

1998

# Wendalyn Smith v. Wendalyn Ence : Brief of Appellee

Utah Court of Appeals

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STATE  
DOCUMENT

IN THE UTAH COURT OF APPEALS

981707

WENDALYN ENCE, nka  
WENDALYN SMITH,

Petitioner/Appellant,

vs.

LARRY D. ENCE,

Respondent/Appellee.

CASE NO. 981707 - CA

PRIORITY NO. 15

BRIEF OF APPELLEE

APPEAL FROM AN AMENDED FINAL JUDGMENT OF DECREE OF DIVORCE  
ENTERED AFTER REMAND,  
IN THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR WEBER  
COUNTY, STATE OF UTAH,  
THE HONORABLE MICHAEL J. GLASMANN, PRESIDING

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Utah Court of Appeals

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WENDALYN ENCE, nka	:	
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vs.	:	
	:	
LARRY D. ENCE,	:	
	:	PRIORITY NO. 15
Respondent/Appellant <sup>ee</sup> .	:	
	:	

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Appellee, LARRY ENCE, hereinafter "Husband" or  
"Respondent", submits the following Brief:

**STATEMENT OF JURISDICTION**

This Court has jurisdiction over this appeal pursuant  
Rules 3 and 4 of the UTAH RULES OF APPELLATE PROCEDURE and to  
§78-2a-3(2)(h) UTAH CODE ANN. (1998).

**STATEMENT OF ISSUES AND STANDARDS OF REVIEW**

1. Whether the trial court's award of alimony for 21  
years was within its broad discretion where the trial court  
specifically addressed the needs and standard of living of  
the Husband, the Husband's earning ability, and the Wife's  
ability to provide support?

"In formulating alimony awards, the trial court has



broad discretion, and its decisions will not be overturned absent an abuse of discretion or manifest injustice."

Watson v. Watson, 837 P.2d 1, 3 (Utah App. 1992) (citing Schindler v. Schindler, 776 P.2d 84, 90 (Utah App. 1989)).

2. Whether the trial court's award of alimony was within its broad discretion as a compensating award of alimony?

"In formulating alimony awards, the trial court has broad discretion, and its decisions will not be overturned absent an abuse of discretion or manifest injustice." Id.

#### **DETERMINATIVE STATUTORY PROVISIONS**

Appellant submits that there are no statutory or constitutional provisions determinative of the issues presented herein. However §30-3-5 UTAH CODE ANN. is relevant to this appeal.

#### **STATEMENT OF THE CASE**

##### **A. NATURE OF THE CASE AND COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW**

Appellant, Wendalyn Ence, now known as Wendalyn Smith (and hereinafter referred to as "Wife") filed a Complaint on January 5, 1995 seeking a divorce from Husband, in Weber County District Court. A trial was held on September 8, 1995, the Honorable Michael J. Glasmann, presiding.

As to the issue of alimony, the court ordered the Wife to pay the Husband \$1,700.00 per month for a period of 21 years. In addition, the court ordered the Wife to pay a portion of the Husband's attorney's fees incurred in this action.

The Wife appealed and the Husband cross-appealed. This Court remanded the case back to the trial court for further findings on the issues of alimony and attorney fees.

On remand, the trial court entered more findings of fact and conclusions of law specifically addressing the issues of the Husband's financial need, his ability to earn, and the wife's ability to provide support.

The Amended Decree of Divorce and Findings of Fact were entered on September 24, 1998. This Decree awarded Husband alimony of \$1,500.00 per month for 4 years and \$800.00 per month thereafter for 17 years. In addition, the trial court again awarded the Husband a portion of his attorney's fees incurred herein.

From this Amended Decree, the Wife has appealed.

#### **B. STATEMENT OF THE FACTS**

The parties were married on November 25, 1974. (ROA 425). At the time of the marriage, the Wife was 21 years of

age and the Husband was 35 years of age. (ROA 425). At the time of trial, the parties had been married for 21 years and had two children, both of whom had reached their majority. (ROA 425). At the time of trial, Husband was 56 years of age and Wife was 42 years of age. (ROA 256).

Throughout the parties' marriage, the Husband worked full-time as a heavy equipment operator, and has worked in the field since 1956. (ROA 257). He has no college training and he has graduated from high school. (ROA 256). Husband earned approximately \$18.52 per hour during the time the Wife was in medical school. (ROA 266). The company Husband worked for was purchased by another company while Wife was in medical school and his wage dropped to \$14.50 per hour. (ROA 268). After six months this was raised to \$15.00 per hour. (ROA 270).

When the parties married, the Wife worked as a secretary in a hospital. (ROA 143). During the marriage when the parties' children were young, the Wife was the primary caregiver and worked part-time at home as a typist for the local airport. (ROA 144). In January of 1981, the Wife entered college at Glendale Community College. (ROA 145). She transferred to Grand Canyon University in 1983.

(ROA 145). She obtained her undergraduate degree 1985.

(ROA 146).

Throughout her four years of undergraduate education, the Wife borrowed approximately \$6,000.00 for tuition and received some scholarships. (ROA 148). Throughout all of this time the Husband supported the family through his full-time employment as a heavy equipment operator. (ROA 257).

For the two years after graduating from college, the Wife worked as an estimator for an industrial truss company and as a substitute teacher. (ROA 150). The Wife earned approximately \$15,000.00 per year during this time. (ROA 151). For these two years the Husband supported the family through his full-time employment. (ROA 257).

The Wife applied for and was accepted to medical school in 1987. (ROA 152). The Wife and the parties' children moved to Tucson for the Wife to attend medical school at the University of Arizona. (ROA 153). In order to facilitate this move and the Wife's desire to go to medical school, the parties purchased a home in Tucson in 1987. (ROA 152-153). During this time, as stated above, the Husband was supporting the family with his full-time employment which allowed the Wife and the parties' children to move to Tucson

and the Wife to attend medical school. (ROA 257 ROA 155).

During these four years, the Husband had to live apart from Wife and his children in order to keep his job and support his family and Wife's decision to attend medical school. (ROA 140-41). The parties sold their trailer home and purchased a home in Tucson, while Husband stayed in Phoenix during the work week and lived in a 1965 19 foot camp trailer and spent the weekends in Tucson. (ROA 264-65). During the four years that the Wife was in medical school, Husband worked 40 hours a week, as well as "a lot of overtime." (ROA 267). Husband tried to find a job in Tucson so that he could be with his family more, but with Wife in medical school, the children to support, and the house in Tucson, it was not financially feasible for Husband to take a lower paying job in Tucson. (ROA 268).

During medical school, the Wife incurred approximately \$49,000.00 in student loans. (ROA 155). Approximately \$23,000.00 of this amount went to tuition, books, and other educational expenses. (ROA 155). The remaining \$26,000.00 assisted with household expenses over her four years in medical school, or \$6,500.00 per year. (ROA 155). During her third and fourth years of medical school, Wife "hired" a

first year medical student to act as a nanny. (ROA 205). In exchange for room and board living in the Tucson home, this nanny cooked for the parties' children, made sure they got to bed, helped them with their homework, and got them off to school in the morning. (ROA 205). In addition, during the Wife's four years of medical school, the parties' savings of approximately \$10,000.00 were spent. (ROA 239 ROA 254).

Wife graduated from medical school in May of 1991. (ROA 163). The family moved to Ogden, Utah in June of 1991 to allow the Wife to complete her internship and residency requirements at McKay Dee Hospital. (ROA 163). Wife completed her internship and residency in June of 1994. (ROA 164).

When the parties moved to Ogden, Husband was 52 years of age and had trouble finding employment. (ROA 271). There were very few union jobs in Utah and \$10.00 per hour was the top wage. (ROA 272). After discussing the situation, the parties decided that Husband should stay home with the parties' children and take care of the house. (ROA 274).

During 1994, the last full year of the parties'

marriage, the Wife earned \$106,381.00. (ROA 171). After the parties' separation, Husband found work in St. George, Utah, and was paid \$12.00 per hour at the time of trial. (ROA 172-173). At the time of trial, Wife was making \$120,000.00 per year. (ROA 199). In addition to this salary, under her employment contract, the hospital paid other expenses for the wife as well, including \$1,600.00 per month to pay back her student loans in full, paying for her malpractice insurance, paying for her continuing education, and her overhead. (ROA 199-200).

On November 12, 1995, the trial court entered a Decree of Divorce, and, in relevant part, ordered Wife to pay Husband \$1,700.00 per month for alimony for 21 years, and ordered Wife to pay a portion of Husband's attorney's fees. (ROA 108). Wife filed a Notice of Appeal on December 12, 1995. (ROA 116). This Court entered a Memorandum Decision on November 7, 1996, case #950819 CA, reversing and remanding the issues of attorneys fees and alimony for further factual findings. (ROA 375-76). The trial court entered subsequent findings on remand, and specifically awarded Husband alimony of \$1,500.00 per month for the first four years, and \$800.00 per month for 17 more years. (ROA

425-35). On September 16, 1997, the trial court filed its Findings of Fact and Order which supplemented its findings with regards to the award of a portion of Husband's attorney's fees. (ROA 435 these findings are attached as Addendum A to this brief).

Wife filed her Notice of Appeal on October 22, 1998.

### **SUMMARY OF THE ARGUMENT**

Wife's attack on the trial court's findings must fail for two reasons. First, Wife has failed to marshal all of the evidence supporting the findings and then demonstrate that, even if viewed in the light most favorable to the trial court, the evidence is legally insufficient to support the findings. Wife simply ignores the evidence in support of the findings and reargues the facts which were already considered and weighed at the trial level.

Second, Wife is precluded from challenging the findings of the trial court as she drafted the findings which were adopted by the trial court and has not alleged any fraud on the trial court. Wife now argues facts which were already argued at trial and not included in the findings which she drafted. Therefore, Wife has effectively waived any objection to the findings, and such a waiver is conclusive



on appeal.

The trial court's award of alimony, in duration and amount, is within the trial court's broad discretion under both theories which the trial court clearly addressed in its Findings of Fact and Order. (ROA 425, Addendum "A"). The first theory the trial court employed was to use alimony to maintain the Husband, as closely as possible, at a reasonable standard of living. The trial court specifically addressed the Husband's needs and standard of living during the marriage, his ability to provide income, and the Wife's ability to provide support.

The second theory the trial court employed was to award Husband a compensating adjustment of alimony (1) because the parties had a marriage of long duration which dissolved on the threshold of a major change in income of the Wife due to the collective efforts of both spouses, and (2) because the trial court found that Wife's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage.

Finally, Husband is entitled to an award of attorney's fees and costs on appeal. The trial court specifically addressed the reasonableness of his attorney's fees, his

ability to pay them, and Wife's ability to assist in paying Husband's fees. The trial court awarded Husband attorney's fees at the trial court and such an award is appropriate on appeal.

### **ARGUMENT**

I. WIFE'S FAILURE TO MARSHALL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDINGS REQUIRE THAT THE FINDINGS OF THE TRIAL COURT BE ACCEPTED.

"To overturn a trial court's finding of fact, 'an appellant must first marshal all the evidence supporting the findings and then demonstrate that, even if viewed in the light most favorable to the trial court, the evidence is legally insufficient to support the findings.'" Bailey-Allen, 945 P.2d 180, 186 (Utah App. 1997) (citing Coalville City v. Lundgreen, 930 P.2d 1206, 1209 (Utah App. 1997) (quoting Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989)), cert. denied, 939 P.2d 683 (Utah 1997)). Two of the issues which the Wife has raised in her Brief attack the trial court's findings. Specifically, the Wife has brought the following issues on appeal:

1. Did the trial court err when it based its alimony award from inferred facts and from income earned during only one year of a twenty-one year marriage?

2. Did the trial court err in finding that Husband is unable to earn more than \$12.00 per hour?

However, the Wife has failed to marshal any evidence in support of the lower court's findings as to these issues. Further, the Wife has mischaracterized the trial court's findings and the facts on which the trial court relied.

The trial court did not simply pick one year out of the parties' 21 year marriage arbitrarily to establish a standard of living. The trial court generally discussed the income of the family and the Husband's earnings from 1956 forward. (ROA 426). The trial court also considered the contributions made by the Wife's part-time and full-time employment, as well as her contributions to the family expenses made through her student loans. (ROA 426). The trial court specifically found the income history of the family to be \$51,000 in 1987 (ROA 428) the year the Wife entered medical school. During the four years the Wife was in medical school the trial court specifically found the family's income to be \$41,000, \$36,000, \$36,000, and \$30,000 respectively (ROA 427). After medical school, when the Husband left his job in Arizona so that the Wife could finish her residency requirements in Utah, the family's

income was \$34,000 in 1992, \$57,000 in 1993, and \$100,000 in 1994. (ROA 428). However, the Wife has failed to marshal this evidence and has mischaracterized the trial court's findings by arguing that the "trial court erred when it based its alimony award from inferred facts and from income during only one year of a twenty-one year marriage." (Aplt. Brief p. 12). The trial court clearly considered the specific family earnings for the eight years listed, and generally considered Husband's earnings and employment since 1956.

The second issue the Wife has raised which attacks the trial court's findings concerns the Husband's earning potential. The Wife argues that "[t]he trial court erred in finding that husband's earning capacity was limited to \$12.00 per hour." (Aplt. Brief p. 15). The Wife acknowledges that the trial court found that the Husband: (1) was 56 years of age at the time of trial; (2) had worked as a heavy equipment operator since 1956; (3) had no formal education beyond high school; and (4) was earning \$12.00 per hour at the time of trial working as a heavy equipment operator in St. George, Utah. (Aplt. Brief p. 15,16). While this evidence is sufficient to support the trial

court's findings, more evidence was available which the Wife neglected to marshal.

The Wife argues that the trial court found that the although the Husband was earning \$12.00 per hour in Utah, "he would have been earning \$15.00 per hour if he had not moved to Utah from Arizona. . . . [t]here is no explanation for this discrepancy." (Aplt. Brief p. 15). However, there is an explanation clearly explained by the trial court. The trial court found that the Husband "testified without rebuttal that because Utah is a non-union state, the top wage available in 1991 for a heavy equipment operator was \$10.00 per hour" and that in 1995, "at the time trial [he] was earning \$12.00 per hour . . . as a heavy equipment operator . . . in St. George, Utah." (ROA 429).

Therefore, the court's justification for using the lower hourly wage was due to the unrebutted fact that, because Utah is a non-union state, the Husband could not earn as much here as elsewhere. The court also clearly found that this move to Utah, and the subsequent decrease in the Husband's earning capacity, was not made by the Husband's choice. The move was made to forward the Wife's medical career. "[The Wife] graduated from medical school

in May 1991 and the parties moved to Ogden, Utah to allow [the Wife] to complete her internship and residency requirements at McKay Dee Hospital." (ROA 427). These facts were not marshaled in by Wife in support of the trial court's findings.

Rather than marshaling the evidence in support of the trial court's findings and then demonstrating that, even if viewed in a light most favorable to the trial court, the evidence is legally insufficient to support the findings, the Wife attempts to offer pure speculation and conjecture to attack the trial court's findings. The Wife argues that "there is no reason to believe husband will stay in Utah and continue to work for lower pay . . . [i]t appears more likely that he will follow the construction booms in other nearby states." (Aplt. Brief p. 15). This statement is made without cite or evidentiary support and has no basis in the record. In fact the trial court found that "[w]hen the parties separated [the Husband] returned to Arizona to look for union employment similar to that he gave up to move to Utah **but was unable to find any.**" (ROA 429, emphasis added). Also, Husband will be of retirement age in very few years. It is just as logical to assume that he cannot work

or is the victim of age discrimination in hiring, as to assume he will move to follow "booms."

Due to Wife's complete lack of marshaling the evidence, Wife has failed to demonstrate that, if the evidence supporting the lower court's findings is viewed in a light most favorable to the trial court, the evidence is in any way legally insufficient to support the findings. Therefore, the findings of fact must be accepted by this court. Bailey-Allen, 945 P.2d at 186.

II. WIFE IS PRECLUDED FROM CHALLENGING THE FINDINGS ABSENT ALLEGED FRAUD ON THE COURT.

Wife drafted the Amended Findings of Fact and Conclusions of Law which were adopted by the trial court. (ROA 397, Aplt. Addendum). Wife's Appellate Brief then attacks these findings and asserts material allegations of fact which were already raised at trial.

"When, however, a party drafts findings which are adopted by the court, and includes therein no mention of a material allegation of fact raised at trial, such party may be deemed to have waived any objection to the failure of the trial court to make such a finding. **Such a waiver must be considered conclusive upon appeal.** To rule otherwise would permit a party tacitly to omit a material finding of fact from the proposed findings, and then pursue reversal as a matter of law due to failure of the trial court to make such a finding." Howard v. Howard, 601 P.2d 931, 935 (Utah 1979) (emphasis added) (citing Farrell v.

Turner, 482 P.2d 117 (Utah 1971).

Wife has not alleged any fraud on the trial court. Wife is simply trying to argue the same facts as were argued and considered at trial because she is not satisfied with the trial court's decision. Therefore, Wife is precluded from challenging the findings of the trial court. See Howard, 601 P.2d at 934 (holding that plaintiff was precluded from challenging the findings of the trial court where plaintiff drafted the findings which were adopted by the trial court and did not allege a fraud on the court).

III. THE TRIAL COURT'S ALIMONY AWARD TO HUSBAND WAS CLEARLY WITHIN THE TRIAL COURT'S BROAD DISCRETION.

A trial court must consider three factors in setting a reasonable award of alimony: 1) the financial conditions and needs of the receiving spouse; 2) the ability of the receiving spouse to produce a sufficient income for himself; and 3) the ability of the payor spouse to provide support. Throckmorton v. Throckmorton, 767 P.2d 121, 124 (Utah App. 1988) (citing Eames v. Eames, 735 P.2d 395, 397 (Utah App. 1987)); Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985); see also §30-3-5(7)(a) UTAH CODE ANN. (1998).

"If these three factors have been considered, we will not disturb the trial court's alimony award unless such a



serious inequity has resulted as to manifest a clear abuse of discretion. Schindler, 776 P.2d at 90 (citing Fullmer v. Fullmer, 761 P.2d 942, 950 (Utah App. 1988); Andersen v. Andersen, 757 P.2d 476, 478 (Utah App. 1988)). "The ultimate test of an alimony award is whether the party receiving alimony will be able to support him or herself 'as nearly as possible at the standard of living . . . enjoyed during the marriage.'" Id. (quoting English v. English, 565 P.2d 409, 411 (Utah 1977)). "In formulating alimony awards, the trial court has broad discretion, and its decisions will not be overturned absent an abuse of discretion or manifest injustice." Watson, 837 P.2d at 3.

In addition to the goal of maintaining parties as nearly as possible at the standard of living enjoyed during the marriage, Utah has also recognized the employment of an alimony award as "compensating adjustment" where a marriage of long duration dissolves on the threshold of a major change in the income of one of the parties due to the collective efforts of both. Martinez v. Martinez, 818 P.2d 538, 542 (Utah 1991); §30-3-5(7)(e) UTAH CODE ANN. (1998).

The trial court's findings clearly support the alimony award under each of these theories.

A. The Trial Court's Award of Alimony to Husband Was Within Its Discretion as the Trial Court Considered All Three of the Factors to Maintain Husband at the Standard of Living Enjoyed During the Marriage.

As stated above, a trial court must consider three factors in setting a reasonable award of alimony: 1) the financial conditions and needs of the receiving spouse; 2) the ability of the receiving spouse to produce a sufficient income for himself; and 3) the ability of the payor spouse to provide support. Throckmorton, 767 P.2d at 124 (citations omitted). The trial court made specific and detailed findings on each of these three issues in awarding alimony to the Husband in the amount of \$1,500 per month for four years and \$800 per month for seventeen years thereafter.

First, the trial court carefully made findings as to the family's income and earnings with general findings from 1956 through 1987 and exact findings from 1987 through 1994, the last full year of the parties' marriage. (ROA 426-428). Specifically, the trial court found that the annual family income fluctuated from \$30,000 to \$100,000 during the marriage. (ROA 427-428). The trial court discussed the duties and contributions of both of the parties from 1956

through 1994. (ROA 426-427). The trial court made findings as to the family's living arrangements and housing. (ROA 427). The family had little to no savings, and therefore it is clear that their entire income went to finance their standard of living. In fact, while in Tucson, the parties were subsidized by student loans to support their standard of living as well as by Husband's income. (These loans were repaid by Wife's first employer after medical school).

The trial court used \$51,000 as a "fair benchmark" as the "general standard of living enjoyed by the parties during the marriage." (ROA 428). At the time of trial, the Husband earned \$12.00 per hour, or \$2,080 gross per month. This amounts to \$24,960 gross per year. With \$1,500 per month in alimony, the Husband would have \$42,960 to attempt to maintain the standard of living enjoyed during the marriage for the first four years. After these four years, Husband would be approximately 60 years of age, and if he can continue to work at \$12.00 per hour, with \$800 per month in alimony, he will have \$34,560 to maintain the standard of living enjoyed during the marriage. Surely, the \$51,000 figure employed by the court was within the court's discretion as the family income was \$57,000 in 1993 and

\$100,000 in 1994, the two years of the marriage closest to the trial date. During the years that the family earned less, the Wife was not contributing any income to the family,<sup>1</sup> or the Husband was unable to find work after the family's relocation to Ogden, which was made to facilitate the Wife's completion of her residency requirements.

Second, the trial court specifically addressed the Husband's "earning capacity or ability to produce income." (ROA 428-430). The trial court found that the Husband was 56 years of age, only had work experience as a heavy equipment operator, and had no formal education beyond high school. (ROA 428). The trial court specifically found that Husband had sacrificed a higher paying job in Arizona to facilitate Wife's medical career by moving to Utah, a non-union state, where his earning capacity was 20% lower than Arizona. (ROA 429). The trial court specifically found that, after the parties had separated, the higher paying work in Arizona was no longer available, and that Husband was earning \$12.00 per hour in St. George, Utah. (ROA 429).

These findings clearly support the trial court's

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<sup>1</sup> However, approximately \$6,500 of the Wife's student loans per year were used to supplement to Husband paying all of the family expenses.

finding that, at the time of trial, Husband's "age and skills limit him to a position as a heavy equipment operator and make him unable to produce income greater than \$12.00 per hour." (ROA 429). If Husband's earning capacity changes in the future, Wife can always petition to modify the alimony award as allowed under existing Utah law.

Third, the trial court specifically addressed the Wife's ability to provide support. (ROA 430). The trial court found that, under the Wife's employment contract at the time of trial, she earned \$120,000 per year, or \$10,000 per month gross and \$7,000 per month net. (ROA 430). In addition to this substantial income, the hospital also paid her overhead, her continuing medical education, her malpractice insurance, and her student loan payments. (ROA 199-200). The court specifically found that the Wife had reasonable monthly expenses of \$4,104, leaving \$2,896 per month out of her net income beyond her expenses to help the Husband maintain a reasonable standard of living. (ROA 430).

As the trial court specifically addressed each of the three factors required under Utah law to set an alimony award that will maintain the Husband, as nearly as possible,

at the standard of living enjoyed during the marriage, the trial court's award of alimony was within its broad discretion. See Watson, 837 P.2d at 3; Schindler, 776 P.2d at 90; Fullmer, 761 P.2d at 950; Andersen, 757 P.2d at 478.

B. The Trial Court's Award of Alimony to Husband Was Within Its Discretion as a Compensating Adjustment.

"When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change **shall be** considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court **may** make a compensating adjustment in dividing the marital property and awarding alimony." §30-3-5(7)(e) UTAH CODE ANN. (1998).

This statute was enacted after the Martinez case. In Martinez, the parties were married for 17 years, during which time the husband went to medical school, against the wishes of the wife. 818 P.2d at 539. The wife "did not contribute financially to her husband's medical education." Id. However, the trial court found that the wife "made substantial sacrifices in order to facilitate the completion of [the husband's] medical schooling and internship." Id. In discussing the alimony issue, the Supreme Court of Utah held that:

When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change, should be given some weight in fashioning the support award . . . [t]hus, if one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, it may be appropriate for the trial court to make a compensating adjustment in dividing marital property and awarding alimony." Id. (citations omitted).

In the current case, the trial court found that "the parties had a marriage of long duration -- 21 years -- and that it dissolved on the threshold of a major change in the income of the [Wife] due to the collective efforts of both spouses." (ROA 431). This finding required that the trial court consider this change in determining the amount of alimony. The code orders that upon such a finding the trial court "shall" consider this change in awarding alimony. The trial court did not have any discretion to not consider this change as it would have been legal error to ignore this change upon the findings.

The trial court also found that the Wife's "earning capacity has been greatly enhanced through the efforts of both spouses during the marriage." (ROA 431). Upon making this finding, the code allows the trial court the discretion to make a compensating adjustment in awarding alimony.

The trial court specifically found that the Husband "provided the infrastructure that supported the [Wife] in her accustomed lifestyle while she attended school." (ROA 431). The trial court found that the Husband paid for the bulk of the family expenses during the marriage, including the purchase of the house in Tucson which was bought so that Wife could attend medical school there. (ROA 431). The Husband's efforts allowed the Wife to hire a nanny while in her last two years in medical school so that she could focus on her medical training. (ROA 431). The trial court found that the employment of the nanny "allowed [Wife] to spend increased time at the school and the hospital, [and] was made possible by the home financed by [Husband's] salary." (ROA 431).

The trial court further found that while Wife and the children lived in Tucson so that Wife could attend medical school, Husband remained in Phoenix so that he could keep his job and support the family and Wife's education. (ROA 432). During this time, because the Husband was paying the mortgage on the house in Tucson, he lived in a travel trailer in Phoenix on his parents' property and traveled an average of 240 miles each weekend to Tucson to visit Wife



and the children. (ROA 432).

In spite of these clear findings, Wife argues that "there is no evidence that husband was disadvantaged economically in any way . . . [h]e made no personal sacrifices that resulted in a reduced standard of living because he did not suffer a loss of income." (Aplt. Brief p. 19). The trial court clearly found that Husband lived in a travel trailer in order to keep his job so that he could afford to buy a house in Tucson so that Wife could attend medical school. This is one sacrifice Husband made to enhance the Wife's earning potential at his expense. Husband almost completely supported Wife while she was in school. Husband's sacrifices allowed Wife to hire a nanny ' so that she could spend more time at the medical school and in the hospital to enhance her career. Husband left his job in Arizona to move with the family to Ogden, Utah to facilitate the Wife's finishing of her residency requirements. This move caused Husband to lose his job and move to a non-union state where wages for the type of job he was qualified for were much lower. After the separation, Husband tried to get his job in Arizona back, but it was not available so he had to take a 20% wage decrease working in

St. George, Utah.

Surely these qualify as both economic sacrifices and the sacrifices of living apart from his family and solely supporting his family, which have greatly enhanced Wife's earning potential. Prior to Husband making these sacrifices to facilitate Wife's education she earned no more than \$15,000 in a year. In the last year of the marriage, she earned \$100,000. The year of trial she earned \$120,000 along with many other aforementioned benefits. This amounts to an enhanced earning of 666% and 800% respectively.<sup>2</sup> It is obvious that Wife's earning capacity has been greatly enhanced by the efforts of both spouses during the marriage and a compensating award is appropriate under these circumstances.

Wife argues that Husband is not entitled to a compensating award of alimony because his "contributions to the support of the family while wife attended medical school was the same support contributions he made willingly when the wife stayed home and took care of the children." (Aplt. Brief p. 20). While irrelevant, this statement is also a misrepresentation of the facts.

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<sup>2</sup>  $\$100,000/\$15,000 = 666\%$  and  $\$120,000/\$15,000 = 800\%$ .

Prior to the Wife's entering medical school, the family did not live separate requiring the Husband, as the primary wage earner to support two households. This sacrifice was made only to facilitate the Wife's attendance at medical school in Tucson. Prior to the Wife's entering medical school, the family never needed to employ a nanny. This employment was made possible through Husband's paying the mortgage on the house in Tucson, although he only was able to stay there on weekends. Prior to Wife's entering medical school, Husband was able to live with his family, but due to the Wife's need to live in Tucson and the family's need for the Husband to continue to solely support them with his job in Phoenix, Husband had to drive 240 miles each weekend to see his family. Prior to the Wife's entering medical school, the family lived in Arizona, a union state, where Husband was able to earn, in 1990, 125% of what he can earn currently in Utah. He had to give up his job and seniority in Arizona to facilitate Wife's medical career.

If this Court accepts Wife's theory of a compensating adjustment to alimony, a spouse who has always supported his/her family could never receive a compensating award because this would be the same support the earning spouse

had always provided. This would render §30-3-5(7)(e) useless. Wife's theory is against the clear language of the code and case law and would provide unjust and unfair results to spouses in Husband's situation who made great sacrifices to facilitate Wife attaining her medical degree, only to be divorced immediately after she finished her residency.

Wife also argues that a compensating or reimbursement type of award of alimony should only be considered "where the supporting spouse becomes economically disadvantaged in a virtually absolute sense in that they were unable to earn a living either at all or above minimum wage." (Aplt. Brief 10). This argument has absolutely no basis in the code or case law. Utah has never required a finding that the recipient spouse be "economically disadvantaged in a virtually absolute sense" or be "unable to earn a living either at all or above minimum wage" in order to be awarded a compensating award of alimony. Such a requirement would be completely contrary to all Utah law which states that alimony should be employed to: (1) keep the parties, as near as possible, at the standard of living enjoyed during the marriage; (2) equalize the parties' respective standards of

living; or (3) to compensate or reimburse a spouse, after a marriage of long duration, when the marriage dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both. See §30-3-5(7); Throckmorton, 767 P.2d 121; Eames, 735 P.2d 395; Jones, 700 P.2d 1072; Martinez, 818 P.2d 538; Schindler, 776 P.2d 84; Godfrey v. Godfrey, 854 P.2d 585 (Utah App. 1993); Watson, 837 P.2d 1. Nowhere in Utah law is a finding of poverty required under any of the theories of alimony in Utah, and such a requirement would be contrary to all Utah law and public policy.

This was a 21 year marriage where the Husband made numerous and substantial sacrifices to enhance the Wife's career and earning capacity, including (1) providing nearly all of the support for the family during Wife's medical education, prior to which she was employed, at least part-time; (2) living apart from his family so that he could keep his job to support Wife's move to Tucson for her education and driving 240 miles each weekend to be with his family all he could; (3) providing the means for Wife to hire a nanny to take care of the kids and the house while in her last two years of medical school; and (4) sacrificing his job in

Arizona and accepting a 20% pay decrease in Utah to facilitate the Wife finishing her residency and internship requirements in Utah. These sacrifices allowed Wife to enhance her earning capacity 800%. On the threshold of this major change in her earning capacity, the marriage dissolved. Therefore, the trial court was clearly within its discretion in awarding a compensating adjustment of alimony to Husband in an amount "necessary both to restore [Husband] to the standard of living enjoyed during the parties' marriage, and to compensate [Husband] for his contribution to [Wife's] increased earning capacity." (ROA 434).

C. The Trial Court Was Within Its Discretion In Awarding Husband Alimony For 21 Years.

The Wife also argues that "[t]he trial court erred in awarding alimony for twenty-one years." (Aplt Brief p. 16). However, this is not a question of legal error, an award of alimony, including the duration, by a trial court is reviewed only for an abuse of discretion. See Jones, 700 P.2d at 1075 (holding that the trial court abused its discretion in ordering temporary alimony); Andersen, 757 P.2d at 479 (holding that the trial court abused its discretion in ordering that alimony terminate upon the

completion of schooling without requiring a showing a material change in financial circumstances).

The Utah Code requires that the trial court consider the length of the marriage in determining alimony. §30-3-5(7)(a)(iv) UTAH CODE ANN. The trial court found that the parties had been married for 21 years at the time of trial. (ROA 425). The trial court ordered alimony to continue for 21 years. (ROA 436). The trial court made specific findings as to Husband's income potential and prospective retirement income. (ROA 430). In addition, the trial court found that Husband's expenses would remain relatively constant and that "in order to keep [Husband] at an appropriate standard of living it is necessary to continue alimony past the point of [Husband's] retirement . . . [and] that alimony should continue for 21 years, or the length of the parties' marriage." (ROA 430).

As the trial court clearly considered the financial condition of Husband, his standard of living, the length of the parties' marriage, and Husband's possible retirement income, it is obvious that the trial court's award of alimony for 21 years was within the trial court's discretion.

IV. HUSBAND SHOULD BE AWARDED HIS ATTORNEY'S FEES ON APPEAL.

" 'Ordinarily, when fees in a divorce have been awarded below to the party who then prevails on appeal, fees will also be awarded to that party on appeal.'" Watson, 837 P.2d at 8 (quoting Bell v. Bell, 810 P.2d 489, 494 (Utah App. 1991) (quoting Burt v. Burt, 799 P.2d 1166, 1171 (Utah App. 1990))). Husband was awarded attorney's fees in the lower court after a careful analysis of the reasonableness of the fees, the Husband's ability to pay said fees, and the Wife's financial ability to contribute to the Husband's attorney's fees. (ROA 435); see Munns v. Munns, 790 P.2d 116, 122 (Utah App. 1990) (citing Rasband v. Rasband, 752 P.2d 1331, 1336 (Utah App. 1988); Huck v. Huck, 734 P.2d 417, 419 (Utah 1986); Kerr v. Kerr, 610 P.2d 1380, 1384 (Utah 1980); Sorensen v. Sorensen, 769 P.2d 820, 832 (Utah App. 1989)). Therefore, Husband should be awarded his attorney's fees on appeal.

**CONCLUSION**

Husband greatly assisted the Wife in attaining her medical degree and enhancing her medical career through financial support, sacrificing time with his family, sacrificing his job in Arizona, and contributing all the



intangible emotional support which is needed when a spouse attends a challenging professional school and engages in a demanding career. Almost immediately after Wife had completed her residency requirements, the marriage was dissolved. Husband is now almost 60, has work experience only with heavy construction equipment, and has a high school education.

The alimony award of \$1,500 per month for four years and \$800 per month for seventeen years thereafter is clearly appropriate as it is only a small fraction of Wife's earnings at the time of the trial, which earnings were made possible by both parties' contributions, and "is necessary both to restore [Husband] to the standard of living enjoyed during the parties' marriage, and to compensate [Husband] for his contribution to [Wife's] increased earning capacity." (ROA 434).

For the foregoing reasons, Husband requests that this Court affirm the trial court's award of alimony, in amount and duration, and award him his attorney's fees and costs incurred pursuant to this appeal.

RESPECTFULLY SUBMITTED this 7th day of June, 1999.

CORPORON & WILLIAMS, PC

A handwritten signature in cursive script, appearing to read "Brian J. Gardner", written over a horizontal line.

BRIAN J. GARDNER

MARY C. CORPORON


Attorneys for Appellee

**CERTIFICATE OF SERVICE**

I hereby certify that two (2) true and correct copies  
of the foregoing BRIEF OF APPELLEE were mailed, first class,  
postage prepaid, to:

CAROLYN D. ZEUTHEN  
Attorney at Law  
2485 Grant Avenue, #200  
Ogden, Utah 84401

on this 7th day of June, 1999.

A handwritten signature in cursive script, appearing to read "Brian D. Dade", written over a horizontal line.

## ADDENDUM A

IN THE SECOND JUDICIAL DISTRICT OF WEBER COUNTY  
OGDEN DEPARTMENT, STATE OF UTAH

WENDALYN ENCE nka WENDALYN  
SMITH,

Plaintiff,

vs.

LARRY D. ENCE,

Defendant.

FINDINGS OF FACT  
AND ORDER

Case No. 954900029

OCT 29 1997

CLERK OF COURT  
JUDICIAL DISTRICT  
OF WEBER COUNTY  
OGDEN, UTAH

This matter is before the court on remand from the Court of Appeals to make additional findings to support the alimony award and to reassess the award based on the additional findings. The court is also directed to redetermine the attorney fees award based on additional findings. This court apologizes to the parties and the appellate court for the inadequate findings. The court makes the following findings of fact:

I. ALIMONY

1. Plaintiff and defendant were married on November 25, 1974; plaintiff was 21 years of age and defendant was 35 years of age. At the time of trial they had been married 21 years. The parties have two children who have reached majority.

*A. The financial condition and needs of the defendant:*

2. The court was not provided with a list of defendant's current monthly expenses and so must therefore infer defendant's needs from the limited evidence provided and from the standard of living enjoyed by the parties during the marriage.

3. Since 1956, and throughout the parties' marriage, defendant has been employed full time as a heavy equipment operator. Although his salary fluctuated, defendant earned as much as \$18.52 per hour during the parties' marriage. Plaintiff supplemented the family income in secretarial positions prior to entering school full time. While the parties' children were young, plaintiff was the primary care giver and also worked part time at home as a typist.

4. In January 1981 plaintiff entered college at Glendale Community College, later transferring to Grand Canyon University. After her first semester of college plaintiff did not work outside of the home until she graduated with her undergraduate degree in May of 1985. Plaintiff's undergraduate education was financed through two loans, totaling \$6,000, and some scholarships. Plaintiff paid off the loans in December 1991 with post-residency earnings.

5. From 1985 to 1987, plaintiff worked as an estimator for an industrial truss company and as a substitute teacher. She earned approximately \$15,000 per year. In 1987 the parties earned \$51,000 jointly.

6. The parties lived in a mobile home until they purchased a small home when their children were young. When the parties moved to Phoenix, Arizona in 1980, they sold that home for approximately \$32,000 and purchased a single 14 x 70 mobile home. They lived together in the mobile home until the plaintiff moved with the children to Tucson, Arizona, in 1987 to attend medical school.

7. Plaintiff was accepted into medical school at the University of Arizona in Tucson in 1987. The parties purchased a home in Tucson and plaintiff moved there with the two children. During the week defendant stayed in a travel trailer in Phoenix and traveled home on the weekends.

8. Plaintiff borrowed approximately \$49,000 in student loans to finance her medical education, and contributed an average of \$6,500 per year from the loans to meet family expenses. The majority of family expenses were paid by the defendant's earnings, which were approximately \$18.52 per hour when plaintiff began medical school and were \$15.00 per hour when plaintiff graduated and the parties moved to Ogden. The income history of the family during plaintiff's time in medical school is as follows: \$41,000 in 1988, \$36,000 in 1989, \$36,000 in 1990, and \$30,000 in 1991.

9. Plaintiff graduated from medical school in May 1991 and the parties moved to Ogden, Utah to allow plaintiff to complete her internship and residency requirements at McKay Dee Hospital. The parties rented a home in Ogden for \$745.00 per month. Defendant was unable to find suitable employment in Utah and he then remained

home to care for their teenage children. The parties earned \$34,000 in 1992, \$57,000 in 1993, and \$100,000 in 1994.

10. Until the parties' 1994 vacation in Alaska, vacations were infrequent and were spent visiting relatives. They purchased moderately priced cars and did not buy expensive clothing. The parties' major asset at the time of trial was their home in Tucson.

11. At the time of trial plaintiff was living in the rented four-bedroom Ogden home, and defendant was renting a camp trailer from a cousin in St. George, Utah, for \$500 per month. Although defendant argued he was unable to move into an apartment on his current income, the court questioned that assertion.

12. During their marriage, with the exception of 1994, the last year of their marriage, the parties lived within a modest family income. Specifically, the court finds that the parties enjoyed as of 1987 a standard of living available to a family of four on approximately \$51,000 per year of gross income. This court finds that the family income and standard of living existing in 1987 is a fair benchmark of the general standard of living enjoyed by the parties during the marriage and accordingly, an award of alimony should allow defendant to sustain a comparable standard of living.

*B. Defendant's earning capacity or ability to produce income:*

13. Defendant was 56 years old at the time of trial. He has worked as a heavy equipment operator since 1956. He has no formal education beyond high school.



14. When the parties separated defendant returned to Arizona to look for union employment similar to that he gave up to move to Utah but was unable to find any. He testified without rebuttal that because Utah is a non-union state, the top wage available in 1991 for a heavy equipment operator was \$10.00 per hour. At the time of trial defendant was earning \$12.00 per hour, or \$2,080 gross and \$1,600 net per year, as a heavy equipment operator for Delray Jackson Construction in St. George, Utah.

15. The court finds that defendant's age and skills limit him to a position as a heavy equipment operator and make him unable to produce income greater than \$12.00 per hour.

16. When the parties moved to Ogden to allow plaintiff to complete her internship and residency requirements, defendant gave up his union position in Arizona, where he was making \$15.00 per hour. The court finds that, but for the parties' move to Utah, defendant would be earning between \$15 per hour, or \$2600 per month, and \$17 per hour, or \$2947 per month.<sup>1</sup> He is now earning \$12 per hour, or \$2080 per month.

17. Defendant's retirement benefits had vested at the time of trial. If defendant retired at the time of trial, at 56 years of

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<sup>1</sup>Although defendant testified that his salary in Arizona was going to stay at \$15 per hour, the court believes his pay would have been raised periodically to keep pace with inflation. Accordingly, based on defendant's testimony that pay in Utah for a comparable job rose from \$10 per hour when he first arrived to \$12 per hour at the time of trial, the court sets the range of defendant's possible salary in Arizona at \$15 per hour to \$17 per hour.

age (without adjustment for the *Woodward* share reduction), he would be eligible to receive \$326.50 per month in benefits for the rest of his life. If he waited until he was 62 years of age to retire, he would collect \$466.50 per month in retirement benefits. At trial plaintiff was awarded a *Woodward* share of defendant's retirement.

18. The court anticipates that defendant's monthly expenses will remain relatively constant even after his retirement, in order to keep defendant at an appropriate standard of living it is necessary to continue alimony past the point of defendant's retirement. This court finds that alimony should continue for 21 years, or the length of the parties' marriage.

C. *Plaintiff's ability to provide support:*

19. At the time of trial plaintiff had a contract with the Medical Arts Clinic in Brigham City, Utah, for employment through August 1997. Plaintiff was unsure of her employment after that time. Under her contract, plaintiff earned \$120,000 per year, or \$10,000 per month gross and \$7,000 per month net. In addition to her salary, the hospital pays plaintiff's overhead expenses, her continuing medical education expenses, and her malpractice insurance.

20. The court finds that plaintiff has reasonable monthly expenses of \$4,104, which includes some of the expenses associated with caring for the parties' adult children.

*D. Compensating Adjustment*

21. The court finds that the parties had a marriage of long duration--21 years--and that it dissolved on the threshold of a major change in the income of the plaintiff due to the collective efforts of both spouses. The court further finds that plaintiff's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage. Although plaintiff clearly earned her medical degree through personal determination and sacrifice, defendant's efforts to assist her cannot be ignored. Specifically the court finds:

a. Defendant provided the infrastructure that supported the plaintiff in her accustomed lifestyle while she attended school. Defendant's salary paid for the bulk of the household expenses, including the payment on the house in Tucson. In addition, during plaintiff's third and fourth years of medical school she was able to offer a first-year medical student a room in the parties' house in return for the student's services as a nanny. This arrangement, which allowed plaintiff to spend increased time at the school and the hospital, was made possible by the home financed by defendant's salary.

b. Until entering school, plaintiff contributed to the family income through various full-time or part-time jobs. During the time plaintiff was in school she did not work, with the exception of the first semester of her undergraduate year. Prior to entering medical school, plaintiff contributed

\$15,000 per year to meet the family expenses. While she was in medical school she contributed an average of \$6,500 per year from her student loans to household expenses.<sup>2</sup> Plaintiff therefore contributed less to the family income during her schooling than she had previously.

c. While plaintiff was in medical school, plaintiff and the children lived in the family's home in Tucson and defendant lived in a travel trailer on his parent's property in Phoenix. Defendant traveled an average of 240 miles each weekend to visit the family.

22. Plaintiff argues that the financial support defendant provided plaintiff simply met his statutory duty of support, and that plaintiff's educational accomplishments came as a result solely of her own increased efforts. Although the court recognizes that plaintiff's degree is a credit to her dedication and hard work, it cannot so easily categorize the support defendant provided her during her schooling. Plaintiff's approach does not take into account and value the intangible emotional support or encouragement provided to the plaintiff, or the sacrifices made by the defendant during this time. "The very idea of marriage contemplates mutual effort and mutual sacrifice." *Martinez v. Martinez*, 818 P.2d 538, 541 (Utah 1991). Plaintiff's education was a marital endeavor; the court cannot sort through each parties' contributions, separate

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<sup>2</sup>The \$6,500 per year from the student loans was plaintiff's contribution to the family income because plaintiff paid off or will pay off the loans through her post-residency earnings.

defendant's support, and dismiss it as not contributing to plaintiff's capacity to greatly enhance her income.<sup>3</sup>

23. The court accordingly finds that plaintiff's earning capacity has been greatly enhanced due to the efforts of both spouses during the marriage and that a compensating adjustment is appropriate in this case.

### *E. Equalization of Income*

24. Although the court recognizes that defendant contributed to plaintiff's increased earning capacity, the court finds that it is not appropriate to equalize the parties' income or standards of living. There is authority that "an alimony award should, to the extent possible, equalize the parties' respective post-divorce living standards," *Rasband v. Rasband*, 752 P.2d 1331, 1333 (Utah Ct. App. 1980), however the court does not find that in this situation equalization is appropriate. The court believes that under these facts a better method of compensating defendant for his contribution to plaintiff's increased earning capacity is to provide reimbursement alimony.

25. Equalization of the parties' standards of living is inappropriate first, because during the parties' marriage they did not enjoy the standard of living now attainable with plaintiff's

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<sup>3</sup>It is interesting to note that the flip side of this argument--that a wife who maintains a home has offered no more than her statutory services of support--has never been accepted by the courts. Utah courts have always valued each spouse's contribution, financial or otherwise, to marital endeavors.

increased earning capacity, and second, because defendant is able, with a limited alimony award, to support himself at the standard of living enjoyed by the parties during their marriage. Compare *Gardner v. Gardner*, 748 P.2d 1076, 1081 (Utah 1988) (finding equalization appropriate where wife could not support herself at the high standard of living the parties had enjoyed together); *Peterson v. Peterson*, 737 P.2d 237 n.4 (Utah App. 1987) (distinguishing its fact pattern from a situation where one party is on the verge of higher earning potential, where a more creative alimony award may be necessary to achieve fairness).

26. Further, although the court finds that the parties' joint efforts made plaintiff's education possible, the court emphasizes that clearly plaintiff's achievements are due in large part to her own extended efforts.

27. The court finds that an award of reimbursement alimony will assist the defendant in establishing a level of housing and personal property ownership that will thereafter allow him, with an ongoing alimony award, to maintain the lifestyle enjoyed by the parties during the marriage.

#### F. Award of Alimony

28. In summary, the court finds that an award of alimony is necessary both to restore defendant to the standard of living enjoyed during the parties' marriage, and to compensate defendant for his contribution to plaintiff's increased earning capacity.

Defendant is therefore awarded \$1500 per month for the first four years following the parties' divorce, and then \$800 per month for 17 more years.

## II. ATTORNEY FEES

1. The court finds that the rate charged by defendant's attorney, Ms. Corporon, of \$150.00 is reasonable considering her experience and is consistent with rates charged in the area for similar services.

2. Defendant's attorney fees will total \$3,000. The court finds this total amount to be reasonable considering the complexity of the case.

3. Without consideration of the alimony award, defendant does not have the financial assets to pay his own attorney fees. He nets \$1600 per month, and is without sufficient savings or assets to cover the expense.

4. The court finds, however, that the defendant, with his initial alimony payments of \$1500, has the necessary income to pay \$2,000 of his own attorney fees.

5. Plaintiff, whose monthly income is approximately \$7000 per month net, has the financial ability to pay her own attorney fees and to pay the remainder of defendant's attorney fees.

III. ORDER

1. Defendant is hereby awarded alimony of \$1500 per month for four years and then \$800 per month for seventeen more years.
2. Plaintiff shall pay \$1,000 of defendant's attorney fees and shall be responsible for her own attorney fees.

Counsel for the parties shall please prepare appropriate amended findings and a decree.

Dated this 16<sup>th</sup> day of September, 1997.

  
Michael J. Glasmann, Judge



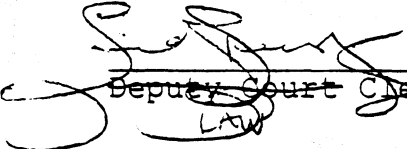
CERTIFICATE OF MAILING

I hereby certify that on the 29 day of <sup>January 1998</sup> ~~September~~, 1997, I sent a true and correct copy of the foregoing ruling to counsel as follows:

Mary C. Corporon  
Corporon & Williams, P.C.  
Attorney for Defendant  
808 East South Temple  
Salt Lake City, Utah 84102

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