (1956). In the more recent case of *Fletcher v. Fletcher*, 615 P.2d 1218, 1222 (Utah 1980), the Utah Supreme Court stated:

There is no fixed formula upon which to determine a division of properties, [sic] it is a prerogative of the court to make whatever disposition of property as it deems fair, equitable, and necessary for the protection and welfare of the parties. In the division of marital property, the trial judge has wide discretion, and his findings will not be disturbed unless the record indicates an abuse thereof.

The allocations of the Cannings' assets and liabilities by the trial court reveal a determined effort to place the parties in comparable economic positions. We cannot fault that effort and outcome, except as indicated above in our disposition of the alimony issue. While equality is a worthy goal, precise mathematical equality is not essential or required. See, for example, *Berger v. Berger*, 713 P.2d 695 (Utah 1985), where sixty percent of the value of the assets was awarded to the wife, and *Turner v. Turner*, 649 P.2d 6 (Utah 1982), where the wife received twenty-seven percent of the assets (her calculation) or forty-two percent (his calculation).

Mrs. Canning argues that the home became her sole and separate property after the parties' first divorce and remained so after they remarried. Although the house (acquired during the first marriage) was awarded to Mrs. Canning in the first divorce, it was subject to a \$15,000 lien in favor of Mr. Canning and to a first mortgage. After remarriage, the parties jointly borrowed additional funds against the home which were used for their personal and mutual benefit, including improvements on the home and purchase of personal property which was later awarded to her.

In any event, the parties stipulated to a sale of the home during the pendency of this

divorce action. Three months before trial, they closed a sale and partially distributed the proceeds--over \$11,000 to him and over \$11,000 to her. Then they filed a stipulation and agreement with the court which recited that they had sold the home and had "in part distributed the proceeds." They agreed that additional proceeds from the sale be held until further order of the trial court. The court subsequently distributed the remaining funds in accordance with its memorandum ruling recited above. In view of all the circumstances described, we cannot say that the district court abused its discretion concerning the home sale proceeds. "A trial court's apportionment of marital property will not be disturbed unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion." *Turner v. Turner*, 649 P.2d at 8.

Mrs. Canning next contends that she did not receive an equitable share of Mr. Canning's retirement benefits. She does not challenge the 50/50 split; she contends that the trial court erred in accepting the value calculated by respondent's expert instead of the higher value calculated by her expert. However, "it is within the province of the fact finder to believe those witnesses or evidence it chooses." *Yelderman v. Yelderman*, 669 P.2d 406, 408 (Utah 1983). The value of the retirement benefits as found by the trial court is substantiated by the record, and we will not disturb it on appeal. *Id.* See Utah R. Civ. P. 52(a). Appellant tried her case on the basis that the value of the retirement benefits could be ascertained. She never suggested to the trial court that they were incapable of valuation at the time of trial, thereby requiring use of the deferred distribution method enunciated in *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982). Although she may now prefer the Woodward approach, we will not address this issue for the first time on appeal. See *Utility Trailer Sales, Inc. v. Fake*, 62 Utah Adv. Rep. 7, 8 (1987); *Insley Mfg. Corp. v. Draper Bank & Trust*, 717 P.2d 1341, 1347 (Utah 1986).

CHILD SUPPORT

Appellant's final challenge on appeal is to the level of child support awarded. In her complaint, Mrs. Canning sought \$200 per month per child, for a total monthly request of \$400. The court considered the needs of the children, as well as the relative abilities of the parties to meet them, and ordered Mr. Canning to pay \$175 per month per child, for a total monthly award of \$350. The monthly \$50 difference between what she requested and what she received can hardly be characterized as an abuse of discretion. We will not second-guess the award. See *Jorgenson v. Jorgenson*, 667 P.2d 22, 23 (Utah 1983).

The judgment of the court below is affirmed as to property distribution and child support. That portion of the judgment awarding no

alimony to appellant is reversed, and the matter is remanded to the trial court for additional findings of fact and possible modification of the judgment. Costs to appellant.

Norman H. Jackson, Judge

WE CONCUR:

Richard C. Davidson, Judge

Pamela T. Greenwood, Judge

1. For more expansive lists of criteria see *MacDonald v. MacDonald*, 120 Utah 573, 236 P.2d 1066, 1070 (1951) and *Wilson v. Wilson*, 5 Utah 2d 79, 296 P.2d 977, 979-80 (1956).

Cite as
68 Utah Adv. Rep. 20

**IN THE
UTAH COURT OF APPEALS**

**CHAMPLIN PETROLEUM COMPANY,
Plaintiff,**

v.

**DEPARTMENT OF EMPLOYMENT
SECURITY and Michael D. Robinson,
Defendants.**

Before Judges Jackson, Bench and Garff.

No. 860266-CA

FILED: October 16, 1987

INDUSTRIAL COMMISSION

ATTORNEYS:

H. Michael Keler, Donald L. Dalton for
Plaintiff.

K. Allan Zable for Defendants.

OPINION

JACKSON, Judge:

Champlin Petroleum Company has petitioned this Court for a writ of review challenging a decision of the Industrial Commission's Board of Review. The Board affirmed an administrative law judge's holding that Michael D. Robinson was entitled to unemployment benefits because he was not discharged from his employment for just cause under the Employment Security Act, Utah Code Ann. §35-4-5(b)(1) (1987). Champlin was, accordingly, held liable for the benefit charges in connection with Robinson's claim. We affirm the Board of Review's decision.

The following basic facts are not disputed by the parties:

Champlin Petroleum Company ("Champlin") took over operation of the Pine View natural gas processing plant in Summit County, Utah, from American Quasar in April of 1985. Robinson, a gas plant operator for American Quasar, was retained in that posi-

tion by Champlin. As such, he primarily worked alone in a job that had the potential for emergency, life-threatening situations requiring fast and efficient handling to avoid injury to persons or property. Champlin's schedule required him to work erratic hours--seven evening shifts before two days off, then six daylight shifts and two days off, followed by seven morning shifts and four days off. Robinson's work performance was never criticized as inadequate or improper by either employer.

Robinson had a history of mental disturbances of varying degrees of severity dating back to 1975. In 1982, Robinson was diagnosed as suffering from paranoid schizophrenia, a condition for which he was treated with medication. Records of his treatment for these disturbances were in his file at Champlin. At the hearing before the administrative law judge, he described the 1982 episode as an emotional or nervous breakdown.

Robinson suffered a similar breakdown episode on April 30, 1986, which required immediate hospitalization that lasted until May 12. During this time, Champlin paid Robinson accumulated sick leave benefits. Dr. Davidson, Robinson's treating physician, wrote "Mike is able to return to work" on a prescription form dated May 19. On May 21, Robinson's supervisor received a copy of a May 19 hospital discharge report in which Davidson diagnosed symptoms of paranoia attributed to intermittent use of and withdrawal from marijuana about a month earlier, coupled with an underlying manic depressive disease. Davidson prescribed Lithium and Haldol as treatment for the mental illness and suggested that, before Robinson returned to his job, he should be "given an opportunity to work in an environment where his job performance [could] be evaluated by someone else."

Champlin, upon receipt of the discharge report, immediately notified Robinson that he might be suspended. On May 28, he received a termination letter that referred to Davidson's note and report and then stated, "Since you are unable to return to work, without limitation, we regretfully must terminate your employment as of the end of your paid sick leave, May 24, 1986."

Our review of the application of the law to the pertinent facts in this case falls under the "intermediate" standard of review, under which we must determine whether it is within the limits of reasonableness and rationality. *Young v. Board of Review*, 731 P.2d 480, 482 (Utah 1986); *Board of Educ. of Sevier County v. Board of Review*, 701 P.2d 1064, 1067 (Utah 1985); *Kehl v. Board of Review*, 700 P.2d 1129, 1133 (Utah 1985); *City of Orem v. Christensen*, 682 P.2d 292, 293 (Utah 1984). See *Utah Dept. of Admin. Servs. v. Public Serv. Comm'n*, 658 P.2d 601, 610 (Utah 1983). We must affirm the Board's determi-

§30-3-5. U.C.A.

Disposition of property - Maintenance and healthcare of parties and children - Court to have continuing jurisdiction - Custody and visitation - Termination of alimony - Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, and parties. The Court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children; and

(b) if coverage is available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance to the dependent children.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the non-custodial parent to provide the day care for the

dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property as is reasonable and necessary.

(4) In determining visitation rights of parents, grandparents, and other relatives, the court shall consider the welfare of the child.

(5) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(6) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

(7) When a petition for modification of child custody or visitation provisions of a court order is made and denied, the

court may order the petitioner to pay the reasonable attorney's fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted in good faith.