

1990

Joan E. Schafer v. Nathan C. Schafer : Brief of Appellee

Utah Court of Appeals

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P. Gary Ferrero; Attorney for Appellee.

Mary C. Corporon; Corporon & Williams; Attorney for Appellant.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

900002

IN THE UTAH COURT OF APPEALS

JOAN E. SCHAFFER,)	BRIEF OF APPELLEE
Plaintiff/Appellee,)	
vs.)	Case No. 900002-CA
NATHAN C. SCHAFFER,)	Priority Classification 14b
Defendant/Appellant.)	

BRIEF OF APPELLEE

AN APPEAL FROM THE FINAL JUDGMENT AND ORDER ENTERED
IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT
LAKE COUNTY, STATE OF UTAH, IN THE FORM OF AN AMENDED
DECREE OF DIVORCE, ON OR ABOUT OCTOBER 17, 1989, THE
HONORABLE JOHN A. ROKICH, JUDGE PRESIDING.

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FILED

MAR 4 1991

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

IN THE UTAH COURT OF APPEALS

JOAN E. SCHAFER,)	BRIEF OF APPELLEE
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JURISDICTION

Jurisdiction is conferred upon the Utah Court of Appeals in this matter pursuant to Utah Code Ann. Section 78-2a-3(2)(h) (1953, as amended).

STATEMENT OF THE CASE

NATURE OF PROCEEDING

This is an appeal from the final judgment and order entered by the trial court herein, consisting of an Amended Decree of Divorce, on or about October 17, 1989. On December 26, 1989, at the request of Plaintiff's counsel, an Order Extending the Time for Appeal, extending the time for appeal to December 26, 1989, was signed and entered by the judge of the trial court. On December 26, 1989, Defendant filed his Notice of Appeal herein with the Third Judicial District Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented for review in the above-captioned appeal are as follows:

1. Did the lower court err in granting Plaintiff an award of attorney's fees in the sum of Ten Thousand Dollars (\$10,000.00)?
2. Did the lower court err in awarding Plaintiff permanent alimony.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

There are no constitutional provisions, statutes or rules believed by Appellee to be wholly dispositive of the

issues on appeal herein.

STATEMENT OF FACTS

1. This case arises out of a divorce proceeding that was initially heard before the Honorable John A. Rokich on or about January 5, 1989. (Appendix A - Decree of Divorce "DOD").

2. The Decree of Divorce dissolved the marriage but did not dispose of other issues and these issues were reserved and heard at trial. (Appendix A - DOD).

3. This matter was heard before the Honorable John A. Rokich on all other issues on or about July 13, 14, and 17, 1989.

4. Subsequent to the trial on the matter, the Court entered an Amended Decree of Divorce on or about October 27, 1989. (Appendix B - Amended Decree of Divorce "ADOD").

5. The Court also entered amended Findings of Fact and Conclusions of Law subsequent to the trial. (Appendix C - Amended Findings of Fact and Conclusions of Law ("AFOF")).

6. The parties were married on or about July 27, 1979, and the Decree of Divorce in this matter terminated the marriage on January 5, 1989, some six (6) months short of ten (10) years. (Appendix C - AFOF, paragraph 2).

7. In determining the issue of alimony, the Court specifically found that the Plaintiff/Appellee was currently unemployed and was attending school full time as a student. (Appendix C - AFOF, paragraph 12).

8. While Appellee was unemployed, the Court did find that, because of current job skills, Plaintiff/Appellee was capable of earning \$18,000.00 per year, or \$1,500.00 per month, and imputed that income earning capability to the Plaintiff/Appellee for the purposes of alimony. (Appendix C - AFOF, paragraph 13).

9. The Court also determined that the Defendant/Appellant was employed as a medical doctor and had a gross monthly income of \$7,560.00. (Appendix C - AFOF, paragraph 14).

10. The Court in this case also issues a Memorandum Decision as to questions of equitable restitution. (Appendix D - Memorandum Decision "Memo").

11. In its Memorandum Decision, the Court found that the Plaintiff/Appellee did not make sacrifices or contributions that increased the earning capacity of the Defendant, but did find that as a mother, the Plaintiff/Appellee did contribute to the family relationship (Appendix D - Memo, page 4).

12. Based upon the findings of the Court, the Court awarded alimony to Plaintiff/Appellee for an indeterminate period of time in the sum of \$650.00 per month.

13. The Plaintiff requested payment of attorney's fees in the sum of \$29,000.00. The Court reviewed the factors surrounding the attorney's fees, found that the hourly rate was reasonable, but that the Plaintiff had made

substantial demands upon counsel which were not necessary. Based upon its findings regarding the circumstances of the attorney's fees, the Court awarded Plaintiff attorney's fees in the sum of \$10,000.00 (Appendix C - AFOF, paragraph 45).

14. The other issues of property and custody were resolved by the Court and are not part of this appeal but are set forth in the Amended Findings of Fact, Conclusions of Law and Decree of Divorce.

15. In this matter, the lower court did extend the time to file an appeal to December 26, 1989. Both parties filed notices of appeal in this matter. However, Plaintiff's counsel withdrew and Plaintiff was not able to prosecute her appeal. Therefore, it was dismissed.

16. Various extensions of time have been granted by the Court and all pleadings herein to date have been filed pursuant to those extensions of time.

SUMMARY OF THE ARGUMENT

In reviewing decisions of the Trial Court in domestic relations cases, the Appellate Courts give wide latitude to the discretion of the Trial Court. An appellant must show that the findings were clearly erroneous. The appellant has the obligation to marshall the record and present the record to the Appellate Court so the court can determine if the Trial Court abused its discretion and entered findings that were clearly erroneous. In this case, the Appellant has failed to even indicate which findings he

believes are clearly erroneous. No record of the trial has been referred to by Appellant and no action taken by the Court has been challenged on the basis of legal authority. The Appellant has failed to meet its burden as to the standard of review.

The Utah Supreme Court and the Court of Appeals has determined that the Trial Court has discretion to determine if attorney's fees are appropriate and if so, the amount of said fees. This is based upon the needs of the parties and what award would be reasonable. In this case, the Court specifically found that the income of the parties was substantially disparate and carefully reviewed the attorney's fees claim by the Plaintiff. The Court determined that \$19,000.00 of the attorney's fees that were claimed was not reasonable under the circumstances. The Court did not find that the amount of time spent by counsel or the work performed was unreasonable, but rather the demands made were not appropriate. Therefore, the Trial Court awarded attorney's fees based on need and reasonableness and met the test required by the Appellate Courts.

As to alimony, the Appellant appears not to question the amount of alimony, but rather only questions whether the Court should have made an award of rehabilitative alimony rather than the award of alimony for an indeterminate time. In determining the alimony, the Trial Court must look at the

ability of the receiving spouse to produce income, the financial income and need of the receiving spouse and the ability of the paying spouse to pay alimony. In looking at these factors, the Trial Court is to keep in mind that the purpose of the award of alimony is to try and maintain the standard of living enjoyed by the parties, prevent the receiving spouse from becoming a public charge and to try and equalize the respective standards of living. In this regard, the Trial Court performed its function. It is clear from the court's finding as to respective incomes, that, absent an award of alimony, the Plaintiff/Appellee would not be able to even come close to maintaining a comparable standard of living. The Court took into account that Plaintiff was capable of earning income, but with her skills, it was also clear that she could not maintain the standard of living. The disparity between the parties, even with Plaintiff's skills, was such that the award of "permanent" alimony was proper.

The Appellant has failed to set forth any findings that he claims were erroneous and has failed to set forth any authority to support the position of the Trial Court erred. Even if such authority was presented, the Trial Court's actions were within its discretion and were supported by its findings. Therefore, the lower court's determination should be upheld and under the circumstances of Plaintiff's impecuniosity, attorney's fees should be

awarded on appeal.

ARGUMENT

I

THE STANDARD OF REVIEW IN DOMESTIC CASES IS THAT THE
LOWER COURT IS GIVEN WIDE LATITUDE AND DISCRETION

In this case, the Trial Court properly exercised its discretion. In prosecuting an appeal, the Appellant has the duty to marshall all the evidence supporting the Trial Court's findings and then demonstrate that such evidence is insufficient to support the court's findings. See Call v. City of West Jordan, 129 Utah Adv. Rpt. 38, 40 (Utah Ct. App. 1990) citing Marchant v. Park City, 771 P.2d 677, 682 (Utah Ct. App. 1989). In this case, the Appellant has failed to designate or set forth anything in the transcript or on the record to support a finding that the Trial Court made findings based on insufficient evidence. The Appellant goes so far as to request that the Appellate Court set aside the award of attorney's fees based upon the Trial Court's exclusion of evidence. Yet, the Appellant fails to designate a portion of the transcript to support the position that the evidence should have been admitted. Based on this factor alone, the Appellate Court could rule against the Appellant.

In a myriad of cases, the courts have indicated that the Trial Court is the place to adjudicate domestic matters. This is "because the proper adjudication of matters is highly dependent upon personal equations which the Trial

Court is in an advantaged position to appraise." Smith v. Smith, 726 P.2d 423, 425 (Utah 1986) citing Johnson v. Johnson, 323 P.2d 16, 19 (Utah 1958). Both the Utah Supreme Court and the Appellate Court have indicated that they will not overturn a Trial Court's determination in domestic matters unless the Appellant can show a misapplication of the facts by the Trial Court in applying principles of law. Unless the evidence presented clearly preponderates to the contrary, the Trial Court's interpretation of the facts must be allowed by the Appellate Court, Berger v. Berger, 713 P.2d 695 (Utah 1985).

Since then, the courts have gone even farther. In Erwin v. Erwin, 108 Utah Adv. Rpt. 55 (Utah Ct. App. 1989), the court found that "we are not confined to the contents of a particular document entitled 'Findings'; rather the findings may be expressed orally from the bench or contained in other documents ..." at 56. Therefore, the Appellate Court is free to review all documents in the record, including the Memorandum Decision, and the initial Findings and Decree in determining whether the Trial Court abused its discretion. In reviewing these documents, the court will find that the Trial Court made specific findings regarding alimony and attorney's fees and that the Appellant has shown nothing in the record to overturn the findings.

II

THE TRIAL COURT APPLIED THE APPROPRIATE TESTS
IN AWARDING ATTORNEY'S FEES AND THEREFORE IT WAS
WITHIN THE SOUND DISCRETION OF THE Trial Court
TO AWARD SAID FEES.

This Court has long recognized that it is within the sound discretion of the Trial Court to assess the evidence in domestic cases and determine if an award of attorney's fees is appropriate, Kerr v. Kerr, 610 P.2d 1380 (Utah 1980), Anderson v. Anderson, 757 P.2d 476 (Utah Ct. App. 1988). In determining whether an award of attorney's fees is appropriate, the Trial Court must find that the award is reasonable and that the needs of the requesting party compels the award. See Osguthorpe v. Osguthorpe, 131 Utah Adv. Rpt. 21, 24 (Utah Ct. App. 1990), Sorenson v. Sorenson, 769 P.2d 820, 832 (Utah Ct. App. 1989) and Walther v. Walther 709 P.2d 387 (Utah 1985). In these cases, the court held that the factors to be used in determining reasonableness went to the necessity for the number of hours utilized, the reasonableness of the rate charged, result accomplished and the rates commonly charged for similar services, Sorenson.

Here the Court went through a very lengthy discussion regarding the attorney's fees. The Court had already determined that the incomes of the parties were disparate and that the other factors in determining the reasonableness of the attorney's fees were present. The one thing the Court did do was determine that only a portion of

the hours were reasonably necessary. See Appendix C, paragraph 45. Therefore, the Trial Court went through the analysis required under Utah law in making a determination of reasonableness and need for the award of attorney's fees. This determination of reasonableness is further supported by the factors enunciated by this Court in Rasband v. Rasband, 752 P.2d 1313 (Utah Ct. App. 1988) citing Beales v. Beales, 682 P.2d 862, 864 (Utah 1984) and Cabrera v. Cottrell, 694 P.2d 622, 624-25 (Utah 1985). The Trial Court soundly exercised its discretion and its determination is supported by the findings in the record. The Appellant has set forth no evidence to support a finding that the Trial Court improperly exercised its discretion in this matter.

The Appellant did introduce the question of the proposed Pre-trial Settlement Agreement. The Appellant claims that a proposed Pre-trial Settlement Agreement was submitted as evidence to show that the Appellee had "run up" attorney's fees when she could have settled a year prior to trial. The Appellant, however, does not make any reference to the trial transcript where this exclusion supposedly happened. In light of the cases cited above, absent a record on this matter, the Appellate Court should decline to even rule on this issue.

However, if the Appellate Court should look at the supposed exclusion of the proposed Pre-Trial Settlement Agreement, there are other factors to support its exclusion.

If in fact the Trial Court did exclude the proposed Pre-trial Settlement Agreement as evidence to deny Appellee's claim for attorney's fees, it was properly done. The submission of pre-trial negotiations for settlement to support or attack a claim is improper under Rule 408 of the Utah Rules of Evidence. In that the Defendant/Appellant claimed he was using the proposed agreement to counter Plaintiff's claim for attorney's fees, this goes directly to the question of liability for her claim. Therefore, Rule 408 would specifically exclude any evidence. The only argument that could be made in supporting the acceptance of the proposed Pre-trial Settlement Agreement as evidence is if it qualified as an offer of judgment pursuant to Rule 68 of the Utah Rules of Civil Procedure. It did not. Rule 68 specifically refers to actions for money judgments only and a divorce proceeding is an equitable proceeding, not a proceeding for money judgment.

This Court held in Ostler v. Ostler, 131 Utah Adv. Rpt. 15 (Utah Ct. App. 1990) that it could be appropriate for the Court to award attorney's fees on appeal, see Maughan v. Maughan, 770 P.2d 156 (Utah Ct. App. 1989). In that decision, the court relies on Utah Code Ann. Section 30-3-3 (1989). In this case, Plaintiff's original counsel withdrew as counsel and Plaintiff was unable to proceed with her appeal pro se. As a result, her appeal was dismissed. Plaintiff/Appellee was only able to obtain counsel through

the pro bono attorney program at Utah Legal Services, Inc. Plaintiff/Appellee is clearly impecunious and, based on the court's language in Ostler, an award of attorney's fees on appeal would be appropriate. Therefore, the Plaintiff/Appellee respectfully requests this Court to extend the grant of attorney's fees made by the Trial Court to include attorney's fees on appeal.

III

THE AWARD OF ALIMONY WAS PROPER IN THIS CASE BASED ON THE NEED AND FINANCIAL CONDITION OF THE PLAINTIFF/APPELLEE AND THE DEFENDANT/APPELLANT'S ABILITY TO PAY.

In determining the need for alimony in a particular case, the Trial Court must look to three basic circumstances. The Trial Court should look at the financial condition and the need of the receiving spouse, the ability of the receiving spouse to produce sufficient income and the ability of the paying spouse to pay alimony, Osguthorpe at 23 citing Schindler v. Schindler, 776 P.2d 84, 90 (Utah Ct. App. 1989). In this case, the court made specific findings as to the financial ability of the Plaintiff. The Court specifically found that she was unemployed at the time of trial but she had the ability to earn \$18,000.00 per year, or \$1,500.00 per month. The Court also specifically found that the Defendant/Appellant was currently employed and earning in excess of \$7,500.00 per month. From these findings, the Appellant had the ability to pay the alimony awarded of \$650.00 per month. It was also determined by the

Court that the amount of income that the Plaintiff/Appellee could earn was not sufficient.

In determining the sufficiency of the alimony, the Trial Court needed to look at other factors. In determining whether or not a party has sufficient income, the Court must look at the purpose for an award of alimony. The Utah courts have held that the purposes for an award of alimony are to maintain the standard of living as close to that of the marriage as possible, prevent the receiving spouse from becoming a public charge and to equalize the respective standards of living, Munns v. Munns, 131 Utah Adv. Rpt. 88 (Utah Ct. App. 1990) citing numerous cases for support. Therefore, in determining whether Appellee had sufficient income without an award of alimony, the Court needed to examine the standard of living. The Court made extensive findings regarding the financial condition of the parties. See Appendix C - AFOF. From these findings, it was clear that, absent an award of alimony, the Plaintiff was not capable of ever reaching the point of earning a sufficient income to attain the standard of living previously enjoyed during the marriage.

During the marriage, the parties earned in excess of \$7,500.00 per month. Based on the findings of the Trial Court, the Defendant/Appellant would continue to earn that amount. However, the Appellee was only capable of earning \$1,500.00 per month. This sum, added to an award of child

support of \$1,183.00, was less than one-third of the income enjoyed by the parties during the marriage. Even with the \$650.00 in alimony, Appellee's income would be less than half of the previous family income and yet she would have two-thirds of the family living with her. This was true while Defendant's income would be reduced by only \$1,833.00 per month. Therefore, the amount of alimony awarded was appropriate.

This Court has determined in numerous cases that an award of alimony for an indeterminant period of time, "permanent" alimony, is appropriate under certain circumstances. The Utah courts have determined that, based upon a party's marketable skills, professional training and ability to earn, if the party would not be able to enter the job market and support himself or herself in anything even resembling the style in which the couple had been living, an award of "permanent" alimony is appropriate. See Jones v. Jones, 700 P.2d 1072 (Utah 1985), Paffel v. Paffel, 732 P.2d 96 (Utah 1986), Olsen v. Olsen, 704 P.2d 654 (Utah 1985) and most recently, the Munns decision. In this case, the Trial Court found that Appellee was capable of earning \$1,500.00 per month. This was based upon her skills and previous earning capacity. This sum fits the test of her not being able to "enter the job market and support herself in anything even resembling the style in which the couple had been living," Jones at 1075.

The Trial Court did find that Appellee was a full time student. It is possible that the Appellee may have an increased income upon graduation. Should this occur, however, it would then be appropriate for the court to determine if the alimony should remain in place. The Court should not speculate until such time as the income becomes definite and actual. If that should occur, the Court retains jurisdiction and can modify the amount. See Olsen at 567 and Anderson at 479.

It should also be noted that the Appellant pushed to have the Divorce Decree entered prior to the expiration of ten (10) years. If Appellee had been married to the Appellant for ten (10) years, she would then be eligible for divorce spouse benefits under the Social Security Act. See 42 U.S.C. Sections 402(b)(1)(3) and 416(d)(1). If the Court had merely waited seven (7) months to enter the Decree of Divorce, the Plaintiff would qualify for social security benefits. In that the Court granted Defendant's Motion to Bifurcate and granted the Decree of Divorce prior to the ten (10) year requirement, these benefits are lost. Therefore, it is appropriate for the award of alimony to be permanent.


CONCLUSION

The Appellant in this case has simply failed to meet the standard required to overturn a Trial Court's decision in a domestic case. The Appellate Court, in reviewing the Trial Court's decision, must give the Trial Court wide

latitude and absent a showing that the Trial Court abused its discretion and entered findings that are clearly erroneous, the Trial Court's determinations must be upheld. The Appellant has made no attempt to show that the Trial Court abused its discretion and made findings that were clearly erroneous. The failure to designate parts of the transcript to show that the Court relied on evidence that was inappropriate shows that the evidence simply must not exist.

If the Appellate Court, absent the Appellant's showing of evidence, still reviews the Court's findings to determine their sufficiency, it is clear that the Trial Court entered sufficient findings for its decision. The Trial Court applied the proper standards in awarding both attorney's fees and "permanent" alimony. Therefore, the Appellee respectfully requests that this Court uphold the Trial Court's decision, also award the Appellee's attorney's fees on appeal, and remand the case for further proceedings on the amount of attorney's fees for the appeal.

Respectfully submitted this 4 day of March, 1991.


P. Gary Ferrero

CERTIFICATE OF DELIVERY

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief of Appellee to Mary C. Corporon, Attorney for Appellant, CORPORON & WILLIAMS, P.C., 310 South Main Street, Suite 1400, Salt Lake City, Utah 84101, this 4 day of March, 1991.



ADDENDA

APPENDIX A

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Third Judicial District

JAN 5 1989

By [Signature]
SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH.

JOAN E. SCHAFER,

Plaintiff,

-vs-

NATHAN C. SCHAFER,

Defendant.

DECREE OF DIVORCE

Civil No. 884902670DA

Judge John A. Rokich

THE ABOVE-CAPTIONED MATTER having come on for hearing before the above-entitled court on Thursday, the 5th day of January, 1989, the Honorable John A. Rokich, Judge presiding, plaintiff being present in person and through her counsel, and defendant being present in person and through his counsel of record, Mary C. Corporon, more than 90 days having elapsed since the filing of the Complaint in this action and the Court having previously signed and entered an Order Granting Motion for Bifurcated Trial, the Court proceeded to hear the sworn testimony of the parties; based thereon, and good cause appearing therefor, the Court having heretofore made and entered its Findings of Fact and Conclusions of Law, now, therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff and defendant are each hereby granted a Decree

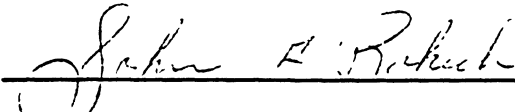
of Divorce from the other, dissolving the bonds of matrimony heretofore existing between the parties, the same to become final and effective immediately upon being signed by the Judge and entered by the clerk in the register of actions.

2. All remaining outstanding issues in this matter are reserved for further trial in this case.

3. Until the trial of the reserved issues in this matter, the temporary order previously entered by this Court shall remain in full force and effect.

DATED THIS 5 day of January, 1989.

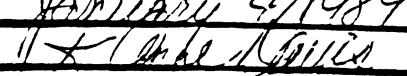
BY THE COURT



JOHN A. ROKICH
District Court Judge

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

DATE:

January 4/1989


DEPUTY COURT CLERK

APPENDIX B

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IN THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH.

JOAN E. SCHAFER,

Plaintiff,

-vs-

NATHAN C. SCHAFER,

Defendant.

AMENDED DECREE OF DIVORCE

Civil No. 884902670DA

Judge John A. Rokich

THE ABOVE-CAPTIONED MATTER having come on for trial before the above-entitled court on the 13th, 14th and 17th days of July, 1989, the Honorable John A. Rokich, Judge presiding, plaintiff being present in person and through her counsel of record, David S. Dolowitz, and the defendant being present in person and through his counsel of record, Mary C. Corporon, the Court having proceeded to hear the sworn testimony of the parties and their witnesses, having received the exhibits of the parties and having heard the arguments of counsel and having reviewed the file and the pleadings contained therein, the Court being fully advised in the premises and more than 90 days having elapsed since the filing of the Complaint for Divorce in this action, and having heretofore made and entered its Findings of Fact and Conclusions of Law, now, therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff is hereby awarded the permanent care, custody and control of the two minor children of the parties, Zachary and Lillian, subject to defendant's reasonable and liberal rights of visitation.

2. Defendant is awarded visitation with the minor children of the parties, including a minimum of the following:

a. Every other weekend, from Friday evening until Sunday evening;

b. One day in the middle of each week;

c. Alternate state and federal holidays;

d. An extended period of time, up to four weeks each summer;

e. Plaintiff shall have the children with her on Mother's Day and her birthday, each year, and defendant shall have Father's Day and his birthday with the children each year, irrespective of any other portion of this visitation schedule;

f. Defendant is awarded reasonable and liberal telephone access to the minor children of the parties;

g. Defendant shall be granted access, at all times, to the educational and health care records of the children.

Based upon the stipulation of the parties, defendant is hereby ordered to exercise his visitation with the minor children of the parties.

3. Defendant is hereby ordered to pay child support to the plaintiff, for the support and maintenance of the minor children of the parties in the total sum of One Thousand One Hundred Eighty-Three Dollars (\$1,183.00) per month, or Five Hundred

Ninety-One Dollars and Fifty Cents (\$591.50) per month, per child, payable through the Clerk of this Court, until each child has attained the age of 18 years or graduated from high school in the normal course of their high school educations, whichever event occurs later. Said child support shall abate by 50% during any period of time in which the defendant has the actual physical care, custody and control of the minor children for 25 or more consecutive days.

4. If the defendant falls thirty (30) or more days in arrears in his child support obligation, the plaintiff shall be entitled to mandatory income withholding relief, pursuant to Utah Code Annotated, Section 62A-11-401, et. seq. (Supp. 1988).

5. Defendant is hereby ordered to maintain health and accident insurance coverage for the benefit of the minor children of the parties as such is available through his employment, until each child has attained the age of 18 years or graduated from high school, whichever last occurs. The parties are ordered to share equally in payment of any non-routine medical and dental expenses incurred for the benefit of the minor children which are not covered by defendant's policy of health and accident insurance. The plaintiff is ordered to pay and assume all routine medical and dental expenses incurred for the benefit of the minor children.

6. Defendant is hereby ordered to maintain in force a policy of life insurance on his own life, having a minimum benefit payable on death of Three Hundred Thousand Dollars (\$300,000.00), naming the minor children as the sole primary beneficiarics thereof. Said insurance coverage shall continue in

effect until each child achieves the age of 18 years or graduates from high school in the normal course of his or her education, whichever event occurs later. Defendant is hereby awarded the cash surrender value of any life insurance policies he presently owns, as his sole and separate property.

7. Each party is awarded his or her own items of personal effects, jewelry, clothing and belongings.

8. The parties' previous division of their items of furniture, fixtures, appliances and household goods is confirmed in each and each party is hereby awarded all such items presently in his or her own possession.

9. Plaintiff is hereby awarded all interest and monies received as a result of the rebate previously received by plaintiff for the parties' 1988 Utah State Income Taxes in the approximate sum of Five Hundred Dollars (\$500.00), free and clear of any interest of the defendant.

10. Pursuant to the stipulation of the parties, the plaintiff and defendant are hereby ordered to file, and cooperate in the filing of, joint federal and state income tax returns for the 1988 tax year. The parties shall share equally in any refund received by reason of that joint income tax filing. The defendant is ordered to pay and assume and hold plaintiff harmless on any income tax liability incurred by reason of the joint filing. In the event that the University of Utah should seek a refund of a PEL grant and/or any financial assistance granted to plaintiff during the 1988/1989 academic year due to this joint filing, defendant is ordered to pay any refund to the University of Utah so requested by the University of Utah and to

hold the plaintiff harmless thereon.

11. Plaintiff is hereby awarded the diamond ring valued at Ten Thousand Eight Hundred Seventy-Five Dollars (\$10,875.00), free and clear of any interest of the defendant.

12. The retirement accounts held in the name of the defendant and acquired through defendant's employment with the University of Utah and the United States Government shall be divided equally between the parties, according to the Woodward formula, one-half to each, This Court should issue the appropriate allocations or qualified domestic relations orders distributing these retirement accounts accordingly.

13. Plaintiff is hereby awarded the 1983 Subaru GL10 automobile and plaintiff is hereby awarded the 1985 Volkswagen Jetta automobile, each free and clear of any interest of the other party.

14. Plaintiff is hereby awarded the Keystone account as her sole and separate property, free and clear of any interest of the defendant. Defendant is hereby awarded the Merrill Lynch account as his sole and separate property, free and clear of any interest of the plaintiff. Defendant is ordered to pay to plaintiff the sum of Seven Thousand Four Hundred Forty-One Dollars (\$7,441.00) as a marital property settlement herein.

15. Plaintiff is hereby awarded all right, title and interest in her banking accounts with Tracy Collins Bank, free and clear of any interest of the defendant. Defendant is hereby awarded all right, title and interest in his banking accounts with the University of Utah Credit Union, free and clear of any interest of the plaintiff.

16. Defendant is hereby ordered to pay alimony to the plaintiff in the sum of Six Hundred Fifty Dollars (\$650.00) per month, said alimony to continue until the death of the plaintiff, the death of the defendant or the remarriage or cohabitation of the plaintiff, whichever first occurs.

17. In the event that any deficiency judgment is assessed against the parties as a result of the foreclosure on their marital residence, the parties are ordered to share equally in payment of the same, and each shall be ordered to hold the other harmless on one-half of any such obligation. Plaintiff is hereby ordered to pay and assume the debts and obligations to her parents, the debt for her moving expenses and the debt for her counseling costs, and is ordered to hold the defendant harmless thereon. Each party is hereby ordered to pay and assume all debts and obligations incurred in his or her own name since the date of filing of the Complaint for Divorce in this action and each is ordered to hold the other harmless thereon.

18. Plaintiff is denied any award of equitable restitution.

19. Defendant is hereby ordered to pay to plaintiff and/or plaintiff's counsel the sum of Ten Thousand Dollars (\$10,000.00) representing a portion of plaintiff's court costs and attorney's fees incurred herein. With this exception, each party is hereby ordered to pay and assume his or her own court costs and attorney's fees incurred in this matter.

20. Each party is hereby ordered to execute and deliver all necessary documents to transfer the title and ownership of the property of the parties pursuant to the Decree entered herein.

21. Plaintiff's previous surname is hereby restored to her

22. Neither party is found to be in contempt of this Court at this time.

BY THE COURT

15

CERTIFICATE OF MAILING

DAVID S. DOLOWITZ
Attorney for Plaintiff
P. O. Box 11008
Salt Lake City, Utah 84147

John K. Dixon
Secretary

APPENDIX C

COPY

MARY C. CORPORON #734
Attorney for Defendant
CORPORON & WILLIAMS
Suite 1100 - Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
(801) 328-1162

IN THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH.

JOAN E. SCHAFER,
Plaintiff,

AMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

-vs-

Civil No. 884902670DA

NATHAN C. SCHAFER,
Defendant.

Judge John A. Rokich

THE ABOVE-CAPTIONED MATTER having come on for trial before the above-entitled court on the 13th, 14th and 17th days of July, 1989, the Honorable John A. Rokich, Judge presiding, plaintiff being present in person and through her counsel of record, David S. Dolowitz, and the defendant being present in person and through his counsel of record, Mary C. Corporon, the Court having proceeded to hear the sworn testimony of the parties and their witnesses, having received the exhibits of the parties and having heard the arguments of counsel and having reviewed the file and the pleadings contained therein, the Court being fully advised in the premises and more than 90 days having elapsed since the filing of the Complaint for Divorce in this action, and good cause appearing therefor, the Court now makes and enters the following:

FINDINGS OF FACT

1. At the time of the trial both plaintiff and defendant were residents of Salt Lake County, State of Utah, and had been so for a period of three months or more immediately prior to the filing of the Complaint in this action.

2. The parties to this action were previously husband and wife, having been married on July 27, 1979 in Slippery Rock, Pennsylvania and having been divorced by a Decree of Divorce entered herein on or about January 5, 1989. The Decree of Divorce reserved all issues remaining as between the parties, with the exception of the entry of the divorce itself.

3. The parties to this action are the parents of two minor children, namely: Zachary, born April 27, 1983; and Lillian, born June 19, 1985. Plaintiff is a fit and proper person to be awarded the permanent care, custody and control of the minor children of the parties, subject to defendant's reasonable and liberal rights of visitation.

4. Defendant's rights of visitation with the minor children should include the following:

a. Every other weekend, from Friday evening until Sunday evening;

b. One day in the middle of each week;

c. Alternate state and federal holidays;

d. An extended period of time, up to four weeks each summer;

e. Plaintiff should have the children with her on Mother's Day and her birthday, each year, and defendant should have Father's Day and his birthday with the children each year,

irrespective of any other portion of this visitation schedule;

f. Defendant should have reasonable and liberal telephone access to the minor children of the parties;

g. Defendant should be granted access, at all times, to the children's educational and health care records.

5. Defendant should be ordered to exercise visitation with the minor children of the parties, based upon the stipulation of the parties to such an order.

6. Defendant should be ordered to pay child support to the plaintiff, for the support and maintenance of the minor children of the parties, pursuant to his child support guideline worksheet submitted to the Court at the time of trial and designated as "Defendant's Exhibit 1." Specifically, said support should be in the total amount of Five Hundred Ninety-One Dollars (\$591.50) per month, per child, for a total of One Thousand One Hundred Eighty-Three Dollars (\$1,183.00) per month, as and for child support, said support to continue until such time as the minor children achieve the age of 18 years or graduate from high school in the normal course of their high school educations, whichever event occurs later. Said child support should be payable through the clerk of this Court. Further, said child support should abate by 50% during any period of time in which the defendant has the actual physical care, custody and control of the minor children for 25 or more consecutive days.

7. If the defendant falls thirty (30) or more days in arrears in his child support obligation, the plaintiff should be entitled to mandatory income withholding relief, pursuant to Utah Code Annotated, Section 62A-11-401, et. seq. (Supp. 1988).

8. Defendant should be ordered to maintain health and accident insurance coverage for the benefit of the minor children of the parties as such is available through his employment, until each child has attained the age of 18 years or graduated from high school, whichever last occurs. The parties should be ordered to share equally in payment of any non-routine medical and dental expenses incurred for the benefit of the minor children which are not covered by defendant's policy of health and accident insurance. ~~The plaintiff should be ordered to pay and assume all routine medical and dental expenses incurred for the benefit of the minor children and should hold the defendant harmless thereon.~~

9. Defendant should be ordered to maintain a policy of life insurance on his own life, having a minimum benefit payable on death of Three Hundred Thousand Dollars (\$300,000.00), naming the minor children as the sole primary beneficiaries thereof, said insurance to continue until the children achieve the age of 18 years or graduate from high school in the normal course of their education, whichever event occurs later. Defendant ~~should be~~ awarded the cash surrender value of any life insurance policies he presently owns, as his sole and separate property.

10. During the course of their marriage the parties have acquired certain items of personal effects, jewelry, clothing and belongings. Each party should be awarded his or her own such items of personalty.

11. During the course of their marriage the parties have acquired various items of furniture, fixtures, appliances and household goods, which items have been previously divided by the

parties and which division should be confirmed in each, with each party to be awarded all such items presently in his or her own possession.

12. At the time of trial herein, plaintiff was not employed outside the home and was attending school full-time as a student at the University of Utah. At the time of trial herein, plaintiff anticipated she would graduate in late 1990 or early 1991 with a Bachelor's degree.

13. Plaintiff's expert at trial, Dr. Steve Reynolds, an economist, testified that plaintiff is capable of obtaining employment in the State of Utah with her current job skills and experience at an income of Eighteen Thousand Dollars (\$18,000.00) per year. Based upon this testimony, the Court attributes an income-earning capability to the plaintiff, for purposes of calculating alimony, in the sum of Eighteen Thousand Dollars (\$18,000.00) per year.

14. At the time of trial herein defendant was employed as a medical doctor at the University of Utah and at the United States Veterans Administration Hospital, both in Salt Lake City, Utah, at a total gross monthly income of Seven Thousand Five Hundred Sixty Dollars (\$7,560.00) per month for both jobs.

15. At the time of trial herein, plaintiff was 40 years of age and defendant was 37 years of age. Plaintiff was previously married, prior to the time she became married to the defendant in this action, and had one child by that marriage, a minor daughter, who was 16 years of age at the time of trial herein. At the time of the trial herein, plaintiff was entitled to receive the sum of Two Hundred Forty Dollars (\$240.00) per month

as and for support for her daughter. As of the time of trial herein, plaintiff had never petitioned any court to increase the child support obligation owing for her child by her former husband.

16. At the time the parties to this action were married, in July 1979, defendant had already graduated from medical school and was already a medical doctor, having completed his M.D. degree in May 1979.

17. At the time of the parties' marriage the plaintiff was employed by Huron Road Hospital, as an administrative assistant, at an annual salary of approximately Thirteen Thousand Dollars (\$13,000.00). As of the date of the parties' marriage, plaintiff had completed some course work toward a degree from a college or university at several institutions, but had not obtained a degree from a college or university.

18. At the time of the parties' marriage, plaintiff was the fee title holder of certain real property, consisting of a single-family dwelling in Cleveland, Ohio, subject to a first mortgage obligation on that property and subject to a lien thereon in favor of her former husband.

19. Immediately upon the parties' marriage, the defendant moved to Akron, Ohio to complete an internship at Akron City Hospital from July 1979 through June 1980. During the defendant's internship at Akron City Hospital, plaintiff resided in her home in Cleveland, Ohio, until November 1979, and then moved to Akron, Ohio to reside with the defendant, thus terminating her employment with the Huron Road Hospital in Cleveland, Ohio.

20. After defendant completed his internship at the Akron City Hospital he completed his residency at the Akron Community Hospital in Akron, Ohio. During the years of the parties' marriage when defendant completed his internship and/or residency in Akron, Ohio, the parties resided in Akron, Ohio, Hudson, Ohio and Stowe, Ohio, all suburbs of the Akron, Ohio area. Each residential move within the Akron, Ohio area, from Akron to Hudson, and from Hudson to Stowe, was made based upon a mutual agreement between the parties and because the parties were seeking better living accommodations within the Akron, Ohio area.

21. Defendant became board certified in 1984.

22. Plaintiff attended college in Ohio off and on from 1980 through 1983.

23. Plaintiff and defendant moved from Stowe, Ohio to Salt Lake City, Utah, in 1983 to enable defendant to accept employment in Salt Lake City, Utah.

24. The parties moved from Salt Lake City, Utah to Pittsburg, Pennsylvania to enable defendant to accept employment. The parties resided in Pittsburg, Pennsylvania for approximately one year, from 1986 to 1987.

25. In 1987, the parties returned from Pittsburg to Salt Lake City, Utah to enable defendant to accept employment at the University of Utah and VA Hospital in Salt Lake City.

26. Plaintiff consented to the moves from Ohio to Salt Lake City, from Salt Lake City to Pittsburg, Pennsylvania and from Pittsburg to Salt Lake City.

27. Plaintiff continued to attend college off and on, on both occasions when she resided in Salt Lake City. As of the end

of winter quarter, 1988, plaintiff had completed or had been given transfer credits for 115 quarter hours toward her degree at the University of Utah.

28. The minor child of the parties, Zachary, was in day care on a regular basis from age six months on, with the exception of the period of time when the parties resided in Pittsburg, Pennsylvania. The minor child of the parties, Lillian, was in day care on a regular basis from age one year on.

29. During the course of their marriage the parties have retained services of a maid or housekeeper off and on to assist the plaintiff with housework in the parties' home.

30. From the time defendant ceased her employment with the Huron Road Hospital in Cleveland, Ohio in November 1979 until the separation of the parties in May 1988, defendant supported the plaintiff's minor child from a previous marriage, with the exception of the Two Hundred Forty Dollars (\$240.00) plaintiff received for the support of said child from the child's natural father.

31. From the date the plaintiff terminated her employment with the Huron Road Hospital in Cleveland, Ohio in November 1979, until 1982, defendant paid the mortgage, real property taxes and insurance on the plaintiff's residence in Cleveland, Ohio, with the exception of a period of approximately one year, during which the parties received sporadic rent payments from tenants for a portion of the expenses of that property.

32. In 1982 plaintiff sold her former marital residence in Cleveland, Ohio. The parties' testimony differed as to the amount of net proceeds received from the sale of that property

after satisfaction of the outstanding mortgage indebtedness and the lien obligation owing thereon to plaintiff's former husband. Plaintiff testified that she received ~~net~~ proceeds of approximately Seventeen Thousand Dollars (\$17,000.00) from the sale of the real property and defendant testified that plaintiff received approximately Eleven Thousand Dollars (\$11,000.00) net proceeds from that sale. The Court finds that the determination of the exact amount of net proceeds received from the sale of the Cleveland, Ohio property is not material to determination of this case. The net proceeds from the sale of the plaintiff's property in Cleveland, Ohio were placed in a joint savings account in the names of both parties.

33. In 1982, from the joint savings account of the parties, the defendant purchased a Porsche automobile, which was titled solely and exclusively in the name of the defendant, and which defendant owned and drove as his motor vehicle, for approximately one year. Thereafter, defendant sold this automobile at a profit, and all of the proceeds of that sale, including the profit, were placed back into the joint savings account of the parties.

34. In 1983, upon moving to Salt Lake City, Utah, the parties purchased a residence in Salt Lake County, hereinafter described as the "marital residence." This property was acquired by the parties for a purchase price of One Hundred Sixty-Nine Thousand Dollars (\$169,000.00). The parties made a down payment on this marital residence of Seventeen Thousand Dollars (\$17,000.00) and financed the balance, of One Hundred Fifty-Two Thousand Dollars (\$152,000.00), pursuant to a variable rate

mortgage. The title to the marital residence was held jointly in the names of both parties. The source of funds for the down payment on the marital residence was Ten Thousand Dollars (\$10,000.00) from defendant's bonus from Akron City Hospital and Seven Thousand Dollars (\$7,000.00) from the joint savings account of the parties. The last monthly payment obligation which the parties owed to the mortgage holder on the marital residence was in the approximately sum of One Thousand Five Hundred Dollars (\$1,500.00), including principal, interest, taxes and insurance. The parties ceased making monthly payments on the marital residence in the summer of 1988, and the property was foreclosed upon and sold pursuant to a trustee's sale in June 1989. As of the date of trial herein, the property had been lost to foreclosure. As of the date when the parties ceased making the monthly mortgage payments on the property, the property had a "negative value" to the parties, in that the outstanding mortgage obligation and costs of sale exceeded the fair market value of the property by reason of declining market values in Salt Lake County from 1983 through 1988. All of the parties' investment in the marital residence had been lost by reason of the declining market value at the time of the parties' separation. The sole source of payments made on the marital residence from 1983 through 1988 was the income of the defendant.

35. The parties received a tax rebate from the State of Utah in October 1988 in the approximate sum of Five Hundred Dollars (\$500.00), representing a rebate on their Utah State Income Taxes for 1988. The plaintiff endorsed this check and cashed it. This distribution of these funds to the plaintiff

should be affirmed and plaintiff should be awarded the 1988 tax rebate of the parties as her sole and separate property, free and clear of any interest of the defendant.

36. Plaintiff and defendant stipulated at the time of trial herein that the parties should file joint state and federal income tax returns for the tax year 1988, with defendant to be solely responsible for any tax liability incurred by reason of the filing of the joint returns and with the parties to share equally in any refunds if any are to be received. Based upon this stipulation, this Court should order that the parties cooperate in the filing of joint 1988 federal and state income tax returns. The parties should be ordered to share equally in any refund received by reason of that joint income tax filing. The defendant should be ordered to pay and assume and hold plaintiff harmless on any income tax liability incurred by reason of the joint filings. In the event that the University of Utah should seek a refund of a PEL grant and/or any financial assistance granted to plaintiff during the 1988/1989 academic year by reason of plaintiff's separation from defendant and by reason of this filing of a joint tax return for 1988, then defendant should be ordered to make any refund to the University of Utah so requested by the University of Utah and should be ordered to hold the plaintiff harmless thereon.

37. During the course of the parties' marriage the plaintiff has acquired an interest in a diamond ring which the plaintiff insured at a value of Ten Thousand Eight Hundred Seventy-Five Dollars (\$10,875.00). The Court places the value of this ring at Ten Thousand Eight Hundred Seventy-Five Dollars

(\$10,875.00). The diamond ring should be awarded to plaintiff, free and clear of any interest of the defendant.

38. During the course of the parties' marriage the defendant has acquired an interest in certain retirement accounts through the University of Utah in the TIAA/CREF retirement plan and through the United States Government through his employment with the United States Veteran Administration Hospital. Both these retirement accounts should be divided equally between the parties, according to the Woodward formula, one-half to each, and the appropriate allocations orders should issue from this Court distributing these retirement accounts accordingly.

39. During the course of their marriage, the parties acquired an interest in certain motor vehicles, including a 1983 Subaru GL10 and a 1985 Volkswagen Jetta. The Subaru should be awarded to the plaintiff, free and clear of any interest of the defendant. The Jetta should be awarded to the defendant, free and clear of any interest of the plaintiff. Neither motor vehicle is encumbered by any obligation. The motor vehicle awarded to the plaintiff has an approximate fair market value of One Thousand Five Hundred Dollars (\$1,500.00) and the motor vehicle awarded to the defendant has an approximate fair market value of Three Thousand Dollars (\$3,000.00).

40. During the course of their marriage the parties acquired an interest in various savings and investment accounts, including accounts at Merrill Lynch and Keystone. The Court finds that at the time of filing of the Complaint for Divorce herein, the Merrill Lynch account had a value of Thirty-One Thousand One Hundred Ninety-Three Dollars (\$31,193.00), less

withdrawals of Two Thousand Two Hundred Fifty-Three Dollars (\$2,253.00) and Three Thousand Dollars (\$3,000.00) to pay debts and attorney's fees. At the time of the filing of the Complaint for Divorce herein the Keystone account had a value of Nine Thousand Three Hundred Eighteen Dollars (\$9,318.00). Each party should receive Seventeen Thousand Six Hundred Twenty-Nine Dollars (\$17,629.00) as his or her share of the Merrill Lynch and Keystone accounts. The plaintiff should receive the Keystone account as her sole and separate property, free and clear of any interest of the defendant, and the defendant should be ordered to pay to plaintiff an additional Seven Thousand Eight Hundred Seventy-Six Dollars (\$7,876.00) as a marital property settlement herein, less a credit to defendant of Four Hundred Thirty-Five Dollars (\$435.00) representing payments made by defendant for the plaintiff's car repairs and Visa account during the parties' separation. Defendant should be awarded all right, title and interest in the Merrill Lynch account of the parties, free and clear of any interest of the plaintiff.

41. Plaintiff should be awarded all right, title and interest in her banking accounts with Tracy Collins Bank, free and clear of any interest of the defendant. Defendant should be awarded all right, title and interest in his banking accounts with the University of Utah Credit Union, free and clear of any interest of the plaintiff.

42. Defendant should be ordered to pay alimony to the plaintiff in the sum of Six Hundred Fifty Dollars (\$650.00) per month, said alimony to continue until the death of the plaintiff, the death of the defendant or the remarriage or cohabitation of

the plaintiff, whichever first occurs.

43. During the course of their marriage the parties have incurred various debts and obligations, including the possibility of a deficiency judgment to be assessed against the parties by reason of the foreclosure on the marital residence, an obligation owing by the plaintiff to her parents, plaintiff's moving expenses by reason of her move from the marital residence of the parties upon its foreclosure, and plaintiff's counseling costs. The parties should be ordered to share equally in any deficiency assessed against them by reason of the foreclosure of the marital residence, and each should be ordered to hold the other harmless on one-half of any such obligation. Plaintiff should be ordered to pay and assume the debts and obligations to her parents, for her moving expenses and for her counseling costs, and should be ordered to hold the defendant harmless thereon. Each party should be ordered to pay and assume all debts and obligations incurred in his or her own name, commencing with the date of filing of the Complaint for Divorce in this action and each should be ordered to hold the other harmless thereon.

44. In addressing the issue of plaintiff's claim for equitable restitution against the defendant, the Court has considered the following: the length of the marriage, which was approximately nine (9) years; and the financial contribution which the plaintiff made to the marriage. The evidence at trial established that at the time the parties were married the defendant had completed medical school and was completing his internship training. The plaintiff only worked for a short period of time during the parties' marriage. During the parties'

marriage the plaintiff had the opportunity to continue her college education and to enjoy other social and educational experiences as she saw fit. The plaintiff did not make any sacrifices or contribution for any substantial period which increased the earning capacity of the defendant. However, the Court has taken into account the fact that, as a mother, the plaintiff did contribute to the family relationship of the parties. Plaintiff did not suffer from a disparity in earning capacity as a result of the marriage; in fact, she had the opportunity to enhance her earning capacity by education during the marriage. Defendant provided the funds to pay for day care and babysitters and for household assistance so that plaintiff could take advantage of furthering her career goals. The assets of the marital estate were acquired primarily from defendant's income. The assets consisted, at the time of trial, of two motor vehicles, personal effects, minimal furniture and cash and securities having a value of Thirty-Four Thousand Two Hundred Fifty-Eight Dollars (\$34,258.00). This marital estate was accumulated solely by defendant's earnings, which averaged approximately Ninety Thousand Three Hundred Sixty-Four Dollars (\$93,364.00) per year for the four years immediately prior to the trial. This case is not an appropriate case for equitable restitution. At the time of the marriage the defendant was well on his way to earning substantial sums of money. Defendant's earning capacity has not been attained by significant efforts and sacrifices on the part of the plaintiff which were detrimental to her development. The Court should not make an award of equitable restitution herein.

45. Plaintiff has incurred attorney's fees herein in the approximate sum of Twenty-Nine Thousand Dollars (\$29,000.00), which is indicative of the fact that the demands made upon her counsel were not necessary. The defendant has incurred attorney's fees of approximately Twelve Thousand Dollars (\$12,000.00) herein, both to his present counsel and to a former counsel of record. The Court finds that the hourly rates charged by counsel were reasonable and that each counsel did a very respectable job in representing his or her client's case. The fees incurred herein were much higher than those usually charged in a case of this type. This was not a complex case, but for the animosity of the parties. This case did not present new and novel issues that have not already been addressed by the courts. In view of the circumstances of this case, it is reasonable, just and proper that defendant be ordered to pay a portion of plaintiff's court costs and attorney's fees incurred herein, in the sum of Ten Thousand Dollars (\$10,000.00). With the exception of this award of Ten Thousand Dollars (\$10,000.00), each party should be ordered to pay and assume his or her own court costs and attorney's fees incurred herein.

46. Each party should be ordered to execute and deliver all necessary documents to transfer the title and ownership of the property of the parties pursuant to the Decree entered herein.

47. Prior to the parties' marriage, plaintiff was known by the surname "Donato," which name should be restored to plaintiff and she should be known hereafter as "Joan Donato."

48. Each party has made various claims of contempt on the part of the other party. The Court does not find either party to

be in contempt of court at this time.

FROM THE FOREGOING Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

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

2. An Amended Decree of Divorce should enter from this Court in conformity with the foregoing Findings of Fact.

DATED THIS _____ day of November, 1989.

BY THE COURT

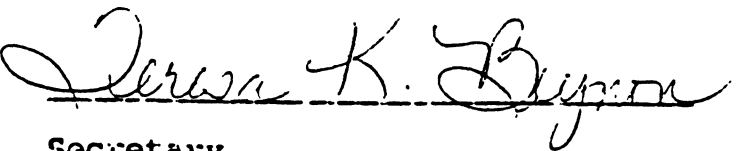
JOHN A. ROKICH
District Court Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am employed in the offices of Corpcron & Williams, attorneys for the defendant herein, and that I caused the foregoing proposed Amended Findings of Fact and Conclusions of Law to be served upon plaintiff by placing a true and correct copy of the same in an envelope addressed to:

DAVID S. DOLOWITZ
Attorney for Plaintiff
P. O. Box 11008
Salt Lake City, Utah 84147

and depositing the same in the United States mail at Salt Lake City, first class postage pre-paid thereon, on the 17th day of October, 1989.


Secretary

APPENDIX D

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOAN E. SCHAFER,	:	MEMORANDUM DECISION
Plaintiff,	:	CIVIL NO. D-88-2670
vs.	:	
NATHAN C. SCHAFER,	:	
Defendant.	:	

This case was tried on July 13 and 14, 1989. The plaintiff was represented by David S. Dolowitz. The defendant was represented by Mary C. Corporon. The Court heard the testimony of the witnesses, received exhibits into evidence, and at the conclusion of the trial heard oral arguments of counsel. The Court being fully advised in the premises, now enters its Memorandum Decision.

The parties stipulated as to the custody of the children, the division of certain assets of the marital estate. The remainder of the issues to be resolved by the Court were: child support; alimony; equitable restitution; payment of debts; the division of the various savings, checking, and investment accounts; and the disposition of a diamond ring.

The Court advised counsel that the child support award would be in accordance with the child support guidelines. Each counsel submitted a Child Support Obligation Worksheet, but there was a difference of \$30.00 between the total of the plaintiff's computations and those of the defendant. The Court accepted the defendant's computations because it took into account the cost of medical and dental insurance. The Court awards to plaintiff \$591.50 per month per child as child support.

The Court awards to plaintiff and defendant one-half of the Merrill Lynch and Keystone accounts which were computed as follows:

Merrill Lynch Account	\$24,940.00
Keystone Account	<u>\$ 9,318.00</u>
TOTAL	\$34,258.00

At the time of the filing of the divorce, the Merrill Lynch account was valued at \$31,193.00, less withdrawals of \$2,253 and \$3,000 to pay debts and attorney's fees.

Each party was to receive \$17,629.00 as their share of the two accounts. The plaintiff is to retain the Keystone account of \$9,318, and the defendant is ordered to pay plaintiff an additional \$7,876. The defendant received credit for \$435.00 paid to plaintiff for car repairs and a visa account.

The Court awards the plaintiff the diamond ring valued at \$10,000.00, alimony in the sum of \$650.00 per month, her costs and attorney's fees in the sum of \$10,000.00.

The plaintiff is ordered to pay the debt due her parents, her moving, and counseling costs.

Defendant is ordered to maintain a minimum of \$300,000.00 life insurance on his life, with his children as beneficiaries, and plaintiff as trustee for the children. Defendant is awarded the cash surrender value of any insurance policies he presently owns.

The Court addressed the issue of equitable restitution and considered the following: the length of the marriage which was approximately nine years; the financial contribution which the plaintiff made to the marriage. The evidence established that at the time the parties were married the defendant had completed medical school and was completing his residency training. The plaintiff only worked for a short period of time during their marriage.

During the marriage the plaintiff had the opportunity to continue her college education and to enjoy other social and educational experiences as she saw fit to do.

The plaintiff did not make any sacrifices or contributions for any substantial period that increased the earning capacity of the defendant. However, the Court recognizes that as a mother, the plaintiff did contribute to the family relationship.

Plaintiff did not suffer from a disparity in earning capacity as a result of the marriage; in fact, she had the opportunity to enhance her earning capacity. Defendant provided the funds for day care and babysitters so that plaintiff could take advantage of furthering her career goals.

The assets of the marital estate were acquired, primarily, from defendant's income. The assets consisted of two vehicles, personal effects, minimal furniture, cash and securities worth \$34,258.00. The marital estate was accumulated with defendant's earnings which averaged \$90,364.00 for the past four years.

This case is not a true equitable restitution case. At the time of the marriage the defendant was well on his way to earning substantial sums of money. Defendant's earning capacity was not attained by significant efforts and sacrifices on the part of the plaintiff which were detrimental to her development.

The Court in making its award of attorney fees to plaintiff took into consideration the difficulty and complexity of the litigation. This was not a complex case, but for the animosity of the parties. This case did not present new and novel issues that have not already been addressed by the courts.

The litigants made demands upon their attorneys' time and should be required to pay for that time. However, that does not mean defendant should pay for all the time that plaintiff demanded of her counsel.

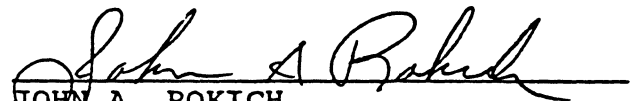
The Court found the hourly rates charged by both counsel were reasonable, that both counsel did a very respectable job in presenting their clients' case. The fees incurred were much higher than those usually charged in a case of this type.

The Court concluded that a substantial portion of the fees incurred by the plaintiff were unnecessary. The defendant had incurred fees of approximately \$12,000, and the plaintiff fees of approximately \$29,000. which is indicative of the fact that the demands made upon her counsel were not necessary.

In view of the circumstances of this case, a fee of \$10,000 would be reasonable to order the defendant to pay in behalf of the plaintiff.

Counsel for plaintiff shall prepare the Findings of Fact and Conclusions of Law, and a Decree of Divorce in accordance with this Memorandum Decision.

Dated this 3/ day of July, 1989.


JOHN A. ROKICH
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 31 day of July, 1989:

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