

1989

Lynette D. Nielsen v. Russell Clyde Nielsen : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 89-0659-CA
IN THE UTAH COURT OF APPEALS

LYNETTE D. NIELSEN,)	
Plaintiff/Appellant,)	
vs.)	Case No. 890659-CA
RUSSELL CLYDE NIELSEN,)	
Defendant/Respondent.)	

BRIEF OF APPELLANT

Appeal of a Decree of Divorce
By The Honorable Gordon J. Low
First Judicial District Court
Cache County, Utah

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TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION OF COURT	1
NATURE OF PROCEEDINGS	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
NATURE OF THE CASE	2
COURSE OF PROCEEDINGS	2
DISPOSITION AT TRIAL COURT	3
STATEMENT OF FACTS	5
SUMMARY OF ARGUMENT	10
 ARGUMENT:	
I. LYNETTE NIELSEN IS ENTITLED TO SUBSTANTIAL, LONG-TERM ALIMONY AND THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO SO PROVIDE	12
II. LYNETTE NIELSEN IS ENTITLED TO ALL OF THE CHILDREN FOR TAX DEDUCTION PURPOSES	19
III. LYNETTE NIELSEN IS ENTITLED TO AN AWARD OF HER ATTORNEY FEES AND COSTS REASONABLY INCURRED IN THIS MATTER AT TRIAL AND ON THIS APPEAL	21
CONCLUSION	23
 ADDENDUM	

TABLE OF AUTHORITIES

Cases Cited

	<u>Page</u>
<u>Andersen v. Andersen</u> , 757 P.2d 476 (Utah App. 1988)	22
<u>English v. English</u> , 565 P.2d 409 (Utah 1977)	15
<u>Fullmer v. Fullmer</u> , 761 P.2d 942 (Utah Ct. App. 1988)	19
<u>Higley v. Higley</u> , 676 P.2d 379 (Utah 1983)	15
<u>Huck v. Huck</u> , 734 P.2d 417 (Utah 1986)	21
<u>Jones v. Jones</u> , 700 P.2d 1072 (Utah 1985)	18,19
<u>Martinez v. Martinez</u> , 754 P.2d 69 (Utah Ct. App.) cert. granted, 765 P.2d 1277 (Utah 1988)	19
<u>Motes v. Motes</u> , 112 Utah Adv. Rep. 50 (Utah Ct. App. 1989)	19,20
<u>Olson v. Olson</u> , 704 P.2d 564, 566 (Utah 1985)	15,17

Statutes Cited

Article VIII, Constitution of Utah	1
Rule 3, R. Utah Ct. App.	1
Section 30-3-3 <u>Utah Code Ann.</u> (1984)	21
Section 78-45-1 et seq. <u>Utah Code Ann.</u> (1953 as amended)	3

IN THE UTAH COURT OF APPEALS

LYNETTE D. NIELSEN,)	
Plaintiff/Appellant,)	BRIEF OF APPELLANT
vs.)	
RUSSELL CLYDE NIELSEN,)	Case No. 890659-CA
Defendant/Respondent.)	

JURISDICTION OF COURT

The Decree of Divorce from which this appeal is taken was signed by the court on October 6, 1989, and entered October 11, 1989. The Notice of Appeal was filed November 3, 1989.

This Court has jurisdiction over the appeal in this matter by virtue of the Constitution of Utah, Article VIII, Section 1 et seq., Section 78-2A-1 et seq. Utah Code Ann. (1953 as amended), and Rule 3 R. Utah Ct. App.

NATURE OF PROCEEDINGS

This appeal is from a final Decree of Divorce signed by Judge Gordon J. Low of the First Judicial District Court of Cache County, State of Utah.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court committed error, given the 16-year marriage of the parties, the disparate financial circumstances and earning ability of the parties, needs of the parties and relative standards of living of the parties,

in awarding Lynette Nielsen only \$300.00 per month alimony and limiting said alimony to a period of three years or until such time as Lynette Nielsen remarries, cohabits as provided by statute, or either party dies, whichever first occurs.

2. Whether the trial court committed error in awarding Russell Nielsen, the non-custodial parent, two children of the parties as income tax dependent deductions until such time as alimony terminates.

3. Whether the trial court committed error in not awarding Lynette Nielsen all of her attorney fees and costs presented at the trial court, Russell Nielsen clearly having the greater income and ability to earn income.

4. Whether Lynette Nielsen is also entitled to an award of attorney fees and costs on appeal.

STATEMENT OF THE CASE

NATURE OF THE CASE

This is a divorce case.

COURSE OF PROCEEDINGS

Lynette Nielsen filed a Complaint for Divorce on November 8, 1988. An Order to Show Cause was filed by the court on November 18, 1988. Russell Nielsen filed an Answer and Counterclaim on or about November 29, 1988.

On December 12, 1988, a hearing on Lynette Nielsen's Order to Show Cause was held before Judge VeNoy Christoffersen of the First Judicial District. An Order on

Order to Show Cause was signed and entered by Judge Christoffersen on December 27, 1988.

Trial was held on May 12, 1989 and a supplemental hearing was held on June 23, 1989 before Judge Gordon J. Low. An Order Clarifying Decree was signed and entered December 20, 1989.

The Findings of Fact and Conclusions of Law and Decree of Divorce were signed by Judge Gordon J. Low October 6, 1989, and entered October 11, 1989.

Another hearing was held November 21, 1989, at the request of Russell Nielsen. The hearing on November 21, 1989 pertained to the valuation and division of personal property items only and was not germane to this appeal.

DISPOSITION AT TRIAL COURT

The Decree of Divorce provided as follows:

The trial court awarded both parties a divorce.

Lynette Nielsen was awarded the care, custody and control of the parties' four minor children. Russell Nielsen was awarded reasonable and liberal visitation with the children. Decree of Divorce, numbered paragraph 1.

Lynette Nielsen was awarded \$715.00 per month child support from Russell Nielsen. Decree of Divorce, numbered paragraph 2. Child support was computed pursuant to Section 78-45-1 et seq. Utah Code Ann. (1953 as amended 1989).

Findings of Fact, numbered paragraph 7.

Russell Nielsen was ordered to maintain the parties' children on health, medical and dental insurance, Lynette Nielsen ordered to pay the "well care", with remaining uninsured expense ordered split equally between the parties. Decree of Divorce, numbered paragraph 3.

Lynette Nielsen was awarded \$300.00 per month alimony from Russell Nielsen for three years or until Lynette Nielsen remarries, cohabits as provided by statute, or either party dies, whichever first occurs. Decree of Divorce, numbered paragraph 4.

Until alimony terminates, Russell Nielsen was awarded two of the children for tax deduction purposes. Decree of Divorce, numbered paragraph 5.

Lynette Nielsen was awarded the home subject to an equal split of equity at least by the time the parties' youngest child reaches 18 (approximately eight years). Decree of Divorce, numbered paragraph 6.

The personal property (including retirement) and debts were divided one-half to each party. Decree of Divorce, numbered paragraphs 8, 9, 10, 11, 12 and 13.

Russell Nielsen was ordered to continue his life insurance with the children named as sole beneficiaries. Decree of Divorce, numbered paragraph 14.

Lynette Nielsen was awarded \$800.00 of her \$2,200.00 attorney fees and costs. Decree of Divorce, numbered paragraph 15.

STATEMENT OF FACTS

1. Lynette Nielsen and Russell Nielsen were married February 23, 1973. (May 12, 1989 Transcript (hereinafter "May Transcript"), page 23, lines 13 and 14.) At the time of their marriage, Lynette Nielsen and Russell Nielsen were 18 years of age. At the time of trial, Lynette Nielsen was 34 and Russell Nielsen was 35 years of age. (May Transcript, page 132, lines 15-19.)

2. During the course of the marriage, the parties had four children. At the time of trial, the children's ages were 15, 13, 11 and 10. (May Transcript, page 23, lines 15-21.)

3. Both parties were high school graduates. (May Transcript, page 43, lines 7-10.)

4. Lynette Nielsen's first substantial employment during the marriage was in 1987 when she worked as a sales clerk at 7-Eleven Sales Corporation, where she earned \$4.25 per hour and earned \$5,735.33 in 1987 and approximately \$4,200.11 in 1988. (May Transcript, page 42, lines 19-25; page 43, lines 1-6; page 36, lines 15-16; page 37, lines 7-10. Plaintiff's Exhibits #2 and #3. June 7, 1989 Jones letter to court referenced in Record, page 97.) Lynette Nielsen also worked at Hastings Books in 1988 where she worked as a sales clerk, earned \$4.25 per hour, and \$2,132.12 during the year. (May Transcript, page 37, lines 23-25; page 38, line 1. June 7, 1989 Jones letter to court

referenced in Record, page 97. June 23, 1989 Transcript (hereinafter "June Transcript"), page 17, lines 7-16.) In 1989, Lynette Nielsen began work at Herff-Jones as a production worker at \$4.65 per hour. (May Transcript, page 38, lines 2-14; page 64, line 25; page 65, lines 1-2.) A week or two before trial, Lynette Nielsen received a raise to \$5.00 per hour. (May Transcript, page 63, lines 24-25; page 64, lines 22-24.) Lynette Nielsen was laid off the day before trial, but remained on-call and expected to go back to work in October or November. (May Transcript, page 38, lines 15-20; page 79, lines 13-25.) Lynette Nielsen testified springtime layoffs were common at Herff-Jones. (May Transcript, page 38, lines 21-25; page 39, lines 1-16.) At the time of the June hearing (approximately six weeks after the May 12 trial), Lynette Nielsen had worked only two days at Herff-Jones since the May 12 trial. (June Transcript, page 18, lines 1-10.) Lynette Nielsen applied for unemployment compensation. (May Transcript, page 39, lines 7-21.) The trial court included Lynette Nielsen's anticipated unemployment compensation in its finding. (June Transcript, page 18, lines 19-25; page 19; page 20, lines 1-14.)

5. Lynette Nielsen was trained as a beautician, worked at a salon when the parties were first married, but had no significant income from this training during the marriage or at the time of trial. Lynette Nielsen testified that at the

time of trial she was only earning \$20.00 or so per month from haircuts. (May Transcript, page 44, lines 18-20; page 75, lines 24-25; page 76; page 77, lines 1-5; page 127, lines 2-25; page 128, line 1.)

6. Lynette Nielsen actively sought better employment. (May Transcript, page 43, lines 11-21; page 79, lines 24-25.)

7. The trial court found Lynette Nielsen's income earning ability to be approximately \$800.00 per month:

Plaintiff's historical income for calendar years 1987 and 1988 has been \$500.00 to \$600.00 per month. Whereas Plaintiff has not worked significantly in a full-time situation until calendar 1989, the Court finds her current income making ability to be just under \$800.00 per month. Said \$800.00 figure shall be used for computation for child support purposes.

Findings of Fact, numbered paragraph 6. In Findings of Fact, numbered paragraph 9, the court found: "Plaintiff has been a store clerk and a production line worker making approximately \$4.00 to \$5.00 per hour."

8. Russell Nielsen worked throughout the marriage. (May Transcript, page 128, lines 8-14.) Russell Nielsen became employed as a journeyman mechanic for Thiokol Corporation in November 1983. (May Transcript, page 89, lines 23-25; page 89, lines 1-4; page 128, lines 8-10.) Russell Nielsen testified that the designation "journeyman mechanic" implied significant experience over a significant period of time and that he had marketable skills as a semi-

truck mechanic. (May Transcript, page 156, lines 23-25; pages 157-158; page 160, line 25; page 161, lines 1-8.) Russell Nielsen testified he earned \$14.83 per hour and worked substantial overtime in calendar years 1987 and 1988, but had no guarantee of as substantial overtime in 1989. (May Transcript, page 90, lines 2-19. Defendant's Exhibit #3. May Transcript, page 140, lines 7-25; page 141; page 142, lines 1-4.) Russell Nielsen's 1987 and 1988 income was \$38,589.14 and \$37,940.28 respectively. (May Transcript, page 40, lines 8-13. May 30, 1989 Vlahos letter to court referenced in Record, page 97. May Transcript, page 142, lines 4-21; page 145, lines 4-6.)

9. The trial court found Russell Nielsen's income earning ability to be \$2,750.00 per month:

Defendant's historical income over calendar years 1987 and 1988 has equalled some \$3,000.00 per month. Defendant's current income appears to be in the \$2,500.00 per month range, Defendant apparently having no overtime available to him at this time. Based upon Defendant's historical earnings and consideration being given to the substantial ability of Defendant to earn income, the Court finds Defendant's current income making ability to be \$2,750.00 per month. The child support computation should be based on Defendant's earning ability of \$2,750.00.

Findings of Fact, numbered paragraph 5. In Findings of Fact, numbered paragraph 9, the court found: "Defendant is a journeyman mechanic and is currently earning nearly \$15.00 per hour."

10. The parties cash assets totalled less than \$4,500.00 and were divided equally between them (less than \$2,250.00 each). The parties had no other income producing property. Findings of Fact numbered paragraphs 7 and 8; Order Clarifying Decree numbered paragraph 1(d).

11. Lynette Nielsen and the children's monthly budget was found by the court to be in excess of \$2,400.00. Findings of Fact, numbered paragraph 5. There was extensive testimony about the monthly budget and Lynette Nielsen's and the children's standard of living both at the time of trial and during the marriage. (May Transcript, pages 33-35. Plaintiff's Exhibit #1. May Transcript, page 53, lines 16-20; page 66, lines 17-25; pages 67-68; page 69, lines 1-18; page 74, lines 24-25; page 75, lines 1-23; page 80, lines 12-24; page 101, line 25; pages 102-103; page 104, lines 1-15; page 121, lines 17-25; pages 122-125; page 126, lines 1-23; page 137, lines 23-25; page 138, lines 1-11; page 139, lines 15-24; page 154, lines 11-16; page 168; page 169, lines 1-7.)

12. The court made no finding on Russell Nielsen's monthly expenses. Russell Nielsen testified he was living with his parents and that his budget of \$1,296.90 per month was an "estimate". (May Transcript, page 132, lines 24-25; pages 133-136; page 137, lines 1-22. Defendant's Exhibit #4, page 5.)

13. At trial, Lynette Nielsen testified and her counsel argued that Lynette Nielsen should receive \$500.00 per month alimony in order that the parties' income and standards of living be equalized. (May Transcript, page 57, lines 24-5; page 58, lines 1-11; June Transcript, page 33, lines 2-25; pages 34-7; page 38, lines 1-3; page 42, lines 7-12.) At trial, Russell Nielsen testified and his counsel argued that Lynette Nielsen should receive no alimony. (May Transcript page 138, lines 12-16; June Transcript page 38, lines 8-25; pages 39-40; page 41, lines 1-14.)

14. Lynette Nielsen's reasonable attorney's fees and costs were found by the trial court to be \$2,200.00. Findings of Fact, numbered paragraph 21. (May Transcript, page 77, lines 24-5; page 78, lines 1-4; page 170, lines 25; pages 171-72; page 173, lines 1-4; June Transcript, page 62, lines 25; page 63; page 64, lines 1-5.)

SUMMARY OF ARGUMENT

1. Lynette Nielsen should receive substantial long-term alimony. The trial court's award of \$300.00 per month alimony for three years should be reversed. During the parties' marriage, Lynette Nielsen cared for the children and maintained the home, Russell Nielsen worked. Lynette Nielsen's work experience is limited and at the time of trial she was unemployed, was on-call at her employment as a production worker for which she was paid \$5.00 per hour when on the job. Russell Nielsen was a journeyman mechanic, was

also qualified to work as a semi-truck mechanic, earned \$14.53 per hour through his employment at Thiokol Corporation and in calendar years 1987 and 1988 worked substantial overtime.

The parties were married for 16-plus years, having been married just out of high school. The parties' four children, ranging in age from 15 to 10, were placed in the custody of Lynette Nielsen.

Lynette Nielsen is entitled to alimony at the \$500.00 level requested at court, said alimony to continue until terminated as provided by law.

2. Lynette Nielsen should be entitled to claim all of the parties' children for tax deduction purposes where she is the custodial parent. The trial court's award of two of the deductions to Russell Nielsen should be reversed on grounds where the court did not make a finding with respect to the maximizing of the financial resources available to the family, the court did not order the award to be contingent on Russell Nielsen remaining current in his payment of child support, and the award has the effect of diluting the value of the alimony award made to Lynette Nielsen.

3. Lynette Nielsen should be awarded her attorney fees and costs incurred at the trial level, subsequent to trial, and on appeal. Lynette Nielsen's attorney fees and costs at trial were \$2,200.00 and were found to be reasonable by the

court. The trial court's award of only \$800.00 of those attorney fees should be reversed on grounds that Lynette Nielsen's ability to earn was much less than the ability of Russell Nielsen to earn income, there were no other financial resources from which Lynette Nielsen may pay her fees, and Lynette Nielsen had a significant financial need. Lynette Nielsen should be awarded her reasonable attorney fees and costs at trial, subsequent to trial, and on this appeal.

ARGUMENT

I

LYNETTE NIELSEN IS ENTITLED TO
SUBSTANTIAL, LONG-TERM ALIMONY AND THE
TRIAL COURT ABUSED ITS DISCRETION IN
FAILING TO SO PROVIDE.

The alimony issue is at the heart of Lynette Nielsen's appeal.

This case involved a 16-plus-year marriage during which four children were born. The children, now in the custody of their mother, Lynette Nielsen, ranged in age from 15 to 10 at the time of trial.

During the parties' marriage, Russell Nielsen provided the income while Lynette Nielsen raised the children and kept the home.

Russell Nielsen, a journeyman mechanic, earned approximately \$38,000.00 per year in calendar years 1987 and 1988. Russell Nielsen was paid a wage of \$14.53 per hour and worked substantial overtime. Citing the apparent

unavailability of overtime, the court found Russell Nielsen's income at the time of trial to be \$2,500.00 per month, but after taking into consideration Russell Nielsen's earning ability and historical income, the court imputed \$2,750.00 per month income to Russell Nielsen.

Lynette Nielsen's first substantial part-time employment during the marriage was in calendar years 1987 and 1988. In 1987, Lynette Nielsen worked as a clerk for 7-11 and earned \$4.25 per hour. Lynette Nielsen's total earnings for 1987 were less than \$6,000.00. In 1988, Lynette Nielsen continued to work at 7-11, eventually changing jobs to work for Hastings Books where she also earned approximately \$4.25 per hour. Lynette Nielsen's 1988 income was approximately \$6,400.00. At the time of trial, Lynette Nielsen was working at Herff-Jones as a seasonal production worker. Two weeks before trial, Lynette Nielsen received a raise, bringing her hourly income to \$5.00 per hour. Due to the seasonal nature of her employment, on the day of trial, Lynette Nielsen was unemployed. Between May 12, 1989 and June 23, 1989, Lynette Nielsen worked only two days. Lynette Nielsen hoped to obtain unemployment compensation. The court added anticipated unemployment compensation to Lynette Nielsen's projected earnings for 1989 and imputed income to Lynette Nielsen of just under \$800.00 per month.

Lynette Nielsen was a licensed beautician, but her only out of home experience was during the first year or two of the marriage and income at the time of trial from cutting hair was approximately \$20.00 per month.

Lynette Nielsen testified that she had searched for meaningful employment and that the Herff-Jones job was the best employment she was able to find.

The court evenly divided the parties' assets and debts. The cash assets divided between the parties were less than \$4,500.00, \$2,250.00 per person. Neither party had other income producing assets.

The trial court found Lynette Nielsen and the children's monthly budget to be in excess of \$2,400.00. The court made no finding with respect to Russell Nielsen's monthly budget.

The trial record readily shows the disparity in income and earning potential of the parties. The trial court found Lynette Nielsen's monthly earning ability to be less than \$800.00 per month. The trial court found Russell Nielsen's monthly earning ability to be \$2,750.00, nearly three and a half times that of Lynette Nielsen. Lynette Nielsen does not dispute the court's findings with respect to the parties' income earning ability.

The court found Lynette Nielsen's and the children's monthly budget to be in excess of \$2,400.00. Lynette Nielsen does not dispute that finding. Adding \$715.00 to

Lynette Nielsen's imputed income of \$800.00 per month (noting the \$800.00 is gross income), Lynette Nielsen has \$1,515.00 under the court's order to meet \$2,400.00 in expenses for herself and the children.

As stated by the Utah Supreme Court on numerous occasions:

An alimony award should, as far as possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage. In determining the amount of alimony to be awarded, it was necessary for the trial court to consider the financial condition and needs of the Plaintiff, her ability to produce a sufficient income for herself, and the ability of the Defendant to provide support.

Olson v. Olson, 704 P.2d 564, 566 (Utah 1985) (footnotes omitted. See also English v. English, 565 P.2d 409 (Utah 1977) and Higley v. Higley, 676 P.2d 379 (Utah 1983).

To date, Lynette Nielsen has held only part-time minimal wage jobs. The economic reality is that Lynette Nielsen may never be able to earn as much as Russell Nielsen. As stated by Justice Durham in Higley, supra:

In 1981, the median income for a woman in the United States with a high school education was \$6,495 per year. See Bureau of the Census, U.S. Department of Commerce, Current Population Reports, Series P-670 No. 137, Money Income of Households, Families, and Persons in the United States: 1981, Table 37 (Washington, D.C., 1983). Another study reveals that, overall, women's earnings in the United States average \$.59 for every \$1 earned by men. See, Bureau of

Labor Statistics, U.S. Department of Labor, Report 673, The Female--Male Earnings Gap: A review of Employment and Earnings Issues, Table 6 (Washington, D.C., September, 1982).

676 P.2d at 831. Lynette Nielsen's income for calendar years 1987 and 1988 was very close to the 1981 median U.S. income for a woman with a high school education. Lynette Nielsen testified she looked for better employment but that the seasonal employment at Herff-Jones at \$5.00 per hour was the best employment she could find.

During the course of the parties' marriage, Russell Nielsen worked while Lynette Nielsen cared for the children and maintained the home. As testified by Russell Nielsen, his journeyman's mechanic status is a result of significant experience in his area of employment. While Lynette Nielsen was at home caring for the children and maintaining the home, Russell Nielsen was able to gain work experience and thereby enhance his income earning ability.

Lynette Nielsen's request for \$500.00 per month alimony was reasonable in light of all of the circumstances of this case. Though concededly not controlling on the trial court, the Order on Order to Show Cause signed by Judge Christoffersen provided for \$500.00 per month temporary alimony. Lynette Nielsen testified the \$500.00 per month temporary alimony received by her for approximately six months before the trial kept her reasonably close to the standard of living enjoyed by her during the marriage.

The trial court's award of alimony was much less than the \$500.00 requested by Lynette Nielsen. When the award of two of the children for tax deduction purposes, and the award of \$800.00 of \$2,200.00 attorney fees and costs are factored in, the trial court's award of alimony is even less. The trial court's award of \$300.00 was contrary to case law, is a substantial and prejudicial abuse of discretion, and should be increased to \$500.00 per month as requested by Lynette Nielsen.

The trial court was also in error in limiting the alimony to three years. Lynette Nielsen's and Russell Nielsen's marriage was a long term marriage. Lynette Nielsen was entitled to long-term alimony.

Though not identical in all respects, this case shares many similarities with the facts in Olson, supra. Similar to Mrs. Olson in Olson, supra, Lynette Nielsen married at 18, worked for a time (Lynette Nielsen as a beautician, Mrs. Olson as a typist) quit work to raise children, (Lynette Nielsen has four children, Mrs. Olson, six) was not employed outside the home during the marriage until two years before the divorce (Mrs. Olson was not employed until her separation), was employed at minimal wage jobs, was custodial parent of four minor children (Mrs. Olson had three at home), and was married 16-plus years (Mrs. Olson was married 22 1/2 years and was separated the last two of those years). In both cases, the husbands worked during the

marriage and received substantial earned income at the time of the divorce (Mr. Olson more than Russell Nielsen), and there were minimal cash assets and income producing property. Lynette Nielsen's and the children's monthly budget was \$2,400.00 (Mrs. Olson's and the children's monthly budget was \$4,200.00). Lynette Nielsen was awarded \$300.00 per month alimony for three years (Mrs. Olson was awarded alimony at \$1,600.00 per month for two years).

Reversing the trial court's limitation of alimony to two years, and exercising its discretion power to make the alimony permanent, the Utah Supreme Court held:

We agree, however, with the plaintiff's contention that the court's order that alimony terminate after two years was a clear and prejudicial abuse of discretion. As we stated in Jones v. Jones, "[t]his is simply not the sort of situation in which a decreasing rehabilitative alimony award is appropriate." Married soon after graduating from high school, the plaintiff's primary occupation during the twenty-odd year marriage, was caring for the parties' home and six children. Having worked only minor clerical jobs for two brief periods over twenty years apart, she has no reasonable expectation of obtaining employment two years hence that will enable her to support herself at a standard of living even approaching that which she had during the marriage. Continuing spousal maintenance is mandated by these circumstances. Therefore, under our discretionary power to modify the final decree in a divorce action, we hereby modify the decree of divorce in this case to provide for permanent alimony from defendant to plaintiff. Again, should the circumstances change in the future, the defendant may petition the court to

modify the decree under its continuing jurisdiction.

704 P.2d at 567 (footnotes omitted). (The citation on Jones v. Jones is 700 P.2d 1072 at 1076 (Utah 1985)).

The trial court's limitation of alimony to three years under the circumstances of this case was contrary to case law, and was a clear and prejudicial abuse of discretion. The alimony should be increased and be made permanent, to terminate only as provided by law.

II

LYNETTE NIELSEN IS ENTITLED TO ALL OF
THE CHILDREN FOR TAX DEDUCTION PURPOSES.

The trial court awarded Russell Nielsen two of the children for tax deduction purposes during the time alimony was paid.

At the time of trial, Fullmer v. Fullmer, 761 P.2d 942 (Utah Ct. App. 1988) and Martinez v. Martinez, 754 P.2d 69 (Utah Ct. App.) cert. granted, 765 P.2d 1277 (Utah 1988) were the controlling cases. After the trial of this case, Fullmer and Martinez, supra, were distinguished in the case of Motes v. Motes, 112 Utah Adv. Rep. 50 (Utah Ct. App. 1989). In Motes, supra, the Court wrote that Fullmer and Martinez, supra, "dealt generally with the question of dependent tax exemption in the divorce context. However, neither involved an actual order that the forms be executed." 121 Utah Adv. Rep. at 52.

Under Motes, supra, the trial court's authority to award a dependency deduction is limited. This court held that "the power to order execution of section 152 declaration should be cautiously and prudently used, with the sole objective of maximizing the financial resources available to the family unit". 121 Utah Adv. Rep. at 55. This court also required that a trial court's order make the signing of a yearly declaration "contingent on the noncustodial parent being current in support payments." Ibid.

The findings in this case do not show whether the trial court was maximizing the financial resources of the family unit in requiring Lynette Nielsen to sign a dependent declaration to Russell Nielsen. The child support award, figured according to the statute, was not refigured. Alimony was essentially diluted.

The order did not condition Lynette Nielsen's signing of the declaration of Russell Nielsen being current in his support.

The trial court's failure to make a finding as to how the dependent deduction award would enhance the family income and failure to condition the award on Russell Nielsen being current in his child support, is contrary to case law, is a clear and substantial abuse of discretion, and is reversible error.

III

LYNETTE NIELSEN IS ENTITLED TO AN AWARD OF HER ATTORNEY FEES AND COSTS REASONABLY INCURRED IN THIS MATTER AT TRIAL AND ON THIS APPEAL.

The trial court found that Lynette Nielsen reasonably incurred \$2,200.00 in attorney fees and costs. The trial court awarded Lynette Nielsen \$800.00 of those fees and costs and stayed execution upon Russell Nielsen's payment of \$50.00 per month.

Lynette Nielsen testified that she had no means with which to pay her fees and costs in this case. As already argued, Russell Nielsen's income and income earning ability far exceeded that of Lynette Nielsen. The trial court recognized the award of attorney fees was in Russell Nielsen's favor. "I am, however, cognizant that given the entire picture, the income and needs of the two parties will probably balance eventually out in favor of the Defendant (Russell Nielsen)." June Transcript, page 63, lines 13-16.

Section 30-3-3 Utah Code Ann. (1984) provides that a trial court may award attorney fees and costs in a divorce action. In order to recover on her attorney fees and costs, Lynette Nielsen was required at trial to show that the fees and costs requested were reasonable and that Lynette Nielsen was financially unable to pay the fees and costs. Huck v. Huck, 734 P.2d 417, 419 (Utah 1986).

In this case the reasonableness of Lynette Nielsen's attorney fees and costs were presented by Lynette Nielsen's counsel by proffer by stipulation of Russell Nielsen's counsel. The fees and costs were not refuted by Russell Nielsen. The trial court found the sum of \$2,200.00 was a reasonable attorney fees and costs.

Lynette Nielsen's income was imputed at \$800.00 per month. Lynette Nielsen was an unemployed minimal wage production worker. Russell Nielsen's income was \$2,750.00 per month. Russell Nielsen was fully employed. Lynette Nielsen testified she had no financial ability to pay her fees.

In Andersen v. Andersen, 757 P.2d 476 (Utah App. 1988), this Court ruled that where the plaintiff was earning \$200.00 per month and the defendant \$1,405.00 per month and the plaintiff had no means to pay her fees, the trial court abused its discretion in failing to award the plaintiff her attorney fees and awarded her attorney fees and costs both for trial and on appeal.

Lynette Nielsen, having met her burden on both reasonableness of the fees and costs incurred, her need, and Russell Nielsen's far greater ability to pay the fees and costs, should have been awarded all of her reasonable attorney fees and costs in this matter. The trial court's failure to award her fees was an abuse of discretion and should be reversed.


Lynette Nielsen respectfully submits that where she had a continuing need and Russell Nielsen's income and earning ability far exceed her own, she should also be awarded a reasonable attorney fee and costs incurred subsequent to trial and in the bringing of this appeal.

CONCLUSION

Lynette Nielsen respectfully requests that this Court reverse the trial court and award her substantial permanent alimony as requested at the trial level, reverse the trial court and reinstate all of the dependent tax deductions to her, and reverse the trial court and award the entire \$2,200.00 attorney fees and costs incurred by her at trial, as well as a reasonable attorney fee and costs incurred subsequent to trial and in the bringing of this appeal.

Dated this 20 day of February, 1990.

HILLYARD, ANDERSON & OLSEN

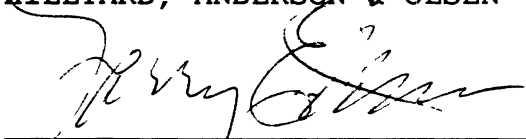


LARRY E. JONES
Attorney for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that ^{from} a true and correct ^{copy} of the
BRIEF OF APPELLANT was mailed, postage prepaid, to Gregory
N. Skabelund, Attorney for Defendant/Respondent, at 2176
North Main, Logan, Utah 84321, this 20 day of February,
1990.

HILLYARD, ANDERSON & OLSEN



LARRY E. JONES
Attorney for Plaintiff/Appellant

ADDENDUM

Findings of Fact and Conclusions of Law	A
Decree of Divorce	B
Order Clarifying Decree	C

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LOGAN DISTRICT

OCT 4 4 13 PM '89

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

LYNETTE D. NIELSEN,)	
Plaintiff,)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.)	
RUSSELL CLYDE NIELSEN,)	Civil No. 880027020
Defendant.)	

The above-entitled matter came on regularly for trial on May 12, 1989. Plaintiff appeared in person and by and through her attorney, Larry E. Jones of Hillyard, Anderson & Olsen. Defendant appeared in person and by and through his attorney, Pete N. Vlahos. Witnesses were heard, exhibits presented, and arguments made. A supplemental hearing was held on June 23, 1989, at the request of the Court. Further arguments from counsel were made. Based on the evidence before the Court, and good cause appearing, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff and Defendant were married February 23, 1973. Plaintiff and Defendant are residents of Cache County, State of Utah, and were residents for more than three months prior to the filing of the complaint and counterclaim in this matter.

2. There exists irreconcilable differences between the parties. Plaintiff having filed a complaint and Defendant

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having filed a counterclaim, each party should be awarded a decree of divorce from the other. It further appearing to the Court that there is no chance of a reconciliation at this time, the decree of divorce should be final upon signing and entry by the Court.

3. Plaintiff and Defendant are the parents of four (4) children, namely: DENISE, born September 11, 1973; SHERI, born June 13, 1976; ANDREW, born May 3, 1978; and CHAD, born October 17, 1979.

4. The Court interviewed the parties' daughter, Sheri, at the request of the Defendant. Based upon the evidence before the Court and based upon the Court's discussion with Sheri in chambers, the Court finds that it is in the best interests and welfare of the children that their care, custody and control be awarded to the Plaintiff. Defendant should be awarded reasonable and liberal visitation with the children upon reasonable notice to Plaintiff.

5. As to child support, the monthly expenses of Plaintiff and the minor children of the parties are over \$2,400.00 per month, evidencing a significant need of support. Defendant's historical income over calendar years 1987 and 1988 has equalled some \$3,000.00 per month. Defendant's current income appears to be in the \$2,500.00 per month range, Defendant apparently having no overtime available to him at this time. Based upon Defendant's historical earnings and consideration being given to the

substantial ability of Defendant to earn income, the Court finds Defendant's current income making ability to be \$2,750.00 per month. The child support computation should be based on Defendant's earning ability of \$2,750.00.

6. Plaintiff's historical income for calendar years 1987 and 1988 has been \$500.00 to \$600.00 per month. Plaintiff's current income is just under \$800.00 per month. Whereas Plaintiff has not worked significantly in a full-time situation until calendar 1989, the Court finds her current income making ability to be just under \$800.00 per month. Said \$800.00 figure shall be used for computation for child support purposes.

7. The Court having requested counsel to compute the child support obligation on the Child Support Guideline Worksheet and also on the guidelines to go into effect on July 1, 1989, consideration to be given to Defendant for some \$30.00 per month which he indicated is his cost for the children's insurance, the Court was presented figures of between \$714.00 and \$789.00 per month child support. The Court finds that \$715.00 is a reasonable sum for child support in this case. Child support should be paid one-half on or before the 5th day and one-half on or before the 20th day of each and every month through the Clerk of the above-captioned Court.

8. Defendant has available to him health, medical and dental insurance through his employment at Morton Thiokol,

Inc. The Defendant should be required to maintain the children on his health, medical and dental insurance. Plaintiff and Defendant should each be required to split any uninsured health, medical and dental expense. Reasonable health, medical and dental expense should include reasonable orthodontic and eye care. In the event an orthodontic bill is to be incurred, the party proposing that the bill be incurred should be required to petition the Court for decision as to the reasonableness of the bill. Further, Plaintiff should be responsible for well care for the children. Well care shall be that medical care which is not anticipated by insurance and is not covered by insurance. For instance, if the child goes to the doctor with a cold, ordinarily part of that bill is covered by insurance, any uninsured amount to be split by the parties. If the child obtains a physical for school purposes or for camp, that is well care and is not normally covered by insurance and would be the responsibility of Plaintiff.

9. The parties have been married for some 16 years. Defendant's earning ability exceeds Plaintiff's by approximately three times. Plaintiff has been a store clerk and a production line worker making approximately \$4.00 to \$5.00 per hour. Defendant is a journeyman mechanic and is currently earning nearly \$15.00 per hour. Given the length of the marriage, differential of income and income earning ability, and the differential in historical earnings, the

Court finds it reasonable to award Plaintiff alimony from the Defendant in the sum of \$300.00 per month for a period of three years or until such time as Plaintiff remarries, cohabits as provided by statute, or either party dies, whichever first occurs. Said alimony should be paid one-half on or before the 5th day and one-half on or before the 20th day of each and every month through the Clerk of the above-captioned Court.

10. Until such time as alimony terminates, the parties shall split the income tax dependent deduction of the minor children of the parties, each party to take two children for tax purposes. Upon termination of alimony, all tax deductions should go to Plaintiff.

11. As to the home of the parties, the Court finds that the home has a value of \$76,000.00. The Court further finds that the current payout on the home is \$25,902.59, for a total equity of \$50,097.41. The Court awards each party one-half of the equity in the home. No interest will accrue on Defendant's share. Rather, Defendant should receive his one-half share of equity upon the first of the following events: Plaintiff's remarriage or cohabitation as provided under the alimony statute; the youngest of the parties' children reaching the age of majority; or upon sale of the home by Plaintiff. The Court reserves jurisdiction with respect to the home and its sale and division of equity.

Plaintiff should be responsible for the mortgage, taxes and insurance on the home. Defendant should immediately quit-claim any and all interest which he may have in the home to Plaintiff subject to the lien interest as provided above.

12. Plaintiff should be awarded the following personal property: Household furniture and appliances, including the stereo, which the Court places at a value of \$3,500.00; one-half of the First Security Bank CD and First Security Bank savings account, which one-half is \$1,231.05 and \$513.26 respectively; the 1974 GMC Jimmy which the Court values at \$750.00; lawn mower and yard equipment which the Court values at \$100.00; 1954-56 Chevrolet truck; Stihl 16" chain saw; as well as all other property presently in her possession except as specifically awarded to Defendant below.

13. Defendant should be awarded the following personal property: His checking account; one-half of the First Security Bank CD and First Security Bank savings account in the amounts of \$1,231.05 and \$513.27 respectively; 1969 Chevrolet truck which is valued at \$500.00; 1981 Terry travel trailer which is valued at \$4,000.00; guns and gun cabinet which are valued at \$1,700.00 for purposes of this distribution; the tools which he now has in his possession which the Court values at \$500.00; 1976 Chevrolet Impala and old car parts; and choice of one of the freezers.

14. Inasmuch as Plaintiff's personal property award totals \$4,350.00 and Defendant's personal property award totals \$6,700.00, the Plaintiff should be awarded one-half the difference of \$2,350.00 or \$1,175.00 as a judgment against Defendant.

15. Plaintiff should be awarded a one-half interest in Defendant's employee savings investment program obtained by Defendant through his employment at Morton Thiokol, Inc. The Court finds the value of said ESIP entitlement to be \$15,794.44, one-half of which should be awarded to Plaintiff, said one-half being \$7,897.22. As of May 12, 1989, said sum should be distributed to Plaintiff, along with any interest accrued thereon from March 30, 1989 to the date of withdrawal, immediately upon request by Plaintiff. Plaintiff should pay any penalties or taxes incurred as a result of her obtaining her one-half interest in said ESIP interest.

16. Plaintiff should be awarded a one-half interest in any and all retirement which Defendant has acquired at his employment at Thiokol, it appearing that Defendant's employment at Thiokol has been during the marriage of the parties. Said one-half interest shall be computed from the Defendant began his employment at Thiokol until the date of the hearing of the divorce in this matter, being May 12, 1989.

17. Plaintiff should be responsible for the following debts and obligations: J.C. Penney bill in the approximate sum of \$75.00; Logan City obligation in the approximate sum of \$700.00; personal loan to her father in the approximate sum of \$500.00. Plaintiff should be required to indemnify and hold Defendant harmless therefrom.

18. Defendant should be responsible for the following debts and obligations: J. Thomas Smith, D.D.S. bill in the approximate sum of \$200.00; First Security Bank credit card in the approximate sum of \$250.00; loan from Carol A. Nielsen, Defendant's mother, in the approximate sum of \$1,250.00; and the 1987 tax obligation. Defendant should be required to indemnify and hold Plaintiff harmless therefrom.

19. The parties represented to the Court that the foregoing debts and obligations are all of the debts and obligations of the parties excepting the mortgage on the home which is provided for above.

20. Pursuant to stipulation of the parties, Defendant should continue his current life insurance through his employment at Morton Thiokol, Inc. in the base amount of approximately \$60,000.00 with the children of the parties named as sole beneficiaries thereon. Said insurance shall continue with the children named as sole beneficiaries until the youngest child of the parties reaches the age of majority.

21. As to Plaintiff's claim for attorney fees, Plaintiff presented attorney fees and costs in the sum of \$2,200.00. The Court finds said fees and costs to be reasonable in light of the difficulty of the divorce and the time spent in the case. The Court further finds the hourly charge of \$85.00 per hour to be a reasonable charge and a rate commonly charged in the community. Given the disparity in income of the parties, relative availability of funds for Plaintiff to pay her own attorney fees, the alimony obligation of Defendant to Plaintiff, the Court awards to Plaintiff the sum of \$800.00 attorney fees and costs to be paid by Defendant to Plaintiff. An order should be entered staying execution upon the \$800.00 attorney fees so long as Defendant pays the sum of \$50.00 per month toward said fees.

22. The terms and conditions of this decree should take effect as of the date of trial in this matter, being May 12, 1989.

The Court having made the foregoing Findings of Fact, makes the following:

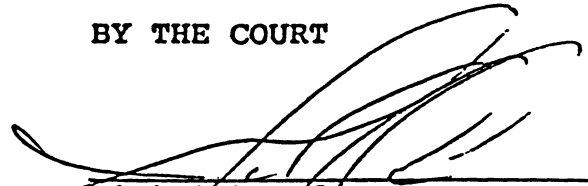
CONCLUSIONS OF LAW

1. That Plaintiff and Defendant each be awarded a decree of divorce one from the other, said decree to become final upon signing and entry by the Court.

2. A decree of divorce should be entered in accordance with the Findings of Fact as stated herein.

Dated this 6 day of Oct., 1989.

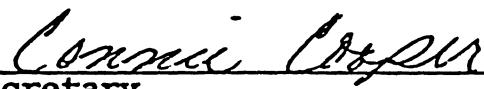
BY THE COURT



District Judge

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to Defendant's attorney, Pete N. Vlahos, at 2447 Kiesel Avenue, Ogden, Utah 84401, this 4 day of October, 1989.



Secretary

LAW OFFICES. HILLYARD, ANDERSON & OLSEN. 173 EAST FIRST NORTH, LOGAN, UTAH 84321

HILLYARD, ANDERSON & OLSEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
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ATTACHMENT B

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

LYNETTE D. NIELSEN,)	
)	DECREE OF DIVORCE
Plaintiff,)	
)	
vs.)	
)	
RUSSELL CLYDE NIELSEN,)	Civil No. 880027020
)	
Defendant.)	

The above-entitled matter came on regularly for trial on May 12, 1989. Plaintiff appeared in person and by and through her attorney, Larry E. Jones of Hillyard, Anderson & Olsen. Defendant appeared in person and by and through his attorney, Pete N. Vlahos. Witnesses were heard, exhibits presented, and arguments made. A supplemental hearing was held on June 23, 1989, at the request of the Court. Further arguments from counsel were made. Based on the evidence before the Court, having heretofore entered its Findings of Fact and Conclusions of Law, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff is awarded the care, custody and control of the minor children of the parties. Defendant is awarded reasonable and liberal visitation with the children upon reasonable notice to Plaintiff.

2. Commencing May 12, 1989, Defendant shall pay to Plaintiff the sum of \$715.00 per month child support. Said

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child support shall be paid one-half on or before the 5th day and one-half on or before the 20th day of each and every month through the Clerk of the above-captioned Court.

3 Defendant shall maintain the children on his health, medical and dental insurance. Plaintiff and Defendant shall split any uninsured health, medical and dental expense. Reasonable health, medical and dental expense shall include reasonable orthodontic and eye care. In the event an orthodontic bill is to be incurred, the party proposing that the bill be incurred is required to petition the Court for decision as to the reasonableness of the bill. Further, Plaintiff is responsible for well care for the children. Well care is that medical care which is not anticipated by insurance and is not covered by insurance. For instance, if the child goes to the doctor with a cold, ordinarily a part of that bill is covered by insurance, any uninsured amount to be split by the parties. If the child obtains a physical for school purposes or for camp, that is well care and is not normally covered by insurance and would be the responsibility of Plaintiff.

4. As of May 12, 1989, Defendant shall pay to Plaintiff the sum of \$300.00 per month alimony for a period of three years or until such time as Plaintiff remarries, cohabits as provided by statute, or either party dies, whichever first occurs. Said alimony shall be paid one-half on or before the 5th day and one-half on or before the 20th

day of each and every month through the Clerk of the above-captioned Court.

5. Until such time as alimony terminates, the parties shall split the income tax dependent deductions of the minor children of the parties, each party to take two children for tax purposes. Upon termination of alimony, all tax deductions shall go to Plaintiff.

6. As to the equity in the home, the present equity in the home is \$50,097.41. Defendant shall receive his one-half share of equity, without interest, on the first of the following events: Plaintiff's remarriage or cohabitation as provided under the alimony statute; the youngest of the parties' children reaching the age of majority; or upon sale of the home by Plaintiff. The Court reserves jurisdiction with respect to the home and its sale and division of equity.

Plaintiff is responsible for the mortgage, taxes and insurance on the home. Defendant shall immediately quit-claim any and all interest which he may have in the home to Plaintiff subject to the lien interest as provided above.

7. Plaintiff is awarded the following personal property: Household furniture and appliances, including the stereo; one-half of the First Security Bank CD and First Security Bank savings account, which one-half is \$1,231.05 and \$513.26 respectively; 1974 GMC Jimmy; lawn mower and yard equipment; 1954-56 Chevrolet truck; Stihl 16" chain

saw; as well as all other personal property presently in her possession except as specifically awarded to Defendant below.

8. Defendant is awarded the following personal property: His checking account; one-half of the First Security Bank CD and First Security Bank savings account in the amounts of \$1,231.05 and \$513.27 respectively; 1969 Chevrolet truck; 1981 Terry Travel Trailer; guns and gun cabinet; the tools which he now has in his possession; 1976 Chevrolet Impala and old car parts; and choice of one of the freezers.

9. Plaintiff is awarded a one-half interest in Defendant's employee savings investment program obtained by Defendant through his employment at Morton Thiokol, Inc. The value of said ESIP entitlement is \$15,794.44, one-half of which is awarded to Plaintiff, said one-half being \$7,897.22. As of May 12, 1989, said sum shall be distributed to Plaintiff, along with any interest accrued thereon from March 30, 1989 to the date of withdrawal, immediately upon request by Plaintiff. Plaintiff shall pay any penalties or taxes incurred as a result of her obtaining her one-half interest in said ESIP interest.

10. Plaintiff is awarded judgment against the Defendant in the sum of \$1,175.00 representing the difference in the personal property awards.

11. Plaintiff is awarded a one-half interest in any and all retirement which Defendant has acquired at his employment at Thiokol, it appearing that Defendant's employment at Thiokol has been during the marriage of the parties. Said one-half interest is computed from the time Defendant began his employment at Thiokol until the date of the hearing of the divorce in this matter, being May 12, 1989.

12. Plaintiff shall be responsible for the following debts and obligations: J.C. Penney bill; Logan City obligation; and personal loan to her father. Plaintiff is required to indemnify and hold Defendant harmless therefrom.

13. Defendant shall be responsible for the following debts and obligations: J. Thomas Smith, D.D.S. bill; First Security Bank credit card; loan from Carol A. Nielsen, Defendant's mother; and the 1987 tax obligation. Defendant is required to indemnify and hold Plaintiff harmless therefrom.

14. Defendant shall continue his current life insurance through his employment at Morton Thiokol, Inc. in the base amount of approximately \$60,000.00 with the children of the parties named as sole beneficiaries thereon. Said insurance shall continue with the children named as sole beneficiaries until the youngest child of the parties reaches the age of majority.

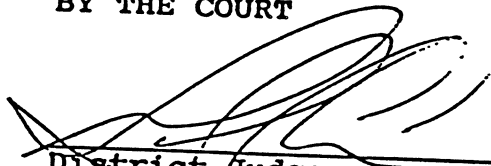
LAW OFFICES, HILLYARD, ANDERSON & OLSEN, 175 EAST FIRST NORTH, LOGAN, UTAH 84321

15. Plaintiff is awarded \$800.00 attorney fees and costs to be paid by Defendant to Plaintiff. There will be a stay upon the \$800.00 attorney fees and costs to be paid by Defendant so long as Defendant pays the sum of \$50.00 per month towards said fees.

16. This decree shall take effect as of the date of trial in this matter, being May 12, 1989.

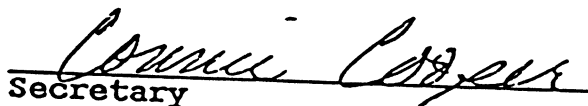
Dated this 6 day of October, 1989.

BY THE COURT

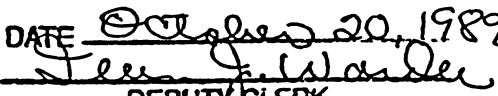

District Judge

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, a true and correct copy of the foregoing DECREE OF DIVORCE to Defendant's attorney, Pete N. Vlahos, at 2447 Kiesel Avenue, Ogden, Utah 84401, this 4 day of October, 1989.


Secretary

I, CERTIFY THAT THE FOREGOING
IS A TRUE AND CORRECT COPY
OF THE ORIGINAL FILED IN FIRST
DISTRICT COURT, CASE NO.

DATE October 20, 1989

DEPUTY CLERK

HILLYARD, ANDERSON & OLSEN

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

175 EAST FIRST NORTH

LOGAN, UTAH 84321

TELEPHONE (801) 752-2610

LOGAN DISTRICT

DEC 18 4 55 PM '89

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY

STATE OF UTAH

LYNETTE D. NIELSEN,)	
)	ORDER CLARIFYING DECREE
Plaintiff,)	
)	
vs.)	
)	
RUSSELL CLYDE NIELSEN,)	Civil No. 880027020
)	
Defendant.)	

The above-entitled matter came on regularly for hearing on Defendant's Objection to Findings of Fact and Conclusions of Law and Decree of Divorce on November 21, 1989. The Honorable Gordon J. Low presided. Plaintiff appeared in person and by and through her attorney, Larry E. Jones of Hillyard, Anderson & Olsen. Defendant appeared in person and by and through his attorney, Pete N. Vlahos. Proffers were made by counsel and arguments heard from counsel. Based upon the proffer and arguments, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The decree of divorce signed by the Court on October 6, 1989, and entered by the Court on October 11, 1989, is hereby clarified and amended as follows:

(a) As to paragraph 12 of the findings of fact and paragraph 7 of the decree of divorce, Plaintiff is awarded the Stihl 16-inch chainsaw and a judgment against

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NUMBER 48
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DATE: 12-21-89

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Defendant for \$150.00, said judgment to be satisfied either by payment of the \$150.00 or delivery of the Stihl 16-inch chainsaw by Defendant to Plaintiff.

(b) As to paragraph 13 of the findings of fact, the guns and gun cabinet are valued at \$1,250.00 for purposes of the distribution.

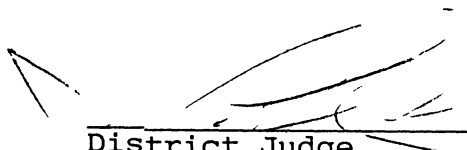
(c) As to paragraph 14 of the findings of fact and paragraph 10 of the decree of divorce the personal property award to Defendant is \$6,250.00 and the difference in the two awards is \$1,900.00, resulting in a \$950.00 judgment to Defendant instead of the \$1,175.00 judgment provided in the decree.

(d) As an additional finding to the findings of fact and additional order to the decree of divorce, the parties' interest in the Metropolitan whole life policy is hereby divided one-half to each, the value of the policy to be determined as of May 12, 1989, and judgment is awarded to Plaintiff and against Defendant for one-half of the value of the policy as of the May 12, 1989 date.

2. Except as specifically clarified and amended herein, the Findings of Fact and Conclusions of Law and Decree of Divorce shall stand as signed and entered.

Dated this 20 day of December, 1989.

BY THE COURT


District Judge

APPROVED AS TO FORM

A handwritten signature in black ink, appearing to read "Pete N. Vlahos", written over a horizontal line.

Pete N. Vlahos
Attorney for Defendant