

1989

Walter James Howell v. Barbara Joyce Howell : Petition for Writ of Certiorari

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

STATE OF UTAH

-----ooo0ooo-----

WALTER JAMES HOWELL,)	
)	
Plaintiff/Appellee/Petitioner,)	PETITION FOR WRIT OF CERTIORARI
)	
vs.)	
)	Docket No.
)	
BARBARA JOYCE HOWELL,)	
)	
Defendant/Appellant/Respondent.)	

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Husband petitions this court for a writ of certiorari to review the decision of the Utah Court of Appeals as published in this matter on February 28, 1991, copies of which are attached hereto as Appendices "A" and "B".

PARTIES

The parties to this action are Walter James Howell, plaintiff in the trial court and appellee in the Utah Court of Appeals, and Barbara Joyce Howell, defendant in the trial court and appellant in the Utah Court of Appeals.

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QUESTION PRESENTED FOR REVIEW

The Utah Court of Appeals created a new rule permitting an award of alimony based upon a hypothetical standard of living not enjoyed during the marriage. This court should review and reverse

that decision, effecting compliance with Utah law governing alimony.

OFFICIAL REPORT OF THE UTAH COURT OF APPEALS

The official decision of the Utah Court of Appeals was issued on February 28, 1991. It has been published in the Utah Advanced Reporter where it is cited as Howell v. Howell, 155 Utah Adv. Rep. 18 (Utah App. 1991). For the convenience of the court, a copy of each is attached hereto as Appendices "A" and "B".

JURISDICTION

A. The Utah Court of Appeals decision was published February 28, 1991.

B. No order respecting rehearing or extension of time to petition for certiorari has been made and as none has been requested.

C. This petition for the writ of certiorari is submitted 28 days after the issuance of the opinion by the Utah Court of Appeals which, pursuant to the provisions of Rule 48 of the Utah Rules of Appellate Procedure, is within the thirty (30) days after entry of the decision by the Utah Court of Appeals.

D. This court has jurisdiction to review the decision in this matter pursuant to the provisions of sections 78-2-2(3)(a) and 78-2-2(5) of the Utah Code (1990).

CONTROLLING STATUTE

When a Decree of Divorce is rendered, the court may include in it equitable orders relating to the children, property, and parties.
Utah Code §30-3-5(1) (1990)

STATEMENT OF THE CASE

This is a divorce action. The parties were married on October 14, 1956. The husband began working as a pilot for Western Airlines shortly after the parties were married. When the parties separated and the husband filed for divorce, in November of 1986, his income had been between \$5,500.00 and \$5,600.00 per month for the five (5) previous years. The defendant had little work experience during the marriage of the parties and raised five (5) children. Four of them were emancipated by the time of trial. After the divorce action was filed, Western Airlines was acquired by Delta Airlines and husband's income rose substantially so that by the time of trial, it was approximately \$10,000.00 per month. (Slip op. at 1-2, 155 Utah Adv. Rep. at 18-19).

The trial court determined that the standard of living of the parties during the course of their marriage should be set by examining the five (5) years prior to the divorce, during which time the plaintiff earned \$5,500.00 to \$5,600.00 per month. (Slip op. at 1-2, 155 Utah Adv. Rep. at 18-19).

Two members of the panel in the Utah Court of Appeals held that the trial court abused its discretion in pinpointing the parties' standard of living at the time of separation. Although the court professed to apply the standards for alimony awards set by this court, that is, by examining the financial condition and needs of the recipient spouse; the recipient's ability to produce income; the ability of the payor spouse to provide income, Davis v. Davis, 749 P.2d 647, 649 (Utah 1988); and, the standard of living

prior to the divorce, Gardner v. Gardner, 748 P.2d 1076 (Utah 1988); the court of appeals did not do so. The decision of the court of appeals, in effect, requires the trial court to project a standard of living which never existed during the marriage; that is, what the husband could now afford. (Slip op. at 3-7, 155 Utah Adv. Rep. 19-21.)

This change in Utah law was identified by the dissenting judge, Judge Bench, who correctly pointed out the error of the other two judges when he observed:

Defendant seeks to benefit from plaintiff's raise by mistakenly, and unnecessarily, claiming that the raise entitled her to alimony based upon a hypothetical standard of living to be calculated from plaintiff's new annual salary of \$120,000, an income to which she has never grown accustomed. In other words, defendant claims that her relevant standard of living is the unknown standard of living that she might have enjoyed were the parties not terminating their marriage. (Slip op. at 10, 155 Utah Adv. Rep. at 22).

ARGUMENT

As Judge Bench correctly pointed out in his dissent, the majority opinion creates a new standard for an award of alimony in Utah, contrary to that articulated in English v. English, 565 P.2d 409 (Utah 1977), and restated in Davis, where this court articulated the basic rule that governs an award of alimony in Utah; that is, that the trial court must consider the financial condition and needs of the recipient spouse, the recipient's ability to produce income, the ability of the payor spouse to provide support, at a level enjoyed during the marriage and to prevent the wife from becoming a public charge. (565 P.2d at 411.)

This court somewhat modified that standard in Gardner v. Gardner, 748 P.2d 1076 (Utah 1988), when it declared that an alimony award should, to the extent possible, equalize the parties' respective standards of living and maintain them as close as possible to that standard of living enjoyed during the marriage.

In the instant case, two members of the panel of the Utah Court of Appeals, when faced with the circumstance of a husband whose income doubled during the pendency of the divorce, rejected those alimony determination guidelines and have, without authority, articulated a new rule. This is contrary to the decision of the court of appeals itself in Bridenbaugh v. Bridenbaugh, 786 P.2d 241 (Utah App. 1990), where the court declared that the standard of living during the marriage is the basis for reexamination of an alimony award.

In this case, the trial judge set alimony at roughly one-third (1/3) of the amount received by the parties during their marriage.¹ The majority of the panel of the court of appeals did not accept that ruling and has ordered, as the dissenting judge discerned, the trial judge to award alimony for a standard of living that never existed. That is an award based on income of \$10,000.00 a month rather than \$5,500.00 a month. By so ruling, the two judges of the panel seek to rewrite the law of alimony in Utah in a fashion that is contrary to the guidelines articulated by this court. This

¹ The trial court awarded \$1,800.00 of husband's earnings as alimony. This would rationalize to a division of the income of the parties as follows: 1/3 to taxes, 1/2 the balance to the husband, 1/2 the balance to the wife, which directly follows the Gardner mandate.

action renders the decision in conflict with prior Utah decisions and substantially departs from the law governing the establishment of alimony, which requires this court in the exercise of proper judicial supervision, to review that decision.

CONCLUSION

This court should grant a writ of certiorari and after appropriate examination, vacate the decision of the majority of the panel of the Utah Court of Appeals, and remand the case for decision in light of the governing authorities as cited and articulated by Judge Bench in his dissent.

RESPECTFULLY submitted this 28 day of March,
1991.


DAVID S. DOLOWITZ
Attorney for Petitioner


APPENDIX

- A. Howell v. Howell, No. 890596-CA (Utah App. Feb. 28, 1991).
- B. Howell v. Howell, 155 Utah Adv. Rep. 18 (Utah App. 1991).
- C. Findings of Fact and Conclusions of Law, Howell (No. D87-4343).
- D. Decree of Divorce, Howell (No. D87-4343).

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that I am a member of and/or employed in the law firm of **COHNE, RAPPAPORT & SEGAL, P.C.**, 525 East First South, Suite 500, P.O. Box 11008, Salt Lake City, Utah 84147-0008, and that in said capacity, I caused four (4) true and correct copies of the foregoing **PETITION FOR WRIT OF CERTIORARI** to be mailed to the person(s) named below:

Paul H. Liapis
Helen E. Christian
GUSTIN, GREEN, STEGALL & LIAPIS
48 Post Office Place
Suite 300
Salt Lake City, Utah 84101



DAVID S. DOLOWITZ

(cdm\dsd\howell.wrt)

APPENDIX "A"

COVER SHEET

CASE TITLE:

Walter James Howell,
Plaintiff and Appellee,
v.
Barbara Joyce Howell,
Defendant and Appellant.

Case No. 890596-CA

PARTIES:

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TRIAL JUDGE:

Honorable Frank G. Noel

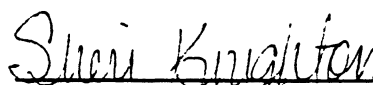
February 28, 1991. OPINION (For Publication).

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the district court herein be, and the same is, affirmed in part, reversed in part and remanded for further proceedings in accordance with the views expressed in the opinion filed herein.

Opinion of the Court by PAMELA T. GREENWOOD, Judge;
REGNAL W. GARFF, Judge, concurs. RUSSELL W. BENCH, Judge,
concurs in part and dissents in part, by separate opinion.

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of February, 1991, a true and correct copy of the foregoing OPINION was deposited in the United States mail or personally delivered to each of the above parties.


Deputy Clerk

TRIAL COURT:

Salt Lake County, Third District Court Case No. D87-4343

FILED

FEB 28 1991

IN THE UTAH COURT OF APPEALS

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Walter James Howell,)
)
Plaintiff and Appellee,)
)
v.)
)
Barbara Joyce Howell,)
)
Defendant and Appellant.)

OPINION
(For Publication)
Case No. 890596-CA

F I L E D
(February 28, 1991)

Mary T. Noonan
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

Third District, Salt Lake County
The Honorable Frank G. Noel

Attorneys: Paul H. Liapis, Helen E. Christian, and Kim M.
Luhn, Salt Lake City, for Appellant
David S. Dolowitz, Michael S. Evans, and M. Joy
Douglas, Salt Lake City, for Appellee

Before Judges Bench, Garff, and Greenwood.

GREENWOOD, Judge:

Defendant, Barbara Joyce Howell, appeals from a divorce decree's award of alimony and division of equity in a California home. We affirm the property division but reverse and remand as to alimony.

FACTS

Defendant and plaintiff, Walter James Howell, were married on October 14, 1956. Plaintiff began working as a pilot for Western Airlines shortly after the parties married. He continued to be employed as a pilot with Western, later taken over by Delta Airlines, throughout the parties' marriage. The parties had five children, four of whom were emancipated at the time of trial. The parties had marital difficulties on and off for a number of years and separated in November 1986. At that time, plaintiff's gross income was between \$5500 and \$5600 per month, and had been at that level for the prior five years. Western Airlines experienced financial problems prior to the takeover by Delta Airlines. As a result of negotiations

between Western and its pilots, plaintiff received virtually no pay raises between 1981 and 1986, despite increases in the cost of living. Both parties testified that their family finances were strained during that time period.

Plaintiff filed for divorce in November 1987. At the time of trial, December 1988, his gross monthly income had increased to \$10,120. Plaintiff's financial declaration indicated monthly expenses of \$7960, which included \$2400 for alimony and child support, \$372 for vacations, and \$633 for attorney fees.

During the parties' marriage, defendant was a homemaker and had worked only part time at unskilled labor jobs. At the time of trial defendant earned \$649.80 per month, though that job was only temporary and terminated in December 1988. She testified at trial that she had monthly expenses totaling \$5021.¹

The parties owned homes in Utah and California, as well as real property in Texas. Plaintiff testified that the Utah home had little, if any, equity, while the California home would yield substantial equity. Plaintiff wanted to sell all the properties and divide the net proceeds. Defendant testified she would prefer to live in the California home.

After trial, the court entered findings of fact, conclusions of law, and a decree of divorce on May 12, 1989. In its findings, the court states its belief that "the income level of \$5500 reflects the income level and living standards of the parties during the last five years of their lives together." The court found that defendant was capable of earning \$625 per month, and that plaintiff had income of \$10,000 per month. The findings further state that "[t]he court has determined in setting alimony that while \$5,500.00 per month represents the living standards of the parties in the last 5 years of the marriage, when the parties resided together, the ability of the plaintiff to pay alimony is based upon his present income of \$10,000.00 per month." Defendant was awarded \$1800 per month alimony and \$1363 per month child support for the parties' then sixteen year-old child, based on the child support guidelines then in effect. The court ordered

1. Defendant filed an earlier declaration of monthly expenses totaling \$4464.62, but included no expenses for real property taxes or insurance, indicating that they were then unknown.

that all of the real property, including the California home, be sold and the net proceeds divided equally between the parties.

On appeal, defendant asserts (1) the parties' standard of living, for purposes of determining alimony, should be based on that at the time of trial; (2) the alimony awarded is insufficient; and (3) the trial court should have taken into consideration the tax consequences of selling the California home.

STANDARD OF REVIEW

Trial courts have considerable discretion in determining alimony and property distribution in divorce cases, and will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated. Rasband v. Rasband, 752 P.2d 1331, 1333 (Utah Ct. App. 1988). Findings of fact in divorce appeals are subject to the clearly erroneous standard of review such that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a); Jense v. Jense, 784 P.2d 1249, 1251 (Utah Ct. App. 1989). Conclusions of law, however, are reviewed for correctness and given no special deference on appeal. Bountiful v. Riley, 784 P.2d 1174, 1175 (Utah 1989); Smith v. Smith, 793 P.2d 407, 409 (Utah Ct. App. 1990).

ALIMONY

Defendant claims that the alimony award would have been higher if the trial court had considered the parties' standard of living at the time of trial rather than when the parties separated, approximately two years earlier. Additionally, defendant claims alimony should have been higher because of the disparity in the parties' income, length of the marriage, and the parties' respective earning abilities and expenses. We consider first the applicable standard of living question.

The value of marital property is determined as of the time of the divorce decree or trial. Fletcher v. Fletcher, 615 P.2d 1218, 1222-23 (Utah 1980). See also Berger v. Berger, 713 P.2d 695, 697 (Utah 1985). The reason for the rule is that "[b]y the very nature of a property division, the marital estate is evaluated according to what property exists at the time the marriage is terminated." Jespersion v. Jespersen, 610 P.2d 326, 328 (Utah 1980). Courts can, however, in the exercise of their equitable powers, use a different date, such as the date of separation, if one party has "acted obstructively, . . ." Peck v. Peck, 738 P.2d 1050, 1052 (Utah Ct. App. 1987).

No cases in Utah or elsewhere, that we or counsel have discovered, have specifically addressed the question of when a couple's "standard of living" should be determined for the purpose of calculating alimony, be it separation or trial or some other time. Most speak only of the standard of living during marriage. See Savage v. Savage, 658 P.2d 1201, 1205 (Utah 1983). "Standard of living" is defined as "a minimum of necessities, comforts, or luxuries that is essential to maintaining a person in customary or proper status or circumstances." Webster's Third New International Dictionary 2223 (1986). "An alimony award should, to the extent possible, equalize the parties' respective post-divorce living standards" Rasband v. Rasband, 752 P.2d 1331, 1333 (Utah Ct. App. 1980).

In this case, the parties were separated for approximately one year before plaintiff filed for divorce. About one year later, trial was held. We note that a separation of two years before trial in a divorce action is certainly not unusual. During that two-year period, plaintiff's income doubled because of the successful takeover of Western Airlines by Delta Airlines. Plaintiff's ability to take advantage of that change was at least in part a result of having persevered during the lean times, as did his wife and children. The impact of the salary increase on the parties' standard of living, however, was certainly affected by the fact that it was used to maintain separate living arrangements.

We believe it is consistent with the goal of equalizing the parties' post divorce status to look to the standard of living existing at or near the time of trial in determining alimony. This is consonant with the treatment of both marital property and child support and is better designed to equip both parties to go forward with their separate lives with relatively equal odds. It is further justified because any future changes in alimony are limited to instances where a material change of circumstances has occurred. Bridenbaugh v. Bridenbaugh, 786 P.2d 241, 242 (Utah Ct. App. 1990). In so holding, we agree with the dissenting opinion that determining standard of living is a "fact-sensitive, subjective task." We disagree, however, that standard of living is determined by actual expenses alone. Those expenses may be necessarily lower than needed to maintain an appropriate standard of living for various reasons, including, possibly, lack of income. As Webster says, standard of living includes "customary or proper status" considering the parties' circumstances. Those circumstances should be evaluated at the time of trial and, contrary to the dissent, can properly

address what situation would have existed if the parties had not separated earlier. In this case, the post-separation substantial increase in plaintiff's income was akin to deferred income. In light of the facts of this case, we conclude that the trial court erred in looking at the pre-separation standard of living in setting alimony, but should have instead considered the standard of living "during the marriage" up to the time of trial. In so concluding we do not intend to establish a rigid rule which must be followed in all domestic cases, but acknowledge that trial courts have discretion to determine the standard of living which existed during the marriage after consideration of all relevant facts and equitable principles. In this case, it was inequitable and an abuse of discretion to pinpoint standard of living as of the time of the parties' separation.

We now turn to defendant's argument that the court did not properly consider all relevant factors, resulting in an unjustifiably low alimony award. Trial courts must consider the following factors in setting alimony: (1) the financial condition and needs of the recipient spouse; (2) the recipient's ability to produce income; and (3) the ability of the payor spouse to provide support. Davis v. Davis, 749 P.2d 647, 649 (Utah 1988). Utah cases have stated that the purpose of alimony is to prevent the receiving spouse "from becoming a public charge" and to maintain the standard of living enjoyed during the marriage, to the extent possible. Fletcher, 615 P.2d at 1223. Therefore, trial courts should first, determine the financial needs and resources for both parties, by examining the three factors enumerated. Second, the court should set alimony as permitted by those parameters, to approximate the parties' standard of living during the marriage as closely as possible. It follows that if the payor spouse's resources are adequate, alimony need not be limited to provide for only basic needs, but should also consider the recipient spouse's "station in life." Gramme v. Gramme, 587 P.2d 144, 147 (Utah 1978). In Gardner v. Gardner, 748 P.2d 1076 (Utah 1988), the Utah Supreme Court reviewed an alimony award after a long-term marriage. The court found that the alimony award in that situation should, "to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to that standard of living enjoyed during the marriage." Id. at 1081. See also Paffel v. Paffel, 732 P.2d 96, 103 (Utah 1986); Olson v. Olson, 704 P.2d 564, 566 (Utah 1985).

The trial court must make findings on all material issues. Failure to do so constitutes reversible error, unless pertinent facts in the record are "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." Andersen v. Andersen, 757 P.2d 476, 478 (Utah Ct. App. 1988).

Utah's appellate courts have considered the appropriateness of alimony after a long term marriage, where the wife (usually) has worked primarily in the home, has limited job skills, and is in her late forties or fifties. Gardner, 748 P.2d 1076; Rasband, 752 P.2d 1331, 1333. In Jones v. Jones, 700 P.2d 1072 (Utah 1985), the supreme court found alimony awarded inadequate to allow the wife a standard of living even approaching that experienced during the marriage, and described the marriage as follows:

During most of the marriage, with the full consent and support of her husband, [the wife] devoted her time to raising their four children and donating her services to various social service organizations. . . . It is entirely unrealistic to assume that a woman in her mid-50's with no substantial work experience or training will be able to enter the job market and support herself in anything even resembling the style in which the couple had been living.

Id. at 1075.

In this case the court made findings as to both plaintiff's and defendant's gross incomes. It did not, however, make the required finding as to defendant's financial needs, although defendant testified to monthly expenses of approximately \$5,000. Child support set pursuant to child support guidelines at \$1363, plus alimony of \$1800, plus defendant's potential salary as determined by the court of \$645, yields total gross monthly income of \$3808 for defendant and her son. Plaintiff, after deducting child support and alimony, has gross monthly income of \$6837. When his child support obligation ceases, approximately fifteen months after the decree, he will have gross monthly income of \$8200 in comparison to defendant's \$2445.² Defendant fits the profile described in Jones and other cases: she is approximately fifty years old, has minimal marketable job skills, and has spent most of the thirty plus years of the parties' marriage raising and caring for their five children and their home, presumably

2. "If courts award child support in lieu of permanent alimony, they may fail to anticipate the financial impact on the remaining family as each child reaches age 18 and his or her award terminates." March 1990 Utah Task Force on Gender and Justice Report to the Utah Judicial Council 38.

with the concurrence of plaintiff. Her likelihood of achieving significant salary levels in the future is slim. The alimony set by the court does not come close to equalizing the parties' standard of living as of the time of the divorce, but allows plaintiff a two to four times advantage.³ We, therefore, hold that the alimony amount set by the court was clearly erroneous.

We reverse and remand to the trial court on the issue of alimony, for findings as to defendant's financial needs, the parties' standard of living at the time of the trial, and for adjustment of the amount of alimony to better equalize the parties' abilities to go forward with their respective lives.

TAX CONSIDERATIONS

Defendant also urges that the court erred by failing to consider the tax consequences of selling the California home. Defendant produced an expert witness at trial who testified as to the possible tax ramifications of the sale. He discussed capital gains tax, but said the amount would depend on the sales price, and that it might be avoided pursuant to tax regulations. He testified that taxes might be deferred, or "rolled over," but could not say with any certainty how the IRS would rule. There is no abuse of discretion if a court refuses to speculate about hypothetical future tax consequences of a property division made pursuant to a divorce. Alexander v. Alexander, 737 P.2d 221, 224 (Utah 1987). Tax consequences in this case were speculative as to whether they could be avoided or delayed, and as to amount. The court heard testimony and evidence regarding possible tax implications, but did not err in refusing to adjust property distribution because of those theoretical consequences.

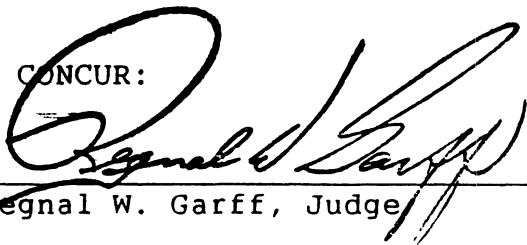
CONCLUSION

We affirm the trial court's property distribution order but reverse as to the alimony award and remand for further proceedings consistent with this opinion.


Pamela T. Greenwood, Judge

3. Exact mathematical equality of income is not required, but sufficient parity to allow both parties to be on equal footing financially as of the time of the divorce is required.

I CONCUR: -----


Regnal W. Garff, Judge -----

BENCH, Judge (concurring in part, dissenting in part):

I agree with the majority opinion's treatment of the "tax considerations." I also agree that this case must be remanded for entry of appropriate findings as to the needs of defendant for alimony and the ability of plaintiff to pay alimony. I respectfully disagree with the majority, however, as to how the parties' standard of living during the marriage impacts the alimony computations. The majority rules, as a matter of law, that in computing the alimony award, the trial court should have considered a hypothetical standard of living as if the parties were living together at the time of trial rather than their actual standard of living enjoyed prior to separation.¹

There are no cases addressing when the parties' standard of living is determined because a "standard of living" cannot, as the majority implies, be quantified by the trial court. It is not like marital property which is capable of objective valuation at a given time. Nor is it capable of being calculated based on set figures of income as are child support payments. Determining the parties' standard of living during marriage is a fact-sensitive, subjective task that requires a trial court to look at the totality of the parties' financial

1. Contrary to the majority's assertion, the trial court did not "pinpoint" the parties' standard of living as of the time of separation. The trial court took the parties' average income over a five-year period prior to separation and assumed that their average income was their "standard of living." While it is clear that the trial court erred in assuming that income alone establishes a standard of living, it may not be said that it made the mistake of pinpointing that standard of living. The majority therefore errs in finding that the trial court abused its discretion when the trial court did not even make the mistake that the majority is accusing it of making.

circumstances during the marriage. The Utah Supreme Court has therefore established objective factors that must be considered by the trial court when it determines an award of alimony.

"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." English v. English, 565 P.2d at 411. With this purpose in mind, the Court in English articulated three factors that must be considered in fixing a reasonable alimony award: [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.

Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985). Accord Paffel v. Paffel, 732 P.2d 96, 100-01 (Utah 1986) (failure to consider these factors is an abuse of discretion); Olson v. Olson, 704 P.2d 564, 566-67 (Utah 1985) (an appellate court will not disturb a trial court's ruling if these factors are adequately addressed).

As is apparent from the foregoing quotation, the receiving spouse's previous standard of living is not an independent factor to be quantified and incorporated into a formula for calculating alimony. Rather, it is a frame of reference for determining the reasonableness of the alimony award. See generally, 2 H. Clark, Jr., The Law Of Domestic Relations In The United States § 17.5(8) (2d ed. 1987). In the present case, we are not concerned with the risk of defendant becoming a public charge given the apparent ability of plaintiff to cover defendant's basic needs. The question is how much additional support above defendant's basic needs should be granted. The parties' standard of living prior to separation helps to establish what would be reasonable by showing the lifestyle to which the parties have grown accustomed.

Defendant seeks to benefit from plaintiff's raise by mistakenly, and unnecessarily, claiming that the raise entitled her to alimony based upon a hypothetical standard of living to be calculated from plaintiff's new annual salary of \$120,000,

an income to which she has never grown accustomed.² In other words, defendant claims that her relevant standard of living is the unknown standard of living that she might have enjoyed were the parties not terminating their marriage. Since any attempt to determine a standard of living for two separated parties as if they were not separated would be purely speculative, the majority's ruling is judicially unworkable. There is no rational way of knowing how the parties might have utilized the increased income had they remained together. Would they have bought a new car, a new house, or maybe a vacation timeshare? Or would they have simply saved the money for retirement? Since a couple's standard of living is determined in large part by how they spend their resources, a trial court could do nothing but speculate about the possible standard of living if the marital relationship had continued beyond separation.

Not only is such an approach unworkable, it is not needed if the traditional approach outlined in English is followed. In the present case, the trial court clearly failed to determine defendant's financial condition and needs based on the expenses she claimed to be necessary to maintain the standard of living she enjoyed during the marriage. See, e.g., Olson, 704 P.2d at 567 ("to maintain the standard of living enjoyed during the marriage, the living expenses of the wife and minor children would be \$4,200 per month").

Defendant presented to the trial court evidence of the expenses which she claimed would be necessary to maintain her standard of living, but the trial court made no findings

2. Defendant claims, and the majority seems to agree, that defendant is entitled to a larger amount of alimony because she "persevered during the lean times." Such an argument does not, however, justify an amount in excess of the needs substantiated by the receiving spouse. English, 565 P.2d at 412. The majority's summary conclusion that the income was "akin to deferred income," is totally unsupported. While the parties may have persevered at Western Airlines during the lean times, there is no evidence that there was any commitment from Western that plaintiff's income would increase if and because he stayed with the airline.

thereon.³ The trial court should have reviewed the expenses claimed and determined which expenses could be deemed reasonable in light of the standard of living she had enjoyed prior to the separation. See, e.g., Jones, 700 P.2d at 1075 (the couple had enjoyed a "very comfortable lifestyle," alimony award of \$1,000 per month was insufficient for wife to "maintain anything even approaching the standard of living she enjoyed during the marriage"). Her reasonable expenses should have then been offset by her own resources, i.e., any investment income and her own wage-earning capacity. Only then could the trial court have made a finding as to defendant's needs.

The trial court should have then gone through the same analysis as to the plaintiff's needs and resources in order to determine his ability to pay. Again, the reasonableness of his claimed expenses should be reviewed with the parties' prior standard of living in mind. The trial court should have then determined whether plaintiff's resources exceeded his reasonable needs. At this point the trial court should have, and in fact did, consider the impact of the dramatic increase in plaintiff's income. If plaintiff had not received the raise, then his ability to pay would be approximately \$4,500 less per month, in which case neither party would likely be able to enjoy a standard of living anywhere near their previous standard. Inasmuch as plaintiff's raise has increased his ability to pay, defendant will be directly benefitted without resort to a hypothetical standard of living to which she had not grown accustomed.

After determining what resources were available to the parties to meet their own reasonable expenses, the trial court should have considered any imbalance in the prospective standards of living if the parties were left to support themselves with their own resources. If it were apparent that defendant could not maintain her previous standard of living with her own resources, and that the plaintiff with his dramatically increased income could maintain a higher standard

3. Defendant's actual expenses at the time of trial were likely greatly diminished due to her limited income at the time. She therefore correctly sought to present not only her actual expenses during the separation, but also the expenses she claimed would be necessary to maintain or, in many cases return to, the standard of living she enjoyed prior to separation.

of living, then the trial court could have awarded alimony to raise the standard of living of the defendant. Davis v. Davis, 749 P.2d 647, 649 (Utah 1988) ("the ultimate test of the propriety of an alimony award is whether, given all of these factors, the party receiving alimony will be unable to support him- or herself 'as nearly as possible at the standard of living . . . enjoyed during the marriage,'" quoting English, 565 P.2d at 411).⁴

Inasmuch as the trial court failed to follow the foregoing approach, the court abused its discretion in making the alimony award. I therefore concur with the majority that this case must be remanded to allow the trial court to properly consider the established factors and make appropriate findings. However, since plaintiff's raise will be fully considered when his ability to pay alimony is determined, I believe there is no need to depart from the established criteria for determining alimony. The parties' standard of living need not, and should not, be extrapolated so as to include speculations about what their standard of living might have been at the time of trial if they had not separated. I therefore respectfully dissent from the majority opinion's legal ruling on that point.


Russell W. Bench, Judge

4. The alimony award, however, need not be large enough to maintain the receiving spouse at the standard of living enjoyed during the marriage if that amount of alimony would lower the standard of living of the paying spouse below that of the receiving spouse. Alimony may only raise the standard of living of the receiving spouse until it is roughly equal to that of the paying spouse. It is in this sense that alimony should seek "to the extent possible, [to] equalize the parties' respective post-divorce living standards." Rasband v. Rasband, 752 P.2d 1331, 1333 (Utah Ct. App. 1988).

APPENDIX "B"

Gillmor's January 25 affidavits or, in denying the motion to reconsider, disregarded those affidavits altogether

Because the trial court granted summary judgment prematurely under the applicable procedural rules, and because nothing in the record indicates that the court corrected its procedural error when that error was called to its attention, the summary judgment is set aside. *See Graco Fishing & Rental Tools, Inc. v. Ironwood Exploration, Inc.*, 735 P.2d 62, 62-63 (Utah 1987); *K.O. v. Denison*, 748 P.2d 588, 591 (Utah Ct. App. 1988). We reverse and remand to the trial court for proceedings consistent with this opinion. Each party shall pay his or its own costs.

Pamela T Greenwood, Judge

WE CONCUR

Russell W Bench, Judge
Judith M Billings, Judge

1 Gillmor correctly claims that there is a disputed issue of fact concerning the location of the record boundary between his property and that of appellees, as is reflected in his affidavit and those of the surveyor. This issue, however, is not material with respect to the question of whether appellees have satisfied the requirements for adverse possession, which was the sole ground for their summary judgment motion. Indeed, the summary judgment motion starts with the assumption that the Garlicks and Pelton do in fact occupy property to which Gillmor holds record title. The true location of the record boundary has no bearing on the adverse possession claim. However, in the event appellees' adverse possession defense fails, they must address Gillmor's boundary line claim.

2 Utah Code Ann §78-12-12 (1987) requires continuous occupation and payment of taxes on land adversely claimed.

In no case shall adverse possession be considered established under the provisions of any section of this code, unless it shall be shown that the land had been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law.

Gillmor's memoranda and affidavits apparently dispute both the seven year continuous occupation and tax payment for the Garlicks and/or Pelton.

3 Although Gillmor did not include procedural error as a basis for appeal in his brief, he did argue the issue before the trial court. We consider the procedural issue on appeal for practical reasons: we are unable to determine from the record before us what the court actually considered in granting the summary judgment and denying the motion for reconsideration. This is similar to those cases where we remand for findings because we are unable to discern from the record how the court resolved material issues. *See Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987), *State v. Lovegren*, 798 P.2d 767, 770-71 (Utah Ct. App. 1990).

Cite as
155 Utah Adv. Rep. 18

IN THE UTAH COURT OF APPEALS

Walter James HOWELL,
Plaintiff and Appellee,

v.

Barbara Joyce HOWELL,
Defendant and Appellant.

No. 890596-CA

FILED: February 28, 1991

Third District, Salt Lake County
Honorable Frank G. Noel

ATTORNEYS:

Paul H. Liapis, Helen E. Christian, and Kim M. Luhn, Salt Lake City, for Appellant

David S. Dolowitz, Michael S. Evans, and M. Joy Douglas, Salt Lake City, for Appellee

Before Judges Bench, Garff, and Greenwood.

OPINION

GREENWOOD, Judge:

Defendant, Barbara Joyce Howell, appeals from a divorce decree's award of alimony and division of equity in a California home. We affirm the property division but reverse and remand as to alimony.

FACTS

Defendant and plaintiff, Walter James Howell, were married on October 14, 1956. Plaintiff began working as a pilot for Western Airlines shortly after the parties married. He continued to be employed as a pilot with Western, later taken over by Delta Airlines, throughout the parties' marriage. The parties had five children, four of whom were emancipated at the time of trial. The parties had marital difficulties on and off for a number of years and separated in November 1986. At that time, plaintiff's gross income was between \$5500 and \$5600 per month, and had been at that level for the prior five years. Western Airlines experienced financial problems prior to the takeover by Delta Airlines. As a result of negotiations between Western and its pilots, plaintiff received virtually no pay raises between 1981 and 1986, despite increases in the cost of living. Both parties testified that their family finances were strained during that time period.

Plaintiff filed for divorce in November 1987. At the time of trial, December 1988, his gross monthly income had increased to \$10,120. Plaintiff's financial declaration indicated monthly expenses of \$7960, which included \$2400 for alimony and child support, \$372 for vacations, and \$633 for attorney fees.

During the parties' marriage, defendant was a homemaker and had worked only part time at unskilled labor jobs. At the time of trial defendant earned \$649.80 per month, though that job was only temporary and terminated in December 1988. She testified at trial that she had monthly expenses totaling \$5021.¹

The parties owned homes in Utah and California, as well as real property in Texas. Plaintiff testified that the Utah home had little, if any, equity, while the California home would yield substantial equity. Plaintiff wanted to sell all the properties and divide the net proceeds. Defendant testified she would prefer to live in the California home.

After trial, the court entered findings of fact, conclusions of law, and a decree of divorce on May 12, 1989. In its findings, the court states its belief that "the income level of \$5500 reflects the income level and living standards of the parties during the last five years of their lives together." The court found that defendant was capable of earning \$625 per month, and that plaintiff had income of \$10,000 per month. The findings further state that "[t]he court has determined in setting alimony that while \$5,500.00 per month represents the living standards of the parties in the last 5 years of the marriage, when the parties resided together, the ability of the plaintiff to pay alimony is based upon his present income of \$10,000.00 per month." Defendant was awarded \$1800 per month alimony and \$1363 per month child support for the parties' then sixteen year-old child, based on the child support guidelines then in effect. The court ordered that all of the real property, including the California home, be sold and the net proceeds divided equally between the parties.

On appeal, defendant asserts (1) the parties' standard of living, for purposes of determining alimony, should be based on that at the time of trial; (2) the alimony awarded is insufficient; and (3) the trial court should have taken into consideration the tax consequences of selling the California home.

STANDARD OF REVIEW

Trial courts have considerable discretion in determining alimony and property distribution in divorce cases, and will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated. *Rasband v. Rasband*, 752 P.2d 1331, 1333 (Utah Ct. App. 1988). Findings of fact in divorce appeals are subject to the clearly erroneous standard of review such that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a); *Jense v. Jense*, 784 P.2d 1249, 1251 (Utah Ct. App. 1989). Conclusions of law, however, are reviewed for correctness and given no special deference on appeal. *Bountiful v. Riley*, 784 P.2d 1174, 1175 (Utah 1989);

Smith v. Smith, 793 P.2d 407, 409 (Utah Ct. App. 1990).

ALIMONY

Defendant claims that the alimony award would have been higher if the trial court had considered the parties' standard of living at the time of trial rather than when the parties separated, approximately two years earlier. Additionally, defendant claims alimony should have been higher because of the disparity in the parties' income, length of the marriage, and the parties' respective earning abilities and expenses. We consider first the applicable standard of living question.

The value of marital property is determined as of the time of the divorce decree or trial. *Fletcher v. Fletcher*, 615 P.2d 1218, 1222-23 (Utah 1980). See also *Berger v. Berger*, 713 P.2d 695, 697 (Utah 1985). The reason for the rule is that "[b]y the very nature of a property division, the marital estate is evaluated according to what property exists at the time the marriage is terminated." *Jespersion v. Jespersen*, 610 P.2d 326, 328 (Utah 1980). Courts can, however, in the exercise of their equitable powers, use a different date, such as the date of separation, if one party has "acted obstructively, ..." *Peck v. Peck*, 738 P.2d 1050, 1052 (Utah Ct. App. 1987).

No cases in Utah or elsewhere, that we or counsel have discovered, have specifically addressed the question of when a couple's "standard of living" should be determined for the purpose of calculating alimony, be it separation or trial or some other time. Most speak only of the standard of living during marriage. See *Savage v. Savage*, 658 P.2d 1201, 1205 (Utah 1983). "Standard of living" is defined as "a minimum of necessities, comforts, or luxuries that is essential to maintaining a person in customary or proper status or circumstances." *Webster's Third New International Dictionary* 2223 (1986). "An alimony award should, to the extent possible, equalize the parties' respective post-divorce living standards" *Rasband v. Rasband*, 752 P.2d 1331, 1333 (Utah Ct. App. 1980).

In this case, the parties were separated for approximately one year before plaintiff filed for divorce. About one year later, trial was held. We note that a separation of two years before trial in a divorce action is certainly not unusual. During that two-year period, plaintiff's income doubled because of the successful takeover of Western Airlines by Delta Airlines. Plaintiff's ability to take advantage of that change was at least in part a result of having persevered during the lean times, as did his wife and children. The impact of the salary increase on the parties' standard of living, however, was certainly affected by the fact that it was used to maintain separate living arrangements.

We believe it is consistent with the goal of equalizing the parties' post divorce status to look to the standard of living existing at or near the time of trial in determining alimony. This is consonant with the treatment of both marital property and child support and is better designed to equip both parties to go forward with their separate lives with relatively equal odds. It is further justified because any future changes in alimony are limited to instances where a material change of circumstances has occurred. *Bridenbaugh v. Bridenbaugh*, 786 P.2d 241, 242 (Utah Ct. App. 1990). In so holding, we agree with the dissenting opinion that determining standard of living is a "fact-sensitive, subjective task." We disagree, however, that standard of living is determined by actual expenses alone. Those expenses may be necessarily lower than needed to maintain an appropriate standard of living for various reasons, including, possibly, lack of income. As Webster says, standard of living includes "customary or proper status" considering the parties' circumstances. Those circumstances should be evaluated at the time of trial and, contrary to the dissent, can properly address what situation would have existed if the parties had not separated earlier. In this case, the post-separation substantial increase in plaintiff's income was akin to deferred income. In light of the facts of this case, we conclude that the trial court erred in looking at the pre-separation standard of living in setting alimony, but should have instead considered the standard of living "during the marriage" up to the time of trial. In so concluding we do not intend to establish a rigid rule which must be followed in all domestic cases, but acknowledge that trial courts have discretion to determine the standard of living which existed during the marriage after consideration of all relevant facts and equitable principles. In this case, it was inequitable and an abuse of discretion to pinpoint standard of living as of the time of the parties' separation.

We now turn to defendant's argument that the court did not properly consider all relevant factors, resulting in an unjustifiably low alimony award. Trial courts must consider the following factors in setting alimony: (1) the financial condition and needs of the recipient spouse; (2) the recipient's ability to produce income; and (3) the ability of the payor spouse to provide support. *Davis v. Davis*, 749 P.2d 647, 649 (Utah 1988). Utah cases have stated that the purpose of alimony is to prevent the receiving spouse "from becoming a public charge" and to maintain the standard of living enjoyed during the marriage, to the extent possible. *Fletcher*, 615 P.2d at 1223. Therefore, trial courts should first, determine the financial needs and resources for both parties, by examining the three factors enumerated. Second, the court should set alimony as permitted by those parameters, to approximate

the parties' standard of living during the marriage as closely as possible. It follows that if the payor spouse's resources are adequate, alimony need not be limited to provide for only basic needs, but should also consider the recipient spouse's "station in life." *Gramme v. Gramme*, 587 P.2d 144, 147 (Utah 1978). In *Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988), the Utah Supreme Court reviewed an alimony award after a long-term marriage. The court found that the alimony award in that situation should, "to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to that standard of living enjoyed during the marriage." *Id.* at 1081. See also *Paffel v. Paffel*, 732 P.2d 96, 103 (Utah 1986); *Olson v. Olson*, 704 P.2d 564, 566 (Utah 1985).

The trial court must make findings on all material issues. Failure to do so constitutes reversible error, unless pertinent facts in the record are "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." *Andersen v. Andersen*, 757 P.2d 476, 478 (Utah Ct. App. 1988).

Utah's appellate courts have considered the appropriateness of alimony after a long term marriage, where the wife (usually) has worked primarily in the home, has limited job skills, and is in her late forties or fifties. *Gardner*, 748 P.2d 1076; *Rasband*, 752 P.2d 1331, 1333. In *Jones v. Jones*, 700 P.2d 1072 (Utah 1985), the supreme court found alimony awarded inadequate to allow the wife a standard of living even approaching that experienced during the marriage, and described the marriage as follows:

During most of the marriage, with the full consent and support of her husband, [the wife] devoted her time to raising their four children and donating her services to various social service organizations.... It is entirely unrealistic to assume that a woman in her mid-50's with no substantial work experience or training will be able to enter the job market and support herself in anything even resembling the style in which the couple had been living.

Id. at 1075.

In this case the court made findings as to both plaintiff's and defendant's gross incomes. It did not, however, make the required finding as to defendant's financial needs, although defendant testified to monthly expenses of approximately \$5,000. Child support set pursuant to child support guidelines at \$1363, plus alimony of \$1800, plus defendant's potential salary as determined by the court of \$645, yields total gross monthly income of \$3808 for defendant and her son. Plaintiff, after deducting child support and

alimony, has gross monthly income of \$6837. When his child support obligation ceases, approximately fifteen months after the decree, he will have gross monthly income of \$8200 in comparison to defendant's \$2445.² Defendant fits the profile described in *Jones* and other cases: she is approximately fifty years old, has minimal marketable job skills, and has spent most of the thirty plus years of the parties' marriage raising and caring for their five children and their home, presumably with the concurrence of plaintiff. Her likelihood of achieving significant salary levels in the future is slim. The alimony set by the court does not come close to equalizing the parties' standard of living as of the time of the divorce, but allows plaintiff a two to four times advantage.³ We, therefore, hold that the alimony amount set by the court was clearly erroneous.

We reverse and remand to the trial court on the issue of alimony, for findings as to defendant's financial needs, the parties' standard of living at the time of the trial, and for adjustment of the amount of alimony to better equalize the parties' abilities to go forward with their respective lives.

TAX CONSIDERATIONS

Defendant also urges that the court erred by failing to consider the tax consequences of selling the California home. Defendant produced an expert witness at trial who testified as to the possible tax ramifications of the sale. He discussed capital gains tax, but said the amount would depend on the sales price, and that it might be avoided pursuant to tax regulations. He testified that taxes might be deferred, or "rolled over," but could not say with any certainty how the IRS would rule. There is no abuse of discretion if a court refuses to speculate about hypothetical future tax consequences of a property division made pursuant to a divorce. *Alexander v. Alexander*, 737 P.2d 221, 224 (Utah 1987). Tax consequences in this case were speculative as to whether they could be avoided or delayed, and as to amount. The court heard testimony and evidence regarding possible tax implications, but did not err in refusing to adjust property distribution because of those theoretical consequences.

CONCLUSION

We affirm the trial court's property distribution order but reverse as to the alimony award and remand for further proceedings consistent with this opinion.

Pamela T. Greenwood, Judge

CONCUR:

Regnal W. Garff, Judge

1. Defendant filed an earlier declaration of monthly expenses totaling \$4464.62, but included no expenses for real property taxes or insurance, indicating that they were then unknown.

2. "If courts award child support in lieu of permanent alimony, they may fail to anticipate the financial impact on the remaining family as each child reaches age 18 and his or her award terminates." March 1990 *Utah Task Force on Gender and Justice Report to the Utah Judicial Council* 38.

3. Exact mathematical equality of income is not required, but sufficient parity to allow both parties to be on equal footing financially as of the time of the divorce is required.

BENCH, Judge (concurring in part, dissenting in part):

I agree with the majority opinion's treatment of the "tax considerations." I also agree that this case must be remanded for entry of appropriate findings as to the needs of defendant for alimony and the ability of plaintiff to pay alimony. I respectfully disagree with the majority, however, as to how the parties' standard of living during the marriage impacts the alimony computations. The majority rules, as a matter of law, that in computing the alimony award, the trial court should have considered a hypothetical standard of living as if the parties were living together at the time of trial rather than their actual standard of living enjoyed prior to separation.¹

There are no cases addressing when the parties' standard of living is determined because a "standard of living" cannot, as the majority implies, be quantified by the trial court. It is not like marital property which is capable of objective valuation at a given time. Nor is it capable of being calculated based on set figures of income as are child support payments. Determining the parties' standard of living during marriage is a fact-sensitive, subjective task that requires a trial court to look at the totality of the parties' financial circumstances during the marriage. The Utah Supreme Court has therefore established objective factors that must be considered by the trial court when it determines an award of alimony.

"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." *English v. English*, 565 P.2d at 411. With this purpose in mind, the Court in *English* articulated three factors that must be considered in fixing a reasonable alimony award:

- [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.

Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985). *Accord Paffel v. Paffel*, 732 P.2d 96, 100-01 (Utah 1986) (failure to consider these factors is an abuse of discretion); *Olson v. Olson*, 704 P.2d 564, 566-67 (Utah 1985) (an appellate court will not disturb a trial court's ruling if these factors are adequately addressed).

As is apparent from the foregoing quotation, the receiving spouse's previous standard of living is not an independent factor to be quantified and incorporated into a formula for calculating alimony. Rather, it is a frame of reference for determining the reasonableness of the alimony award. See generally, 2 H. Clark, Jr., *The Law Of Domestic Relations In The United States* §17.5(8) (2d ed. 1987). In the present case, we are not concerned with the risk of defendant becoming a public charge given the apparent ability of plaintiff to cover defendant's basic needs. The question is how much additional support above defendant's basic needs should be granted. The parties' standard of living prior to separation helps to establish what would be reasonable by showing the lifestyle to which the parties have grown accustomed.

Defendant seeks to benefit from plaintiff's raise by mistakenly, and unnecessarily, claiming that the raise entitled her to alimony based upon a hypothetical standard of living to be calculated from plaintiff's new annual salary of \$120,000, an income to which she has never grown accustomed.² In other words, defendant claims that her relevant standard of living is the unknown standard of living that she might have enjoyed were the parties not terminating their marriage. Since any attempt to determine a standard of living for two separated parties as if they were not separated would be purely speculative, the majority's ruling is judicially unworkable. There is no rational way of knowing how the parties might have utilized the increased income had they remained together. Would they have bought a new car, a new house, or maybe a vacation timeshare? Or would they have simply saved the money for retirement? Since a couple's standard of living is determined in large part by how they spend their resources, a trial court could do nothing but speculate about the possible standard of living if the marital relationship had continued beyond separation.

Not only is such an approach unworkable, it is not needed if the traditional approach outlined in *English* is followed. In the present case, the trial court clearly failed to determine defendant's financial condition and needs based on the expenses she claimed to be necessary to maintain the standard of living she enjoyed during the marriage. See, e.g., *Olson*, 704 P.2d at 567 ("to maintain the standard of living enjoyed during the marriage, the living expenses of the wife and minor children would

be \$4,200 per month").

Defendant presented to the trial court evidence of the expenses which she claimed would be necessary to maintain her standard of living, but the trial court made no findings thereon.³ The trial court should have reviewed the expenses claimed and determined which expenses could be deemed reasonable *in light of the standard of living she had enjoyed prior to the separation*. See, e.g., *Jones*, 700 P.2d at 1075 (the couple had enjoyed a "very comfortable lifestyle," alimony award of \$1,000 per month was insufficient for wife to "maintain anything even approaching the standard of living she enjoyed during the marriage"). Her reasonable expenses should have then been offset by her own resources, i.e., any investment income and her own wage-earning capacity. Only then could the trial court have made a finding as to defendant's needs.

The trial court should have then gone through the same analysis as to the plaintiff's needs and resources in order to determine his ability to pay. Again, the reasonableness of his claimed expenses should be reviewed with the parties' prior standard of living in mind. The trial court should have then determined whether plaintiff's resources exceeded his reasonable needs. At this point the trial court should have, and in fact did, consider the impact of the dramatic increase in plaintiff's income. If plaintiff had not received the raise, then his ability to pay would be approximately \$4,500 less per month, in which case neither party would likely be able to enjoy a standard of living anywhere near their previous standard. Inasmuch as plaintiff's raise has increased his ability to pay, defendant will be directly benefitted without resort to a hypothetical standard of living to which she had not grown accustomed.

After determining what resources were available to the parties to meet their own reasonable expenses, the trial court should have considered any imbalance in the prospective standards of living if the parties were left to support themselves with their own resources. If it were apparent that defendant could not maintain her previous standard of living with her own resources, and that the plaintiff with his dramatically increased income could maintain a higher standard of living, then the trial court could have awarded alimony to raise the standard of living of the defendant. *Davis v. Davis*, 749 P.2d 647, 649 (Utah 1988) ("the ultimate test of the propriety of an alimony award is whether, given all of these factors, the party receiving alimony will be unable to support him- or herself 'as nearly as possible at the standard of living ... enjoyed during the marriage,'" quoting *English*, 565 P.2d at 411).⁴

Inasmuch as the trial court failed to follow the foregoing approach, the court abused its discretion in making the alimony award. I

therefore concur with the majority that this case must be remanded to allow the trial court to properly consider the established factors and make appropriate findings. However, since plaintiff's raise will be fully considered when his ability to pay alimony is determined, I believe there is no need to depart from the established criteria for determining alimony. The parties' standard of living need not, and should not, be extrapolated so as to include speculations about what their standard of living might have been at the time of trial if they had not separated. I therefore respectfully dissent from the majority opinion's legal ruling on that point.

Russell W. Bench, Judge

1. Contrary to the majority's assertion, the trial court did not "pinpoint" the parties' standard of living as of the time of separation. The trial court took the parties' average income over a five-year period prior to separation and assumed that their average income was their "standard of living." While it is clear that the trial court erred in assuming that income alone establishes a standard of living, it may not be said that it made the mistake of pinpointing that standard of living. The majority therefore errs in finding that the trial court abused its discretion when the trial court did not even make the mistake that the majority is accusing it of making.

2. Defendant claims, and the majority seems to agree, that defendant is entitled to a larger amount of alimony because she "persevered during the lean times." Such an argument does not, however, justify an amount in excess of the needs substantiated by the receiving spouse. *English*, 565 P.2d at 412. The majority's summary conclusion that the income was "akin to deferred income," is totally unsupported. While the parties may have persevered at Western Airlines during the lean times, there is no evidence that there was any commitment from Western that plaintiff's income would increase if and because he stayed with the airline.

3. Defendant's actual expenses at the time of trial were likely greatly diminished due to her limited income at the time. She therefore correctly sought to present not only her actual expenses during the separation, but also the expenses she claimed would be necessary to maintain or, in many cases return to, the standard of living she enjoyed prior to separation.

4. The alimony award, however, need not be large enough to maintain the receiving spouse at the standard of living enjoyed during the marriage if that amount of alimony would lower the standard of living of the paying spouse below that of the receiving spouse. Alimony may only raise the standard of living of the receiving spouse until it is roughly equal to that of the paying spouse. It is in this sense that alimony should seek "to the extent possible, [to] equalize the parties' respective post-divorce living standards." *Rasband v. Rasband*, 752 P.2d 1331, 1333 (Utah Ct. App. 1988).

Cite as
155 Utah Adv. Rep. 23

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH in the interest of M.S., a
person under the age of eighteen years,

v.
Michael SALATA,
Appellant.

No. 900193-CA
FILED: February 28, 1991

Third District Juvenile Court, Salt Lake
County

Honorable Arthur G. Christean

ATTORNEYS:

Kim Rilling, Salt Lake City, for Appellant R.
Paul Van Dam and Carol L. C. Verdoia,
Salt Lake City, for the State of Utah
Arnold G. Gardner, Jr., Salt Lake City,
Guardian Ad Litem

Before Judges Bench, Greenwood, and Orme.

OPINION

BENCH, Judge:

Michael Salata appeals from an order of the juvenile court terminating his parental rights to M.S., his young child.¹ We affirm.

Salata suffers from schizophrenia, which has afflicted him for at least sixteen years. His condition includes "anti-social traits," and he has been repeatedly incarcerated. When not incarcerated or hospitalized, he has occasionally been homeless. Although Salata has submitted to voluntary hospitalization at least four times, he generally resists attempts to treat his illness and sees them as unwarranted interferences with his life.

In 1987, Salata lived with a woman and fathered M.S. After birth, M.S. lived with Salata for several months, but was removed from Salata's custody after workers from the Division of Family Services observed unsanitary conditions and a lack of parental care. Three treatment plans were developed with the objective of reuniting M.S. and Salata, but Salata did not fulfill his commitments under the plans.

The juvenile court found that Salata's mental illness manifests itself in

(1) A pattern of blaming others for his misfortunes and an almost complete inability to recognize any deficiencies in his lifestyle choices or parenting abilities.

(2) A persistent denial of any justification for state intervention

APPENDIX "C"

DAVID S. DOLOWITZ (0899)
of and for
COHNE, RAPPAPORT & SEGAL
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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

WALTER JAMES HOWELL,)	
)	
Plaintiff,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
v.)	
)	
BARBARA JOYCE HOWELL,)	Civil No. D87-4343
)	Judge Frank Noel
Defendant.)	

* * * * *

The above-entitled matter came before the court for trial on Thursday, the 22nd day of December, 1988, the Honorable Frank G. Noel presiding. The plaintiff was present in person and represented by counsel, David S. Dolowitz and John Mason. The defendant was present in person and represented by counsel, Paul H. Liapis. The court heard and considered the testimony of the parties, received exhibits into evidence and determined to take the matter under advisement. Thereafter, being advised in the premises, the

court announced its decision in open court on the 19th day of January, 1989. The plaintiff then submitted proposed Findings of Fact and Conclusions of Law and Decree to the court, provisions to which defendant objected. Those objections were heard and resolved before the court on April 27, 1989. Accordingly, the court now makes and enters the following as its

FINDINGS OF FACT

1. The defendant was a resident of Salt Lake County, State of Utah, when this action was filed and had been so for more than three months immediately prior thereto.

2. The parties are husband and wife, having been married on October 14, 1956, in Cushing, Oklahoma.

3. Irreconcilable differences arose between the parties which they attempted to reconcile, but were unable to do so.

4. There were five (5) children born as issue of this marriage; four (4) are emancipated. Both of the parties agreed that care, custody and control of the one (1) remaining minor child of the parties, Sean Daniel Howell, born August 21, 1972, age 16, should be awarded to the defendant, subject to reasonable rights of visitation in the plaintiff. The defendant is a fit and proper parent to be awarded the care, custody and control of the minor child of the parties.

5. At the time of the separation of the parties, the plaintiff was earning between \$5,500.00 per month and \$5,600.00 per month and had been earning this sum for five years prior to this time. After separation, the plaintiff filed an action for divorce which he dismissed at trial; that after a two-day attempted reconciliation, he filed this action.

6. The court believes the income level of \$5,500.00 reflects the income level and living standards of the parties during the last five years of their lives together.

7. The plaintiff earns, from his present employment, a salary of \$10,000.00 per month. The court has determined in setting alimony that while \$5,500.00 per month represents the living standards of the parties in the last 5 years of the marriage, when the parties resided together, the ability of the plaintiff to pay alimony is based upon his present income of \$10,000.00 per month.

8. The defendant earns, or is capable of earning, \$7,500.00 per year, or \$625.00 per month. At the time of trial, defendant was employed with Casual Furniture on a part-time basis earning a gross income of \$649.80 per month, although that employment was scheduled to end on December 31, 1988 and she had not yet secured replacement employment.

9. Application of the Child Support Guidelines

adopted by the courts of the State of Utah would require the payment of child support from the plaintiff to the defendant in the sum of \$1,363.00 per month based upon plaintiff's income of \$10,000.00 per month until Sean attains the age of 18 and graduates from high school with his regularly-scheduled graduating class.

10. The plaintiff filed separate tax returns in 1986 and 1987 and the defendant has not filed tax returns for those years.

11. The parties acquired, during the course of their marriage, a home and real property located in California, to-wit: 1767 Calle Rocas, Camarillo, California, which was the primary residence of the parties prior to their move to Utah in 1984; a home and real property located in Utah, to-wit: 8241 Top of the World Drive, Salt Lake City, Utah; seven (7) lots in the state of Texas; interests in a series of pension plans maintained by the employer of the plaintiff, to-wit: Western Airlines and Delta Airlines, (these plans are the Western Airlines Plan A, the Western Airlines Plan B, the Western Airlines Plan D, the Delta Plan and the Delta Savings Plan); and an interest in a military retirement plan, part of which was earned prior to the marriage; three IRA accounts, one in the name of the plaintiff for \$7,546.57, a second in the name of the plaintiff in the sum of \$4,196.43 and one in

the name of the defendant for \$10,397.00; bank accounts at Western Federal Credit Union, Ranier Bank, Valley Bank, Mt. West Savings, and Camarillo Community Bank; 8.6023 shares of Delta stock; stock in Continental Power Co.; furniture, fixtures, furnishings and appliances; five guns; an IBM computer and software; a 1977 Buick automobile; a 1987 Ford truck and camper; a 1980 Datsun 280Z; a 1978 ski boat; a 1982 fold boat and motor; several pieces of ivory; and a 35mm camera.

12. The plaintiff testified that the precise term of the military retirement plan is being re-examined by the United States Navy, as plaintiff was in the Naval Reserve prior to going on active duty and this period of time should have been included in the plan calculations but had not, as of the date of trial, and this determination had been appealed and was being reviewed by the Navy.

13. After separation of the parties, the plaintiff withdrew \$33,000.00 from a retirement fund which was expended to pay for marital debts of the parties, to-wit: \$16,000.00 to repay a loan \$3,400.00 on the VISA account; \$12,500.00 to pay income taxes; \$1,000.00 on their daughter's wedding; and \$600.00 to refinance the parties' home.

14. The parties acquired various debts which remain unpaid, to-wit:

Tracy Collins Bank
Camarillo Community Bank
Defendant's Personal Loan (attorney's fees)
Camarillo Bank VISA
Nordstroms
Weinstocks
ZCMI
Western Federal Credit Union
Western Federal Credit Union for camper
Security Pacific Solar Loan
Valley Bank VISA
State of California taxes.

15. The plaintiff has two life insurance policies, one with Delta Airlines for \$100,000.00 and one with Beneficial Life Insurance for \$100,000.00.

16. The defendant employed counsel to represent her in this matter and does not have a ready source of assets from which she can pay for the services which she has secured.

17. The plaintiff has available, through his employment, health and dental insurance and will maintain health and dental insurance for Walter and Sean as long as it is available through his employment.

From the foregoing Findings of Fact, the court now makes and enters the following

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and subject matter of this action.

2. Each of the parties should be awarded a Decree of Divorce, terminating the marriage between them on the grounds of irreconcilable differences.

3. Care, custody and control of the minor child of the parties, Sean Howell, should be awarded to the defendant, subject to reasonable rights of visitation in the plaintiff.

4. The plaintiff should be ordered to pay child support to the defendant for Sean in the amount of \$1,363.00 per month until Sean is 18 and graduated from high school with his regularly-scheduled class. Payments should be made on the 20th of each month.

5. The income exemption for Sean should be awarded to the defendant.

6. The plaintiff should be ordered to pay alimony to the defendant based upon the standard of living enjoyed by the parties at the time of their separation in 1986. Accordingly, he should pay her \$1,800.00 per month, one-half on the 5th of each month; one-half on the 20th of each month until such time as she dies, remarries, cohabits with a man to whom she is not married, or further order of the court.

7. The parties should divide the retirement plan benefits acquired by them during the course of their marriage at the value determined by this court on December 22, 1988, by appropriate qualified domestic relations order, that is, the Western Airlines Plan A, Plan B, and Plan D, and the Delta Savings Plan and Delta Plan, which should be effected by separate orders to implement the provision of the Decree of

Divorce.

8. The military retirement plan of the parties, once finally valued and the period of service set, should be divided by application of the Woodward formula. The plaintiff should keep the defendant advised as to the progress of this inquiry and the actions and decisions of the United States Navy.

9. Plaintiff should be awarded the IRA in his name at Merrill Lynch in the amount of \$7,546.57 and the IRA at the Western Federal Credit Union of \$4,196.43, and the defendant should be awarded her IRA in the amount of \$10,397.00.

10. The plaintiff should be ordered to maintain the health and dental insurance that is available to him through his employment on both Sean and his older brother, Walter, so long as that insurance is available to him through the age of 21. Each of the parties should pay one-half of any extraordinary medical, dental, orthodontic or eyecare expense which is not covered by insurance.

11. The plaintiff has available to him life insurance in the sum of \$100,000.00. He should be required to maintain Matthew and Sean as beneficiaries of that policy until they attain the age of 21 years or are married. After that occurs, he shall be free to name whomever he wishes as beneficiary of that insurance. To assist the children in assuring this

coverage, the plaintiff should provide them with the policy number and name of the insurance company.

12. The plaintiff should be ordered to cooperate with the defendant in making available to her all health insurance benefits for which she can qualify under the COBRA provisions of the Internal Revenue Code.

13. The home and real property in California, at 1767 Calle Rocas, Camarillo, California, should be sold for the best possible price and at the earliest possible time. The net proceeds of sale divided equally between the parties. There is presently a debt due to the State of California for taxes. If it is determined that those are property taxes, they should be paid from the proceeds of sale of this property prior to division of the proceeds of sale. If it is determined that those are taxes for any other reason, the plaintiff should assume and pay those taxes and hold the defendant harmless therefrom. The plaintiff should be responsible for the sale of the California home, and should keep the defendant fully advised as to that transaction, and the defendant should take all actions necessary to effect sale.

14. The home and real property in Utah should be placed for sale at the best possible price and sold at the earliest possible date. The plaintiff should pay the

mortgage for the months of February, March and April, 1989, and if the January house payment has not been made, he should make that payment. Thereafter, the defendant shall be responsible for those payments if the home is not sold. The defendant shall be responsible for this sale and shall keep the plaintiff advised as to that transaction and the parties shall divide equally the net proceeds of sale.

15. The 8.6023 shares of Delta stock and Continental Power Stock should be awarded to the plaintiff.

16. The parties should sell one of the seven lots in Texas and divide the net proceeds of sale between them. Each should be awarded three of the remaining lots.

17. Each of the parties have accumulated savings accounts in their own names and they should be awarded those savings, to-wit: the plaintiff should be awarded the Western Federal Credit Union account; the Ranier Bank account; and the Valley Bank account, while the defendant should be awarded the Mountain West Savings account and the Camarillo Community Bank account.

18. The insurance proceeds for the 1977 Buick should be awarded to the defendant who should also be awarded the 1980 Datsun 280Z.

19. The 1987 Ford truck and camper should be awarded to the plaintiff.

20. The 1969 Ford automobile should be awarded to Matthew.

21. The 1978 ski boat should be awarded to the defendant.

22. The 1982 fold boat and engine should be awarded to the plaintiff.

23. Each of the parties should be awarded the furnishings, fixtures, furniture and appliances in their own possession with the exception of the IBM computer and computer software in the plaintiff's possession which should be awarded to the defendant and the 35mm camera which should be awarded to the plaintiff.

24. Each of the parties should be awarded one-half of the ivory collection.

25. Each of the parties should be ordered to make available family photographs in their possession to the other for copying. The photographs should be divided fairly between them.

26. The plaintiff has accounted for the \$33,000.00 he removed from the retirement to the satisfaction of the court and no order is entered in regard to those funds which the court believes are appropriately resolved in the division of the marital estate as set forth above.

27. Each of the parties should be ordered to assume

and pay the debts in their own name with the exception of the mortgage provisions set forth above, which, restated, are that the plaintiff should pay the mortgage on the California home and may use the rent received from the California home until its sale. The plaintiff should pay the mortgage payments on the Utah home for February, March, and April, 1989, and the January payment, if that has not been paid. Thereafter, the defendant should be responsible for payment of that debt.

The plaintiff should pay the debts due and owing to:

- a. Weyerhauser Mortgage (Calif. home);
- b. Western Federal Credit Union (pick-up);
- c. Western Federal Credit Union (camper);
- d. Security Pacific solar loan;
- e. Valley Bank VISA;
- f. State of California taxes.

The defendant should pay the debts due and owing to:

- a. Lincoln Mortgage (Utah home);
- b. Tracy Collins Bank;
- c. Camarillo Community Bank;
- d. Personal loan (attorney fees);
- e. Camarillo Bank VISA;
- f. Nordstroms;
- g. Weinstocks;
- h. ZCMI.

28. The parties should consult with an accountant regarding the filing of amended joint 1986 and 1987 tax returns. If these can be filed and the parties save money and secure a refund in excess of the \$2,500.00 that has been received by the plaintiff, they should do so and divide all refunds received in excess of the \$2,500.00 which has already

been received by the plaintiff.

29. The plaintiff should be ordered to pay on behalf of the defendant the sum of \$7,500.00 to assist her in the payment of her attorney fees within thirty (30) days from entry of the Decree of Divorce.


DATED this ____ day of _____, 1989.

FRANK G. NOEL
District Court Judge

APPROVED AS REFLECTING
THE RULING OF THE COURT:



DAVID S. DOLOWITZ
Attorney for Plaintiff



PAUL H. LIAPIS
Attorney for Defendant

Delivery
CERTIFICATE OF MAILING

I hereby certify that I caused to be *delivered* mailed a true copy of the above and foregoing Findings of Fact and Conclusions of Law, this 28 day of April, 1989, to:

Mr. Paul Liapis
Attorney at Law
48 Post Office Place, Third Floor
Salt Lake City, Utah 84101

David S. Dolowitz
DAVID S. DOLOWITZ

APPENDIX "D"

FILED DISTRICT COURT
Third Judicial District

MAY 12 '1989

DAVID S. DOLOWITZ (0899)
of and for
COHNE, RAPPAPORT & SEGAL
Attorneys for Plaintiff
525 East 100 South, Suite 500
P.O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone: (801) 532-2666

SALT LAKE COUNTY
By Pat Jones
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * * * *

WALTER JAMES HOWELL,)	
)	DECREE OF DIVORCE
Plaintiff,)	
)	
v.)	
)	
BARBARA JOYCE HOWELL,)	Civil No. D87-4343
)	Judge Frank Noel
Defendant.)	

* * * * *

The above-entitled matter came before the court for trial on Thursday, the 22nd day of December, 1988, the Honorable Frank G. Noel presiding. The plaintiff was present in person and represented by counsel, David S. Dolowitz and John Mason. The defendant was present in person and represented by counsel, Paul H. Liapis. The court heard and considered the testimony of the parties, received exhibits into evidence and determined to take the matter under advisement. Thereafter, being advised in the premises, the

court announced its decision in open court on the 19th day of January, 1989. The plaintiff then submitted proposed Findings of Fact, Conclusions of Law and Decree to the court; provisions of which the defendant then objected. Those objections were heard and resolved before the court on April 27, 1989. Accordingly, the court, having made and entered its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This court has jurisdiction over the parties and subject matter of this action.

2. Each of the parties is awarded a Decree of Divorce, terminating their marriage.

3. Care, custody and control of the minor child of the parties, Sean Howell, is awarded to the defendant, subject to reasonable rights of visitation in the plaintiff.

4. The plaintiff is ordered to pay child support to the defendant for Sean in the amount of \$1,363.00 per month on the 20th of each month until Sean is 18 and graduates from high school with his regularly-scheduled class.

5. The income exemption for Sean is awarded to the defendant.

6. The plaintiff is ordered to pay alimony to the defendant in the sum of \$1,800.00 per month, one-half on the 5th of each month; one-half on the 20th of each month until

such time as she dies, remarries, cohabits with a man to whom she is not married, or further order of the court.

7. The parties shall divide the retirement plan benefits, valued as of December 22, 1988, acquired by them during the course of their marriage by appropriate qualified domestic relations order, that is, the Western Airlines Plan A, Plan B, and Plan D, and the Delta Savings Plan and Delta Plan, which shall be effected by separate orders to implement the provision of the Decree of Divorce.

8. The military retirement plan of the parties, once finally valued and the period of service set, shall be divided by application of the Woodward formula. The plaintiff shall keep the defendant advised as to the progress of this inquiry and the actions and decisions of the United States Navy.

9. Plaintiff is awarded the IRA in his name at Merrill Lynch in the amount of \$7,546.57 and the IRA at the Western Federal Credit Union in the amount of \$4,196.43, and the defendant is awarded her IRA in the amount of \$10,397.00.

10. The plaintiff is ordered to maintain the health and dental insurance that is available to him through his employment on both Sean and his older brother, Walter, through the age of 21, so long as that insurance is available to him. Each of the parties shall pay one-half of any extra-

ordinary medical, dental, orthodontic or eyecare expense which is not covered by insurance.

11. The plaintiff has available to him life insurance in the sum of \$100,000.00. He shall maintain Matthew and Sean as beneficiaries of that policy until they attain the age of 21 years or are married. After that occurs, he shall be free to name whomever he wishes as beneficiary of that insurance. To assist the children in assuring this coverage, the plaintiff shall provide them with the policy number and name of the insurance company.

12. The plaintiff should be ordered to cooperate with the defendant in making available to her all health insurance benefits for which she can qualify under the COBRA provisions of the Internal Revenue Code.

13. The home and real property in California, at 1767 Calle Rocas, Camarillo, California, legally described as:

LOT 44, TRACT NO. 1359, in the County of Ventura, State of California, as per Map recorded in Book 35, Page 59 of Maps, in the office of the County Recorder of said county,

shall be sold for the best possible price and at the earliest possible time. The net proceeds of sale shall be divided equally between the parties. There is presently a debt due to the State of California for taxes. If it is determined that those are property taxes, they shall be paid from the

proceeds of sale of this property prior to division of the proceeds of sale. If it is determined that those are taxes for any other reason, the plaintiff shall assume and pay those taxes and hold the defendant harmless therefrom. The plaintiff shall be responsible for the sale of the California home, and should keep the defendant fully advised as to that transaction, and the defendant should take all actions necessary to effect the sale.

14. The home and real property in Utah, at 8241 Top of the World Drive, Salt Lake City, Utah, and the adjacent lot, legally described as:

(House) LOT 18, TOP OF THE WORLD #3 SUBDIVISION;

(Lot) BEG S 84 FT FR NE COR LOT 17, TOP OF THE
WORLD #3 SUBDIVISION; S 84 FT; E 100 FT;
W 100 FT TO BEG. 0.2 AC M OR L;

shall be placed for sale at the best possible price and sold at the earliest possible date. The plaintiff shall pay the mortgage for the months of February, March and April, 1989, and if the January house payment has not been made, he shall make that payment. Thereafter, the defendant shall be responsible for those payments if the home is not sold. The defendant shall be responsible for this sale and shall keep the plaintiff advised as to that transaction and the parties shall divide equally the net proceeds of sale.

15. The 8.6023 shares of Delta stock and Continental

Power Stock are awarded to the plaintiff.

16. The parties shall sell one of the seven lots in Texas and divide the net proceeds of sale between them. Each is awarded three of the remaining lots.

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defendant and the 35mm camera which is awarded to the plaintiff.

24. Each of the parties is awarded one-half of the ivory collection.

25. Each of the parties is ordered to make available family photographs in their possession to the other for copying. The photographs are to be divided fairly between them.

26. The plaintiff has accounted for the \$33,000.00 he removed from the retirement to the satisfaction of the court and no order is entered in regard to those funds which the court believes are appropriately resolved in the division of the marital estate as set forth above.

27. Each of the parties is ordered to assume and pay the debts in their own name with the exception of the mortgage provisions set forth above, which, restated, are that the plaintiff shall pay the mortgage on the California home and may use the rent received from the California home until its sale. The plaintiff shall pay the mortgage payments on the Utah home for February, March, and April, 1989, and the January payment, if that has not been paid. Thereafter, the defendant shall be responsible for payment of that debt. The plaintiff shall pay the debts due and owing to:

- a. Weyerhaeuser Mortgage (Calif. home);
- b. Western Federal Credit Union (pick-up);

- c. Western Federal Credit Union (camper);
- d. Security Pacific solar loan;
- e. Valley Bank VISA;
- f. State of California taxes.


and the defendant shall pay the debts due and owing to:

- a. Lincoln Mortgage (Utah home);
- b. Tracy Collins Bank;
- c. Camarillo Community Bank;
- d. Personal loan (attorney fees);
- e. Camarillo Bank VISA;
- f. Nordstroms;
- g. Weinstocks;
- h. ZCMI.

28. The parties are ordered to consult with an accountant regarding the filing of amended joint 1986 and 1987 tax returns. If these can be filed and the parties save money and secure a refund in excess of the \$2,500.00 that has been received by the plaintiff, they shall do so and divide all refunds received in excess of the \$2,500.00 which has already been received by the plaintiff.

29. The plaintiff is ordered to pay on behalf of the defendant the sum of \$7,500.00 to assist her in the payment of her attorney fees within thirty (30) days from entry of the Decree of Divorce.


DATED this 12 day of May, 1989.

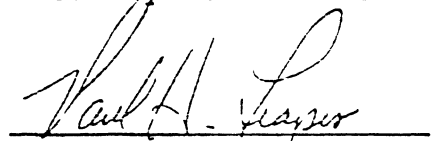

FRANK G. NOEL
District Court Judge

I CERTIFY THAT THIS IS A TRUE COPY OF AN
ORIGINAL DOCUMENT ON FILE IN THE THIRD
DISTRICT COURT, SALT LAKE COUNTY, STATE OF
UTAH.

DATE: May 17, 1989
Pat Jones
DEPUTY COURT CLERK

APPROVED AS REFLECTING
THE RULING OF THE COURT:


DAVID S. DOLOWITZ
Attorney for Plaintiff


PAUL H. LIAPIS
Attorney for Defendant