

1988

Karen C. Martinez v. Jess M. Martinez : Petition for Writ of Certiorari

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

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KAREN C. MARTINEZ, :
 :
Plaintiff/Appellant, : Cert. No.
 :
vs. : Category No. 13
 :
JESS M. MARTINEZ, : Court of Appeals
 : Case No. 860159-CA
Defendant/Respondent/ :
Petitioner. :
-----ooOoo-----

PETITION TO THE SUPREME COURT OF UTAH
FOR WRIT OF CERTIORARI

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MAY 17 1989

880189
Clerk S.

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Plaintiff/Appellant,	:	Cert. No.
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QUESTIONS FOR REVIEW

I.

Is the creation of the remedy of "equitable restitution" by the Court of Appeals in conflict with that Court's previous holdings that an advanced degree is not divisible marital property pursuant to the provisions of Utah Code Anno. § 30-3-5 (1987)?

II.

Does a trial court have the authority under Utah Code Ann. § 30-3-5 (1987) to allocate income tax exemptions in any manner that it deems fair and equitable in a divorce action?

III.

Was it an abuse of discretion for the Court of Appeals to modify the trial court's award of alimony and child support in light of the inadequacy of facts in the record and that court's creation of the remedy of equitable restitution?

REFERENCE TO COURT OF APPEALS OPINION

The opinion of the Court of Appeals is reported at Martinez v. Martinez, 80 Utah Adv. Rep. 35 (April 26, 1988).

JURISDICTIONAL STATEMENT

The decision being reviewed was filed by the Utah Court of Appeals on April 19, 1988. No Petitions for Rehearing have been filed or are pending. No extension of time has been granted in which to Petition for Writ of Certiorari. This

Petition for Writ of Certiorari is filed within 30 days of the filing of the opinion of the Court of Appeals. The Utah Supreme Court has jurisdiction pursuant to Utah Code Ann. § 78-2-3(a) and § 78-2a-4 (1987).

DETERMINATIVE AUTHORITY

Utah Code Ann. § 30-3-5 (1987).

Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987).

Petersen v. Petersen, 737 P.2d 237 (Utah App. 1987).

Rayburn v. Rayburn, 738 P.2d 238 (Utah App. 1987).

STATEMENT OF THE CASE

This is a divorce case. The parties were married for seventeen years and have three children. At the time the parties were married, each had a high school education. Thereafter, the husband graduated from medical school in 1981; the parties separated during the husband's internship, and at the time of the trial, the husband was completing his residency. During the course of the marriage, the wife worked outside the home for a total of three years as a part-time waitress. She earned a total of \$2,779.

The pertinent provisions of the trial court's ruling are as follows:

1. The wife was awarded custody of the parties' three children subject to the husband's reasonable visitation rights. [Record at 213.]

2. The husband was ordered to pay \$300 per month per child as child support (for a total of \$900) with that support to continue until each child reached 21 years subject to a \$100 per month per child abatement should that child come to live with him. [Record at 213.]

3. The husband was awarded the tax exemptions for the two older children and the wife received the youngest. [Record at 213-14.]

4. The husband was ordered to pay to the wife \$400 per month alimony for five years, and the award would not terminate should she remarry in the first three years. [Record at 214.]

5. The wife was awarded the marital residence subject to a lien in the husband's favor payable upon the occurrence of certain events, but not payable upon her remarriage. [Record at 214-15.]

6. Each party was awarded the personal property in their respective possessions. [Record at 215.]

7. Each party was ordered to pay the debts which they incurred after their separation and the husband was ordered to pay approximately \$20,000 in student loans. [Record at 215-16.]

8. The husband was ordered to pay his attorney's

fees and \$2,500 to the wife for her attorney's fees and costs. [Record at 216.]

The wife then appealed this decision to the Utah Court of Appeals and the case was argued before Judges Davidson, Billings and Jackson. The Court's opinion was written by Judge Davidson, concurred in by Judge Billings and dissented from by Judge Jackson. It affirmed in part, reversed in part and remanded. The majority ruled as follows:

1. It found that the trial court's award of child support was an abuse of discretion, and then awarded \$600 per month per child as child support, (for a total of \$1,800) to continue to age twenty-one if the child is full-time student and not married.

2. It found that the trial court's award of alimony was an abuse of discretion, and then awarded the plaintiff permanent alimony in the amount of \$750 per month.

3. In addition to the increased alimony, it held that the wife was entitled to an award of "equitable restitution" and remanded for determination of an appropriate amount. In determining the newly created concept of "equitable restitution," the Court stated:

We use the term equitable restitution to describe the award in order to establish a clear distinction between it and traditional alimony or any other form of

spousal maintenance or support. The function of equitable restitution is to enable a spouse to share the newly obtained earning capacity of a former spouse who has achieved that capacity through the significant efforts and sacrifices of the requesting spouse which were detrimental to that spouse's development. It is nothing more than an equitable sharing of the rewards of both parties' common efforts and expectations.

Martinez v. Martinez, 80 Utah Adv. Rep. 35, 41 (April 19, 1988), (emphasis in original) (footnotes omitted).

4. It also agreed with the appellant that the trial court did not have the authority to equitably distribute the state and federal tax exemptions for the parties' minor children as such distribution violated the supremacy clause of the United States Constitution in light of the 1984 Tax Reform Act and the provisions of 26 U.S.C. § 152(e) (1988). Therefore, the Court held that under federal law the plaintiff was entitled to claim all of the exemptions.

5. Finally, the Court found no abuse of discretion in the trial court's award of attorney's fees.

STATEMENT OF FACTS

When the parties were married on June 6, 1968, Mr. Martinez was an E-5 in the United States Army [Transcript at 4.] and both parties only had a high school education. [Transcript at 6.]

From 1968 to 1977, Mr. Martinez remained continually

employed and was the primary income producer while his wife only worked part-time for a total of three years between 1968 and 1982, the date of the parties' separation. [Transcript at 52-53.]

The income of the parties, as presented at trial in Mrs. Martinez's Exhibit "A" is reflected as follows:

FAMILY INCOME

YEAR	TOTAL	HUSBAND	WIFE	OTHER
1973	\$10,840	\$10,840		
1974	11,411	11,381		\$ 30.36
1975	13,324	13,323		
1976	14,797	14,464	\$ 116	
1977	15,968	13,089	2,663	216.00

MEDICAL SCHOOL

YEAR	TOTAL	HUSBAND	WIFE	OTHER
1981	\$11,248			64.00
1982	26,990			189.00
1983	35,579			185.00

In 1970, Mr. Martinez decided to attend college, and Mrs. Martinez reluctantly agreed. [Transcript at 13.] He applied to medical school, and he was accepted by the University of Utah School of Medicine in 1977. [Transcript at 7.]

Mrs. Martinez was adamantly opposed to Mr. Martinez going to medical school, and that disagreement almost destroyed the marriage. [Transcript at 14, 31 and 33.] To support his family and pay for tuition and books during the four years of undergraduate school and the first year of medical school, Mr.

Martinez worked and received benefits from his G.I. Bill. [Transcript at 35 and 53.] During this time, he purchased a home and built an equity which was used to purchase a second home, which was the residence awarded to the wife in the divorce action. [Transcript at 57.] In addition to these monies, he received \$7,000 from his mother's estate and used that to pay family expenses. [Transcript at 53.] Mr. Martinez also took out three student loans, one of which was for \$20,000 [Transcript at 54.] and all of which he is now repaying and for which Mrs. Martinez was not held responsible. [Record at 215.]

During the entire marriage, Mrs. Martinez did not work except as a part-time waitress in 1978, 1979 and 1980. [Transcript at 35 and 53.] When she worked, Mr. Martinez stayed home and watched the three children. [Transcript at 30 and 35.]

After Mr. Martinez graduated from medical school in 1981, he secured an internship at Danville, Pennsylvania, [Transcript at 7] and although Mrs. Martinez was reluctant, the family moved to Pennsylvania with him. [Transcript at 16, 52 and 55.] After six months, Mrs. Martinez returned to Utah because she was uncomfortable in the setting and missed her family and friends. [Transcript at 17.] Her dissatisfaction affected Dr. Martinez's work and internship and placed an

extreme amount of additional pressure on him. [Transcript at 19.]

At the time of trial in May 1985, Mrs. Martinez was working for Mountain Fuel and had just voluntarily gone to three-quarters time to get an education and spend more time with the children. [Transcript at 48 and 59.] Her net income was \$846 per month [Transcript at 42] and Mountain Fuel was going to pay all of the costs of her education. [Transcript at 48.] At trial, her monthly family expenses were \$2,056. [Transcript at 43 and 58.]

Also, at the time of trial, Dr. Martinez had completed one year of a two year residency as an emergency room physician in Pennsylvania. [Transcript at 3 and 100.] Under his two year contract, he earned \$100,000 per year, or \$8,333 per month. His net income was \$7,100 per month after the deduction of expenses such as malpractice insurance. [Transcript at 9-11 and 66.] He had to put one-half of his gross earnings in a tax account as he had no tax deductions or shelters. [Transcript at 102-03.] He was paying back his student loans and had expenses, including a \$1,100 temporary support payment for a total of \$4,337. [Exhibit 3.] His net monthly salary after taxes was \$4,022. [Transcript at 102.] There was no evidence in the record to establish his employment plans or potential income after his contract ended

in 1986.

ARGUMENTS

I.

A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE COURT OF APPEALS DECISION CREATING THE REMEDY OF EQUITABLE RESTITUTION IS INCONSISTENT WITH AND IS A DRASTIC DEPARTURE FROM PREVIOUS DECISIONS OF THAT COURT ON AN IMPORTANT QUESTION OF STATE LAW.

In Martinez v. Martinez, 80 Utah Adv. Rep. 35 (April 26, 1988), the Court of Appeals created a new remedy called "equitable restitution." Under Martinez, an award of this type is now to be considered in divorce cases where one spouse has obtained a professional degree during the marriage, and the divorce occurs as that spouse begins his/her new career and is on the threshold of increased earning capacity. The court expressly distinguished this new remedy from all other forms of spousal maintenance or support and stated that, "'[equitable restitution]' is nothing more than an equitable sharing of the reward of both parties' common efforts and expectations." Id. at 41. An award of equitable restitution evidently will not terminate upon remarriage and may be payable in a lump sum or periodically over time. In addition to remanding the Martinez case for determination of the amount of equitable restitution to be awarded her, the court also awarded Mrs. Martinez permanent alimony in the amount of \$750

per month based upon Dr. Martinez's increased salary.

The practical and realistic effect of this decision is in conflict with previous rulings by other panels of the Court of Appeals and the dictum of the Utah Supreme Court. The basic issue is whether an advanced degree is marital property subject to division upon divorce. It was first addressed by the Court of Appeals in Petersen v. Petersen, 737 P.2d 237 (Utah App. 1987). In Petersen, the trial court had awarded \$1,000 per month alimony, \$300 per month per child as child support for a total of \$1,800, and a \$120,000 cash settlement as a property award representing Mrs. Petersen's interest in her husband's medical degree. The Court of Appeals panel consisting of Judge Orme, Bench and Jackson unanimously decided 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." Id. at 241. The Court went on to conclude that "[i]n this State, traditional alimony analysis is the appropriate and adequate method for making adjustments between the parties in cases of this type." Id. at 242.

Shortly thereafter, the Court of Appeals followed and reemphasized the principle of Petersen in Rayburn v. Rayburn, 738 P.2d 238 (Utah App. 1987). The Rayburn court, again made up of Judges Orme, Bench and Jackson, stated:

Recently this court held that an advanced degree or professional licence is not marital property subject to division upon divorce. However, an advanced degree often accompanies a disparity in earning potential that is appropriately considered as a factor in alimony analysis. We affirm our holding in Petersen and analyze the instant appeal under the same analysis applied in that case.

Id. at 240 (citations omitted).

Finally, although it did not have to decide the issue, the Utah Supreme Court addressed case law from other states pertaining to the division of degrees as "property" upon divorce in the case of Gardner v. Gardner, 748 P.2d 1076 (Utah 1988). After stating that, in order to do equity in some factual instances, a court may have to compensate a spouse based on other legal and equitable principles, this Court concluded that, "we agree that an educational or professional degree is difficult to value and that such evaluation does not easily fit the common understanding of the character of property." Id. at 1081.

The practical effect of the new concept created in Martinez is wholly inconsistent with the law as set out in Petersen, Rayburn and Gardner. Martinez begins by awarding Mrs. Martinez an increased amount of permanent alimony based upon Dr. Martinez's increased earning capacity. It then also awarded her an amount of "equitable restitution," a remedy expressly distinguished from traditional alimony or other

spousal support and based on the increased earning capacity of a spouse as a result of that spouse's professional degree. Therefore, regardless of its facial characterization, an award of equitable restitution is an award of an interest in a marital asset.

Judge Jackson, who concurred in both the Petersen and Rayburn cases, summed up the inequities and improprieties of the Martinez decision in his well reasoned dissent. He pointed out that Mrs. Martinez did not provide the financial capital necessary for her husband to obtain his medical degree and that here was no evidence that she deferred her own educational or career plans in order to advance her husband's. He also noted that the parties had accumulated sufficient real and personal property from which an appropriate award could be fashioned. He went on to say:

On the facts presented in this case, there are additional reasons why I believe the majority's disposition of this appeal is misguided: (1) equity can be achieved under current alimony and property distribution statutes and case law; (2) an award of equitable restitution coupled with the majority's generous alimony and child support awards is double-dipping; and (3) an award of equitable restitution, in effect, treats the professional education as "property" subject to division upon dissolution of a marriage.

After outlining his position, Judge Jackson concluded:

Provision for Mrs. Martinez's needs is

best dealt with through a generous but fair distribution of property and award of alimony, not through the creation of a distinctly new form of cleverly disguised marital property for which there is no precedent. (footnotes omitted)

As a result, the Martinez decision is in conflict with previous decisions of the Court of Appeals and this Court on an important question of state law. It represents a drastic departure from this law. It also represents a theory never raised by appellant in the Courts below. Therefore, certiorari should issue to review its creation and application to Petitioner.

II.

A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE HOLDING BY THE COURT OF APPEALS THAT A TRIAL COURT CANNOT EQUITABLY DISTRIBUTE TAX EXEMPTIONS IN A DIVORCE ACTION IS IN CONFLICT WITH UTAH CODE ANN. § 30-3-5 AND DECISIONS OF THE UTAH SUPREME COURT.

On appeal, Mrs. Martinez argued that the supremacy clause of the United States Constitution, in light of the 1984 Tax Reform Act and its effect on 26 U.S.C. § 152 (Supp. 1988), prevents a state court from allocating tax exemptions between the parties to a divorce action. She argued that the statute requires the trial court to award her all three exemptions and that the only exception is where the custodial parent signs a written declaration agreeing to not claim the children for a tax year in question. Because she did not sign such a

written declaration, she claimed that the trial court abused its discretion in awarding two exemptions to Dr. Martinez because the issue was preempted by the federal law under the provisions of the supremacy clause.

The Court of Appeals agreed and discussed whether Mrs. Martinez's amended complaint in 1985 preempted an earlier settlement agreement wherein she agreed that Mr. Martinez could claim the tax deductions. The court concluded that the complaint did in fact preempt the settlement agreement, and since there was no other valid agreement, Dr. Martinez did not fit within the only exception outlined under federal law. Therefore, Mrs. Martinez was awarded the tax exemptions for all three children. This holding is in conflict with Utah law, and is not supported by the language in § 152.

Utah Code Ann. § 30-3-5 (1987), grants great discretion to the trial court in divorce matters. It states, "When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property and parties." The case law interpreting this section is equally broad. In Gramme v. Gramme, 587 P.2d 144 (Utah 1978), this Court stated:

In the distribution of the marital estate, there is no fixed rule or formula. The statutory standard is established in Section 30-3-5, the court may make such orders in relation to the parties as may be equitable. The responsibility of the

trial court is to endeavor to provide a just and equitable adjustment of their economic resources so that the parties might reconstruct their lives on a happy and useful basis.

Id. at 148. (See also, Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980).)

In the past, the Utah Supreme Court has held that this authority allows a trial court to determine which party is entitled to the tax exemptions for the parties' minor children. In Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987) the appellant argued that the trial court erred in awarding the tax exemption to the wife because in her complaint she had asked the award to be given to him. The Utah Supreme Court held that the entitlement to the tax deduction became a matter of dispute between the parties at trial, and it was proper for the trial court to consider the issue. The Newmeyer case stands for the proposition that the trial court has the authority to equitably award and distribute tax exemptions between the parties to a divorce action.

In addition, 26 U.S.C. § 152 does not limit this broad authority of the trial court. This section is included in the appendix to this Petition. It simply requires that a custodial parent sign a written declaration stating he or she will not claim the child as a dependent and then the noncustodial parent must attach this to his or her return. The federal law does not prohibit a state court from

determining an equitable distribution of tax exemptions and ordering a custodial spouse to execute the required form.

Therefore, the Martinez decision on tax exemptions is inconsistent with Utah law. Because the holding is a drastic departure from established law on an important issue of state and federal law, certiorari should be granted as to this issue also.

III.

A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE THE COURT OF APPEALS' MODIFICATION OF ALIMONY AND CHILD SUPPORT AWARDS IS INCONSISTENT WITH ACCEPTED APPELLATE PRACTICES AND PREVIOUS RULINGS OF THE COURT OF APPEALS AND THE UTAH SUPREME COURT.

In Martinez, the trial court awarded Mrs. Martinez alimony in the amount of \$400 per month for five years and the award was made non-terminable should she remarry in the first three years. It also ordered Dr. Martinez to pay child support of \$300 per child per month for a total of \$900 until each child reached 21 years.

The Martinez case held that these awards were too low and constituted an abuse of discretion. However, instead of remanding this issue, the Court of Appeals modified the child support award to \$600 per month per child for a total of \$1,800 per month and awarded Mrs. Martinez permanent alimony of \$750 per month. As the dissent of Judge Jackson correctly

points out, there was insufficient evidence in the record to enable the Court of Appeals to properly make these modifications and that the proper forum to make any adjustments would be the trial court.

Therefore, this decision is inconsistent with the law and standard judicial practices. It is a well accepted tenet of appellate review that an appellate court cannot consider matters not in the record before it. This Court, in Reliable Furniture Co. v. Fidelity & Guar. Ins. Underwriters, Inc., 14 Utah 2d 169, 380 P.2d 135 (1963), stated "Under simple principles of appellate review, we cannot consider matters not on the record before the trial court, absence of which was made apparent on examination of the record filed with this Court." Id.

In Martinez, the Court of Appeals did not follow these principles of appellate review. First, the court modified the support awards based on Dr. Martinez's gross income under a two year contract of which he had already worked one year at the time of trial and which had expired 2 years before the Martinez opinion. At the time of trial, Dr. Martinez had not yet been board certified, and there was no evidence presented as to his future employment or potential income after he completed his residency in 1986. In addition, as outlined by the dissent, the only evidence as to need was Mrs. Martinez's

estimate of hers and the childrens' expenses. The majority disregarded this figure as too low and made what the dissent termed as an "independent estimate" of need. (80 Utah Adv. Rep. at 44). The lack of necessary evidence should have led the court to remand the case for a determination of need and Dr. Martinez's ability to pay after reviewing all of the parties' circumstances.

The error as to the alimony and child support modification is even more serious in light of the court's remand to determine a further award of "equitable restitution." Consequently, the discretion of trial court will be severely restricted because the appellate court has locked in the alimony and child support awards. As correctly stated by Judge Jackson in his dissent, "This action deprives the trial court, on remand, of any flexibility to adjust the debts, property, alimony and support awards and to fashion an overall award package that harmonizes all the variables. The trial court's discretion will be so restricted that an equitable outcome will be impossible." Id. at 44.

Thus, the unilateral fixing of increased amounts of child support and alimony is contrary to the law of this Court and accepted judicial practices. Certiorari should issue to review the decision by the Court of Appeals and correct the errors committed by that Court.

CONCLUSION

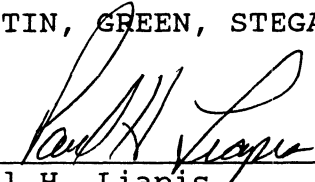
Under Utah law: (1) a professional degree is not considered a marital asset subject to division in a divorce action; (2) a trial court has broad discretionary authority to enter orders to achieve equity in a divorce action, including but not limited to making orders for the distribution of tax exemptions for minor children; and (3) an appellate court cannot render a decision based on matters or evidence not in the record.

The decision of the Court of Appeals in Martinez v. Martinez, supra, is contrary to these principles. An award of "equitable restitution" is, for all practical purposes, the same as treating a professional degree as a marital asset subject to division upon divorce. This is especially true in the Martinez case when the Court of Appeals directed that "equitable restitution" be made and also increased the alimony award based on Mr. Martinez's increased income as a result of his degree. Second, in awarding Mrs. Martinez the three tax exemptions, the holding in Martinez strips Utah trial courts of any authority to consider tax exemptions as a part of the overall financial package that must be created for the parties in a divorce action. Finally, the Court of Appeals unilaterally modified the trial court's child support and alimony awards without sufficient evidence before it to do so.

The holdings in Martinez are in conflict with and represent a drastic departure from Utah statutory law and case law as established by this Court and the Court of Appeals. Because the issues are important questions of state law and serious and substantial inequities have occurred, a Writ of Certiorari should issue.

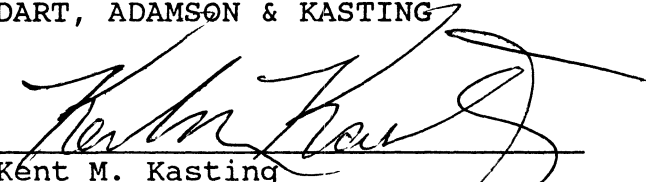
RESPECTFULLY SUBMITTED this 17th day of May, 1988.

GUSTIN, GREEN, STEGALL & LIAPIS



Paul H. Liapis

DART, ADAMSON & KASTING



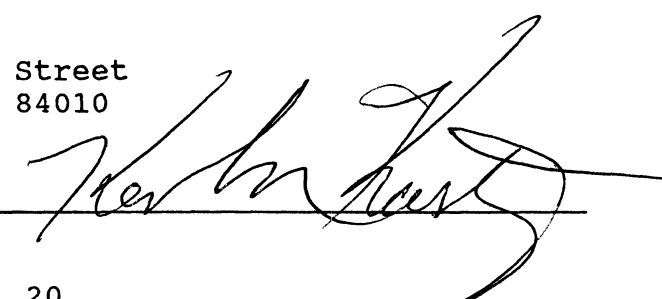
Kent M. Kasting

Attorneys for Petitioner/
Respondent/Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 17 day of May, 1988, I mailed 4 true and correct copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Utah, by placing such in the United States mail, postage prepaid and addressed to:

Neil B. Crist
HANSEN & CRIST
110 West Center Street
Bountiful, Utah 84010



APPENDIX

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4. Gardner v. Gardner, 748 P.2d 1076 (Utah 1988).
5. Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987).
6. 26 U.S.C. § 151 (Supp. 1988).
7. Utah Code Ann. § 30-3-5 (1987).

3 (1984). See *Heltman v. Heltman*, 29 Utah 2d 444, 511 P.2d 720 (1973)

Norman H. Jackson, Judge

WE CONCUR:

Richard C. Davidson, Judge

Pamela T. Greenwood, Judge

1 Although the court's order with respect to the adult child was only "temporary" until the court received an evaluation of her condition by Davis County Mental Health, the record contains no such report or any ruling or further order of the court modifying or terminating this provision of the decree, which neither party has objected to on appeal

2 The decree attributes present and future work and income to Mrs. Rasband with which she is expected to provide ongoing support for herself and her adult daughter. The court, however, made no specific earning capacity finding, i.e., a dollar amount the trial court believes she is capable of earning monthly. She needs such a "baseline" in order to seek a modification of alimony in the future by showing a substantial change in circumstances if, in fact, she does not or cannot obtain work providing that level of income. See *Higley v. Higley*, 676 P.2d 379, 382 n.1 (Utah 1983). On the other hand, without such a specific finding, any income she does earn from employment will show improved circumstances on her part, supporting a request by respondent to lower his alimony obligation. She should not be thus penalized, at least until her earnings exceed the baseline amount the trial court contemplated she could and would make when the decree was entered. See *Canning v. Canning*, 144 P.2d 325, 327 (Utah App. 1987).

It is obvious that many circumstances of the parties could change materially in eight years or less. Accordingly, we think decreasing alimony--based on speculation about a future ability to earn--is generally inappropriate in view of the court's continuing jurisdiction to modify an original decree under Utah Code Ann. §30-3.5 (1987).

3 Even if she secured full time employment at the federal minimum wage, Mrs. Rasband would only earn a gross income of \$134 per week, approximately \$536 per month. After taxes are taken out, these earnings plus the alimony awarded by the trial court do not even meet her basic monthly needs of \$1,250-\$1,400.

4 See *Higley*, 676 P.2d at 382.

On remand, the trial court must consider whether the appellant has the ability to earn enough to supplement the permanent alimony award to a level consistent with the guidelines set forth by this Court for determining a reasonable alimony award. If the trial court finds that the appellant does not have this ability, then it should modify its award of permanent alimony accordingly. If the trial court believes that the appellant does have this ability, then it should make such a finding of fact. Absent a finding regarding the appellant's ability to work, the appellant would be precluded in the future from asking the court to modify her alimony award based on changed circumstances if she can show

in the future that she is unable to work

enl
5 Appellant's counsel advised the trial court that his assistant was present at trial to help him with witness and exhibit management. The court advised counsel that it did not intend to allow him to receive credit for that work, since that was precisely the bailiff's job. There is nothing in the record to suggest that the court categorically refused to consider the pre-trial work performed by the legal assistant in determining the reasonable attorney fee in this case. Because of this, we need not reach the issue of whether a trial court must take into account the time expended by counsel's legal assistant in determining a reasonable attorney fee.

Cite as

80 Utah Adv. Rep. 35

IN THE UTAH COURT OF APPEALS

Karen C. MARTINEZ,
Plaintiff and Appellant,
v.

Jess M. MARTINEZ,
Defendant and Respondent.

Before Judges Jackson, Billings and
Davidson.

No. 860159-CA
FILED: April 19, 1988

SECOND DISTRICT
Honorable Rodney S. Page

ATTORNEYS

Neil C. Crist for Appellant
Yasemin M. Salahor, Paul H.
Liapis for Respondent
Kent M. Kasting for Respondent

OPINION

DAVIDSON, Judge:

Plaintiff appeals from a decree of divorce entered by the Second District Court. We affirm in part, reverse in part, and remand.

FACTS

The parties were married on June 22, 1968, subsequently, three children were born. At the time of marriage, both plaintiff and defendant were high school graduates and defendant was serving as an enlisted man in the U.S. Army. After defendant's discharge from the service, he accepted employment

at Hill Air Force Base, Utah where he worked as an instrument repair mechanic with an annual gross salary of approximately \$10,000.00. Defendant began his higher education in 1970. Defendant testified the parties discussed his pursuit of a degree and that plaintiff thought it was a "good idea" but that she "wasn't terribly in favor of it" because it would be time consuming. Plaintiff testified she was in favor of the decision because the family would "have a better future." Defendant completed his undergraduate program five and one-half years later. During this phase of his education, defendant supported the family on his wages and G.I. Bill benefits. Plaintiff gave birth to children in 1970, 1971, and 1975.

While an undergraduate, defendant decided to apply to medical school. The parties agree that defendant's application to medical school threatened their marriage. Plaintiff was concerned that defendant's lack of employment during four years would be financially detrimental to the family and that medical school would severely limit defendant's ability to "spend much time" with the children and plaintiff. Seeing that defendant was adamant, plaintiff agreed to "stick by him" during the next four years believing that, as a result of their mutual sacrifices, the family would eventually enjoy a higher standard of living.

Defendant entered medical school in 1977 and graduated in 1981. Family support was derived from student loans, savings, the remainder of defendant's G.I. Bill entitlement, \$7,000.00 from defendant's mother's estate, and income from plaintiff's part-time employment.

Upon completion of medical school, defendant accepted an internship in Pennsylvania. Plaintiff reluctantly left Utah. The family's first residence in Pennsylvania was in an isolated location with no telephone and no playmates for the children. The family then rented a home in a larger town and plaintiff sought employment to supplement defendant's salary as an intern. Plaintiff testified that she found a position at a fast food restaurant but defendant did not want her to work there because it would be embarrassing. Because of the friction between the parties and defendant's admitted relationship with another woman, plaintiff requested they seek marital counseling but defendant refused. Because of plaintiff's lack of prospects for suitable employment in Pennsylvania and the marital discord, plaintiff and the children returned to the family home in Utah to wait for defendant to finish his medical training. Although plaintiff understood defendant intended to practice medicine

in Utah, defendant completed his training and accepted employment in Pennsylvania.

Plaintiff filed a verified complaint for divorce on February 15, 1983. In a stipulation and separation agreement, signed by the parties and filed with the court on July 29, 1983, plaintiff agreed defendant could claim federal tax exemptions for two of the children while she retained the exemption for the third child. The settlement agreement also recognized the need to "make appropriate adjustments" in the support agreement in the event of future changes in financial circumstances.

After plaintiff hired new counsel, she filed a verified amended complaint in November 1983, in which the distribution of the tax exemptions remained the same. On May 9, 1985, however, plaintiff filed a motion for leave to amend the complaint which was subsequently granted. This amendment listed defendant's salary as \$100,000.00 per annum and requested that the child support and alimony awards reflect the significant increase in defendant's income. Plaintiff requested attorney fees and costs which would reflect the current state of the litigation as opposed to that anticipated in 1983. Plaintiff also requested the trial court to strike the previously proposed distribution of federal tax exemptions for the children.

Trial to the court was held on May 31, 1985. The decree of divorce awarded custody of the children to plaintiff subject to reasonable visitation. Plaintiff received \$300.00 per month per child in child support subject to an abatement of \$100.00 per month per child in the event that a child should live with defendant for an extended period. The distribution of tax exemptions was as initially agreed in the stipulation and separation settlement. Alimony was awarded in the amount of \$400.00 per month for a period of five years being nonterminable for a period of three years even if plaintiff remarried. Plaintiff was awarded attorney fees in the amount of \$2,500.00. Plaintiff was also awarded the home subject to a mortgage and an equitable lien in favor of defendant for the sum of \$17,528.00 payable upon the occurrence of enumerated, future contingencies. The award of the home to plaintiff necessitated that she continue to make monthly mortgage payments of \$309.00.

Plaintiff presents the following issues for review: (1) did the award to defendant of the two tax exemptions violate federal law, (2) were the awards of attorney fees, child support, and alimony so inadequate as to constitute an abuse of discretion, and (3) is defendant's medical degree marital property subject to division?

DISTRIBUTION OF INCOME TAX EXEMPTIONS

Plaintiff contends the distribution of state and federal income tax exemptions for two of

the children to defendant violates the Supremacy Clause of the U. S. Constitution in light of the 1984 Tax Reform Act and its effect on 26 U.S.C. §152(e) (1988) ¹

Subsection 152(e)(1) describes the normal situation where a custodial parent claims the tax exemption for a child. An exception is provided in subsection 152(e)(4)(A). The noncustodial parent may claim the exemption when there is a qualified pre-1985 instrument between the parents which states that the noncustodial parent shall be entitled to the exemption for the child and that parent provides at least \$600.00 yearly for the child's support. The definition of a qualified pre-1985 instrument is stated in subsection 152(e)(4)(B) as:

For purposes of this paragraph, the term "qualified pre-1985 instrument" means any decree of divorce or separate maintenance or written agreement ---

- (i) which is executed before January 1, 1985,
- (ii) which on such date contains the provision described in subparagraph (A)(i), and
- (iii) which is not modified on or after such date in a modification which expressly provides that this paragraph shall not apply to such decree or agreement

The parties stipulated to the distribution of the tax exemptions for the children in a separation agreement filed with the court in 1983. The distribution was incorporated in the verified amended complaint also filed that year. Subparagraphs (i) and (ii) of subsection 152(e)(4)(B) are satisfied by the 1983 filings. There was no written modification prior to January 1, 1985, which expressly revoked the distribution of tax exemptions during the period the stipulation and separation agreement was in effect. Therefore, defendant was entitled to the two exemptions as stipulated prior to the entry of the decree of divorce.

However, plaintiff's amended complaint in 1985 put the distribution of tax exemptions at issue in the divorce proceeding. The provisions of the separation agreement were no longer effective. Plaintiff requested the tax exemptions for all three children but the trial court's order did not honor that request. This result is contrary to the general provisions of section 152(e). Any argument that the stipulation and separation agreement qualifies as a pre-1985 instrument, where plaintiff willingly relinquishes her right to the exemptions under federal law, neglects plaintiff's rejection of its terms in the *post-divorce* period. By amending her complaint, plaintiff modified and affirmatively rejected the pre-divorce distribution. Plaintiff is entitled to the tax exemptions for all of the children in view of the award of custody to

her and the failure of defendant to establish any exception to the general rule stated above.

AWARD OF ATTORNEY FEES

Plaintiff argues the trial court abused its discretion in awarding attorney fees of only \$2,500.00 when she asked for \$7,871.00. Plaintiff clearly demonstrated a need for assistance. The court recognized that need by making the award. However, the court considered a written statement of attorney fees as a basis for the award. Extensive fees were generated by interest and preparation of the expert testimony offered to support the valuation of the medical degree. That argument was rejected by the lower court. We find no abuse of discretion in the award.

Because defendant did not cross appeal on this issue, we do not consider whether there was sufficient evidence presented to the trial court to justify any award of attorney fees. *Newmeyer v. Newmeyer*, 745 P.2d 1276 (Utah 1987).

AWARD OF CHILD SUPPORT

Utah Code Ann. §§78-45-3, -4 (1987) establish the obligation of both parents to support their children and "[a] child's right to that support is paramount." *Woodward v. Woodward*, 709 P.2d 393, 394 (Utah 1985). The Utah Supreme Court continued "The trial court may fashion such equitable orders in relation to the children and their support as is reasonable and necessary, considering not only the needs of the children, but also the ability of the parent to pay." *Id.* Plaintiff contends the award of \$300.00 per month per child was so inordinately low that it constituted an abuse of discretion by the trial court. We agree.

The trial court found defendant's gross income was \$100,000.00 per annum or \$8,333.00 per month, at the time of the divorce, while it determined plaintiff's gross income was \$1,033.00 per month.² The court found that plaintiff had monthly expenditures of \$2,050.00 and was in need of financial assistance from defendant to assist the children "in maintaining a standard of living more comparable to that enjoyed by their father."

Assuming the three children spend the majority of the year with plaintiff, her gross monthly income, including awarded child support and alimony, is \$2,333.00. After taxes have been deducted from the portions of income subject to taxation, plaintiff's net monthly income approximates her meager monthly expenses leaving no leeway for emergencies, presently necessary replacement expenditures, or any amenities of life. Under such grim economic reality, the children who reside with their mother will not enjoy a standard of living remotely comparable to that of their father.

The award established by the trial court cannot be justified when applying the factors

listed in Utah Code Ann. §78-45-7(2) (1987).³ We find plaintiff and her children are left in a precariously balanced financial existence while defendant is relatively affluent. Plaintiff and the children are in great need of assistance. The defendant has no responsibility for the support of anyone other than plaintiff, the children, and himself.

At the present time the courts of this state do not have uniform guidelines to employ in determining an award of child support.⁴ Many other jurisdictions, however, have established child support guidelines or schedules, based upon current economic data as to the cost of rearing children, to be used by trial courts. Although we do not use the numbers or approaches in fashioning the award in this case, a general comparison illustrates the inadequacy of the award. Because these formulas are based upon adjusted incomes, we cannot directly compare the numbers. Nevertheless, it is clear that under each, the support would be much higher. For example, in Colorado, an income shares guideline state, the award would be approximately \$1,535.00. Under Wisconsin's Child Support Guidelines, which were recently adopted by our neighboring states of Idaho and Nevada, where only the noncustodial parent's income is considered and where 29% of gross income is the presumptive award, the child support for the three children would be \$2,320.00.

Under the economic circumstances of this case, the award of child support is inequitable and must be modified. The dissent argues the case must be remanded to determine the children's need and the ability of each party to pay child support. We note the findings of fact do not fully address the child support factors. However, we believe this not to be reversible error because the totality of the factual evidence in the record is "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment" of the need for child support. *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987); *Marchant v. Marchant*, 743 P.2d 199, 202 (Utah App. 1987). The record is also replete with the financial needs of the children and the relative abilities of plaintiff and defendant to meet those needs. Nothing could be gained by a remand for this purpose except a delay of the increased award. Based upon the above reasoning, we award the sum of \$600.00 per month per child, support to continue to age 21 if the child is a full time student and not married.⁵ On remand, the trial court shall enter its order for child support in accordance with Utah Code Ann. §30-3-5.1 (1987).

AWARD OF ALIMONY

The standard of review relating to alimony requires that we not disturb the trial court's award unless "such a serious inequity has resulted as to manifest a clear abuse of discr-

etion." *English v. English*, 565 P.2d 409, 410 (Utah 1977). The Utah Supreme Court in that often quoted case states 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." *Id.* at 411. The Court continued that a trial court should consider "the financial conditions and needs of the wife, the ability of the wife to produce a sufficient income for herself; and the ability of the husband to provide support." *Id.* at 411-12.

In *Jones v. Jones*, 700 P.2d 1072 (Utah 1985), the Court conducted an extensive analysis of these three factors. Although the trial judge carefully considered the factors outlined in *Jones*, because plaintiff and the children were living in an artificially depressed standard of living, the award of only \$400.00 per month of terminable alimony is inadequate. We refuse to penalize plaintiff for trying to live within her means and failing to show higher necessary expenses.⁶

An application of one of the *English* standards could justify the award made in this case. Plaintiff endured a poor standard of living during the marriage. She had little money to spend then so she should have little now. That result will preserve "the standard of living she enjoyed during marriage." But such a result is unfair. A divorce court is a court of equity. It is not equitable to preserve the status of limited income for one party and affluence for the other when the one sacrificed to help the other achieve such affluence. When the totality of the *English* standards are applied the award is clearly inadequate.

The court below also abused its discretion in limiting the award of alimony to a period of five years; being nonterminable by reason of remarriage for three years. In *Olson v. Olson*, 704 P.2d 564 (Utah 1985), the Utah Supreme Court analyzed a similar fact situation wherein the plaintiff wife was a high school graduate and had spent the majority of the marriage bearing and rearing the parties' six children. Defendant husband was a well paid consultant who provided his services to governmental agencies on a contract basis. While affirming the award of alimony in the amount of \$1,600.00 per month, the Court modified the award by striking its two-year limitation and making the alimony permanent subject to future changed circumstances. In support of its modification, the Court pointed to the wife's limited education, her lack of work experience, and that she had "no reasonable expectation of obtaining employment two years hence that will enable her to support herself at a standard of living even approaching that which she had during the marriage." *Id.* at 567. See also *Paffel v. Paffel*, 732 P.2d 96, 103 (Utah 1986).

For the reasons stated previously and based upon the facts in the record, we hold that plaintiff is entitled to an award of alimony on a continuing basis and we award permanent alimony in the sum of \$750.00 per month subject to the provisions of Utah Code Ann. §30-3-5 (1987).

THE MEDICAL DEGREE AND AWARD OF EQUITABLE RESTITUTION

We next must determine whether defendant's medical degree is marital property subject to division. In the recent case of *Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988), the Utah Supreme Court discussed this problem and noted that there is authority from other jurisdictions on both sides of the issue. However, this Court, in *Petersen v. Petersen*, 737 P.2d 237, 239-42 (Utah App. 1987) and *Rayburn v. Rayburn*, 738 P.2d 238, 240 (Utah App. 1987), analyzed the issue and held that a medical degree is not marital property subject to division in a divorce decree. We agree with the Utah Supreme Court "that an educational or professional degree is difficult to value and that such a valuation does not easily fit the common understanding of the character of property." *Gardner*, 748 P.2d at 1081. The Court in *Gardner* was not required to address the issue because there was significant other property accumulated during the marriage resulting from the increased earning capacity afforded by the medical degree and the numerous years the Gardners enjoyed the standard of living afforded by the medical degree. That is not the case here. The Court noted, "The cases which have refused to hold that professional degrees and practice constitute marital property subject to valuation and distribution have nonetheless assessed and divided the value of the degree or practice on the basis of other legal and equitable remedies." *Id.* at 1080-81. The Court described the common fact pattern applicable to this acknowledgment of the degree's equitable worth as a situation where "the husband is supported throughout a long graduate or professional program by the working wife, and the couple is divorced soon after graduation. In such cases, there are few marital assets to distribute, and the courts have considered other ways of compensating the spouse." *Id.* at 1081. This is essentially the situation presented here. While this marriage has continued for many years the only assets are the home and the enhanced earning capacity of defendant. The earning capacity must be recognized in fashioning those "legal and equitable remedies" necessary to assist plaintiff to readjust her life. The valuation and distribution of the medical degree in this case is not a viable alternative. Valuation would be speculative in the extreme, and distribution ignores the fact that the degree is personal to defendant.⁷ We prefer to follow the majority

rule, upheld in *Petersen* and *Rayburn*, that a medical degree is not subject to valuation and distribution in a divorce. However, this case is a striking example of a highly paid professional disposing of his wife with a minimum amount of support just as that professional is reaching a level of income for which both the professional and his wife have striven. This prevents the wife from enjoying the benefit of *her labor and sacrifice* in support of her husband's goals. See generally L. Weitzman, *The Divorce Revolution*, ch. 5, 124-35 (1985).

From the time of the marriage in 1968 until their separation in 1982, the parties enjoyed few of the material pleasures of life. The court found that "During the 14 years that the parties lived together, plaintiff assisted extensively in Defendant's obtaining a college education, medical degree and internship. In addition, plaintiff made substantial sacrifices in order to facilitate the completion of Defendant's medical schooling and internship." Plaintiff accepted the sacrifices necessary to support defendant's aspirations in anticipation of future benefits. The trial record shows the following exchange:

Q. Okay. Was there any discussion of future benefits that would be obtained through this?

A. Yes. He [defendant] told me that if I would sacrifice, and if I would see it through, that someday he would make it up to me and we would have material items that we had gone without. And his hours would be flexible and he would have more time to spend with himself and the children. If we would just be patient.

Defendant offered no rebuttal to the exchange.

This Court in *Petersen*, 737 P.2d at 242, foresaw the situation now at issue. Writing for the Court, Judge Orme recognized that an occasion might arise whereby one spouse was reaching a high level of income just at the time of divorce rather than the more frequent situation in which the parties had enjoyed the benefits of the husband's medical education for a number of years. Judge Orme wrote:

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* [*In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978)], 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 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).

Id. at n.4. This is the situation where our analysis "must become more creative to achieve fairness." *Id.* Equity demands a recognition of the sacrifices and contributions made by plaintiff in support of defendant's medical education. The defendant has been enriched by plaintiff's efforts and, therefore, plaintiff has earned an award of some permanent financial benefit, in her own right, that will allow her to share in the economic benefits achieved through their joint efforts. The modified award of traditional alimony merely maintains plaintiff on a plane modestly above that experienced by the parties during the marriage. Even this modest award may be lost through the happening of some future circumstance.⁹ The dissent would restrict plaintiff to an award of traditional alimony based upon defendant's newly acquired level of income. Because there has been little property accumulated and because the income was acquired after separation, plaintiff is entitled to a more permanent remedy.

This issue has engendered much case law. Many courts have held that a professional degree is not marital property subject to distribution but nevertheless believe some remedy must be created for the spouse who supported the attainment of that degree. A threshold factor is the meaning of "support" when the term is applied to the efforts of the non-professional spouse. Must "support" equate to direct financial assistance provided through full time employment while the student spouse devotes his or her full time efforts to course work? Is "support" rendered by a spouse whose full time activities are devoted to providing a home environment for the student

spouse and family? Here, plaintiff bore the children, was the principal in providing child care and maintaining the domestic setting, and was also employed part-time for several years while defendant attended medical school. To hold that plaintiff's only value is the income she generates ignores the value of her contributions in every other aspect of family life. The logical conclusion is that motherhood and nurturing of children is valueless; that preserving and maintaining a home is worthless; that the functions of mother, homemaker, and helpmate contribute nothing of value to a family. We refuse to so limit our definition of support. Certainly, our Supreme Court in analyzing traditional property distributions has never limited a wife to recovering only what she monetarily contributed to the marriage. *Huck v. Huck*, 734 P.2d 417 (Utah 1986). We hold in accordance with the court's finding that plaintiff contributed to and supported defendant's educational achievements.

The case law remedies in this situation establish a spectrum, from those narrowly focusing on financial support provided to the professional spouse, while he or she was a student, to those which consider the totality of the non-professional spouse's efforts in the family venture to obtain economic stability through education. For example, in *Hubbard*, 603 P.2d at 747, the wife was allowed to recover from her physician husband contributions to his direct support, school and professional training expenses, plus reasonable interest and adjustments for inflation.

A case recognizing more than strict financial contributions is *Saint-Pierre v. Saint-Pierre*, 357 N.W.2d 250 (S.D. 1984), in which the Supreme Court of South Dakota held, "in a proper case," the trial court should consider "all relevant factors" in awarding "reimbursement or rehabilitative alimony." These included "the amount of the supporting spouse's contributions, his or her foregone opportunities to enhance or improve professional or vocational skills, and the duration of the marriage following completion of the nonsupporting spouse's professional education." *Id.* at 262.

In *Washburn v. Washburn*, 101 Wash.2d 168, 677 P.2d 152, 159 (Wash. 1984), the Supreme Court of Washington listed and analyzed several factors the trial court must consider "in determining the proper amount of compensation for the supporting spouse." These include the supporting spouse's contributions for direct educational costs, no more than one-half what the couple would have earned had "the efforts of the student spouse not been directed towards his or her studies," "[a]ny educational or career opportunities which the supporting spouse gave up in order to obtain sufficiently lucrative employment, or to move to the city where the student spouse wished to attend school[,] and "[t]he future

earning prospects of each spouse, including the earning potential of the student spouse with the professional degree."

Wisconsin statutes allow a trial court to grant an order requiring maintenance payments to either party after considering several factors. Among these are:

(4) The educational level of each party at the time of marriage and at the time the action is commenced.

(5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.

(6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.

....

(8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocity or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.

(9) The contribution by one party to the education, training or increased earning power of the other.

Wis. Stat. §767.26 (1982), See also *Haugan v. Haugan*, 117 Wis.2d 200, 343 N.W.2d 796, 800-01 n.4 (Wis. 1984).

Clearly, some jurisdictions require courts to examine and value the contributions to a marriage partner's development. This appears to be the fair and equitable approach. Therefore, we hold that plaintiff is entitled to an award of "equitable restitution" in addition to traditional alimony. We use the term equitable restitution to describe the award in order to establish a clear distinction between it and traditional alimony or any other form of spousal maintenance or support. The function of equitable restitution is to enable a spouse to share the *newly obtained* earning capacity of a former spouse who has achieved that capacity through the significant efforts and sacrifices of the requesting spouse which were detrimental

to that spouse's development. It is nothing more than an equitable sharing of the rewards of both parties' common efforts and expectations.¹⁰

Factors to be analyzed in determining an award of equitable restitution include, but are not limited to: (1) the length of the marriage; (2) the financial contributions and personal development sacrifices made by the requesting spouse; (3) the duration of these contributions and sacrifices during the marriage; (4) the resulting disparity in earning capacity between the requesting spouse and the spouse benefited thereby; and (5) the amount of property accumulated during the marriage.¹¹ An award of equitable restitution will not terminate upon plaintiff's remarriage, and may be payable in lump sum or periodically over time depending on the circumstances of each case.¹²

CONCLUSION

The judgment of the trial court is affirmed in part and reversed in part. The case is remanded to the trial court for the purpose of taking any further evidence that may be necessary to determine the amount of equitable restitution to be awarded to plaintiff and its manner of payment and for entry of judgment pursuant to this opinion. Costs against defendant.

Richard C. Davidson, Judge

I CONCUR:

Judith M. Billings, Judge

1. The decree of divorce utilizes the term "deduction" and the United States Code utilizes "exemption" when referring to the individual allowance subtracted from income when computing tax owed.

2. The lower court also found that plaintiff expected a 25% reduction in her salary because of a voluntary transfer to a less stressful position within her employment.

3. Section 78-45-7(2) lists the following factors to be considered in awarding prospective support:

(a) the standard of living and situation of the parties;

(b) the relative wealth and income of the parties;

(c) the ability of the obligor to earn;

(d) the ability of the obligee to earn;

(e) the need of the obligee;

(f) the age of the parties;

(g) the responsibility of the obligor for the support of others.

4. This Court notes, however, that a Task Force established by the Judicial Council is presently investigating the propriety of adopting Uniform Child Support Guidelines for Utah based upon current economic data.

5. The award to age 21 was made by the trial court pursuant to Utah Code Ann. §15-2-1 (1986).

6. A review of plaintiff's expenses shows them to be extremely low and based upon what she actually spent rather than estimates of what she needed to sustain herself and her children at a reasonable standard of living based upon the total family income.

7. It is argued that estimating the value of a medical degree is no more speculative than measuring damages in a wrongful death case. However, in wrongful death, the measurement begins at death and is subject to no future variables introduced by the decedent. Here, we must guess at the future course of defendant's career. Will he continue to practice in the same specialty in the same locale? A future decision or happenstance could totally change or even terminate the value of the medical degree. Can defendant then return to court to change the valuation and distribution based upon the more certain circumstances? Could plaintiff prevent defendant from making decisions which could impact the value of the degree?

8. We must wonder whether defendant could have or would have entered and completed medical school had plaintiff obtained a divorce earlier. Defendant likely would have been obligated to pay alimony and child support. He would probably not have had the benefit of the family home and surely would not have had the benefit of plaintiff's part-time work.

9. Traditional alimony forces the recipient to make future choices with the understanding that such choices may result in the loss of alimony. See Utah Code Ann. §§30-3-5(5) and (6) (1987). No one should be forced into making such choices, particularly when the other party, who enjoys his position through the joint efforts of both parties, is under no similar restrictions on behavior. We note what the Oklahoma Supreme Court wrote in *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979), when responding to the argument that the wife's recovery from her physician husband, whom she helped through medical school, be limited to alimony for support and maintenance. The per curiam decision reasoned "To do so would force her to forego remarriage and perhaps even be celibate for many years simply to realize a return on her investments and sacrifices of the past twelve years." *Id.* at 752 (footnote omitted).

10. We emphasize the specific nature of the facts presented in this case and stress that equitable restitution would not be awarded in the more frequent case where the marriage lasted for many years after the professional degree had been granted. There, sufficient assets would have been accumulated and an appropriate distribution to the requesting spouse would enable that spouse to share in the economic benefits earned as a result of the degree.

11. Because this case establishes a new form of spousal award, we hesitate to state that the enumerated factors in determining equitable restitution are all inclusive as of the writing of this opinion. See *Biswell v. Duncan*, 742 P.2d 80, 86 n.5 (Utah App. 1987).

12. For example, in following the Utah Supreme Court's admonishment against unnecessarily tying a couple together after divorce as stated in *Gardner*, 748 P.2d at 1079, defendant's lien on the family home might be extinguished and the amount credited against the overall award of equitable restitution. We recognize that this would probably be only a fraction of the total amount of equitable restitution awarded.

JACKSON, Judge (dissenting):

I respectfully and loyally dissent.

Loyal to the majority, but not to their opinion, I flag their decision as being at the forefront of judicial activism. I regret that I

could not dissuade my colleagues from breaking new ground with the invention of "equitable restitution." The opinion manufactures a divorce remedy that is (1) outside our statutory scheme;¹ (2) without precedent in the pronouncements of the Utah Supreme Court; (3) not requested by the appellant;² (4) forced on the trial courts for further development; (5) not needed to do justice to the parties in this case and may, in fact, work inequity.

EQUITABLE RESTITUTION OR SUPPORT

In *Petersen v. Petersen*, 737 P.2d 237 (Utah App. 1987), this court held that an advanced degree is not marital property subject to division upon divorce, even where this achievement has been made possible through the assistance of the other spouse. We have, nonetheless, acknowledged that there may be situations where equity demands an extraordinary award of nonterminable rehabilitative or reimbursement alimony in order to compensate a spouse who "endure[s] substantial financial sacrifices or defer[s] her own education to help" the other spouse in obtaining an advanced degree. *Rayburn v. Rayburn*, 738 P.2d 238, 241 (Utah App. 1987). This might occur where: (a) the parties mutually endeavor to increase one spouse's earning capacity, but at the time of trial the spouse who has benefited from the parties' endeavors is merely on the threshold of a substantial increase in earnings, *Petersen*, 737 P.2d at 242 n.4; or (b) there is insufficient marital property from which to make a compensatory award to the contributing spouse. See *Gardner v. Gardner*, 748 P.2d 1076, 1081 (Utah 1988). In such cases, the spouse who has made substantial financial sacrifices and contributions to increase the earning capacity of the other spouse is entitled to recompense for those contributions that are beyond the duty of support normally associated with marriage, less any benefits received. See, e.g., *Roberto v. Brown*, 107 Wis.2d 17, 318 N.W.2d 358 (1982); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982).

Decisions from other jurisdictions involving compensation of the spouse who has contributed to the attainment of an advanced degree have generally involved four factors:

[F]irst, they share the loss of the husband's foregone earnings during the period of investment; second, the wife provides the financial capital to enable her husband to forego those earnings; third, she may forego opportunities to further the development of her own earning capacity; fourth, and most significantly, they both expect to gain a return on the full costs of the investment through continuation of the marriage. Thus, the working spouse

predicates her sacrifice of income and personal educational advancement on the expectation of future returns to her from sharing in her husband's enhanced earning capacity.

Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 Kan. L. Rev. 379, 380 (1980).

The extraordinary award fashioned by the majority in this case is inappropriate for several reasons. First, Mrs. Martinez did not provide the financial capital that enabled her husband to attain his college and advanced degree. Instead, Dr. Martinez provided the bulk of the family's financial support, in addition to paying for his education. This is not the classic "working spouse/student spouse" situation necessitating an extraordinary award. See, e.g., *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979); *Haugan v. Haugan*, 117 Wis.2d 200, 206, 343 N.W.2d 796, 799-800 (1984); *Roberto*, 318 N.W.2d 358.

Second, no evidence was presented that Mrs. Martinez deferred her own career or education in order to advance the education of her husband. Both parties had only high school educations at the time of marriage. Mrs. Martinez testified at trial that she wanted to continue her own education someday but had not yet begun doing so, even though her employer would pay three-fourths of her school costs and would allow her to continue working.

While Mrs. Martinez raised the children and performed the household responsibilities, Dr. Martinez provided the family's primary financial support in the form of his inheritance monies, funds from student loans (which the trial court required him to repay), and proceeds from his G.I. Bill. Mrs. Martinez worked part-time during three of the seventeen years of their marriage. Her nominal total earnings of approximately \$2,300 were applied to family living expenses. During the marriage, the family took modest vacations, purchased two homes, furniture and furnishings, and two automobiles. Equity simply does not demand an extraordinary remedy in this case because no extraordinary injustice is present.

Even if Mrs. Martinez had made substantial financial contributions or educational sacrifices in order to further her husband's education and career, there are other reasons why the creation of a new hybrid award of equitable restitution is not warranted in this case. Unlike the hypothetical case contemplated by this court in *Petersen*, 737 P.2d at 242 n.4, in which the spouse with an advanced degree is only on the threshold of reaping an enhanced income at the time of the parties' divorce, Dr. Martinez was already earning a gross annual

income of \$100,000. He is not merely at the threshold of significant earnings; he is already standing in the parlor. In addition, the parties here accumulated real and personal property from which a compensatory property award could be made: \$34,561 equity in a home; three vehicles worth \$3,995; an IRA account valued at \$2,000; stocks of unknown value; and household furnishings valued at \$6,500. The presence of both substantial earnings and accumulated property at the time of the divorce provides an adequate basis for rendering an extraordinary remedy, if Mrs. Martinez is entitled to recompense.

On the facts presented in this case, there are additional reasons why I believe the majority's disposition of this appeal is misguided: (1) equity can be achieved under current alimony and property distribution statutes and case law; (2) an award of equitable restitution coupled with the majority's generous alimony and child support awards is double-dipping; and (3) an award of equitable restitution, in effect, treats the professional education as "property" subject to division upon dissolution of a marriage.

First, in fashioning an award of alimony, the trial court must consider the financial condition and needs of the recipient spouse,³ the ability of that spouse to be self-supporting, and the ability of the other spouse to pay. *Paffel v. Paffel*, 732 P.2d 96, 100-01 (Utah 1986); *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985).

Dr. and Mrs. Martinez were married for approximately seventeen years. The trial court found that Dr. Martinez incurs expenses associated with his employment of approximately \$7,000 per year, leaving approximately \$93,000 annually or \$7,750 per month. Mrs. Martinez earned approximately \$1,033 per month and estimated that she required \$2,050 per month to meet the expenses for herself and the three children. Under the temporary support order, she had been receiving \$1,100 per month in child support. She sought additional monies to make up the difference between her net earnings and expenses and to provide her with the means to make major house repairs.—In the event that a professional degree was not viewed as a marital asset, she sought an alimony award not subject to termination upon remarriage.

The trial court stated that it considered the large disparity between the parties' respective earning abilities and the fact that the wife's resources were inadequate to meet her needs. However, I agree with Mrs. Martinez that the trial court failed to apply these factors correctly in that the award of \$400 per month alimony, nonterminable for three years and continuing for a period of five years, is so low as to constitute a clear and prejudicial abuse of discretion. Mrs. Martinez earns \$1,033 gross income per month. The alimony

awarded by the trial court, plus her net monthly earnings of \$846, provides her with approximately \$1,246 with which to meet her monthly expenses, excluding sums awarded for child support. In contrast, Dr. Martinez enjoys approximately \$7,750 gross monthly income. Considering the disparate earning capacities, the trial court's alimony award was insufficient and inequitable in that it failed to provide the parties with a comparable standard of living.

Second, based on Dr. Martinez's earnings at the time of trial, the majority has increased total child support from \$900 to \$1,800 and increased the duration and amount of alimony to a permanent award of \$750 per month. An award of equitable restitution on top of the already generous awards of alimony and child support fashioned by the majority is duplicative and not necessary to achieve equity.

Finally, an advanced degree is the memorialization of an individual's "attainment of the skill, qualification and educational background which is the prerequisite of the enhanced earning capacity." *Wehrkamp v. Wehrkamp*, 357 N.W.2d 264, 266 (S.D. 1984); cf. *Petersen*, 737 P.2d at 240 (quoting *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978)(en banc)). The value of an advanced degree lies in the potential for increased earnings made possible by the degree and by other factors and conditions of employment. If the advanced degree itself does not fall within the classification of marital "property" subject to distribution upon divorce, then neither should an individual's enhanced earning capacity. *Hodge v. Hodge*, 337 Pa. Super. Ct. 151, 486 A.2d 951 (1984); *Wehrkamp*, 357 N.W.2d at 266; *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975).

The majority declares that:

The function of equitable restitution is to enable a spouse to share the *newly obtained* earning capacity of a former spouse who has achieved that capacity through the significant efforts and sacrifices of the requesting spouse which were detrimental to that spouse's development. It is nothing more than an equitable sharing of the rewards of both parties' common efforts and expectations.

By creating a divisible interest in Dr. Martinez's enhanced earning capacity, this court has awarded a nonterminable property interest in a medical degree which goes beyond the compensation approved in *Petersen*. The majority has not limited its award to Mrs. Martinez's contributions toward her husband's medical education costs; it has taken the further step of providing financial recompense for lost expectations. I would reject any compensation formula based on

future earning capacity. The factors and variables involved in the valuation of an enhanced earning capacity are as speculative as those involved in an attempt to value an advanced degree; such speculation can only lead to inequity.

Provision for Mrs. Martinez's needs is best dealt with through a generous but fair distribution of property and award of alimony,⁴ not through the creation of a distinctly new form of cleverly disguised marital property for which there is no precedent.

CHILD SUPPORT

Both husband and wife have a duty to support their children. Utah Code Ann. §§78-45-3, -4 (1987). "Child support awards should approximate actual need, and, when possible, assure the children a standard of living comparable to that which they would have experienced if no divorce had occurred." *Peterson v. Peterson*, 748 P.2d 593, 596 (Utah App. 1988).

The trial court found that Dr. Martinez earned approximately \$7,750 gross income per month. Dr. Martinez testified that his earnings were established under a two-year employment contract, that he was in the 50% tax bracket, and that he had no tax shelter. The trial court also found that Mrs. Martinez earned approximately \$1,033 gross income per month. Mrs. Martinez testified to net monthly earnings of \$846 plus nominal royalties from an oil well. She anticipated a reduction in her earnings as a result of her voluntary cutback in working hours. Mrs. Martinez calculated monthly living expenses for herself and the three children at \$2,050. This was the only evidence of the dollar amount of the children's monthly need for support. The majority has elected to disregard that evidence because they think the figure was too low. Having rejected the only evidence of the children's need, the majority makes its own independent estimate.

Using their own estimate of need and the parties' gross monthly incomes, the majority has awarded \$600 per month per-child for a total of \$1,800.⁵ Their action fails to account for the effects on each party of: (1) tax rate changes under the 1986 Tax Reform Act;⁶ (2) their award of the tax exemptions for all the children to Mrs. Martinez; (3) the disposition of the home mortgage debt as discussed below; (4) their increase of alimony from \$400 to \$750 per month; and (5) their equitable restitution award in an amount to be determined by the trial court.

I would remand this case on the child support issue for the taking of further evidence and a current determination of the children's need and the ability of both parents to pay child support, to be considered with the other appropriate adjustments in the parties' incomes and liabilities.

HOME MORTGAGE

The parties stipulated at trial that their jointly-acquired home had a current market value of \$63,000 and an equity of \$34,561. The stipulated figures reveal the existence of a home mortgage obligation in the sum of \$28,439. However, neither the trial court nor counsel identified this sizeable debt in the distribution of debts and property. Nor do the trial court's written Findings of Fact specify who must assume the \$28,439 mortgage obligation and make the payments. The record reveals that Mrs. Martinez had been making a \$309 monthly mortgage payment and the court stated that each party was to assume and discharge those debts that they have been paying.

Paragraph 19 of the written Findings of Fact states that the "[p]laintiff [Mrs. Martinez] should be awarded the exclusive use and occupancy of the parties' residence subject to a lien in favor of Defendant for the sum of \$17,528.00 ..." The Decree of Divorce reiterates this language and awards plaintiff "exclusive use and occupancy," subject to a lien in defendant's favor. The court's oral ruling was: "[t]he Court will award to the the [sic] Plaintiff the home of the parties, subject to a lien for defendant's share of the equity in the amount of one-half of the net equity."

The court's allocation of the parties' financial obligations includes no reference to \$28,439 of mortgage debt. Mrs. Martinez was required to pay specified debts and obligations totalling \$8,179.73. The \$28,439 was not specified and does not appear in the record. Dr. Martinez was required to pay specified debts and obligations totalling \$26,169.04. If Mrs. Martinez must assume and pay the house mortgage, her post-divorce debt responsibility is \$36,618.73, \$10,449.69 more than his.

Conclusion of Law C provides that, "[i]n order to make the distribution ... [of marital property] as equal as possible, Plaintiff should be awarded the real property ... subject to a lien in favor of Defendant for one-half of the present equity therein, that being for the sum of \$17,678." Although the stated objective is equality of distribution, the requirement that Mrs. Martinez assume and pay the mortgage would burden her by an additional \$14,219.50 (1/2 of \$28,439), despite the parties' widely disparate disposable income and the fact that Mrs. Martinez must support herself and the children on less than \$2,200 per month. Since the court failed to specifically identify the home mortgage, the court also failed to include the amount of \$28,439 in the equity calculation. Thus Mrs. Martinez became personally responsible to pay the major debt of the parties.

The trial court's inclusion of the home mortgage in Mrs. Martinez's debt burden as part of the property and debt distribution is an abuse of discretion, even without looking

at the gross disparity of income. The home mortgage matter alone justifies a remand.

CONCLUSION

The majority has fixed the amount of alimony and child support to be paid. This action deprives the trial court, on remand, of any flexibility to adjust the debts, property, alimony, and support awards and to fashion an overall award package that harmonizes all the variables. The trial court's discretion will be so restricted that an equitable outcome will be impossible. This case should instead be remanded for retrial on the alimony, child support and property distribution issues.

Norman H. Jackson, Judge

1. The majority acknowledges the existence of our divorce statutes in remanding the child support and alimony issues. The majority states. (a) "On remand, the trial court shall enter its order for child support in accordance with Utah Code Ann. §30-3-5.1 (1987)," i.e., raise the total amount of child support from \$900 to \$1,800 per month; (b) "[W]e award permanent alimony in the sum of \$750 per month subject to the provisions of Utah Code Ann. §30-3-5 (1987)," i.e., increase alimony from the \$400 awarded by the trial court. However, no statute is cited as the basis for equitable restitution. Our divorce statutes and case law authorize only the distribution of property and an award of support for the benefit of the spouse and children Utah Code Ann. §§30-3-1 to 30-6 (1987)

2. Mrs. Martinez argued both at trial and on appeal that a professional degree is a property interest subject to division upon divorce. Since equitable restitution was not a part of Utah law until this majority opinion was crafted, the trial was not conducted and the evidence was not presented under that theory.

3. In determining the "need" of the recipient non-student spouse, the trial court is not limited to considering only the low living expenses incurred during the time that the other spouse studied to obtain an advanced degree. The Utah Supreme Court recently stated in *Gardner*, a case also involving an advanced degree, that alimony should "equalize the parties' respective standards of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage." *Gardner*, 748 P.2d at 1081; accord *Boyle v. Boyle*, 735 P.2d 669, 671 (Utah App. 1987), *Petersen*, 737 P.2d at 239, *Olson v. Olson*, 704 P.2d 564, 566 (Utah 1985), *Higley v. Higley*, 676 P.2d 379, 381 (Utah 1983). Although *Gardner* involved a marriage in which the parties enjoyed a high standard of living for many years prior to the divorce, the language of *Gardner* was clearly aimed at preventing the divorced spouse of a high income earner from suffering a major decline in standard of living following a divorce. This language should not be construed as prohibiting a trial court from making an award that raises the recipient spouse's standard of living from what it was during the marriage where, as here, the student spouse experiences a major increase in earnings just prior to the marriage's termination. In other words, the "need" of the recipient spouse in this situation is not necessarily what he or she managed to live on during the lean school years.

4. Unlike the majority's award of equitable restitution, an alimony award can be modified, in appropriate circumstances, under the court's exercise of continuing jurisdiction Utah Code Ann §30-3-5(3)(1987) This is particularly important in the situation presented here, where Dr Martinez is working under a contract of limited duration

5 The majority opinion interchanges the terms "adjusted gross income" and "gross income" in comparing the amount of child support awarded by the trial court with an award calculated under guidelines from Colorado and Wisconsin, even though the terms have markedly different meanings Although the majority disclaims reliance on the child support guidelines from other jurisdictions, they do, in fact, rely upon the potentially greater amounts available in other jurisdictions in order to justify an award of \$600 per month per child

The problem with this analysis is that the guidelines adopted by other jurisdictions are irrelevant for purposes of an award in Utah Child support guidelines utilize different approaches to allocate economic responsibility for children of divorced parents depending upon varying public policy See generally Cassetty, "Emerging Issues in Child Support Policy and Practice," in *The Parental Child Support Obligation Research, Practice and Policy* 3 (J Cassetty ed 1983)

As the majority opinion demonstrates, the recommended amount of child support under other jurisdictions' guidelines may radically differ because of differences in the underlying policy goals adopted by a given state The guidelines of some states, such as Wisconsin, do not adjust for the income of the custodial parent This is obviously inconsistent with Utah's adoption of a public policy which holds both parents responsible for the support of their children For these reasons, whether the support guidelines in other states would afford a higher level of support should not be a factor in making an equitable award in Utah

6 The Tax Reform Act of 1986 will have a significant impact on Dr Martinez's disposable income, assuming ongoing gross income in the \$100,000 range He testified at trial that he had to set aside one-half of his income to pay taxes For 1988 and later tax years, there are two basic tax rates for individuals, 15% and 28% In addition, the law effectively creates a third rate of 33% on income above certain levels Thus, portions of Dr Martinez's income will be taxed at 15%, 28%, and 33% rather than all at 50% Moreover, Utah income tax laws have changed in the interim Counsel in divorce actions would be well advised to provide the trial court with complete information regarding the tax implications of the property distribution, alimony, child support and dependency exemption arrangements being proposed The combined disposable income available to the severed family can often be increased by prudent tax planning during a divorce

Gary V. PETERSEN, Plaintiff
and Appellant,
v.

Julie A. PETERSEN, Defendant
and Respondent.
No. 860007-CA.

Court of Appeals of Utah.

May 18, 1987.

Parties' marriage was dissolved by the Second District Court, Weber County, Calvin Gould, J., and husband appealed from court's division of marital property. The Court of Appeals, Orme, J., held that: (1) medical degree that husband earned during marriage while wife was principal wage earner did not constitute "property" subject to division in connection with parties' divorce, but (2) award of \$1,000 per month to wife, to compensate her for her "share" in husband's advanced degree, could be sustained by recharacterizing it as provision for additional alimony.

Affirmed and remanded with directions.

1. Divorce \S 184(4)

Generally, trial court is permitted considerable discretion in adjusting financial and property interests of parties to divorce action, and its determinations are entitled to presumption of validity.

2. Divorce \S 252.3(1)

Medical degree that husband earned while wife was principal wage earner was not "property" subject to division in connection with parties' divorce.

See publication Words and Phrases for other judicial constructions and definitions.

3. Divorce \S 252.3(1)

Advanced degree is or confers intangible right which cannot properly be characterized as "property," subject to division between spouses in connection with their divorce; declining to follow *Daniels v. Daniels*, 20 Ohio Op.2d 458, 185 N.E.2d 773.

4. Divorce \S 237

Traditional alimony analysis is appropriate and adequate method for making adjustments between spouses, one of whom has helped finance the other's advanced education, where divorce does not take place until several years after second spouse has earned his/her degree.

5. Divorce \S 247

"Rehabilitative" or "reimbursement" alimony not terminable upon remarriage may be appropriate, to compensate one spouse for sacrifice of helping to finance other spouse's advanced degree, where divorce takes place shortly after degree is obtained, before first spouse has had chance to enjoy comfortable life-style which degree will permit.

6. Divorce \S 240(2)

Award of \$1,000 per month to doctor's wife, to compensate wife for her "share" in husband's medical degree, could be sustained by recharacterizing not as property settlement but as provision for additional alimony, to extent such additional alimony was warranted under circumstances.

7. Divorce \S 237

Criteria considered in determining reasonable award of support must include financial conditions and needs of spouse in need of support, ability of that spouse to produce sufficient income for his or her own support, and ability of other spouse to provide support.

8. Divorce \S 240(2)

Alimony of \$2,000 per month was not unreasonable, where wife had substantially financed husband's medical education, subsequently became accustomed to comfortable life style that medical degree made possible, and enjoyed much different earning potential than that of husband, to whom all of income-producing assets had been awarded.

Paul M. Belnap, Strong & Hanni, Salt Lake City, for plaintiff and appellant.

Pete N. Vlahos, Vlahos & Sharp, Ogden, for plaintiff and appellant.

Before ORME, JACKSON and
BENCH, JJ.

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 install-

ments 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. Peter-

sen's interest therein over a 10-year period

STANDARD OF REVIEW AND PRELIMINARY CONSIDERATIONS

[1] 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. *Eg., 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

[2] 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 professional 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 Hortsman*, 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*, 123 N.H. 358, 461 A.2d 733, 735 (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

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.

community property), *Hubbard v Hubbard*, 603 P 2d 747, 750-51 (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

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).

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 couple's 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

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

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 715-16, 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 585-88, 489 N.E.2d at 716-18, 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.

[3-5] 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

award maintenance to cases where the spouse seeking it was unable to support himself or herself. 574 P.2d at 79.

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

[6] 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 corpo-

ration. We find the basic property division equitable.

[7] 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).

[8] 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

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).

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 406 (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

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.*

is otherwise affirmed. Each party shall bear his or her own costs of appeal.

BENCH and JACKSON, JJ., concur.



**Dawn W. HORNE, Plaintiff
and Respondent,**

v.

**W. Reid HORNE, Defendant
and Appellant.**

No. 860060-CA.

Court of Appeals of Utah.

May 18, 1987.

The 3rd District Court, Salt Lake County, Kenneth Rigtrup, J., entered nunc pro tunc order distributing property incident to previously granted divorce. Ex-husband appealed. The Court of Appeals, Billings, J., held that: (1) statute committing broad discretion to trial courts in granting nunc pro tunc orders in domestic relations matters was not limited in scope to cases involving marital status of the parties; (2) statute eliminated the common-law requirement of previously made final order; and (3) good cause did not exist for entry of the order nunc pro tunc.

Reversed and remanded.

1. Courts ⇐114

The court has the power to act nunc pro tunc—to do act upon one date and make it effective as of prior date; the common-law power of nunc pro tunc allows the court to correct errors or supply omissions to permit the record to accurately reflect that which in fact took place. U.C. A.1953, 30-4a-1.

2. Statutes ⇐189

In construing legislative enactments, the reviewing court assumes that each

term in the statute was used advisedly, and thus, interprets and applies the statute according to its literal wording unless it is unreasonably confused or inoperable.

3. Divorce ⇐254(1)

Statute committing broad discretion to trial courts in granting nunc pro tunc orders in domestic relations was not limited in scope to cases involving marital status of the parties, but could also apply to property division problems; by its wording, the statute applies to any and all matters relating to divorce proceedings. U.C.A.1953, 30-4a-1.

4. Statutes ⇐222, 239

Statutes are not to be construed as effecting any change in the common law beyond that which is clearly indicated; however, where statute is in derogation of the common law, and is also remedial in nature, the remedial application should be construed so as to give effect to its purpose.

5. Divorce ⇐162

Statute committing broad discretion to trial courts in granting nunc pro tunc orders in domestic relations matters eliminated the common-law nunc pro tunc requirement of previously made final order; literal reading of statute indicated legislative intent to change standard for entry of nunc pro tunc orders in domestic proceedings from requiring previously made final order as delineated by common law to requiring finding of "good cause," and legislative history indicated that statute was remedial in nature; *Preece v. Preece*, 682 P.2d 298 (Utah), superseded by statute. U.C.A.1953, 30-4a-1.

6. Divorce ⇐254(1)

"Good cause" did not exist to enter nunc pro tunc order distributing property incident to previously granted divorce; agreement between parties expressly stated that property was to be transferred to equalize the marital assets in order to insure that the transfer of property would not be taxable event, and in entering order prior to effective date of the Tax Reform Act of 1984 and without the essential and

ry intent is clearly revealed in the words he wrote. Since every required statutory element was expressed in his handwriting, no sound purpose or policy was served by invalidating Fitzgerald's holographic will. *See Estate of Black*, 30 Cal 3d 880, 889, 641 P 2d 754, 759, 181 Cal Rptr 222, 227 (1982). The will with two dates is facially ambiguous about whether it was executed before or on the same date as the single-dated will. However, the terms of the twice-dated will do not conflict with the other will's terms. These consistent provisions must be considered valid. Utah Code Ann § 75-2-503 (1978).

The holographic wills should have been admitted to probate. The order of the trial court appointing Kenneth Fitzgerald as the personal representative of decedent is vacated, and the case is remanded for proceedings consistent with this decision. No costs are awarded.

BILLINGS and GARFF, JJ., concur



**Catherine RAYBURN, Plaintiff
and Respondent,**

v.

**Robert L. RAYBURN, Defendant
and Appellant.**

No. 860022-CA.

Court of Appeals of Utah

May 29, 1987

Action was brought for divorce. The Third Judicial District Court, Salt Lake County, Dean E. Conder, J., entered divorce decree, and husband appealed. The Court of Appeals, Orme, J., held that (1) installment payments to account for husband's medical degree could not be sustained as property settlement, but payments could be properly affirmed as tempo-

rary alimony, and (2) award to wife of one-half interest in husband's retirement fund was not abuse of discretion.

Affirmed as modified.

1. Divorce \S 237, 252.3(1)

Advanced degree or professional license is not marital property subject to division upon divorce, but an advanced degree often accompanies disparity in earning potential that is appropriately considered as factor in alimony analysis.

2. Divorce \S 247, 252.3(1)

Cash settlement of \$45,000, payable in monthly installments of \$750, could not be sustained as property settlement, in that value represented compensation for husband's professional degree but payments could be properly affirmed as temporary alimony, given wife's needs and husband's ability to provide support.

3. Divorce \S 247

Award to wife of one-half interest in present value of husband's retirement fund, payable over five years with interest, was not abuse of discretion in that fund was asset accumulated during marriage and especially where court permitted payments to be treated as "alimony" for tax purposes.

Gaylen S. Young, Jr., Salt Lake City for defendant and appellant.

B. L. Dart, Salt Lake City, for plaintiff and respondent.

Before ORME, BENCH and JACKSON, JJ.

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

[1] Recently this court held that an advanced degree or professional license is not marital property subject to division upon

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 con-

divorce *Petersen v Petersen*, 737 P 2d 237 (Utah App 1987). However, an advanced degree often accompanies a disparity in earning potential that is appropriately considered as a factor in alimony analysis. See *id.*, 243. We reaffirm our holding in *Petersen* and analyze the instant appeal under the same analysis employed in that case.

[2] 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 five-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 ex-

clusions 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 payment, 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 instrument 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.)

pressly 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*, 737 P.2d at 242 n. 4. However, this is not such a case. Dr Rayburn acquired

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

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, adequately meets Mrs Rayburn's support needs and is readily sustainable under the criteria outlined in *Jones*.

THE RETIREMENT PLAN

[3] 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 *Engert v Engert* 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

elapse of ten years. See *Petersen v Petersen* 737 P.2d at 243 n. 5. 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).

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 manifest injustice or inequity as to indicate a clear abuse of discretion. *E.g., Turner v Turner*, 649 P2d 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, corre-

spondingly, to delete the \$45,000 cash award. The decree is otherwise affirmed. Each party shall bear his or her own costs of appeal.

BENCH and JACKSON, JJ, concur



SCIENTIFIC ACADEMY OF HAIR DESIGN, INC., a Utah corporation, dba Mediterranean Hair Academy, Plaintiff and Appellant,

v

Robert O BOWEN, in his official capacity as director of the Division of Registration within the Department of Business Regulation, a Department of the Government of the State of Utah, Defendant and Respondent

No 860035-CA

Court of Appeals of Utah

June 8, 1987

Administrative suspension of license to operate a cosmetology/barbering school was affirmed by order of the District Court, Third Judicial District, Salt Lake County, James S Sawaya, J, and school appealed. The Court of Appeals, Billings, J, held that (1) the Court of Appeals had jurisdiction to hear the appeal, but (2) the findings in support of the suspension were not contrary to a clear preponderance of the evidence, even assuming such standard rather than the "arbitrary and capricious" standard was applicable.

Affirmed

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 en-

titling 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.

a somewhat similar instruction was harmless error. Furthermore, the property stolen was not fungible property which defendant might have legitimately possessed. Rather, the checks were identified as property belonging to others were shown to have been forged and would not legitimately have been in his possession under any circumstances.

Affirmed.

HALL, C.J., concurs.

DURHAM, Justice (concurring separately):

I concur in the majority opinion, but write separately to emphasize the obligation of defense counsel to notify judges who have ruled on pretrial suppression issues that defendants' objections to challenged evidence are reserved and not withdrawn, thus alerting those judges to the possibility that trial evidence may affect the validity of earlier rulings. I agree that in this case there was an extensive hearing on defendant's motion to suppress, and it is quite clear from the record that defense counsel did not intend to waive any related evidentiary objections at trial. In fact, several ambiguous references during trial to a "prior motion" may have referred to defendant's pretrial motion to suppress. It is important, however, that trial judges be given the opportunity to review pretrial suppression rulings when and if there is any likelihood that they were erroneous. When the pretrial judge is also the trial judge, unlike the circumstance in *State v. Lesley*, 672 P.2d 79, 82 (Utah 1983), this is easily accomplished by indicating on the record, either at the end of the pretrial hearing or at the trial outside the presence of the jury, that there is a continuing objection to the evidence challenged in the motion to suppress.

HOWE, and ZIMMERMAN JJ.,
concur in the concurring opinion of
DURHAM, J.



Betty M. GARDNER, Plaintiff
and Appellant,

v.

William James GARDNER, Defendant
and Respondent.

No. 19246.

Supreme Court of Utah.

Jan 4, 1988.

Divorce decree was entered by the Second District Court, Weber County, Ronald O. Hyde, J., and wife appealed. The Supreme Court, Stewart, Associate C.J., held that (1) trial court was required to value husband's retirement account, (2) wife was entitled to findings in support of denial of her request for portion of husband's medical assets, (3) regardless of whether evaluation and distribution of a professional degree or professional practice is ever appropriate, it was inappropriate in the present case where marriage was of long duration and present earnings and business assets provided a more accurate measure of the true worth of wife's investment in husband's degree, and (4) alimony award was insufficient and inequitable.

Reversed and remanded.

Howe, J., filed opinion concurring and dissenting.

1. Divorce \Rightarrow 286(5)

Though the Supreme Court may modify decisions of trial court, trial court's apportionment of marital property will not be disturbed unless it is clearly unjust or a clear abuse of discretion.

2. Divorce \Rightarrow 252(4)

Marital property includes pension fund or insurance, but dividing retirement or pension funds is not necessarily consistent with principles of equitable distribution in all cases, and providing for payments when

payout begins should be employed only in rare instances.

3. Divorce \S 252.3(4)

Trial court, in apportioning marital property upon divorce, was required to at least consider the value of the husband's retirement account, and alternatives available for taking that value into account would include requiring husband to pay half of net present value to wife in annual installments, or reapportioning property distribution to offset that value

4. Divorce \S 253(4)

Wife was entitled to finding in support of denial of her request for a portion of the assets of husband's medical assets, and it was error to refuse to place present value thereon on the ground that the assets were futuristic

5 Divorce \S 252.3(1)

Goodwill is properly subject to equitable distribution upon divorce

6 Divorce \S 252.3(1)

Regardless of whether professional degree and professional practice may in appropriate cases constitute marital property subject to evaluation and distribution upon divorce wife's request for property interest in husband's medical degree was inappropriate where the marriage was of long duration and present earnings and business assets provided a more accurate measure of the true worth of the wife's investment in her husband's degree

7. Divorce \S 237

Alimony award should, after marriage of long duration and to the extent possible equalize the parties' respective standards of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage

8 Divorce \S 240(2)

Alimony award of \$1,200 per month until husband's retirement and \$600 per month thereafter was an abuse of discretion where husband was a physician with earnings of \$6,000 per month wife had not been employed for 30 years husband had substantial retirement assets, and wife

would qualify for social security payments only as an "ex-wife married over 20 years"

9. Divorce \S 225

There was no error in divorce case in failing to award attorney fees to wife, where portion of property award was for purpose of assisting wife to pay attorney and no showing was made in trial as to the nature and amount of fees

Pete N. Vlahos, Ogden, for plaintiff and appellant

C. Gerald Parker, Ogden, for defendant and respondent

STEWART, Associate Chief Justice

Plaintiff Betty Gardner appeals from a decree awarding alimony and attorney fees in a divorce action she brought against her former husband, William Gardner. We reverse and remand for further consideration.

Mr. and Mrs. Gardner were married at Steels Tavern, Virginia, on April 17, 1950. No children were born to them, but the couple adopted two children who are now both adults. Early in the marriage Mrs. Gardner worked full time as a secretary while Mr. Gardner completed his medical training. Mr. Gardner also worked various jobs, and his parents provided support in the form of medical school tuition. Mrs. Gardner has not worked since 1958 when Mr. Gardner completed his medical training. Mr. Gardner is now employed as a general surgeon, earning \$6,000 per month.

While married Mr. and Mrs. Gardner acquired substantial real and personal property. Their major asset was a farm including a home and equipment located near Eden, Utah, worth between \$246,000 and \$280,000. Other assets included Mr. Gardner's medical assets and retirement funds with an uncertain valuation of between \$73,000 and \$177,000, a contract for the sale of stock in the Ogden Clinic Investment Company, a certificate of deposit, household furniture, furnishings and fixtures, boats and automobiles, sporting equipment, and two horses and associated equipment. At the time of divorce the

couple's only outstanding debts were a first mortgage on the family home and a loan for the purchase of one automobile.

The trial court ordered that the farm, home, and equipment be sold and the proceeds be divided equally. Until the farm was sold, Mrs. Gardner was entitled to its use, although she had to pay the mortgage, taxes, and insurance. The court also ordered that the motor vehicles and boats be sold and the proceeds divided equally, with the exception of one personal automobile for each party. The household furnishings and other items of personal property were divided roughly equally, according to personal need. Mr. Gardner was awarded his medical and business assets, including retirement funds, except Mrs. Gardner was awarded one third of the proceeds from the sale of the Old Ogden Clinic building to pay her attorney fees. They were to share equally a money market certificate. The court granted Mrs. Gardner \$1,200 per month alimony, to be reduced to \$600 per month following Mr. Gardner's retirement. Mrs. Gardner was also to have a claim for \$50,000 against Mr. Gardner's estate in the event that he predeceased her.

Mrs. Gardner asks this Court to reverse the judgment of the lower court. She cites *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982), for the proposition that she has a spousal right to an equitable distribution of Mr. Gardner's retirement funds. She also asserts a property interest in his medical degree and business and claims that the alimony award was insufficient. Finally, she asks this Court for an award of attorney fees.

[1] In a divorce proceeding, the trial court should make a distribution of property and income so that the parties may readjust their lives to their new circumstances as well as possible. *Turner v. Turner*, 649 P.2d 6 (Utah 1982); *MacDonald v. MacDonald*, 120 Utah 573, 236 P.2d 1066 (1951). Although this Court may modify decisions of the trial court, its apportionment of marital property will not be disturbed unless it is clearly unjust or a clear abuse of discretion. *Turner*, 649 P.2d at 8.

The trial court awarded Mr. Gardner his retirement account and medical assets without placing a present value on any of those assets. The trial court called those types of assets "futuristic" and indicated that their value would be utilized in retirement. The court did not attempt to resolve the differing valuations of the assets and provided little explanation for the award to Mr. Gardner.

Recently, in *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987), we noted:

Failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983). The findings of fact must show that the court's judgment or decree "follows logically from, and is supported by, the evidence." *Smith v. Smith*, 726 P.2d 423, 426 (Utah 1986). The findings "should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Rucker [v. Dalton]*, 598 P.2d [1336] at 1338 [Utah 1979]. See also *Mountain States Legal Foundation v. Public Service Commission*, 636 P.2d 1047, 1051 (Utah 1981).

The trial court's statement in its findings that the retirement account and Mr. Gardner's medical assets are "futuristic" was apparently intended to mean that they could not be given a present value or should not for other reasons be taken into account. That, however, does not follow from the evidence presented at trial, nor is it supported by our cases. Regardless of how remote the full value of an asset is, it still has present value. The testimony adduced at trial devoted to differing valuations by the parties merited more precise findings.

[2] In *Woodward v. Woodward*, 656 P.2d at 432, we recognized that retirement benefits, whether vested or not, are a form of deferred compensation which a court should at least consider when dividing marital assets. A right to deferred compensa-

tion acquired during marriage, or that portion of one's right to deferred compensation acquired during marriage, should not be entirely ignored in dividing assets, irrespective of when the vested funds are payable. Thus, marital property "encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived; and this includes any such pension fund or insurance." *Englert v. Englert*, 576 P.2d 1274 (Utah 1978).

However, an award of a part of a spouse's retirement funds may create significant problems. In some instances, marital assets are sparse, income is low, and an award of an equitable share of retirement assets might work a substantial hardship. Courts have, however, awarded the value of the assets on a periodic payment plan and, in some instances, have provided for payments when payout begins. This alternative should be employed only in rare instances. In *Woodward*, the Court stated:

Long term and deferred sharing of financial interests are obviously too susceptible to continued strife and hostility, circumstances which our courts traditionally strive to avoid to the greatest extent possible. . . .

... [W]here other assets for equitable distribution are inadequate or lacking altogether, or where no present value can be established and the parties are unable to reach agreement, resort must be had to a form of deferred distribution based upon fixed percentages.

656 P.2d at 433 (quoting *Kikkert v. Kikkert*, 177 N.J.Super. 471, 478, 427 A.2d 76, 79-80 (1981)).

Obviously, dividing retirement or pension funds is not necessarily consistent with principles of equitable distribution in all cases. The purpose of divorce is to end marriage and allow the parties to make as much of a clean break from each other as is reasonably possible. An award of deferred compensation which ties a couple together long after divorce can frustrate that objective.

[3] Nevertheless, the division of retirement funds between two persons can be

accomplished when necessary. For example, in *Rayburn v. Rayburn*, 738 P.2d 238 (Utah App.1987), a physician was required to pay one-half the net present value of his retirement plan, \$56,850, to his former wife in five annual installments. The court awarded present value of the share to be paid within five years to avoid "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.'" *Id.* at 241-42. *Rayburn* provides a possible alternative for dealing with the value of the retirement account in this case. Because of the sizeable assets in this case, another alternative would be reapportionment of the property distribution to offset the value of the retirement account.

In any event, it will be necessary on remand to determine the value of the retirement account. The account has a present value of between \$73,000 and \$177,000, and the Court should at least consider the value of the account in making the property distribution.

Another alternative for the apportionment of property lies in the trial court's discretion to award the entire value of a solely owned professional corporation to the husband. *Dogu v. Dogu*, 652 P.2d 1308 (Utah 1982). In *Dogu*, the earning power of the corporation resulted entirely from Dr. Dogu's continuing ability to work; however, there were questions as to his ability to do so. The trial court awarded the wife savings certificates, bank accounts, and stock to offset the present liquid assets of the corporation (accounts receivable and bank accounts). The trial court did not attempt to value the future earnings potential of the corporation, presumably because of questions regarding the ability of Dr. Dogu to continue to generate income for the corporation.

[4,5] The Ogden Clinic, of which Mr. Gardner is a member, is a well-entrenched institution, whose twenty-three members have banded together in a business organization. It is not likely to be highly susceptible to earnings interruptions because

of the ill health of one of its members. The Ogden Clinic is not entirely valueless. Mr. Gardner's share, using his own figures, is worth at least \$3,826 (partnership \$3,726, corporation \$100). Mrs. Gardner's accountants value the business much higher. Neither gave consideration to the good will inherent in the professional clinic.¹ Mrs. Gardner was entitled to findings in support of the denial of her request for a portion of those assets. Instead, the trial court disposed of the medical assets in the same sentence in which it disposed of the retirement account.

The medical assets at issue here were not included in the retirement account, but the trial court seems to have assumed that they were one and the same. In any event, no findings of fact were made as to the value of the medical assets. The award to Mr. Gardner of his retirement funds and medical assets may be proper and equitable. However, we cannot adequately review the trial court's determinations on the basis of the sparse findings before us. Accordingly, we reverse and remand for a valuation of the medical assets and retirement accounts and reconsideration of the distribution of the marital property on the basis of those findings.

In addition, Mrs. Gardner asserts an equitable and legal property interest in the medical degree of her former spouse. Whether professional degrees and professional practice constitute marital property subject to valuation and distribution upon the dissolution of a marriage has been the subject of much debate in recent years, especially in the wake of decisions where such a valuation has been made. See, e.g., *Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982); *Mahoney v. Mahoney*, 91 N.J. 488,

453 A.2d 527 (1982); *O'Brien v. O'Brien*, 66 N.Y.2d 576, 498 N.Y.S.2d 743, 489 N.E.2d 712 (1985). It has similarly been the subject of discussion in our Court of Appeals. See *Rayburn v. Rayburn*, 738 P.2d 238 (Utah App.1987); *Petersen v. Petersen*, 737 P.2d 237 (Utah App.1987).

One authority has argued that educational achievements are susceptible to valuation,² but there is judicial authority for the proposition that the value of an education does not fall within the common understanding of the concept of property:

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.

In re Marriage of Graham, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978). See also *Mahoney*, 91 N.J. 488 at 496, 453 A.2d 527 at 531.

The cases which have refused to hold that professional degrees and practice constitute marital property subject to valuation and distribution have nonetheless assessed and divided the value of the degree

1. A marriage may be analogized to a partnership. Upon dissolution of the marital "partnership," an equitable distribution should be based on consideration of all assets, not just those that survive the trip to the bottom of the balance sheet. Where appropriate, value may be given to that "something in business which gives reasonable expectancy of preference in the race of competition," commonly known as good will. *Jackson v. Caldwell*, 18 Utah 2d 81, 85, 415 P.2d 667, 670 (1966).

The ability of a business to generate income from its continued patronage is commonly re-

ferred to as good will. Good will is properly subject to equitable distribution upon divorce. See, e.g., *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (1983). *Matter of Marriage of Fleege*, 91 Wash. 2d 324, 588 P.2d 1136 (1979). But see *The Treatment of Good Will in Divorce Proceedings*, 18 Fam.L.Q. 213 (1984).

2. See Fitzpatrick & Doucette, *Can the Economic Value of an Education Really Be Measured?*, 21 J.Fam.L. 51 (1983).

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or practice on the basis of other legal and equitable remedies. These cases follow a common fact pattern. Typically, the husband is supported throughout a long graduate or professional program by the working wife, and the couple is divorced soon after graduation. In such cases, there are few marital assets to distribute, and the courts have considered other ways of compensating the spouse. In a limited number of cases, the courts focus on the educational degree or professional practice. See generally *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978), *Mahoney*, 91 N.J. 488, 453 A.2d 527, *Inman*, 648 S.W.2d 847, *O'Brien*, 66 N.Y.2d 576, 498 N.Y.S.2d 743, 489 N.E.2d 712, and *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979), for various theories of valuation.

[6] We agree that an educational or professional degree is difficult to value and that such a valuation does not easily fit the common understanding of the character of property. However, at least in the present instance, we need not reach the question of whether such a valuation may ever take place. Sufficient assets distinguish this case from others in which equity and fairness required another solution. Where, as here, the marriage is of long duration, present earnings and business assets provide a more accurate measure of the true worth of the wife's investment in her husband's degree. The home, farm, automobiles, and other assets of approximately \$500,000 allow for a divisible award between the Gardners. In a sense, Mrs. Gardner has realized benefits from the medical degree in the form of a greater property settlement and higher alimony. We find Mrs. Gardner's request for a property interest in Mr. Gardner's medical degree inappropriate under these facts and affirm the findings of the trial court in this regard.

[7.8] Mrs. Gardner also claims the trial court's award of alimony was insufficient and inequitable. We agree. An alimony award should, after a marriage such as this and to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possi-

ble to that standard of living enjoyed during the marriage. *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985), *Higley v. Higley*, 676 P.2d 379, 381 (Utah 1983). In *Jones*, we enumerated three factors important in fixing an alimony award: (1) the financial conditions and needs of the wife; (2) the ability of the wife to produce sufficient income for herself, and (3) the ability of the husband to provide support. *Jones*, 700 P.2d at 1075. See also *English v. English*, 565 P.2d 409, 412 (Utah 1977).

Mrs. Gardner has not been gainfully employed since 1958. Though testimony indicated that she was skilled as an executive secretary, it will be difficult for her to regain these skills and become reemployed after a thirty-year absence. Mr. Gardner, by contrast, retains his career as a physician with earnings of \$6,000 per month. The trial court awarded Mrs. Gardner \$1,200 per month as alimony, to be reduced to \$600 per month following Mr. Gardner's retirement. The court provided no explanation of the basis for the preretirement award and stated that the reduction in alimony following Mr. Gardner's retirement reflected a drop in his earning potential, Mrs. Gardner's eligibility for social security, and the fact that the house would be sold, providing Mrs. Gardner with liquid assets. We think that this award was an abuse of discretion.

Mrs. Gardner executed an affidavit prior to trial listing her monthly expenses at \$1,700 per month. The trial court apparently relied on testimony at the hearing and on a prior affidavit which set her monthly needs at \$1,200. Mrs. Gardner is not employed and has little prospect of being reemployed. Viewing her future earning potential and current monthly expenses, however arrived at, against that of Mr. Gardner's, we think it is clear that the award is insufficient to equalize the parties' standards of living.

Similarly, the trial court's award of \$600 monthly alimony following Mr. Gardner's retirement is also unreasonably low. Mr. Gardner has substantial retirement assets. Should Mr. Gardner reach retirement age, these assets will have increased substan-

tially. Mrs. Gardner, however, has no pension and will qualify for social security payments only as an "ex-wife married over 20 years." She will not qualify for regular social security benefits until she has worked another thirty-nine quarters. Because the likelihood of her providing for her own retirement is small, we find that the trial court's award is insufficient to equalize the parties' standards of living following Mr. Gardner's retirement.

We reverse and remand for further proceedings in light of the above and in light of the factors enumerated in *Jones*, 700 P.2d at 1075. On remand, the trial court must evaluate the wife's ability to support herself based on findings and conclusions under the standards stated in *Acton v. Deliran*, 737 P.2d 996. It is not clear from the record before us that Mrs. Gardner will be able to meet her monthly needs either before or after Mr. Gardner's retirement, and this is the focus of our concern. Our review of the record therefore indicates that the alimony award may have to be increased. However, explicit findings based on the factors in *Jones* are needed to support that conclusion.

[9] Finally, Mrs. Gardner asks this Court to make an award of attorney fees. The trial court made no specific award of attorney fees. However, in its findings of fact and conclusions of law, the trial court made clear that an award of a one-third interest in the Old Ogden Clinic building account and the division of the money market certificate was for the purpose of assisting the wife to pay her attorney. Mr. Gardner correctly notes that a request for attorney fees must be accompanied by evidence at trial as to the nature and amount of such fees. See *Warren v. Warren*, 655 P.2d 684, 688 (Utah 1982). No such showing was made at trial, and the findings do not support Mrs. Gardner's request. Insofar as we have approved the property settlement of the lower court, the award of attorney fees made part of that settlement is affirmed.

HALL, C.J., and DURHAM and
ZIMMERMAN, JJ., concur.

HOWE, Justice (concurring and dissenting).

I concur in the majority opinion except in that part dealing with alimony. As to that part, I dissent for the following reasons:

First, in reversing and remanding for a valuation of the medical and retirement assets and a redistribution of marital property on the basis of those findings, Mrs. Gardner's financial position will undoubtedly improve and her income increase. This increase will have a direct bearing on the amount of alimony which she should be awarded. It is premature for us to now hold that the \$1,200 per month or the \$600 per month awarded by the trial court is inadequate. It may well be that after the redistribution of property is made, the amounts awarded will be entirely fair and could even be excessive. This is especially true as to \$600 alimony after Mr. Gardner's retirement. Any amount of his retirement awarded to her on remand decreases her need for alimony and his ability to pay it. The trial judge recognized this reality when he wrote in his memorandum decision:

Upon his retirement, the alimony shall reduce to \$600 per month. The reasons for this reduction are: by the time of retirement, the home should be sold and the plaintiff should have liquid assets; defendant's income will materially decrease; plaintiff will also receive some social security benefits. It is my intent in awarding to the defendant his medical assets and retirement assets that alimony shall be paid therefrom and that the plaintiff shall have a claim thereon as against the defendant's estate if he should predecease her. This claim shall be in the amount of \$50,000.

Second, the \$1,700-per-month alimony requested by Mrs. Gardner was based on her affidavit which listed her monthly needs at that amount, but based on her assumption that the court would allow her to continue to live on the twenty-one-acre country estate of the parties on which is a six-bedroom home with garages for four cars, a barn, and other outbuildings. Consequently, in arriving at her \$1,700-per-month request, she included the monthly mortgage

payment, the property taxes, insurance premiums on that property, monthly utilities on that property, and amounts for the care of the farm animals and for farm, garden, and house maintenance and repairs. However, the trial court did not award her the country estate or allow her to permanently stay there, but ordered that the parties sell the property as soon as possible. The majority opinion does not assail this determination. The sale of the property ordered by the court necessarily eliminated many of the monthly expenses which formed a basis for the \$1,700 alimony request. The trial court, therefore, acted properly in excluding those items of expense in determining a reasonable amount of monthly alimony and presumably included instead the cost of Mrs. Gardner's living in smaller and less expensive quarters. On cross-examination, Mrs. Gardner admitted that her cost of living would be less if she did not live on the estate. Thus, the \$1,200 awarded by the trial court was clearly within the range of the evidence before the court. The majority does not claim that \$1,200 was "clearly erroneous" as rule 52, Utah Rules of Civil Procedure, requires us to conclude before we may upset findings of fact by the trial court.

We have always accorded trial courts considerable latitude in fixing alimony. Yet here, the majority sweeps aside the trial court's judgment because it is only one-fifth of Mr. Gardner's monthly income and is insufficient to "equalize the parties' standard of living." Insofar as this writer knows, reasonable and fair alimony has never been expressed as a percentage of the husband's monthly income. This is a new concept, completely foreign to the test recognized in *Jones v. Jones*, 700 P.2d 1072 (Utah 1985), for determining an alimony award. Since the monthly income of divorced husbands is not all the same, the monthly needs and financial conditions of divorced wives vary widely, and debts and other factors have to be considered, percentages should not be employed or relied on.

Finally, I strongly dissent from the repeated references in the majority opinion that alimony is to "equalize" the financial

position of the parties after their divorce. Again, this concept is contrary to the three factors to be considered which we enumerated in *Jones v. Jones, supra*: (1) the financial condition 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. We have said that the wife is entitled to enjoy as near as possible the same standard of living she enjoyed during the marriage and she should be prevented from becoming a public charge. *English v. English*, 565 P.2d 409, 411 (Utah 1977). But this is not the same as "equalizing" their incomes. The instant case is a good example. Mr. Gardner is a highly skilled surgeon earning \$6,000 per month. Mrs. Gardner was not employed at the time of the divorce. She thought she could maintain the standard of living to which she had become accustomed if she received \$1,700 per month alimony. If their financial positions after divorce are to be equal, she presumably should have \$3,000 per month alimony. I do not think the majority intends that result.

The object of divorce is to set the parties free of each other after an equitable division of property is made and, if needed, an award of alimony is made which will enable both parties to maintain as near as possible the standard of living they enjoyed during the marriage. The parties then go their separate ways and attempt to rebuild their lives. But because of the disparity in their earning ability, the wife here, who has training as a secretary but has not been employed for thirty-three years, will never earn as much as her husband-surgeon. Our cases do not suggest that the divorce decree should attempt to cure this disparity by "equalizing" their future incomes.



press the disputed evidence. The officers in this case made no attempt to obtain a search warrant. For the reasons discussed above, I do not think that the circumstances justified this failure.

ZIMMERMAN, J., concurs in the dissenting opinion of DURHAM, J.



Kathryn Myrna NEWMAYER, Plaintiff
and Respondent,

v.

Jeddy Paul NEWMAYER, Defendant
and Appellant.

No. 19183.

Supreme Court of Utah.

Nov. 13, 1987.

Divorce was sought. The Third District Court, Salt Lake County, Jay E. Banks, J., granted divorce, divided property, awarded alimony, and awarded attorney fees to former wife. Former husband appealed. The Supreme Court, Zimmerman, J., held that: (1) trial court properly credited wife with inheritances used to purchase homes and properly valued house; (2) wife was entitled to annual alimony of \$1; and (3) wife failed to establish right to attorney fee award of \$1,423.

Affirmed, but attorney fee award stricken.

Howe, J., concurred and filed opinion.

Durham, J., concurred in part, dissented in part, and filed opinion.

1. Divorce \S 252.5(1)

Trial court properly exercised discretion by crediting former wife with inheritances used to purchase homes and by crediting former husband with equal share of appreciation of value in homes despite

much lower contribution. U.C.A.1953, 30-3-5(1).

2. Divorce \S 252.3(3)

Appropriate treatment of property brought into marriage by one party may vary from divorce case to divorce case; overriding consideration is that ultimate division be equitable—that property be fairly divided between parties, given contributions during marriage and circumstances at time of divorce. U.C.A.1953, 30-3-5(1).

3. Divorce \S 253(2)

Evidence supported trial court's conclusion as to amount of money contributed by former wife from her inheritances to purchase homes and as to amount of former husband's contribution to purchase homes. U.C.A.1953, 30-3-5(1); Rules Civ. Proc., Rule 52(a).

4. Divorce \S 253(3)

Evidence \S 574

Trial court dividing home upon divorce did not abuse discretion by rejecting expert appraisal of \$122,000 and appraisal of \$112,000 and by valuing house at \$117,000. U.C.A.1953, 30-3-5(1).

5. Pleading \S 427

Question as to whether former wife or former husband was entitled to tax deduction for child was tried by parties without objection and could be decided by trial court awarding deduction to wife, even though her initial prayer for relief consented to husband's use of deduction. Rules Civ.Proc., Rule 15(b).

6. Divorce \S 252.3(1)

Amount of alimony awarded after divorce and relative earning capabilities of parties are relevant to determine equitable division of marital assets. U.C.A.1953, 30-3-5(1).

7. Divorce \S 237

Alimony is to be awarded after consideration of three factors: receiving spouse's financial condition and needs; receiving spouse's ability to earn adequate income; and providing spouse's ability to provide support.

8. Divorce \Rightarrow 210(2)

Former wife was entitled to annual alimony of \$1, even though former wife received majority of assets of marriage and was working at time of divorce; wife had worked only episodically at low-paying jobs during two decades of marriage and did not have opportunity to build retirement fund.

9. Divorce \Rightarrow 227(1)

Former wife failed to provide sufficient evidence to demonstrate that award of \$1,423 in attorney fees was reasonable; there was no separate showing of hours, rate, or community standard.

Glen M. Richman, Salt Lake City, for appellant.

J. Bruce Reading, Michael W. Spence, Salt Lake City, for respondent.

ZIMMERMAN, Justice:

Plaintiff Kathryn Newmeyer brought this divorce action against her husband, Jeddy Newmeyer. The trial court granted Kathryn custody of the couple's minor child and awarded her the bulk of the property, one dollar per year as alimony, and attorney fees. Jeddy appeals. He contends that the property division was incorrect, that Kathryn should not have been awarded any alimony, and that the evidence is insufficient to support an award of attorney fees. We agree only with the third contention and vacate the award of attorney fees. The judgment is otherwise affirmed.

The Newmeyers were married just over twenty years. During that period, they owned three homes in succession. During the holding periods, each appreciated. The trial court awarded Jeddy an automobile, all rights to his pension plan, miscellaneous household items, his savings of approximately \$7,000, and an equitable lien against the couple's current home in the amount of \$32,606. The court awarded Kathryn the balance of the equity in the home, valued in excess of \$80,000, two automobiles, miscellaneous household items, her savings of approximately \$17,000, one dollar per year alimony, and \$1,423 in attorney fees. Kathryn also was allowed to take an income

tax deduction for the couple's minor child for the tax year 1982. Jeddy was required to pay \$200 per month child support and was awarded the tax deduction for the minor child for all the years following 1982.

Jeddy challenges numerous aspects of the property division. However, he concentrates his attention on the division of the equity in the home. He challenges the findings on the relative contribution of each party and the current value of the home. Regarding the first of these issues—the contribution of each party—he contends that the trial court erred in finding that Kathryn should receive credit for substantial amounts she received from inheritances that were invested in the homes early in the marriage.

In dividing the marital estate, the trial court may make such orders concerning property distribution and alimony as are equitable. Utah Code Ann. § 30-3-5(1) (1984 & Supp.1987). In making such orders, the trial court is permitted broad latitude, and its judgment is not to be lightly disturbed, so long as it exercises its discretion in accordance with the standards set by this Court. *Jones v. Jones*, 700 P.2d 1072, 1074 (Utah 1985); see *Pusey v. Pusey*, 728 P.2d 117, 119 (Utah 1986). It is therefore incumbent on the appealing party to prove that the trial court's division violates those standards, see, e.g., *Jones*, 700 P.2d at 1074, or that the trial court's factual findings upon which the division is grounded are clearly erroneous under Utah Rule of Civil Procedure 52(a).

[1, 2] Jeddy concedes that Kathryn put money from her inheritances into the homes. However, he argues that because the inheritances received by Kathryn came into the marriage many years ago and were committed to the common venture of purchasing a home, the trial court was bound to divide this contribution equally between both parties. There is nothing in our cases that mandates such a result. The appropriate treatment of property brought into a marriage by one party may vary from case to case. Compare *Workman v. Workman* 652 P.2d 931, 933 (Utah

1982) (husband's property acquired prior to marriage properly a part of marital assets to be divided upon divorce), and *Jackson v. Jackson*, 617 P.2d 338, 340-41 (Utah 1980) (title to marital property prior to divorce not binding on trial court's distribution), with *Preston v. Preston*, 646 P.2d 705, 706 (Utah 1982) (inheritance acquired during marriage properly excluded from valuation of marital assets), and *Jespersion v. Jespersen*, 610 P.2d 326, 328 (Utah 1980) (not unreasonable for trial court to withdraw from marital property the equivalent of assets brought into marriage). The overriding consideration is that the ultimate division be equitable—that property be fairly divided between the parties, given their contributions during the marriage and their circumstances at the time of the divorce. See *Huck v. Huck*, 734 P.2d 417, 420 (Utah 1986).

In the present case, the circumstances warrant the treatment given the inheritances by the trial court. Under any version of the facts, it is readily apparent that Kathryn paid the lion's share of the cost of the homes from money she received through inheritances. Moreover, the trial court was more than fair to Jeddy by crediting him with an equal share in the appreciation of the value of the homes despite his much lower contribution. Therefore, we conclude that the trial court exercised its discretion within the bounds set by our cases when it credited Kathryn with the inheritances she put into the homes.

[3] Jeddy also disputes the trial court's factual determination of the amount each party contributed toward the purchase of the homes. There was conflicting evidence on this point at trial. Evidence fixed Kathryn's probable contribution at \$55,000 to \$60,000 and Jeddy's at \$7,000 to \$12,000. Jeddy's present challenge to the trial court's factual findings as to the relative contributions of the parties amounts to nothing more than an attempt to retry the matter on appeal. There was evidence supporting the positions of both parties. It was for the trial court to resolve the conflicts. We will not overturn such a factual resolution unless the appellant first mar-

shals all the evidence supporting the trial court's finding and then demonstrates that that evidence, when compared to the contrary evidence, is so lacking as to warrant the conclusion that clear error has been committed. Utah R.Civ.P. 52(a); see *Harline v. Campbell*, 728 P.2d 980, 982 (Utah 1986); *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985). In the present case, Jeddy has not begun to meet this burden. Therefore, we reject his attack on the trial court's determination of the relative contributions of the parties.

Jeddy next attacks the trial court's findings as to the market value of the current home. Jeddy's expert witness testified that the house was worth \$122,000, while Kathryn's testified that the value of the house was \$112,000. The trial judge fixed the value of the house at \$117,000. Based upon that finding, the appreciation in the value of the couple's successive homes was approximately \$50,000. Jeddy argues that in fixing the value at \$117,000, the court improperly "split" the difference between the values fixed by the experts. He argues that his expert should have been believed.

[4] This argument, like the one that preceded it, is nothing but an attempt to have this Court substitute its judgment for that of the trial court on a contested factual issue. This we cannot do under Utah Rule of Civil Procedure 52(a). In apparent recognition of this proposition, Jeddy masks this claim as a legal argument by contending that the trial judge acted improperly in splitting the difference between the experts. That argument is, of course, utterly lacking in merit. It is elementary that a judge is not bound to believe one witness's testimony to the total exclusion of that of another witness. When acting as the trier of fact, the trial judge is entitled to give conflicting opinions whatever weight he or she deems appropriate. See *Groen v. Tri-O-Inc.*, 667 P.2d 598, 603 (Utah 1983); see also *Goodmundson v. Goodmundson*, 201 Mont. 535, 655 P.2d 509, 511 (1982) (in adopting proposed values for marital assets, trial court may average conflicting values given by experts to arrive at an equitable solution). Therefore,

we hold that the district court did not abuse its discretion in determining that the value of the home was \$117,000.

[5] Jeddy next argues that the trial court improperly credited Kathryn with the 1982 tax deduction for the minor child because under the prayer for relief contained in her initial complaint in this action, she asked that Jeddy be allowed that deduction. Kathryn did not amend her complaint to change the prayer for relief; therefore, Jeddy argues, the trial court lacked the authority to award her the 1982 tax deduction. Whatever the state of the pleadings, the record indicates that at trial, the entitlement to the 1982 tax deduction became a matter of dispute between the parties and was adjudicated without objection. Under Utah Rule of Civil Procedure 15(b), a trial court is permitted to decide issues that are not raised by the pleadings when (i) they are tried by the parties and (ii) the failure to amend the initial pleadings to conform to the evidence in no way impairs the trial court's ability to resolve such an issue. Both of these requirements were met. We therefore conclude that it was proper for the trial judge to consider the issue

[6] Jeddy's other contentions regarding the trial court's property distribution lack merit.¹

[7,8] Jeddy next contends that the trial court abused its discretion by awarding plaintiff one dollar per year alimony. Alimony is to be awarded after considering three factors: the receiving spouse's financial condition and needs; the receiving spouse's ability to earn an adequate income; and the providing spouse's ability to provide support. *Jones v. Jones*, 700 P.2d at 1075. The record indicates that Kathryn received the majority of the assets of the marriage. However, she appears to have a relatively poor ability to earn an income sufficient to maintain as nearly as possible

the standard of living that the parties enjoyed when married. Although working at the time of the divorce, during the course of her two decades of marriage to Jeddy, Kathryn was employed only episodically, for brief periods, and at low-paying jobs. She did not have the opportunity to build up a retirement fund. Yet the trial court did not give her any interest in Jeddy's pension. Finally, the evidence suggests that Jeddy has better future income prospects than Kathryn. In light of these circumstances, however, Kathryn only received an alimony award of one dollar per year, presumably to preserve her right to seek an increase should there be a material change in circumstances in the future. Given these facts, Jeddy's claim that the trial court abused its discretion in awarding any alimony is utterly without merit. See, e.g., *Stephens v. Stephens*, 728 P.2d 991, 992-93 (Utah 1986).

[9] Jeddy's final contention is that the trial court abused its discretion in awarding Kathryn \$1,423 in attorney fees. An award of attorney fees in divorce cases "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 at 419 (citing *Beals v. Beals*, 682 P.2d 862 (Utah 1984)). Because ample evidence of Kathryn's financial condition was before the court, we reject Jeddy's argument that the trial court's finding of need was unsupported by the evidence. On the other hand, it is incumbent on the party requesting attorney fees to demonstrate "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." *Beals*, 682 P.2d at 864 (quoting *Kerr v. Kerr*, 610 P.2d 1380, 1384-85 (Utah 1980)); accord *Delatore v. Delatore*, 680 P.2d 27, 28 (Utah

1. It is worth noting that in attacking the property distribution, Jeddy fails entirely to take account of the fact that Kathryn received an alimony award of only one dollar per year. In determining whether a certain division of property is equitable, neither the trial court nor this Court considers the property division in a vac-

uum. The amount of alimony awarded and the relative earning capabilities of the parties are also relevant, because the relative abilities of the spouses to support themselves after the divorce are pertinent to an equitable determination of the division of the fixed assets of the marriage.

1984). Kathryn failed to provide sufficient evidence to demonstrate that the fees were reasonable. The evidence regarding attorney fees consisted solely of Kathryn's testimony. There was no separate showing of the hours, rate, or community standard. Because Kathryn failed to carry her burden and establish the proper evidentiary basis for the award, we hold that it was an abuse of discretion for the trial court to award her \$1,423 in attorney fees.

The divorce decree is affirmed, but the award of attorney fees to plaintiff is stricken. Costs to respondent.

HALL, C.J., and STEWART,
Associate C.J., concur.

HOWE, Justice: (concurring).

I concur. This case presents a recurring issue before this Court, viz., the division of property inherited or received by gift by one spouse from his or her family either before or during marriage. No rules to guide the trial court have been expressed by the legislature or by this Court over the past years except the illusory standard that the ultimate division should be fair and equitable. While I recognize that trial judges must have flexibility and discretion in dividing property, I believe that such inherited or donated property should be dealt with more consistently and according to more definite and meaningful guidelines. Typical of our expressions dealing with inherited property is the following language found in *Burke v. Burke*, 733 P.2d 133, 135 (Utah 1987) (a case in which I concurred), where we said:

[I]n appropriate circumstances equity requires that each party recover the separate property brought into or received during the marriage.

However, no mention was made of what comprise "appropriate circumstances."

From my review of the cases decided by this Court in recent years, many of which are cited in the instant case and in the footnotes to *Burke v. Burke*, *supra*, no discernible pattern of treating inherited or donated property is apparent. For instance, in *Burke*, Mrs. Burke, ten years into the marriage, inherited from her moth-

er's estate three and one-half acres of unimproved land, then worth less than \$5,000. Without any improvements being made to the property or any effort expended by either party, the property appreciated at the time of divorce to \$35,000 per acre. The trial court awarded the property solely to Mrs. Burke, giving Mr. Burke no part of the original value (\$5,000) or its appreciation during the marriage (\$117,500). This Court refused to disturb that award.

Similarly, in *Preston v. Preston*, 646 P.2d 705, 706 (Utah 1982), we affirmed a divorce decree awarding to each party in general the real and personal property he or she brought to the marriage or inherited during the marriage. We there said:

Following the principle we have approved in cases like *Georgedes v. Georgedes*, Utah, 627 P.2d 44 (1981); *Jespersion v. Jespersen*, Utah, 610 P.2d 326 (1980); and *Humphreys v. Humphreys*, Utah, 520 P.2d 193 (1974), the district court concluded that each party should, in general, receive the real and personal property he or she brought to the marriage or inherited during the marriage.

Without any mention or recognition of the principle referred to in the above quotation, we have in other cases approved a division among the parties of property inherited or donated to one party prior to or during the marriage. *Argyle v. Argyle*, 688 P.2d 468 (Utah 1984); *Bushell v. Bushell*, 649 P.2d 85 (Utah 1982); *Dubois v. Dubois*, 29 Utah 2d 75, 504 P.2d 1380 (1973); *Weaver v. Weaver*, 21 Utah 2d 166, 442 P.2d 928 (1968). No case has been found where we have reversed a trial court's disposition of such property.

A middle approach was taken in the instant case. Mr. Newmeyer was awarded no part of his wife's inheritance, but he was allowed to share equally in the appreciation of the properties in which her inheritance was invested. Yet I am unable to discern why it was "fair and equitable" to deny to Mr. Burke that which was given to Mr. Newmeyer.

SALT LAKE CITY v TUERO

Cite as 745 P.2d 1281 (Utah App 1987)

Utah 1281

While I recognize that each case has its own unique set of circumstances, I am concerned with the lack of consistency in treating inherited and donated property. Without more definite rules, each party takes his or her chances that the particular trial judge assigned to hear the case on that given day will perceive it to be fair and equitable to divide or not to divide such property. I believe that some general rules should at least be articulated and followed.

The Court's opinion in *Burke v Burke*, *supra*, repeated the factors which we enunciated in *Pinion v Pinion*, 92 Utah 255, 67 P.2d 265 (1937), that are generally to be considered in making property divisions. No guidance, however, was given as to when it would be appropriate to divide inherited or donated property. We would be doing a service to the Bar and to the trial bench to be more definite in our treatment of such property. It is no wonder that so many cases involving such property have been appealed, since the "losing" party in comparing his or her case with other cases decided by this Court can discern no rational basis for the disparate treatment he or she has received.

Legislative guidance would be helpful on this question. Utah Code Ann. § 30-2-1 expresses a legislative intent that property of a married woman acquired by gift or inheritance should remain her estate and property. To what extent should that rule be modified when a divorce occurs? See *Izatt v Izatt*, 627 P.2d 49 (Utah 1981).

DURHAM, Justice (concurring and dissenting).

I concur in the majority opinion except for its vacation of the award of attorney fees. The standard of reasonableness set forth by the majority is entirely correct but in view of the pleadings, discovery, pretrial appearances, full day's trial, and number and complexity of the issues, all of which are patent on the face of the record (and therefore obvious also to the trial judge), I think that the trial court had sufficient information to assess reasonableness. Plaintiff established that the fees

were charged and due; the amount itself proves that counsel devoted approximately 17 to 18 hours at \$80 per hour, or approximately 14 to 15 hours at \$100 per hour, or even 28 to 29 hours at \$50 per hour. Keeping in mind that the trial itself took a full day and that there was a pretrial hearing on support and at least one deposition taken by defendant's counsel, I have no difficulty taking judicial notice that the fee of \$1,423 was reasonable. In view of plaintiff's need, I think it inappropriate to deny her the assistance ordered by the trial court.



SALT LAKE CITY Plaintiff
and Respondent,

John TUERO, Defendant and Appellant.

No. 870018-CA

Court of Appeals of Utah

Nov. 20, 1987

Defendant was convicted of driving under the influence by the Fifth Circuit Court, Salt Lake County, Sheila K. McCleve, by jury verdict. Defendant appealed. The Court of Appeals, Davidson, J., held that (1) the trial court did not abuse its discretion by refusing to dismiss for cause potential juror, who stated that his wife had been "broad-sided by a drunk driver," and (2) the trial court was not required to question potential jurors on whether they believed penalties involved were too harsh or too lenient.

Affirmed.

1 Jury ¶105(2)

The trial court did not abuse its discretion, in prosecution for driving under the influence, by refusing to dismiss for cause

1986 Amendments. Subsec. (c). Pub.L. 99-514, § 103(b), redesignated former subsec. (e) as (c) and struck out prior subsec. (c) provision for an additional exemption for taxpayer or spouse aged 65 or more.

Pub.L. 99-514, § 1847(b)(3), substituted "section 22(e)" for "section 37(e)" in par. (a)(5).

Subsec. (d). Pub.L. 99-514, § 103(b), redesignated as subsec. (d) former subsec. (f), as amended by Pub.L. 99-514, § 103(a), and struck out prior subsec. (d) provision for an additional exemption for blindness of taxpayer or spouse.

Subsec. (e). Pub.L. 99-514, § 103(b), redesignated former subsec. (e) as (c).

Subsec. (f). Pub.L. 99-514, § 103(a) added subsec. (f) "exemption amount" provision and struck out prior "exemption amount" provision reading: "For purposes of this section, the term 'exemption amount' means, with respect to any taxable year, \$1,000 increased by an amount equal to \$1,000 multiplied by the cost-of-living adjustment (as defined in section 1(f)(3)) for the calendar year in which the taxable year begins. If the amount determined under the preceding sentence is not a multiple of \$10, such amount shall be rounded to the nearest multiple of \$10 (or if such amount is a multiple of \$5, such amount shall be increased to the next highest multiple of \$10)."; the "exemption amount" provision redesignated by Pub.L. 99-514, § 103(b), as subsec. (d).

1984 Amendment. Subsec. (e)(5). Pub.L. 98-369 added par. (2).

1981 Amendment. Subsecs. (b), (c), (d)(1), (2), (e)(1). Pub.L. 97-34, § 104(c)(1), substituted "the exemption amount" for "\$1,000" wherever appearing.

Subsec. (f). Pub.L. 97-34, § 104(c)(2), added subsec. (f).

Effective Date of 1986 Amendment. Amendment of this section by section 103 of Pub.L. 99-514 applicable to taxable years beginning after Dec. 31, 1986, see section 151(a) of Pub.L. 99-514, set out as a note under section 1 of this title.

Amendment by sections 1801 to 1880 of Pub.L. 99-514 effective as if included in the provisions of the Tax Reform Act of 1984, Pub.L. 98-369, except as otherwise provided, see section 1881 of Pub.L. 99-514, set out as a note under section 48 of this title.

Effective Date of 1984 Amendment. Section 426(b) of Pub.L. 98-369 provided that: "The amendment made by subsection (a) [enacting subsec. (e)(5) of this section] shall apply to taxable years beginning after December 31, 1984."

Effective Date of 1981 Amendment. Amendment by section 104 of Pub.L. 97-34 applicable to taxable years beginning after Dec. 31, 1984, see section 104(e) of Pub.L. 97-34, set out as a note under section 1 of this title.

Legislative History. For legislative history and purpose of Pub.L. 98-369, see 1984 U.S. Code Cong. and Adm. News, p. 697. See, also, Pub.L. 99-514, 1986 U.S. Code Cong. and Adm. News, p. 4075.

Law Review Commentaries

Domestic relations tax reform. 20 Gonzaga L. Rev. 251 (1984/85).

Notes of Decisions

2. Generally

No exemption or deduction existed for cost of providing taxpayer's family with the "American Standard of good living." *Grimes v. C.I.R.*, C.A. 9, 1986, 806 F.2d 1451.

§ 152. Dependent defined

(a) **General definition.**—For purposes of this subtitle, the term "dependent" means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under subsection (c) or (e) as received from the taxpayer):

- (1) A son or daughter of the taxpayer, or a descendant of either,
- (2) A stepson or stepdaughter of the taxpayer,
- (3) A brother, sister, stepbrother, or stepsister of the taxpayer,
- (4) The father or mother of the taxpayer, or an ancestor of either,
- (5) A stepfather or stepmother of the taxpayer,
- (6) A son or daughter of a brother or sister of the taxpayer,
- (7) A brother or sister of the father or mother of the taxpayer,
- (8) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of the taxpayer, or
- (9) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 7703, of the taxpayer) who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household.

(b) **Rules relating to general definition.**—For purposes of this section—

- (1) The terms "brother" and "sister" include a brother or sister by the halfblood.
- (2) In determining whether any of the relationships specified in subsection (a) or paragraph (1) of this subsection exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such

individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child satisfies the requirements of subsection (a)(9) with respect to such individual), shall be treated as a child of such individual by blood.

(3) The term "dependent" does not include any individual who is not a citizen or national of the United States unless such individual is a resident of the United States or of a country contiguous to the United States. The preceding sentence shall not exclude from the definition of "dependent" any child of the taxpayer legally adopted by him, if, for the taxable year of the taxpayer, the child has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household, and if the taxpayer is a citizen or national of the United States.

(4) A payment to a wife which is includible in the gross income of the wife under section 71 or 682 shall not be treated as a payment by her husband for the support of any dependent.

(5) An individual is not a member of the taxpayer's household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law.

(c) **Multiple support agreements.**—For purposes of subsection (a), over half of the support of an individual for a calendar year shall be treated as received from the taxpayer if—

(1) no one person contributed over half of such support;

(2) over half of such support was received from persons each of whom, but for the fact that he did not contribute over half of such support, would have been entitled to claim such individual as a dependent for a taxable year beginning in such calendar year;

(3) the taxpayer contributed over 10 percent of such support; and

(4) each person described in paragraph (2) (other than the taxpayer) who contributed over 10 percent of such support files a written declaration (in such manner and form as the Secretary may by regulations prescribe) that he will not claim such individual as a dependent for any taxable year beginning in such calendar year.

(d) **Special support test in case of students.**—For purposes of subsection (a), in the case of any individual who is—

(1) a son, stepson, daughter, or stepdaughter of the taxpayer (within the meaning of this section), and

(2) a student (within the meaning of section 151(c)(4)),

amounts received as scholarships for study at an educational organization described in section 170(b)(1)(A)(ii) shall not be taken into account in determining whether such individual received more than half of his support from the taxpayer.

(e) **Support test in case of child of divorced parents, etc.**—

(1) **Custodial parent gets exemption.**—Except as otherwise provided in this subsection, if—

(A) a child (as defined in section 151(c)(3)) receives over half of his support during the calendar year from his parents—

(i) who are divorced or legally separated under a decree of divorce or separate maintenance,

(ii) who are separated under a written separation agreement, or

(iii) who live apart at all times during the last 6 months of the calendar year, and

(B) such child is in the custody of one or both of his parents for more than one-half of the calendar year,

such child shall be treated, for purposes of subsection (a), as receiving over half of his support during the calendar year from the parent having custody for a greater portion of the calendar year (hereinafter in this subsection referred to as the "custodial parent").

(2) **Exception where custodial parent releases claim to exemption for the year.**—A child of parents described in paragraph (1) shall be treated as having

received over half of his support during a calendar year from the noncustodial parent if -

(A) the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and

(B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.

For purposes of this subsection, the term "noncustodial parent" means the parent who is not the custodial parent.

(3) **Exception for multiple-support agreement.**—This subsection shall not apply in any case where over half of the support of the child is treated as having been received from a taxpayer under the provisions of subsection (c).

(4) **Exception for certain pre-1985 instruments.**—

(A) **In general.**—A child of parents described in paragraph (1) shall be treated as having received over half his support during a calendar year from the noncustodial parent if—

(i) a qualified pre-1985 instrument between the parents applicable to the taxable year beginning in such calendar year provides that the noncustodial parent shall be entitled to any deduction allowable under section 151 for such child, and

(ii) the noncustodial parent provides at least \$600 for the support of such child during such calendar year.

For purposes of this subparagraph, amounts expended for the support of a child or children shall be treated as received from the noncustodial parent to the extent that such parent provided amounts for such support.

(B) **Qualified pre-1985 instrument.**—For purposes of this paragraph, the term "qualified pre-1985 instrument" means any decree of divorce or separate maintenance or written agreement—

(i) which is executed before January 1, 1985,

(ii) which on such date contains the provision described in subparagraph (A)(i), and

(iii) which is not modified on or after such date in a modification which expressly provides that this paragraph shall not apply to such decree or agreement.

(5) **Special rule for support received from new spouse of parent.**—For purposes of this subsection, in the case of the remarriage of a parent, support of a child received from the parent's spouse shall be treated as received from the parent.

(6) **Cross reference.**—

For provision treating child as dependent of both parents for purposes of medical expense deduction, see section 213(d)(4).

(Aug. 16, 1954, c. 736, 68A Stat. 43; Aug. 9, 1955, c. 693, § 2, 69 Stat. 626; Sept. 2, 1958, Pub.L. 85-866, Title I, § 4(a)-(c), 72 Stat. 1607; Sept. 23, 1959, Pub.L. 86-376, § 1(a), 73 Stat. 699; Aug. 31, 1967, Pub.L. 90-78, § 1, 81 Stat. 191; Dec. 30, 1969, Pub.L. 91-172, Title IX, § 912(a), 83 Stat. 722; Oct. 27, 1972, Pub.L. 92-580, § 1(a), 86 Stat. 1276; Oct. 4, 1976, Pub.L. 94-455, Title XIX, §§ 1901(a)(24), (b)(7)(B), (8)(A), 1906(b)(13)(A), Title XXI, § 2139(a), 90 Stat. 1767, 1794, 1834, 1932; July 18, 1984, Pub.L. 98-369, Title IV, §§ 423(a), 482(b)(2), 98 Stat. 799, 848; Oct. 22, 1986, Pub.L. 99-514, Title I, § 104(b)(1)(B), (3), Title XIII, § 1301(j)(8), 100 Stat. 2104, 2105, 2658.)

1986 Amendment. Subsec. (a)(9). Pub.L. 99-514, § 1301(j)(8), substituted reference to section "7703" for "143".

Subsec. (d)(2). Pub.L. 99-514, § 104(b)(3), substituted "section 151(c)(4)" for "section 151(c)(4)".

Subsec. (e)(1)(A). Pub.L. 99-514, § 104(b)(1)(B), substituted reference to "section 151(c)(3)" for "section 151(c)(3)".

1984 Amendment. Subsec. (c). Pub.L. 98-369, § 423(a), in substantially revising support test

provisions, enacted par. (1) custodial parent exemption, former par. (1) declaring the general rule that where a child received over one-half of his calendar year support from parents who were divorced or legally separated under a decree of divorce or separate maintenance, or were separated under a written separation agreement, and the child was in the custody of one or both parents for more than one-half of the calendar year, the child would be treated as receiving over half of his support from the parent having custody for a

30-3-4.4. Jurisdiction of commissioner — Referral of cases to court.

(1) All domestic relations matters, including orders to show cause, pretrial conferences, petitions for modification of a divorce decree, scheduling conferences, and all other applications for relief, except ex parte motions, shall be referred to the court commissioner before any hearing may be scheduled before the district court judge, unless otherwise ordered.

(2) The court commissioner shall, after hearing any motion or other application for relief, recommend entry of an order, and shall make a written recommendation as to each matter heard. Should the parties not consent to the recommended order, the matter shall be referred for further disposition by a district judge.

(3) Any party objecting to the recommended order or seeking further hearing before a district judge shall, within ten days of the entry of the commissioner's recommendations, provide notice to the commissioner's office and opposing counsel that the recommended order is not acceptable or that further hearing is desired. The commissioner shall then refer the matter to a district judge for further hearing, conference, or trial. If no objection or request for further hearing is made within ten days, the party is deemed to have consented to entry of an order in conformance with the commissioner's recommendation.

History: C. 1953, 30-3-4.4, enacted by L. 1985, ch. 151, § 5.

30-3-5. Disposition of property — Maintenance and health care 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 for 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.

History: R.S. 1898 & C.L. 1907, § 1212; L. 1909, ch. 109, § 4; C.L. 1917, § 3000; R.S. 1933 & C. 1943, 40-3-5; L. 1969, ch. 72, § 3; 1975, ch. 81, § 1; 1979, ch. 110, § 1; 1984, ch. 13, § 1; 1985, ch. 72, § 1; 1985, ch. 100, § 1.

Compiler's Notes. — The 1985 amendment by Chapter 72 rewrote Subsection (1) which formerly read as set out as the first three sentences of subsection (1) in the parent volume; added Subsection (2); designated two undesignated paragraphs as Subsections (3) and (4); inserted "In determining" and "the court" in Subsection (4); redesignated former Subsections (2) and (3) as Subsections (5) and (6); divided Subsection (5) into two sentences, substituting "However, if the remarriage" for "unless that marriage"; substituted "payment of" for "in which case" in Subsection (5); substituted "terminates upon establishment by the party paying alimony" for "shall be terminated upon application of that party establishing" in Sub-

section (6); divided Subsection (6) into two sentences, substituting "However, if" for "unless"; deleted "between them" after "association" in Subsection (6); added "payment of alimony shall resume" in Subsection (6); and made minor changes in phraseology.

The 1985 amendment by Chapter 100 rewrote Subsection (1) which formerly read as set out as the first three sentences of Subsection (1) in the parent volume; designated two undesignated paragraphs as Subsections (2) and (3); made identical changes in Subsections (2) and (3) as those made to Subsections (3) and (4) by Laws 1985, Chapter 72; redesignated former Subsections (2) and (3) as Subsections (4) and (5); made identical changes in Subsections (4) and (5) as those made to Subsections (5) and (6) by Laws 1985, Chapter 72; added Subsection (6); and made minor changes in phraseology.

ANALYSIS

Alimony.

—Amount.

—Modification.

—Termination.

Bankruptcy.

—Effect upon divorce decree.

Children.

—Custody.

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—Support.

—Failure to pay.

—Modification.