

1989

# Homer v. Homer : Brief of Respondent

Utah Court of Appeals

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**UTAH COURT OF APPEALS  
BRIEF**

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*890689-CA*

IN THE UTAH COURT OF APPEALS

KATHE HOMER,	:	
	:	
Plaintiff-Respondent,	:	Docket No. 890689-CA
	:	Priority No. 16
v.	:	
	:	Fourth District Court
STEPHEN HOMER,	:	No. CV 874402098
	:	
Defendant-Appellant.	:	

PLAINTIFF-RESPONDENT'S BRIEF

APPEAL FROM NON-JURY TRIAL AND JUDGMENT  
ENTERED ON JULY 31, 1989, BY THE FOURTH  
JUDICIAL DISTRICT COURT IN AND FOR UTAH  
COUNTY, STATE OF UTAH,  
HONORABLE RAY M. HARDING

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Appeals

TABLE OF CONTENTS

	<u>PAGE</u>
Jurisdiction. . . . .	1
Statement of Issues Presented for Review. . . . .	1
Determinative Authority . . . . .	1
Statement of the Case . . . . .	1
Summary of Argument . . . . .	4
Argument	
POINT I:	
MOTION TO STRIKE AND FOR AWARD OF ATTORNEYS' FEES. . . . .	6
POINT II:	
THE COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ALIMONY TO MRS. HOMER. . . . .	8
POINT III:	
THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CALCULATING MR. HOMER'S CHILD SUPPORT OBLIGATION . . . . .	13
POINT IV:	
THE COURT'S DIVISION OF THE PERSONAL PROPERTY, INCLUDING PENSION BENEFITS, WAS FAIR AND EQUITABLE . . . . .	18
Conclusion . . . . .	24
ADDENDUM	
Determinative Authority	
Utah Code Ann. § 30-3-5 (1989). . . . .	1
Utah Code Ann. § 78-45-4.1 (1987) . . . . .	1
Utah Code Ann. § 78-45-7.6 (Supp. 1990) . . . . .	2
Utah Code Ann. § 78-45-7.16 (Supp. 1990). . . . .	2
Plaintiff's Exhibit 10 - Personal Property List	4

TABLE OF AUTHORITIES

CASES CITED

	<u>PAGE</u>
<u>Boyle v. Boyle</u> , 735 P.2d 669 (Utah App. 1989) . . .	12
<u>Davis v. Davis</u> , 749 P.2d 647 (Utah 1988) . . . . .	10, 12, 13
<u>Englert v. Englert</u> , 576 P.2d at 1276 . . . . .	23
<u>English v. English</u> , 565 P.2d 409 (Utah 1977) . . .	9, 13
<u>Gardner v. Gardner</u> , 748 P.2d 1076 (Utah 1988) . . .	12
<u>Gramme v. Gramme</u> , 587 P.2d 144 (Utah 1978) . . . .	9
<u>Jense v. Jense</u> , 784 P.2d 1249 (Utah App. 1989) . . .	22
<u>Jones v. Jones</u> , 700 P.2d 1072 (Utah 1985) . . . . .	12, 13
<u>Motes v. Motes</u> , 786 P.2d 232 (Utah App. 1989) . . .	15
<u>Olson v. Olson</u> , 704 P.2d 564 (Utah 1985) . . . . .	12
<u>Osguthorpe v. Osguthorpe</u> , 131 Utah Adv. Rptr. 21 (March 19, 1990) . . . . .	10
<u>Paffel v. Paffel</u> , 732 P.2d 96, 102 (Utah 1986) . . .	12, 16
<u>Rasband v. Rasband</u> , 752 P.2d 1331 (Utah App. 1988) .	12
<u>Read v. Read</u> , 594 P.2d 871 (Utah 1979) . . . . .	9
<u>Schindler v. Schindler</u> , 776 P.2d 84 (Utah App. 1989) . . . . .	11
<u>Woodward v. Woodward</u> , 656 P.2d 431 (Utah 1982) . .	22

STATUTES

Utah Code Ann. § 78-45-4.1 . . . . .	23
Utah Code Ann. § 78-45-7.14 (Supp. 1990) . . . . .	14
Utah Code Ann. § 78-45-7.16 (Supp. 1990) . . . . .	17

RULES

Rule 24(e), Utah Rules of Appellate Procedure. . .	7
Rule 24(k), Utah Rules of Appellate Procedure. . .	6
Rule 33, Utah Rules of Appellate Procedure. . . . .	6
Rule 33(b), Utah Rules of Appellate Procedure . . .	7

## JURISDICTION

This is an appeal from a decree of divorce entered in the Fourth Judicial District Court, Utah County, State of Utah, on October 26, 1989. The Notice of Appeal was filed on November 24, 1989. The Utah Court of Appeals has jurisdiction of this appeal pursuant to Rules 3 and 4 of the Utah Rules of Appellate Procedure and Utah Code Ann., § 78-2a-3(2)(h) (Supp. 1989).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

Although Mr. Homer seeks to complicate this appeal by listing multiple issues, there are really only three:

1. Whether the court abused its discretion in awarding permanent alimony to Mrs. Homer.

2. Whether the court abused its discretion in calculating Mr. Homer's child support obligation.

3. Whether the court abused its discretion in its division of the parties' marital assets and in its award of pension benefits to Mrs. Homer.

## DETERMINATIVE AUTHORITY

Determinative authority is included in the addendum to this brief and by reference made a part hereof.

## STATEMENT OF THE CASE

Mrs. Kathe Homer, the Plaintiff-Respondent in this case, filed a complaint on September 11, 1987, against her husband, the Defendant-Appellant, seeking a decree of divorce, sole custody of

the parties' minor child, alimony, child support, a fair and equitable division of the real and personal property, and attorney's fees. The case was tried before the Honorable Ray M. Harding for one day on July 13, 1989.

Each side was represented by counsel and presented documentary evidence, as well as their own testimonies. In addition, Mr. Homer presented testimony of three witnesses, including Randy Marchant and Maxine Shick, who testified as to social security and pension benefits.

The court issued its Memorandum Decision on July 31, 1989, (R. 234) a copy of which is attached to Mr. Homer's primary brief. The plaintiff's attorney, Richard Johnson, submitted proposed findings of fact and conclusions of law, decree of divorce and qualified domestic relations order (hereinafter "QDRO") on August 23, 1989.

Thereafter, Mr. Homer, acting as his own attorney, filed a motion for reconsideration (R. 303) and objection to the proposed qualified domestic relations order. (R. 314) Contemporaneously therewith, Mr. Homer submitted his own supplemental findings of fact, conclusions of law and decree of divorce. (R. 381)

In a subsequent Memorandum Decision, filed on October 25, 1989, (R. 294) the court considered Mr. Homer's objections. (R. 268) Where the court granted those objections, it interlineated the necessary changes on the documents prepared by Mrs. Homer's

counsel, and the decree of divorce was entered on October 26, 1989. (R. 324) The court denied all other objections and all other arguments for reconsideration. Mr. Homer filed his notice of appeal on November 24, 1989. (R. 324)

#### STATEMENT OF FACTS

The Plaintiff-Respondent, Mrs. Kathe Homer, and the Defendant-Appellant, Mr. Stephen Homer, were married on August 13, 1980. (R. 1) One child was born as issue of this marriage, Melissa Ann Homer, on July 17, 1981. (R. 2) At the time of trial, she was eight years old. In addition, Mrs. Homer had two children from a previous marriage, Ben and Peter, who at time of trial were 21 and 19 respectively. (Tr. 39-40).

At time of trial Mrs. Homer was employed as a library technician by the City of Orem, and had gross earnings of \$1,673.00 per month. (R. 291). Mr. Homer is a licensed attorney practicing law in the State of Utah. At time of trial he was employed by the City of West Jordan, and his gross income was \$3,627.00 per month. (R. 291).

The parties reached a stipulation on the division of all personal property except for the value of the parties' two automobiles and the division of Mr. Homer's pension benefits. At trial, the court found that the value of the marital assets awarded to each party was close enough that no offset for the values of the vehicles in each party's possession was required as

part of the overall equitable property settlement. (R. 285) As to pension benefits, the court ordered that each party was entitled to one-half of all retirement programs accrued during the course of the marriage. (R. 288) The court rejected the defendant's argument that a portion of his pension benefits were exempt from division because they are a substitute for social security benefits and social security would be exempt by federal law in this case as the marriage was less than 10 years. (R. 288)

The court awarded Mrs. Homer sole custody of the parties' minor child, and ordered Mr. Homer to pay child support in the amount of \$404.95 per month. (R. 287) The court attached a copy of the Child Support Obligation Worksheet to the Decree of Divorce. (R. 290) The court further found that Mrs. Homer pays ongoing child care of \$140.00 per month and that the defendant was obligated pursuant to prior court order to pay \$200.00 per month as child support to the children of his prior marriage. (R. 287) All such amounts were considered in the worksheet calculations (R. 290-293).

#### SUMMARY OF ARGUMENT

1. Mr. Homer's appellate brief does not comply with the Utah Rules of Appellate Procedure. The facts are not cited to the record, and the arguments are not supported by law. In fact, many arguments are contrary to well-established case law and

express statute. In addition, Mr. Homer's brief is burdensome, full of irrelevant and immaterial information and an abuse of the appellate process. It should be stricken, and Mrs. Homer should be awarded her costs and fees for the necessity of defending against it.

2. The lower court's award of permanent alimony in the amount of \$150.00 per month is consistent with the evidence presented at trial and the court's findings. The award should be affirmed.

3. Mr. Homer's child support obligation was correctly calculated pursuant to the Uniform Civil Liability for Support Act. Mr. Homer was given credit where appropriate for the child support ordered to be paid for the children of his prior marriage; the consideration of tax consequences is built into the child support tables; he presented no evidence at trial that an award to him of the dependency exemption would be in the best economic interest of the parties; and Mr. Homer has a statutory right to reduce his child support payments when work-related child support costs are no longer being incurred. Therefore, the child support order should be affirmed in all respects.

4. The lower court's award of personal property, including pension benefits, was not an abuse of discretion. Instead, the assets were correctly valued at the time of divorce. The trial court has discretion to award pension benefits based upon a

percentage, and all such benefits acquired by both parties during a marriage are subject to division as marital assets. The trial court correctly denied Mr. Homer an offset for amounts paid in support of his stepchildren during the parties' marriage. Therefore, the personal property division should be affirmed in all respects.

#### ARGUMENT

##### I

#### MOTION TO STRIKE AND FOR AWARD OF ATTORNEYS' FEES

Mrs. Homer respectfully moves this Court to strike Mr. Homer's Appellate Brief and to award her costs and attorney's fees expended in the necessity of defending against that brief pursuant to Rules 24 and 33 of the Utah Rules of Appellate Procedure.

Pursuant to Rule 24(k), all briefs must be "concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters." The rule goes on to provide that "briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer."

Pursuant to Rule 33, a party is entitled to an award for its damages if the court determines that an appeal is frivolous.

These damages may include single or double costs and/or reasonable attorneys' fees to the prevailing party.

These rules are directly applicable to this case. Mr. Homer's brief does not comply with the Rules of Appellate Procedure in the following respects:

1. Contrary to Rule 24(e), Mr. Homer has completely failed to make any citation to the record in his brief. Therefore, his statement of facts is unsupported. Although Mr. Homer cites case law, he rarely uses it to support his position. Instead, Mr. Homer uses the brief as a forum to attempt to relitigate factual issues based upon his interpretation of equity. Many of these positions are contrary to well established case law and statute. Therefore, his positions are "not grounded in fact, not warranted by existing law, and not based on a good faith argument to extend, modify, or reverse existing law" as required by Rule 33(b).

In only one example among many, Mr. Homer argues that it is somehow unconstitutional to award permanent alimony in a contested, no-fault divorce over his objection. There is simply no basis in law for this position, and the fact that Mr. Homer is an attorney makes this abuse of the appellate process even more egregious.

2. Looking strictly to the form of the brief, it is a burdensome and irrelevant stream-of-consciousness rendition of Mr. Homer's self-serving view of fairness. Further, Mr. Homer

makes scandalous allegations, among others, that Mrs. Homer was never committed to the marriage and that she intentionally delayed this matter so as to increase the benefits to which she would be entitled upon divorce. Such allegations are without merit or basis. Mr. Homer goes so far as to mock the judicial system by implying that a judge's personal experience in his or her marriage is the primary influence on a judge in his or her decision to award alimony. Again, Mr. Homer's position as an officer of the court makes the allegations particularly offensive.

Based on the foregoing, Mrs. Homer moves this Court to strike Mr. Homer's brief and to award her judgment for her costs and attorney's fees incurred by the necessity of defending against it.

## II

### THE COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ALIMONY TO MRS. HOMER

Mr. Homer argues that the lower court failed to make adequate findings to support its award of alimony and that the award of permanent alimony was an abuse of discretion. In addition, Mr. Homer submits a lengthy monologue arguing that the award of alimony is unconstitutional in two respects.

First, he argues that the court cannot award alimony in a no-fault divorce over the objection of the paying spouse. Second, he argues that historically only women have received

alimony, and therefore the award is discriminatory.

Although he makes these assertions, Mr. Homer cites no legal authority for his arguments and both are unsupported by law and in fact. Instead, the concept of fault in a divorce is irrelevant to an award of alimony. This principle was outlined by the Utah Supreme Court in Read v. Read, 594 P.2d 871 (Utah 1979). In that case, the Supreme Court ruled that fault should not be used in setting alimony or dividing property to impose a punishment upon either party. The standard was articulated in the case of Gramme v. Gramme, 587 P.2d 144 (Utah 1978) wherein the Utah Supreme Court stated that:

The purpose of alimony is to provide post-marital support; it is intended neither as a penalty imposed on the husband nor as a reward granted to the wife. Its function is to provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage and to prevent her from becoming a public charge. Important criteria in determining a reasonable award for support and maintenance are the financial conditions and needs of the wife, considering her station in life; her ability to produce sufficient income for herself; and the ability of the husband to provide support.

Id. at 147. (quoting English v. English, 565 P.2d 409 (Utah 1977)).

Therefore, the grounds for each divorce, regardless of their severity, are irrelevant to the court's determination of alimony. Mr. Homer's argument that it is unconstitutional to award alimony in a no-fault divorce is unsupportable.

The second aspect of Mr. Homer's unconstitutionality argument, that an award of alimony is discriminatory, is likewise absurd. Mr. Homer cites no facts or legal authority for his claim. Instead, more women than men have been awarded alimony for the simple fact that women have not historically been financially self-supporting. Therefore, the case law reflects the reality of women's roles in the work force.

Turning to the issues which are relevant to an award of alimony, the trial court did not abuse its discretion in this case. The Utah courts have established three factors which must be considered by the trial court in making an alimony award, and such an award will not be overturned on appeal absent a manifest abuse of discretion. As recently outlined by the Utah Court of Appeals in Osguthorpe v. Osguthorpe, 131 Utah Adv. Rptr. 21 (March 19, 1990):

Trial courts have broad discretion in awarding alimony. We will not disturb the trial court's alimony award so long as the trial court exercises its discretion within the standards set by the court. In determining alimony, the trial court must consider three factors: 1) the financial conditions and needs of the receiving spouse; 2) the ability of the receiving spouse to produce a sufficient income for him or herself; and 3) the ability of the responding spouse to provide support. If the trial court considers these factors, this court will not disturb the alimony award unless such a serious inequity has resulted as to manifest clear abuse of discretion.

Id. at 22. (citing Davis v. Davis, 749 P.2d 647 (Utah 1988) and

Schindler v. Schindler, 776 P.2d 84 (Utah App. 1989)).

Applying these factors to the case on appeal, it is clear that the court did not abuse its discretion in fashioning a support award for Mrs. Homer. To begin with, the court found that Mrs. Homer was employed as a library technician by the City of Orem, with a gross monthly income of \$1,673.00. (R. 291) The court also found that Mr. Homer is a licensed attorney practicing law in the state of Utah and that his gross monthly income was \$3,627.00. (R. 291) Evidence before the court established that Mrs. Homer's expenses totalled \$1,706.56. (R. 114) These facts are set forth in the findings of fact as follows:

14. . . . The court finds that the defendant has a monthly income of \$3,627 and that the plaintiff has an income of \$1,673. .

16. The court finds that the plaintiff is in need of alimony and the defendant has the ability to pay the same and, accordingly, the defendant is ordered to pay to the plaintiff the sum of \$150.00 per month as alimony payable in two equal monthly payments on the 5th and 20th of each month commencing July 19, 1989.

Mr. Homer argues that these are insufficient findings of fact to support the trial court's award of alimony. Contrary to this assertion, the findings are adequate in light of the fact that there was sufficient evidence for the trial court to make a proper determination of alimony, including expenses and earnings

of both parties. Therefore, any lack of additional findings is not fatal on appeal. As this court stated in Boyle v. Boyle, 735 P.2d 669 (Utah App. 1989):

This Court concurs in the Supreme Court's reflection that more detailed findings on each required factor would assist in the appellate process. However, we find as did the Supreme Court in Paffel, that 'the evidence in this case supports the lower court's order and appellant has made no showing to rebut the presumption that the trial court did consider respondent's income, expenses and need for support.'

Id. at 671-72. (quoting Paffel v. Paffel, 732 P.2d 96, 102 (Utah 1986)).

Finally, Mr. Homer argues that it was an abuse of discretion to award Mrs. Homer permanent alimony. Both the Utah Supreme Court and the Utah Court of Appeals have held that permanent alimony should be awarded after a long-term marriage. (See Jones v. Jones, 700 P.2d 1072 (Utah 1985); Olson v. Olson, 704 P.2d 564 (Utah 1985); Gardner v. Gardner, 748 P.2d 1076 (Utah 1988) and Rasband v. Rasband, 752 P.2d 1331 (Utah App. 1988)).

Although the courts have not defined what constitutes a long-term marriage, the Utah Supreme Court in Davis v. Davis, 749 P.2d 647 (Utah 1988) upheld an award of permanent alimony in the sum of \$750.00 per month after a 13-year marriage. In the Davis case, the Court pointed out that the trial judge had considered the three factors necessary. The Court stated:

All three factors must be considered, and the ultimate test of the propriety of an alimony

award is whether, given all of these factors, the party receiving alimony will be able to support him-or herself 'as nearly as possible at the standard of living . . . enjoyed during the marriage.'

Id. at 649. (quoting Jones, 700 P.2d at 1075, and English v. English, 565 P.2d 409, 411 (Utah 1977)). The Utah Supreme Court went on to compare each parties' income after the payment of alimony to determine that Mr. Davis "can afford the alimony awarded and is left with ample resources to provide himself with what is very likely to be a far more luxurious living standard than [his wife] will enjoy." Davis, 749 P.2d at 649.

These principles are directly applicable to Mr. Homer's appeal. The trial court only awarded Mrs. Homer the minimal sum of \$150.00 per month in alimony. Coupled with the child support of \$404.95, Mrs. Homer's total income with the award of alimony is still significantly less than Mr. Homer's income. Mr. Homer is left with ample resources to provide for himself, and the court's award to Mrs. Homer of \$150.00 per month was not an abuse of discretion. It should be upheld on appeal.

### III

#### THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CALCULATING MR. HOMER'S CHILD SUPPORT OBLIGATION

In his appeal of his child support obligation, Mr. Homer alleges three errors.

The first error is defined by Mr. Homer as a failure of the

trial court to consider the income tax consequences of the order. Mrs. Homer asserts that what Mr. Homer really means is that the court erred in not awarding him the dependency exemption.

Second, Mr. Homer argues that it was an abuse of discretion for the trial court not to consider amounts he voluntarily pays toward support of children from his previous marriage in excess of the court ordered child support in that marriage.

Finally, Mr. Homer argues that it was error to enter a child support obligation in an amount that includes child care costs when those costs will not be paid at some point in the future.

The Utah Uniform Civil Liability for Support Act governs child support awards in the state of Utah. The appropriate child support worksheet was completed in this matter, and it has been incorporated in the lower court's findings and conclusions. This worksheet includes the appropriate base combined child support obligation calculated upon the parties' gross incomes. The child support tables in Utah Code Ann., § 78-45-7.14 (Supp. 1990) are adjusted for FICA, federal and state taxes. Therefore, contrary to Mr. Homer's initial assertion that the court did not consider the income tax consequences of the award, such consideration is built into the process and the statute.

The other aspect of this issue is Mr. Homer's claim he should have received the dependency exemption for the minor child. While state courts do have the authority to order a

custodial parent to execute a section 152 declaration to allow a non-custodial parent to claim a dependent as a tax exemption, courts can do so only in narrow circumstances. This was outlined by the Utah Court of Appeals in Motes v. Motes, 786 P.2d 232 (Utah App. 1989). The court pointed out that a specific finding must be made that the award of the exemption financially benefits the parties. The Utah Court of Appeals stated:

Thus, use of the power to order a custodial parent to execute a section 152 declaration should not be used to evenly or otherwise divide the available exemptions without regard to the particular economic realities. On the contrary, it should be limited to those situations where the non-custodial parent had the higher income and provides the majority of support for the child or children whose exemption is claimed -- support at a level which can be increased as a result of a reduction in his or her tax burdens. Indeed, it would be an abuse of discretion for a divorce court to order a custodial parent to sign the declaration in the absence of appropriately supported findings to that effect or demonstrating other exceptional circumstances making it in the best interest of the parties and their children that the declarations be signed.

Id. at 239. Applying this principle to the facts of this case, Mr. Homer offered absolutely no evidence at trial that an award of the exemption to him would economically benefit the parties or that it would be in the best interest of the parties and their minor child. Not only is this contrary to the law as outlined in Motes, a party cannot raise for the first time on appeal an issue

not raised before the trial court. (See Paffel v. Paffel, 732 P.2d 96, 99 (Utah 1986)). Therefore, this aspect of Mr. Homer's argument is without merit.

Mr. Homer's next contention is that the trial court erred in failing to give him credit for amounts he has paid toward support of the children of his first marriage in excess of what h. was ordered to pay. This contention is directly contrary to express statutory law. Utah Code Ann., § 78-45-7.6 (Supp. 1990) states as follows:

As used in the guidelines, 'adjusted gross income' is the amount calculated by subtracting from gross income alimony previously ordered and paid and child support previously ordered.

At trial, Mr. Homer argued that, in addition to the \$200.00 he was ordered to pay, he was voluntarily paying his first wife an additional \$100.00 a month toward support of his children. To begin with, the lower court found, in Finding of Fact No. 14, "that the defendant is presently ordered to pay \$200 per month support to the children of a prior marriage." When Mr. Homer objected to this finding on the basis that he paid amounts in excess of amounts ordered, the trial court addressed that issue in its Memorandum Decision dated October 26, 1989, and stated:

The court will not change the proposed order with regards to child care expenses, nor will non-ordered amounts of support paid to other children be considered on the child support obligation worksheet.

(R. 269). The court's resolution of the issue is consistent with

the statute, and Mr. Homer's argument again has no basis in law.

Finally, Mr. Homer argues that the child support award as entered fails to take into consideration the fact that work-related child care costs will not continue to be incurred by Mrs. Homer once the minor child reaches a certain age. Once again, this argument is expressly contrary to the statute. Utah Code Ann., § 78-45-7.16 (Supp. 1990) directly resolves Mr. Homer's concern. That statute states:

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.

Thus, Mr. Homer has nothing about which to complain. The worksheet which is attached to the findings and conclusions outlines his base child support obligation and his child support obligation to be paid while work-related child care costs are actually incurred. Pursuant to the terms of the statute, when those costs are no longer incurred, Mr. Homer will have no obligation to pay the higher amount and must only pay the base award. Mr. Homer is an attorney and to have even raised this issue on appeal without doing basic research into the law is an abuse of the appellate process.

All of Mr. Homer's arguments on appeal of his child support obligation have no basis in fact or law. Instead, the lower court carefully considered the evidence before it and complied with the law as outlined in the Uniform Civil Liability for Support Act. Therefore, Mr. Homer's support obligation should be affirmed in all respects.

#### IV

#### THE COURT'S DIVISION OF THE PERSONAL PROPERTY, INCLUDING PENSION BENEFITS, WAS FAIR AND EQUITABLE

Prior to trial in this matter the parties had stipulated to the division of all personal property except whether or not Mr. Homer was entitled to an offset for the disparity in value of the vehicles possessed by each party and the division of pension benefits. At trial, Mr. Homer argued that some of his pension benefits were exempt from division and that others should be valued as of the date of separation and not as of the date of trial. Finally, he argues that any award of benefits to Mrs. Homer should be offset by the amount of his support of her children during their marriage.

The court found that, despite the disparity between the value of the parties' vehicles, the overall property distribution was fair and equitable. The court also divided equally all pension and retirement benefits accrued during the course of the marriage. The court made the following finding:

9. The Court finds that the parties did

reserve for trial the issue concerning values of the cars that each received. The Defendant claimed to be entitled to an offset because his car had a lower value. The Court finds that the values of the cars are close enough that no offset is required as part of an overall equitable property settlement in this case and confirms the award of the automobiles as they existed at the time of trial.

The only evidence before the trial court on the personal property issue was Mrs. Homer's testimony and the Plaintiff's Exhibit 10. (A copy of Exhibit 10 is included in the Addendum to this brief as Exhibit B and by reference made a part hereof.) Exhibit 10 sets forth the agreed upon division of the personal property and the values of each. Under that division, Mrs. Homer was awarded personal property in the amount of \$4,550.00, and Mr. Homer was awarded personal property in the amount of \$3,940.00--a difference of approximately \$600.00. Mrs. Homer's evidence at trial remained uncontroverted, and Mr. Homer put in no evidence which would establish a different value for the cars or other personal property.

Based upon the evidence, the overall division of property is equitable. Any issue of the values of the automobiles cannot be considered in a vacuum without consideration of the entire property distribution.

Mr. Homer also raised this issue in his objections to the findings of fact. The court responded in its Memorandum Decision dated October 26, 1989, by stating that:

Defendant's objection to proposed finding # 6

is an attempt to relitigate on the issues of the respective of values of the cars awarded to the parties. The Court will not change it's [sic] determination regarding the cars as it is a part of an overall equitable property settlement.

(R. 269). Mr. Homer's appellate brief is yet another attempt to relitigate the issues before the court on the division of property. The trial court, based on all the evidence before it, made a fair and equitable division of the parties' personal property which should be upheld on appeal.

Mr. Homer's second contention is that the trial court erred in awarding Mrs. Homer one-half of the amounts accrued in all of his pension and retirement accounts during the course of the marriage. Mr. Homer claims this error is three-fold:

1. That the accounts should be valued as of the date of separation and not the date of divorce;
2. That the court's failure to make a specific finding as to a dollar value of each account is reversible error; and
3. That his pension benefits are a substitute for Social Security and, since under federal law Social Security benefits would be exempt in this case, these benefits should also be exempt.

Contrary to Mr. Homer's assertions, the trial court's division of pension and retirement accounts was appropriate and strictly according to law.

At trial, each party presented evidence as to their

retirement benefits accrued over the course of the marriage. The court addressed the division of these benefits in Findings of Fact Nos. 18 and 19 which state:

18. The Court finds, as it relates to retirement, that the Court will order that a qualified domestic relations order be prepared and submitted to the employers of each of the parties. Each of the parties is entitled to one-half of the retirement programs of the other accrued during the course of the marriage. This includes the Defendant's pension account which he claims is a substitute for social security. The Court is now [sic] aware of any authority which exempts this type of pension from being divided as a marital asset. The only reason social security is not divided is that federal law expressly prohibits division. This decision also includes division of the retirement account which Defendant claims belongs to West Jordan City.

19. Each of the parties is entitled to one-half of the individual retirement account and that distribution is ordered to be effective immediately with both parties being allowed to roll over the retirement account into an account chosen by them.

In his objections to these findings, Mr. Homer argued that the retirement account should be divided as of the date of separation and that his pension was exempt from division. (R. 250-251) In response, in its Memorandum Decision dated October 26, 1989, the trial court stated:

Defendant's objection to proposed Finding # 18 is not well taken. 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 retirement benefits were accrued during the time of entry into the marriage, and final termination of the marriage through this divorce action.

(R. 269)

Findings of Fact Nos. 18 and 19 are sufficient to support the court's division of pension and retirement benefits and the subsequent entry of the QDRO. In turn, these findings are well supported by case law. To begin with, it is well established that assets of a marriage are valued as of the date of the divorce. (See Jense v. Jense, 784 P.2d 1249 (Utah App. 1989)). This rule also applies to division of pension and retirement benefits.

Second, there is no requirement in law that a trial court make a specific finding as to a dollar value of a retirement account or pension benefit. To the contrary, in the case of Woodward v. Woodward, 656 P.2d 431 (Utah 1982), the Utah Supreme Court approved the award of a percentage of retirement benefits.

Third, Mr. Homer cites no law for his proposition that his retirement benefits are exempt from division. Instead, he seeks to expand the exemption provided by federal law for Social Security benefits to his pension account. Not only is there no support for such a position, it is indeed contrary to law. Instead, as outlined by the Utah Supreme Court in Woodward, supra., a trial court has broad power to consider all assets of a

marriage, including pension benefits. The Court stated:

In Englert v. Englert, Utah, 576 P.2d 1274 (1978), we emphasized the equitable nature of proceedings dealing with the family, pointing out that the court may take into consideration all of the pertinent circumstances. These circumstances encompass 'all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived; and that this includes any such pension fund or insurance.' To the extent that Bennett v. Bennett, supra, may limit the ability of the court to consider all of the parties' assets and circumstances, including retirement and pension rights, it is expressly overruled.

Id. at 432. (quoting Englert, 576 P.2d at 1276).

Finally, Mr. Homer's argument that Mrs. Homer's award of pension and retirement benefits should be reduced or offset by the amounts he contributed for the support of her two children, his stepchildren, is without merit. Utah Code Ann. § 78-45-4.1 imposes a duty on parents to support their stepchildren during the term of the marriage. To expect to be reimbursed or credited for such amounts if or when the marriage terminates is ludicrous and would, in its practical effect, completely negate the statutory duty imposed by § 78-45-4.1. Such a result is contrary to public policy and unsupported by law.

Therefore, all of Mr. Homer's arguments with respect to the division of the parties' retirement benefits are wholly unsupported by and contrary to current law. His appeal of the issue should be denied, and the trial court's ruling should be

affirmed in all respects.

CONCLUSION

Mr. Homer's appellate brief fails to comply with the Utah Rules of Appellate Procedure, and the issues contained therein have no basis in fact or law. The form and substance of Mr. Homer's brief are so inadequate that this Court should grant Mrs. Homer's motion to strike and award her costs and fees incurred by the necessity of defending against it.

The lower court's award of permanent alimony and child support are supported by the evidence and the findings. The division of personal property, including pension benefits, is fair and equitable and according to law. The lower court's decision should be affirmed in all respects.

Respectfully submitted this 25th day of September, 1990.

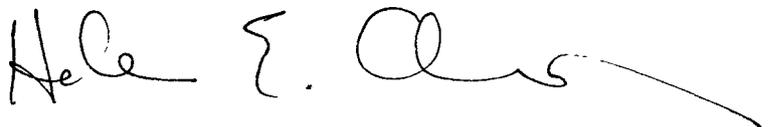


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Plaintiff-Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 25<sup>th</sup> day of September, 1990, I mailed, postage prepaid, four copies of the foregoing Reply Brief of Plaintiff-Respondent to:

Stephen G. Homer  
Pro Se  
P.O. Box 493  
West Jordan, Utah 84084



## ADDENDUM

DETERMINATIVE AUTHORITY

1. Utah Code Ann. § 30-3-5 (1989).

Disposition of property -- Maintenance and Health care of parties and children -- Court to have continuing jurisdiction -- Custody and visitation -- Termination of alimony -- Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, and parties.

. . .

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the non-custodial parent to provide the day care for the dependent children, necessitated by the employment or training of the custodial parent.

2. Utah Code Ann. § 78-45-4.1 (1987).

Duty of a stepparent to support stepchild -- Effect of termination of marriage or common law relationship.

A stepparent shall support a stepchild to the same

extent that a natural or adoptive parent is required to support a child. Provided, however, that upon the termination of the marriage or common law relationship between the stepparent and the child's natural or adoptive parent the support obligation shall terminate.

3. Utah Code Ann. § 78-45-7.6 (Supp. 1990).

Adjusted gross income.

(1) As used in the guidelines, "adjusted gross income" is the amount calculated by subtracting from gross income alimony previously ordered and paid and child support previously ordered.

(2) The guidelines do not reduce the total child support award by adjusting the gross incomes of the parents for alimony ordered in the pending proceeding. In establishing alimony, the court shall consider that in determining the child support, the guidelines do not provide a deduction from gross income for alimony.

4. Utah Code Ann. § 78-45-7.16 (Supp. 1990).

Child care expenses -- Expenses not incurred.

(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.

PERSONAL PROPERTY LIST

<u>ITEM</u>	<u>FMV</u>	<u>AWARDED TO</u>
1981 Datsun 210	\$1,200	Defendant
1983 Honda Accord	4,000	Plaintiff
Waterbed	50	Plaintiff
Color t.v.	75	Plaintiff
Radial arm saw	100	Defendant
Wing back chairs	75	Plaintiff
Word processor	700	Defendant
Refrigerator	600	Defendant
Washing machine	40	Defendant
13" t.v.	150	Defendant
VCR	250	Defendant
Waterbed	300	Defendant
Shop tools	500	Defendant
Dishwasher (replaced)	150	Plaintiff
VCR	100	Plaintiff
Disc player	100	Plaintiff
Freezer	75	Defendant
Picnic table	25	Defendant
Plaintiff	\$4,550.00	
Defendant	3,940.00	



EXHIBIT B