

1989

Kathe Homer v. Stephen Homer : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Helen E. Christian; Gustin, Green, Stegall & Liapis; Attorney for Plaintiff-Respondent.

Stephen G. Homer; Defendant-Appellant Pro Se.

Recommended Citation

Reply Brief, *Homer v. Homer*, No. 890689 (Utah Court of Appeals, 1989).

https://digitalcommons.law.byu.edu/byu_ca1/2350

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH
DOCUMENT
FFU
6

ARGUMENT PRIORITY CLASSIFICATION # 16

890689-CA

IN THE UTAH COURT OF APPEALS

KATHE HOMER,)	
)	
Plaintiff-Respondent)	
)	
vs)	Docket No. 890689-CA
)	
STEPHEN HOMER,)	
)	
Defendant-Appellant)	

APPELLANT'S REPLY BRIEF

APPEAL FROM NON-JURY TRIAL AND JUDGMENT ENTERED
BY THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY

The Honorable Ray M Harding, District Judge

STEPHEN G HOMER
P O Box 493
West Jordan, Utah 84084
Defendant-Appellant Pro Se

HELEN E CHRISTIAN
GUSTIN, GREEN, STEGALL & LIAPIS
New York Building, Third Floor
48 Post Office Place
Salt Lake City, Utah 84101
Attorney for Plaintiff-Respondent

IN THE UTAH COURT OF APPEALS

KATHE HOMER,)
)
Plaintiff-Respondent)
) APPELLANT'S REPLY BRIEF
vs)
) Docket No. 890689-CA
STEPHEN HOMER,)
)
Defendant-Appellant)

TABLE OF CONTENTS

Table of Contents	i
Authorities Cited	ii
Designation of Parties	1
Response to Plaintiff-Respondent's Brief	1
Certificate of Service	23
Addenda	A1,A2,A3

AUTHORITIES CITED

Cases cited

Colman vs State Land Board, 795 P.2d 622 (Utah Supreme Court, 1990)	9
Davis vs Davis, 749 P.2d 647 (Utah Supreme Court, 1988)	7
Haumont vs Haumont 793 P.2d 421 (Utah Court of Appeals, 1990)	4,6
Jense vs Jense, 784 P.2d 1249 (Utah Court of Appeals, 1989)	20
Marchant vs Marchant 743 P.2d 199 (Utah Court of Appeals, 1989)	4,6

Martinez vs Martinez,	
754 P.2d 59 (Utah Court of Appeals, 1988)	6,20
Motes vs Motes	
786 P.2d 232 (Utah Court of Appeals, 1989)	11,12,13,14
Nollan vs California Coastal Commission,	
483 US 825, 97 LEd2d 677, 107 SCt 3141 (1987)	8
Woodward vs Woodward	
656 P.2d 431 (Utah Supreme Court, 1982)	18
<u>Statutes and other authorities</u>	
Article I, Section 22, Utah Constitution	9
Fourteenth Amendment, United States Constitution	8
Section 30-3-11.1, Utah Code	8
Section 78-45-7.16, Utah Code	16,17
<u>Court rules</u>	
Rule 24, Utah Rules of Appellate Procedure	1
Rule 37, Utah Rules of Appellate Procedure	17

IN THE UTAH COURT OF APPEALS

KATHE HOMER,)	
)	
Plaintiff-Respondent)	
)	APPELLANT'S REPLY BRIEF
vs)	
)	Docket No. 890689-CA
STEPHEN HOMER,)	
)	
Defendant-Appellant)	

Pursuant to the provisions of Rule 24(c), Utah Rules of Appellate Procedure, the Appellant submits the following Reply Brief.

DESIGNATION OF PARTIES

Pursuant to the provisions of Rule 24(d), Utah Rules of Appellate Procedure, the Plaintiff-Respondent (Kathe Homer) is designated herein as "Ms Homer"; the Defendant-Appellant (Stephen Homer) as "Mr Homer".

RESPONSE TO RESPONDENT'S BRIEF

I

THE APPELLANT'S BRIEF AND APPEAL

Ms Homer asserts in her brief [pp. 6-8] that the brief of Mr Homer fails to comply with the Rules, in that it fails to correlate the assertions therein to the Record. Those statements are merely a ruse to sidetrack the Court from examining the meritorious issues raised in this appeal.

Ms Homer's brief fails to identify even one particular where the "facts" or other issues, as stated in Mr Homer's brief, are in contravention to "the Record".

The issues raised by Mr Homer are not factually-intensive, but rather are more "legal": these legal issues are evident from the result, as evidenced by the decree and the findings (signed and unsigned), which were referred to by his brief and which were included in the Addendum, as required by the Rules. The Addendum also contained significant portions of the Transcript of Trial and Exhibits on some major factual issues.

References to the Record---or the lack thereof---are simply not dispositive as far as Mr Homer's appeal is concerned. The major thrust of his appeal is that there was insufficient findings made by the trial court concerning such "equitable" issues as alimony.

Ms Homer's brief [pp. 6-8] is critical of his brief, claiming such is an unwarranted recitation of his personal interpretation of "equity". Divorce actions are supposed to be "equitable". So it is indeed fitting that the thrust of this appeal center around "equity". His brief certainly should champion his interpretation of what is "equitable". There would never be an appeal in a divorce case the parties always blandly accepted the the lower court's "definition" of "equity".

Mr Homer's brief complies with the Rules and does contain the necessary references "to the Record". It is Ms Homer who, in the evidence presented to the trial court and in the "findings" prepared by her counsel, who has failed to comply with the requirements of the law.

II

THE TRIAL COURT'S FAILURE TO MAKE ADEQUATE FINDINGS

Ms Homer's brief [p. 11] states:

"Evidence before the court established that Mrs. Homer's expenses totalled \$1706.56. (R. 114)¹"

(Emphasis added.) Her brief then recites portions of Findings Nos. 14 and 16, which indicated that Ms Homer had a monthly income of \$1673.

If her expenses were \$1706.56 per month, then her "margin" (between her earnings without alimony and her expenses) is less than \$34 per month. WHY THEN IS THE MONTHLY ALIMONY AWARD \$150?

Her monthly expenses of \$1706.58 included amounts she claimed to pay for the parties' minor child, Melissa! Mr Homer was ordered to pay in excess of \$400 per month as "child support" and "child care expenses". Thus, her available "revenue" is in excess of \$2,073 and she has expenses of \$1706 per month. She shouldn't need alimony on top of that!

The trial court's brief "findings" certainly do not resolve what should be obvious from simple arithmetic; indeed, the "finding" is contrary to the evidence, as claimed by Ms Homer's own brief.

The trial court's Finding [#16] makes no specific reference to her monthly expenses, makes no reference to her standard of living, and is similarly devoid of any reference to the potential of her becoming a "public charge".

¹ Actually, the \$1706.58 amount is found on Page 112---not 114---of the Record, at ADDENDUM A1, herein.

This Court has held it is "reversible error" for the trial court to fail to enter specific findings concerning the issues raised by an alimony award. The trial court must make findings on all material issues and those findings must be sufficiently detailed and consist of enough subsidiary facts to reveal the steps the court took to reach its conclusions on each factual issue presented. *Marchant vs Marchant*, 743 P.2d 199 (Utah Court of Appeals, 1989).

The issue of Ms Homer's "need" for alimony was vigorously contested at all stages of this action. In light of the foregoing, this Court cannot determine the steps the trial court took to reach its conclusion. As with *Marchant*, the findings entered by the trial court are insufficient to support an award of permanent alimony. Ms Homer's appellate counsel has conveniently chosen to overlook and ignore those two cases and the principles for which they stand.

III

ALIMONY IN A NO-FAULT DIVORCE

This action was filed as a "no fault" (i.e. "irreconcilable differences") divorce under the statutory amendments recently adopted by the 1987 Legislature.

In *Haumont vs Haumont*, 793 P.2d 421, (Utah Court of Appeals 1990), this Court correctly noted that "no fault need be proven or inferred" (Id. at 427) in an action such as this. *Haumont* did not address the issue of the award of alimony in the "no fault" context, but rather reversed and remanded due to the trial court's failure to enter sufficient findings. Thus, this case is a case of first impression for

this Court.

The "old" cases cited by Ms Homer in her brief interpreting divorce actions NOT in a "no fault" context ought to be limited to their specific facts and law. Furthermore, we are in the 1990s: a time when the economic opportunities for women are many times what they were when those traditional "alimony" cases were developed. It is time to abandon those archaic concepts, particularly in the case of an ex-wife totally able to support herself.

The Legislature, consistent with the national trend of "throw-away marriages" has adopted the "no fault" concept. The purpose thereof was to make divorce easier. That arguably laudible will not be met if the courts continue to award alimony in a "no fault" context; the parties will still fight over that. As judged from the number of appeals concerning that singular issue and the number of divorce modifications in which its termination is sought, the men appear not to enjoy paying alimony; that situation is going to be aggravated when the divorce was to be "no fault". If it is nobody's "fault", then why should the man be forced to pay his ex-wife? If the award of alimony is not to be characterized as a "punishment" (for the paying husband) or a "reward" (for the receiving wife), then there is not logical explanation for routinely denying the award of permanent alimony in so-called "short-term" marriages, while awarding it in "long-term" marriages. The recipient spouse---even in a "short-term" marriage might have become just as "accustomed to that standard of living". And after the marriage, she

might just as likely to become a "public charge".

Haumont recognizes the principle that "no fault is to be inferred", an award of alimony---for the ostensible purpose of enabling the recipient spouse (Ms Homer) to "continue, as nearly as possible, in the lifestyle to which she has become accustomed"---which has the exact opposite effect on Mr Homer: contrary to whatever the courts as bystanders to the transaction may have characterized it in the past, it's a penalty. Since it is she that is now "breaking the marital contract", it should be he---the non-breaching party---who ought to be entitled to "the lifestyle at which he has become accustomed".

Obviously, the Court is placed in the unenviable position of, as one commentator put it, "dividing a single blanket to cover two beds."

The instant case is dissimilar to that situation presented in *Martinez vs Martinez*, 754 P.2d 59 (Utah Court of Appeals, 1988). Ms Homer is a college-graduate with post-graduate education, employed in a full-time job in her own chosen career, with full medical and retirement benefits, living in the home that she purchased prior to the marriage when she was receiving no alimony from her previous husband. She claims to be "entitled" to alimony, strictly on the basis of Mr Homer's "ability to pay it".

Ms Homer cites [p. 12] to the case of Davis vs Davis, 749 P.2d 647 (Utah Supreme Court 1988), as authority for an award of "permanent alimony" in a "long-term marriage". Davis involved a 13-year marriage: almost TWICE AS LONG as the instant relationship terminated at 7 years. And in Davis, Mr Davis had after-alimony annual income approaching \$100,000.

Davis is more applicable to Ms Homer in this case for the issues described by Justice Howe in his concurring opinion:

She is . . . healthy, and well-educated. She has worked and continues to work full-time. She received a large cash settlement at the time of the divorce. . . , as well as substantial amounts of property. She was not left with any indebtedness incurred during the marriage, . . . Assuming she continues to [work] and invests the proceeds of the settlement, she is in a strong financial position without additional support from plaintiff.

. . .

Thus, the district court's award of permanent alimony was an abuse of discretion when reviewed under the criteria established by this Court. **This is not the type of situation where an award of permanent alimony, or any alimony whatsoever, is warranted.**

749 P.2d at 650 (Justice Howe, concurring and dissenting).

Emphasis added.

Assuming that a major element necessary for an award of permanent alimony is the "standard of living issue enjoyed by the spouse during marriage", that criteria should not be followed in a "no fault" case. An award of alimony in a "no fault" case encourages the break-up of the marital and family relationships: the spouse gets to live in the "standard of living to which she has become accustomed, but without making the agreed-upon contributions or commitment which supposedly were the basis of the marital relationship. Such "judicial

logic" conflicts with the expressed "public policy" of Utah: "to take reasonable measures to preserve marriages, particularly where minor children are involved." Section 30-3-11.1, Utah Code.

It is ironic that in a state which prides itself---both in the expressed legislative policy as well as in the attitudes of the majority of its people---in the integrity of families and the institution of marriage, judicial policies are applied in a fashion which encourage divorce, thus undermining those policies.

Secondly, the award of permanent alimony in this case raises issues of "constitutional" dimension. The relatively new "no fault" character of this action highlights and refines the "constitutional" issues, which Ms Homer's brief (pp. 9-10) does not even address. Except for a brief reference that Mr Homer's "constitutional" issue is "unsupportable" (p. 9 of Ms Homer's brief), she choses not even to address this issue which apparently has never been raised, probably due to the recent vintage of the "no-fault" statute.

A major element in the "alimony" analysis is the "keep the recipient spouse from becoming a public charge" issue. In *Nollan vs California Coastal Commission*, 483 US 825, 97 LEd2d 677, 107 Sct 3141 (1987), the United States Supreme Court ruled that the Fourteenth Amendment prevented state government from "taking private property for public use" without just compensation. Certainly *Nollan* is not a "divorce case", but the constitutional principle applies: "private

property" (from Mr Homer's future earnings) cannot be "taken for public use" (for the purpose of insuring that Ms Homer does not become a "public charge")! Those principles are consistent with the ruling in *Colman vs Utah State Land Board*, 795 P.2d 622 (Utah Supreme Court, 1990), interpreting Article I, Section 22 of the Utah Constitution: "Private property shall not be taken or damaged for public use without just compensation." Those two cases raise serious questions as to the "constitutionality" of any alimony award, especially a "no fault" divorce alimony award. That this "constitutional" issue has not been previously addressed by the appellate courts should not prevent Mr Homer from now litigating it.

IV

THE CHILD SUPPORT ISSUES

A. The "dependency exemption" under federal tax law

Ms Homer's brief [p. 14] implies that the "dependency exemption" allowed under Section 152 of the federal Internal Revenue Code was a major issue which was actively litigated and that he "lost" the fight in the trial court below for the "dependency exemption". Later her brief [p. 15] states that this issue is raised for the first time on appeal. Such mutually-inconsistent statements are both incorrect.

The "dependency exemption", per se, was not mentioned in the course of the proceedings; however, the income tax consequences attendant to the custody award were mentioned at trial. Mr Homer's position was not to seek the "dependency exemption." It was beneficial to the parties jointly, and

especially Ms Homer, that she be entitled to keep the "dependency exemption" under federal law, so as to enable her to file income taxes in even a lower "tax bracket" (i.e. "head of household") than would have been the case is she had to file merely as "single". However, the "income tax consequences" were addressed by Mr Homer. At page 160 of the Transcript of the Trial, he---in response to inquiry as to why the child support amount should be stated to be less than the amount specified in the "guidelines"---stated:

MR. HOMER: "Furthermore the schedules and the process do not take into account the custody issue and the tax consequences attendant to the parties of who ends up with custody. And I think that should be taken into account in an equitable distribution of the assets and/or the child support amount that should be awarded."

Transcript of Trial, p. 160. [ADDENDUM A2, herein] Ms Homer made no attempt to rebut this statement.

The specific impact as to the actual effect was sought to be addressed in the "Supplemental Findings of Fact", as prepared by Mr Homer and submitted to the trial court. Specifically, Proposed Findings # 33, 34, 35 and 36 addressed this issue, included in Mr Homer's original Brief at p. A37 of the Addendum.

The filing status and the rates at which the taxes would be calculated are "matters of law" (state and federal), easily determinable---by judicial notice, if necessary---and for which there is no dispute. Ample factual evidence was presented to establish the parties' incomes. Nevertheless, inspite of the express request to make a "finding" on that issue, the trial court refused, tersely stating:

The Court has also received and reviewed the "Supplemental Findings of Fact", prepared by defendant. The Court will not execute those proposed findings as they do not accurately reflect the Court's ruling in it's [sic] memorandum decision, and because much of the material contained in the "Supplemental Findings of Fact" is not relevant, and appears to be an attempt by defendant to relitigate the case.

[Trial Court's October 26, 1989, memorandum decision, at p. 268 of the Record; at p. A4 of Appellant's original brief.]

In *Motes vs Motes*, 786 P.2d 232, 121 Utah Advance Reports 54 (Utah Court of Appeals, 1989), this Court declared that the trial court

"must always recognize the financial benefit accompanying dependency exemption when awarding alimony and child support."

786 P.2d at 239. Emphasis added. The "must always recognize" standard imposed upon the trial court is even stronger than a "judicial notice" standard. The trial court failed to do this, even when Mr Homer expressly called it out in his testimony.

Even when the issue was specifically called out to the trial court in the "Supplemental Findings", the trial court refused to sign the "findings"---not because they were not accurate, but because (1) they were not included in the trial court's earlier Memorandum Decision, (2) were irrelevant, or (3) were an attempt to relitigate the case.

The trial court's original (July 31, 1989) Memorandum Decision makes absolutely no reference to any income tax consequences. The fact that the trial court omits to dispose of an issue cannot be the basis for refusing to consider it, particularly when it is brought to its attention, especially

when the Court of Appeals has said that "the trial court must always recognize" the tax consequences. If the reason for the trial court's reticence to sign Supplemental Findings ## 33-36 was that such "relitigated" the case, such a characterization is perhaps the highest compliment as to the integrity and accuracy of that finding. The purpose of the findings---including "Supplemental Findings" prepared by the "losing" party---are to enable the appellate court to determine the thought processes of the trial judge. The trial judge cannot refuse to sign a finding merely because it didn't fit into his original disposition of the case or he felt it was "irrelevant".

Contrary to the assertions of Ms Homer's brief [p. 14], the child support "guidelines" (tables) DO NOT take into account the income tax consequences which come from the custody award. The "guidelines" couldn't take those tax consequences into account, as the "guidelines" themselves are "CUSTODY-NEUTRAL": the calculations as to the monthly support to be paid by each parent are made using the guidelines without regard to which parent has custody.

Ms Homer states that the "guidelines" are "adjusted for FICA, federal and state taxes"; indeed, the statute (Section 78-45-7.14, Utah Code) even says so, although the word "adjusted" is unexplained. However, to say that this sentence overrules the principles announced in *Motes* is incorrect. That sentence refers to the tables as to how "monthly combined adjusted gross income" is calculated; its purpose was to reflect the fact that the Legislature ostensibly

considered the impact of taxes generally when setting the guidelines. The purpose of the sentence is to insure that the "gross" income figure---not the "net" income (following deductions for FICA and taxes)---will be utilized.

The "taxes" paid by parties could not be taken into account because the parties might have differing "marginal rates" (the rates at which the federal tax bracket jumps from 15% to 28% of taxable income). Because the tables utilize only a "combined" monthly income, there could be no taking into account of the taxes to be paid, by the parties, vis-a-vis each other, which was the whole purpose behind the principles announced in *Motes*.

The fact that the tax consequences are not taken into account can be readily seen by the instant case. The mathematical calculations are adequately document in Appellant's initial brief and need not be repeated here.

The amount by which Ms Homer's income taxes are reduced (which is the same amount by which Mr Homer's income taxes are increased) should be equitably divided, in the same manner as the child support obligation is divided.

Instead, the trial court ignored the issue presented to it. *Motes* says it "must always be considered". If Ms Homer does not want the "child support amount" to be equitably reduced to take into account those tax consequences, then she ought to be forced to give up the "dependency exemption" as *Motes* allows.

Motes is exactly applicable to the instant situation, where Mr Homer (the non-custodial parent) has the "higher income" and provides "the majority of the support".

B. Child support paid for children of previous marriage

Mr Homer paid and continues to pay \$300 "child support" for children of a previous marriage, even though only \$200 was "ordered" for two children. This is not merely an issue of following the statute, as she suggests in her brief [p. 16].² The statute allows the trial court "discretion" in taking into account payments which are less than what was ordered, equity would demand that Mr Homer be given credit for paying more---a situation the Legislature certainly didn't envision.

It is certainly inequitable for Ms Homer to contest this point, since she's claiming their child (Melissa) is entitled to \$351.75 worth of support from Mr Homer, but that his other children from a previous marriage are only worth \$100 each. That inequity is illustrated by the fact that the net impact to her is a mere \$6 per month: the actual costs of providing for Melissa are not increased or decreased ONE PENNY by any of this. No, the focus is whether there's a signed paper in a dusty court file somewhere. If there is, then she'll take the \$6 less per month.

² One can but wonder what her position would be if Mr Homer did NOT PAY the court-ordered \$200. Would she thus argue for an increase in the child-support to be paid for Melissa, because of his increased "adjusted income"?

Divorce actions---including the award of child support---are "equitable". Equity does what ought to be done; in close cases, "equity" will overrule "law". The policy of this state should not be to discourage non-custodial parents from PAYING MORE CHILD SUPPORT than is ordered, because of hypertechnical adherence to a statute. The "policy" of the state be such that the "guidelines" are that and that the trial judges have "discretion" for such cases, which discretion ought to be followed to advance the obvious goals of the statute.

Indeed, the trial court did abuse that discretion.

C. The "child care expenses" component

Concerning the the "child care expenses" component of the child support award, Ms Homer's brief [p. 16] states that to "have even raised this issue on appeal without doing basic research into the law is an abuse of the appellate process." Such is an absolute misrepresentation of law and fact!

This case was tried in the summer of 1989. The decree was finally signed in October 1989. The appeal was filed in November and the issues on appeal were established through the "Docketing Statement", filed with the Court in December 1989. The Docketing Statement preserved the "child care expenses" issue---which had been argued unsuccessfully to the trial court. Mr Homer's brief addressed the issue.

Section 78-45-7.16³, Utah Code, which arguably renders moot this particular issue, was amended by the 1990 Legislature pursuant to H.B. 103! The 1990 Edition of the Utah Code books---published by Michie Company---by which this amendment could be publicly-determined, were not even available until August 1990---AFTER Mr Homer's Appellant's Brief was written and filed!

His position is certainly justified; it is not an "abuse of the appellate process". On the contrary, his position on the point seems to be well taken, as the Legislature adopted the position he sought, but was refused by the trial court, even when it was specifically called to his attention. In pursuing his appeal, he certainly could not predict that the Legislature would, in a subsequent year, adopt legislation addressing the very situation he felt inequitable.

³ Section 78-45-7.16, ~~amended~~ by the 1990 Legislature AFTER THIS APPEAL WAS FILED, now reads:
(1) The monthly amount to be paid for reasonable work-related child care costs actually incurred on behalf of the dependent children of the parents shall be specified as a separate monthly amount in the order.
(2) If an actual expense included in an amount specified in the order ceases to be incurred, the obligor may suspend making monthly payment of that expense while it is not being incurred, without obtaining a modification of the child support order.
Emphasis added.

Ms Homer's brief [p. 17] notes that the "worksheet" and the "findings" and "conclusions" call out the "child care expenses" component and that Mr Homer can be excused from paying that component when those costs are no longer incurred. While there still may be a problem with the "decree" (which includes the amount, without actually saying so---which was the whole point of the appeal), Mr Homer is willing to concede this issue is now moot and that pursuant to the provisions of Rule 37(a), Utah Rules of Appellate Procedure, the Appellant suggests⁴ that in light of the 1990 legislative amendments to Section 78-45-7.16, Utah Code, the issues raised in POINT VII of APPELLANT'S BRIEF [pp. 43-45] are "moot" and that no dispute thereon is presented. The Appellant submits herewith a "Suggestion of Mootness", in the form contained in ADDENDUM A3, hereto.

V

DIVISION OF THE PENSION BENEFITS

A. The "pension" account

Contrary to Ms Homer's assertion [p. 18 of her brief], Mr Homer has NEVER, NEVER---either in the trial court or in this appeal---claimed that the "pension" account (adopted by

⁴ Pursuant to Rule 37, Utah Rules of Appellate Procedure, Ms Homer's counsel has a "duty . . . at all times during the course of an appeal" to inform the court of any circumstances which have transpired subsequent to the filing of the appeal which would render moot one or more of the issues raised. That party shall "forthwith advise" the appellate court thereon. It is interesting that Ms Homer's counsel is so quick and critical (by using terms like "abuse of the judicial process") of Mr Homer's failure to predict the legislative will, when arguably much time and effort might have been saved had she notified the Court and Mr Homer of the amendments to 78-45-7.16, which became effective 23 April 1990, in a timely manner.

his employer as a substitute for federal social security coverage) was "exempt from division" by the divorce court. This is NOT an issue of a statute (or lack thereof) which prevents the "division" of the account upon divorce. The issue is one of simple equity.

The court should take into account the "penalty" which will be imposed upon him by reason of the federal "Windfall Elimination Provision", which WILL reduce his federal social security benefits in the future. Randy Marchant, an employee of the social security administration, testified as to the "Windfall Elimination Provision". [TRANSCRIPT at pp. 86-91, contained in the ADDENDUM (A64 thru A69) to Mr Homer's original brief.]

The "Windfall Elimination Provision" has been on the books since 1983; it was adopted by Congress for the specific purpose of discouraging the exodus of state and local government employees to "private plans" in lieu of social security, as they were then---but no longer---allowed to do. The fact that the "Provision" has no present impact is of no consequence to the analysis; it is there now and, given Congress' seemingly-apparent intent to adopt legislation to include everyone in the social security system, the Provision will be around permanently.

To quote from Ms Homer's own brief [p. 23, citing to Woodward vs Woodward, 656 P.2d 431 (Utah 1982):

In Englert vs Englert we emphasized the equitable nature of proceedings dealing with family, pointing out that the court may take into consideration all of the pertinent circumstances.

Id. at 432. Citations omitted. Emphasis added. Indeed, the federal law (denying her benefits by reason of his employment) and the impact of the Windfall Elimination Provision should have been one of the "pertinent circumstances" which the trial court took into account in making an "equitable" distribution. The trial court---closing its eyes to the issue---merely pulled out the sword of justice and divided the baby in equal halves!

B. Set-off for expenses of step-children

Contrary to the assertions of Ms Homer's brief [p. 23], taking into account contributions to the living expenses of step children will not "completely negate" the statutory duty of a step-parent to support stepchildren; it will further that policy.

If such contributions are taken into account, step-parents will be more willing to make those contributions for those children, knowing that if there is a divorce, the assets will be "equitably" adjusted. If Ms Homer's position should prevail (that there be no set-off), then persons will be reluctant to make those expenses. Instead, the step-parent will be motivated to "hoard" his monies against the time when the divorce occurs, particularly when one party announces---as Ms Homer did---that she will file for divorce three years in the future (1987), which she did! [TRANSCRIPT at p. 165-166, contained in ADDENDUM A70-A71 of Mr Homer's original brief.]

In **Martinez vs Martinez**, 754 P.2d 59 (Utah Court of Appeals, 1988), Mrs Martinez was under the same "statutory duty" to support her husband. Yet on the demise of her marriage, she was entitled to "equitable restitution" for the investment she had made. Mr Homer is merely asking for the same thing: not in terms of alimony as was awarded to Mrs Martinez, but rather as an "offset" against her claim in a share of his retirement accounts---the single asset of any significant value.

C. Date of valuation of retirement account assets

Ms Homer's brief fails to even respond to the numerous cases cited for the proposition that the retirement assets ought to be valued as of the date the action was filed. It is on that date that Ms Homer ceased to be a marital "partner". She should now not be heard to criticise of utilization of that date.

Ms Homer's citation [p. 22] of **Jense vs Jense**, 784 P.2d 1249 (Utah Court of Appeals, 1989), is clearly erroneous. **Jense** involved a post-decree request for modification---on the basis that property values in the agreed-upon settlement had not materialized. **Jense** doesn't even discuss the "general rule" as to the date of property valuation.

In any event, those cases which might have been cited for that general rule involve either (1) property which it is difficult to obtain a precise value on, particularly in the past and/or (2) a relatively short time between the filing for the divorce and its ultimate disposition. Mr Homer is merely asking for a common-sense refinement to that general

rule in cases such as this where the increase in value occurs because of his continued post-filing contributions.

Although the "general rule" might be to the contrary, the application of the earlier valuation date in "retirement" account cases such as this is meritorious. First, it does not reward one party---at the expense the other---by dragging out the litigation. And even if such was not intentional, she still chose to terminate the "marital partnership" as of the earlier date. Secondly, such an approach would be consistent with the stated policy of encouraging the "preservation" of the marriage, particularly when minor children are involved.

Ms Homer's brief [pp. 21-22] counters his arguments by quoting the trial court's analysis and disposition of this issue. However, when examined, the trial court's approach is contradictory to the "policy", is contrary to the law, and even contradicts itself. The trial court wrote:

Had the Defendant wished to limit the Plaintiff's interest in payments made to retirement programs during the pendency of this litigation, he could have moved for a bifurcated proceeding, and could likely have ended the marriage shortly after the action was filed. Plaintiff is entitled to a percentage of whatever benefits were accrued during the time of entry into the marriage, and final termination of the marriage through this divorce action.

The better---and certainly more "equitable" (both in terms of "fairness" and just common sense)---approach would have been something along the lines of "if Plaintiff had wanted an interest in the Defendant's retirement programs, she shouldn't have filed for divorce, kicked him out and ceased being the marital 'partner' she originally contracted to be."

There is nothing in the statutes which even describe, let alone provide for this questionable practice of having a "bifurcated hearing" to which the trial judge referred. The defendant-spouse is forced to likewise file (or at least move with dispatch to the divorce, lest the spouse continue to leech from his personal earnings and benefits) for divorce. Such certainly is contrary to the legislative policy! Indeed, it is time for that policy to be changed, as has been done in many other states.

The trial court implies---through its reference to the "bifurcated proceeding"---that the assets would have been valued and divided as of the earlier date, even though the property distribution portion of the "bifurcated hearing" would be held at a later time: in this case, two years later! That simply doesn't make sense. First, the bifurcated hearing is not provided for in the statute; secondly, to force the defending party to also file (or at least seek the divorce quickly) is contrary to the public policy described; and thirdly, it is conceptually impossible---or as a minimum, contrary to the statute---for the court to enter the divorce decree and yet fail to resolve the outstanding property distribution issues.

Indeed, the trial court's ruling is inconsistent with itself. It implies that the trial court would have valued and divided the assets as of the earlier date---had the mysterious "bifurcated hearing" been held---and yet goes on to say that she'd be "entitled" to a percentage of "whatever retirement benefits were accrued during the time of entry

into the marriage and final termination of the marriage through this action." Such an analysis totally ignores the evidence before the court: not necessary testimonial evidence presented at trial, but rather the documentary evidence in the court file itself, to the effect that she has, in fact terminated the marriage!

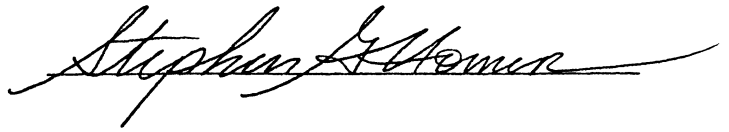
If such "bifurcated" proceedings are allowed, then such should come from the Legislature, in expressed terms. They should not come by judicial decision or local court practice, particularly when such has an effect so contrary to the public policy of the this state.

Respectfully submitted this 29th day of October, 1990.


STEPHEN G. HOMER
Defendant-Appellant Pro Se

CERTIFICATE

I certify that I caused four copies of the foregoing APPELLANT'S REPLY BRIEF to be hand-delivered to the office of Ms Helen E Christian, Attorney at Law, 48 Post Office Place, Salt Lake City, Utah 84101, this 29th day of October, 1990.



	<u>Husband</u>	<u>Wife</u>
Rent or mortgage payments (residence)	_____	602.00
Real property taxes (residence)	_____	_____
Real property insurance (residence)	_____	_____
Maintenance (residence)	_____	30.00
Food and household supplies	_____	300.00
Utilities including water, elec., gas & heat	_____	190.56
Telephone	_____	40.00
Laundry and cleaning	_____	21.00
Clothing	_____	25.00
Medical	_____	10.00
Dental	_____	10.00
Insurance (life, health, accident, comprehensive disability) Exclude payroll deducted	_____	_____
Child Care	_____	108.00
Payment of child/spousal support re prior marriage	_____	_____
School	_____	10.00
Entertainment (includes clubs, social obligations, travel, recreation)	_____	40.00
Incidentals (grooming, tobacco, alcohol, gifts, donations, including tithing)	_____	155.00
Transportation (other than automobile)	_____	_____
Auto expense (gas, oil, repair, insurance)	_____	105.00
Auto payments	_____	_____
Installment payments (insert total and attach itemized schedule if not fully set forth in (d))	_____	_____
Other expenses (insert total and specify on a attached sheet Melissa/\$30.00 violin/plus misc. \$18.00 dance	_____	60.00
TOTAL EXPENSES	_____	1,706.56

I declare under penalty of perjury that the foregoing, including any attachments are true and correct and that this declaration was executed on the 24th day of May, 1988, at _____.

Richard B. Johnson
Attorney Signature

(Plaintiff ~~XXXXXX~~)

RICHARD B. JOHNSON, Attorney at Law

Kathe C. Homer
Party's Signature

KATHE HOMER

BRING TO THE HEARING ALL DOCUMENTS AND OTHER SUPPORTING INFORMATION NECESSARY TO EXPLAIN THE STATEMENTS MADE IN THIS DECLARATION, INCLUDING, BUT NOT LIMITED TO BOOKS, CHECKBOOKS, CANCELLED CHECKS, CERTIFICATES, POLICIES, AND OTHER DOCUMENTS.

ADDENDUM A1

1 that -- It doesn't cost that much. I find it
2 interesting that for seven years \$115 was enough, for
3 seven years \$200 for Kirk and Daniel.

4 MR. JOHNSON: Judge, I object.

5 It's not responsive.

6 THE COURT: I will sustain the objection. Just
7 stick to the facts per the question that was asked.

8 Mr. Homer THE WITNESS: As the father of Melissa and having
9 resided in the home as being a noncustodial parent who
10 visits her, and I am familiar with the living
11 arrangements and the expenses attendant to those living
12 arrangements, they are not as high as what the schedules
13 would dictate would work out.

14 Furthermore the schedules and the process
15 do not take into account the custody issue and the tax
16 consequences attendant to the parties of who ends up
17 with custody. And I think that should be taken into
18 account in an equitable distribution of the assets
19 and/or the child support amount that should be awarded.

20 Q. Okay. Now should she receive half your
21 retirement?

22 A. No.

23 Q. Why not?

24 A. In September of '87 Kathy legally called it
25 quits. She took legal steps to terminate the marriage.

STEPHEN G HOMER
P O Box 493
West Jordan, Utah 84084
Telephone 561-1463
Defendant-Appellant Pro Se

IN THE UTAH COURT OF APPEALS

KATHE HOMER,)
)
Plaintiff-Respondent)
) SUGGESTION OF MOOTNESS
vs)
) Docket No. 890689-CA
STEPHEN HOMER,)
)
Defendant-Appellant)

Pursuant to the provisions of Rule 37 of the Utah Rules of Appellate Procedure, the Defendant-Appellant hereby suggests that one of the issues raised in the above-entitled action is moot: namely, the reduction of "child care expenses", as described in Paragraph 5.f of the "Docketing Statement" (filed December 1989) and argued under Point VII of Appellant's Brief [pp. 43-45], written and filed before the 1990 legislative enactments were publicly available.

The mootness on this singular issue arises by reason of the 1990 Legislature's adoption of H.B. 106, which made amendments to Section 78-45-7.16, Utah Code, authorizing the very result which the Appellant sought in that portion of the appeal.

Based upon the statements made on page 17 of the Plaintiff-Respondent's Reply Brief, dated 25 September 1990,

APPENDIX A

it is the undersigned's belief that counsel for the opposing party would concur in this Suggestion of Mootness.

The Court may dispose of the mooted issue as the Court deems appropriate.

Respectfully submitted this 29th day of October, 1990.


STEPHEN G. HOMER
Defendant-Appellant Pro Se

CERTIFICATE

I certify that I caused a copy of the foregoing SUGGESTION OF MOOTNESS to be hand-delivered to the office of Helen E Christian, Attorney at Law, 48 Post Office Place, Salt Lake City, Utah 84101, this 29th day of October, 1990.

