

2000

McKenzie v. McKenzie : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *McKenzie v. McKenzie*, No. 20000174 (Utah Court of Appeals, 2000).

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IN THE UTAH COURT OF APPEALS

CHARLES DELOY McKENZIE,)

Plaintiff/Appellant,)

v.)

KATHY McKENZIE,)

Defendant/Appellee.)

Appellate Case No. 20000174-CA
Priority Classification 15

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FILED

NOV 03 2000

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STATEMENT OF JURISDICTION

On February 14, 2000, the Fourth Judicial District Court entered its Findings of Fact and Conclusions of Law and Decree of Divorce. [R. 196, 190]. On February 29, 2000, Plaintiff filed his notice of appeal. [R. 217]. This Court has jurisdiction over this appeal pursuant to Utah Code Annotated Section 78-2A-3(2)(h).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Whether the trial court properly awarded Defendant alimony inasmuch as said court considered the three factors articulated in *English v. English*, 565 P.2d 409 (Utah 1977). The *English* court articulated three factors that must be considered in affixing a reasonable alimony award. (1) the financial condition and needs of the wife, (2) the ability of the wife to produce sufficient income for herself, and (3) the ability of the husband to provide support. *See also Davis v. Davis*, 749 P.2d 647, 649 (Utah 1988) and *Howell v. Howell*, 806 P.2d 1209 (Ut. Ct. App. 1991). The trial court's determination and award of alimony should not be disturbed if these factors are adequately addressed. , *Olsen v. Olsen* 704 P.2d 564, 566-67 (Utah 1985). These Utah cases have stated that the purpose of alimony is to prevent the receiving spouse from becoming a public charge and to maintain the standard of living enjoyed during the marriage to the extent possible. *Howell*, 806 P.2d 1209 (Ut. Ct. App. 1991).

Whether, given the evidentiary facts and specific findings of the court, the trial court was required to make additional subsidiary findings of the financial conditions and needs of the receiving spouse, (2) the ability of the receiving spouse to produce sufficient income for herself, and (3) the ability of the responding spouse to provide support. *Schindler v. Schindler*, 776 P.2d 84, 90 (Ut. Ct. App. 1989). (If the trial court considers these factors, the Court of Appeals will not disturb the alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion).

Whether the trial court properly awarded Defendant her attorney's fees given the standard that the trial courts are given considerable deference due to their familiarity with the facts and the evidence and given the fact that the court properly considered Deloy's ability to pay and Kathy's financial needs. *Pathel v. Pathel*, 732 P.2d 96, 100 (Utah 1986); *Owen v. Owen*, 579 P.2d 911, 913 (Utah 1978)(stating that considerable discretion is afforded the trial court "due to the advantaged position and the responsibilities of the trial court in such matters.").

Whether the trial court is required to make subsidiary findings on Deloy's ability to pay, or Kathy's ability to per her own attorney's fees.

Whether the trial court properly awarded Kathy the 1978 Ford truck given the fact that she was awarded the physical custody of the children, that she is in

need of transportation and that she was forced to sell her only other form of transportation to pay family bills and help support herself and the children after the parties' separation. The sufficiency of the trial court's factual findings are reviewed under a correction of error standard. *Anderson v. Doms*, 984 P.2d 392 Paragraph 9 (Ut. Ct. App. 1999).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Utah Code Ann. Section 30-3-5.

Disposition of property - Maintenance and health care of parties and children-Division of debts - Court to have continuing jurisdiction - Custody and visitation - Determination 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, debts or obligations, and parties. The court shall include the following in every decree of divorce:

* * * * *

(c) pursuant to Section 15-4-6.5:

- (i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;
- (ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of

debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

- (iii) provisions for the enforcement of these orders; and
- (d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services.

* * * * *

- (7)
 - (a) The court shall consider at least the following factors in determining alimony:
 - (i) the financial condition and needs of the recipient spouse;
 - (ii) the recipient's earning capacity or ability to produce income;
 - (iii) the ability of the payor spouse to provide support;
 - (iv) the length of the marriage;
 - (v) whether the recipient spouse has custody of minor children requiring support;
 - (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and
 - (vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.
 - (b) The court may consider the fault of the parties in determining alimony.
 - (c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (7)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that

existed at the time of the marriage.

- (d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.
- (e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.
- (f) In determining alimony when a marriage of short duration dissolves and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.
- (g)
 - (i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.
 - (ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.
 - (iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this Subsection (7).
 - (A) The court may consider the subsequent spouse's financial ability to share living expenses.
 - (B) The court may consider the income of a

subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

- (h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.
- (8) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage or death of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.
- (9) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

STATEMENT OF THE CASE

A. Nature of Case, Course Proceedings, and Disposition Below

This is a divorce action in which the parties have very few assets, except for a marital home, various personal property assets and modest to moderate incomes during the marriage. The primary issue was how to equalize the reported income of the parties, and how to maintain two households, one of which would contain three individuals, while the other consisted of one. As a result of Defendant's debilitating physical condition known as Fibromalaysia and sleep disorder, she

was unable to work two years prior to the separation of the parties. For the purposes of calculating child support and determining alimony, the trial court ultimately determined that the Defendant should have minimum wage income imputed to her.

The court having considered the best interests of the children, awarded Defendant primary physical custody of the parties' two minor children. Defendant was awarded possession of the marital home, subject to its indebtedness, of \$52,000.00. Both parties were awarded equal shares in the ownership interest of the home. Defendant is responsible to maintain and protect the parties' equity in said home until such time as it is sold or either party buys the other out.

The court considered all three of the standard factors required to make a determination of alimony, and entered judgment against Plaintiff for alimony in the amount of \$600.00 per month. The court made a finding that Plaintiff's average gross monthly income is \$2,400.00 and that Defendant is voluntarily unemployed because of her physical disability. The Court found that Defendant, as a result of her condition, is presently receiving assistance from the State of Utah.

Defendant presented evidence of her physical and emotional limitations. This evidence was not refuted by Plaintiff. With that evidence, the court awarded

alimony. For the purposes of determining appropriate child support and alimony, the court imputed minimal income to Defendant of \$829.00 per month. The court restricted the alimony award to \$600.00 per month for a short duration of two years.

The court awarded Plaintiff the right to claim both tax deductions of the children.

Plaintiff has filed this appeal to challenge the trial court's determination with respect to alimony, attorney's fees and the award of the 1978 pick-up truck.

B. STATEMENT OF THE FACTS

Plaintiff, Charles Deloy McKenzie ("Deloy") and Defendant, Kathy McKenzie ("Kathy") were married almost 12 years. [R.190]. They have two children, Cassie, born January 8, 1989, and Sierra, born April 19, 1992.

The primary marital asset is the martial home. [R. 186, 189]. The trial court found that the equity in the home was \$73,000.00. [R. 189]. The court awarded the ownership of the home to both parties, each receiving one-half of the equity. The trial court determined that it was in the best interests of the children that Kathy be awarded possession of the home. However, she is to maintain the monthly mortgage, pay the monthly utilities, be responsible for the day to day maintenance and administration of the home, safe guarding Deloy's one-half

equity interest. [Mem. 2 ; R. 188-89].

As a result of a medical condition termed, Fibromylagia, Kathy has been unemployed for over three years. The symptoms include extreme constriction of all muscle groups, inability to sit or stand for extended periods of time, and sleep disorder. The condition affects her ability to speak, grasp objects with her hands and arms and focus, uninhibited by muscle cramps, on routine tasks. [Trans. 125-129, 170-181].

As a result of these physical, and accompanying emotional challenges, coupled with her financial needs, she receives state assistance. [Mem. 3]. The Court awarded alimony in the amount of \$600.00 per month for a period of two years, beginning August 1999. [Mem. 3].

For the purposes of determining child support and alimony, the Court imputed her at the minimum monthly income of \$829.00. [Mem. 2].

In reality, Kathy's total, real monthly income is \$956.00; \$521.00 in child support for two children, and \$435.00 in state aid. [Trans. 35-36, 133, R. 36]. This is the amount used to support herself and her three children. Were she to receive alimony, the state aid of \$435.00 would likely decrease proportionately.

Deloy's gross monthly income is approximately \$2,400.00. [Mem. 3]. However, he also receives per diem compensation of \$.24 per mile with his long

haul trucking work. [Trans. 74-76]. He is on the road between 20 and 21 days per month. [Trans. 41]. He averages between 14,000 and 7,000 miles each month. [Trans. 76-78]. Deloy's monthly average for the first 1/4 of 1999 was \$2,423.00, and for the last 1/4 of 1999 it was \$2,644.00. [Trans. 99].

Deloy's main offering of his alleged expenses was presented through his Exhibit 5. Deloy's direct testimony indicated his monthly expenses were; rent at \$600.00; maintenance on his truck at \$50.00; medical bill loan payment of \$177.00; personal expenses at \$50.00; entertainment at \$50.00; (this is separate and apart from his additional per diem compensation); monthly installments toward a \$612.00 doctor bill, and \$150.00 per month storage rental fee. [Trans. 40-41, 69-78].

Kathy was awarded child support in the amount of \$464.00 per month. [R. 185].

Not-with-standing the admission of Deloy's Exhibit 5 financial statement, Kathy's attorney disputed and refuted the expenses represented by Deloy during cross examination. Although the trial court accepted into evidence Deloy's exhibit constituting his claim, and Kathy's counsel did not object to it being admitted, this procedure did not necessarily obviate the need for further evidence in support of some items listed on the exhibit. The trial court did not necessarily

accept each item of expense as a proven fact just because it received a statement of the expenses into evidence.

The trial court found that after the separation of the parties, Kathy was in possession of a 1985 Dodge Diplomat. By reason of her inability to meet the financial needs of the family, she was forced to sell the automobile, using the money to pay the family obligations and to support her and the children. The trial court awarded the 1978 Ford truck to Kathy. [Mem. 5].

SUMMARY OF ARGUMENTS

The issues of this divorce were alimony, property division, child custody and attorney's fees. Appellant, Deloy McKenzie, has appealed the issues of alimony, property division, and attorney's fees. He claims there is a lack of evidence justifying the court's award to Appellee, Kathy McKenzie, on each of these issues. The court made adequate findings regarding, (1) the financial conditions and needs of the receiving spouse, (2) the ability of the receiving spouse to provide for herself, and (3) the ability of the payer spouse to provide support that are required by law to award alimony. The court has a duty to assure that Kathy does not become a public charge. *See English v. English*, 565 P.2d 409, 411 (Utah 1977) (discussing that one of the functions of alimony is to provide support for the wife to prevent her from becoming a public charge).

Deloy has the financial ability to pay alimony. His gross monthly income was determined to be \$2,400.00 per month. Kathy is in need of financial assistance. She is the primary care giver of the parties' two minor children. She is awarded physical custody, and bears the burden associated with caring for their day to day needs. She suffers from a debilitating medical condition identified as Fibromyalgia and sleep disorder. Said condition affects her muscle and all the abilities and movement associated with all the muscles in her body. These range from the ability to grasp objects to the ability to speak, her ability to walk, to her ability to focus on ordinary, everyday tasks. She is unable to sit, stand or walk for extended periods of time. She is unable to work and has not worked for over three years. She has received state financial aid as a result of her condition. Deloy did not contest or dispute any of the evidence offered regarding Kathy's physical and emotional limitations.

Kathy was properly awarded possession of the marital home. She is the custodial parent. Deloy's work keeps him away for the majority of the days of each month. Kathy lives in the home subject to paying the mortgage and monthly utilities. She is responsible for its day to day maintenance. Deloy's income is \$2,400.00 per month, Kathy's is approximately \$980.00.

Deloy was awarded the tax benefit for the two children.

The court considered Deloy's representations of his debts and expenses. The court considered both his exhibits and his testimony offered in direct and cross.

Kathy's attorney disputed Deloy's represented debts and expenses. Although the court accepted into evidence Deloy's Exhibit of expenses, the court was not required to accept each item of expense as a proven fact. Particularly where Kathy's attorney disputed the expenses.

In determining whether to award alimony and establishing the amount, the trial court must consider (1) the financial conditions and needs of the receiving spouse, (2) the ability of the receiving spouse to provide for herself, and (3) the ability of the payor spouse to provide support. So long as the record is clear that the trial court has considered these three factors, the determination regarding alimony should not be disturbed unless the court has clearly abused its discretion. In fact, the trial court's alimony award should not be disturbed unless there is a serious inequality that has resulted as to manifest a clear abuse of discretion.

Deloy argues that the findings are against the clear weight of the evidence, and thus clearly erroneous. In determining whether the findings are clearly erroneous, the facts should be viewed in the light most favorable to the findings.

The court considered Deloy's evidence and arguments that he did not have the ability to pay the alimony, specifically directing its own question to Deloy's representations of income and expenses.

The court was availed of much detailed testimony and exhibits of expenses and income of both parties. In such a case, deference should be given to the trial court's assessment of the credibility of the witnesses. The court took all these factors into consideration and determined that Kathy was in need of temporary espousal support for the reasonable and limited duration of two years, beginning August 1, 1999.

Although the function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage, the standard of review does not necessarily require the court to make a specific, detailed finding of the standard of living. With this purpose in mind, the court in *English v. English*, 565 P.2d 409 (Utah 1977), determined that the appellate court need not disturb the trial court's ruling regarding alimony if the three aforementioned considerations are adequately addressed. *Id.* at 411.

Standard of living: The standard of living factor is not an independent factor to be quantified; rather, it is a frame of reference for determining the reasonableness of the alimony award. *Howell v. Howell*, 806 P.2d 1209 (Ut. Ct.

App. 1991). Kathy submitted specific financial information, including debts and income, as well as testimony regarding state assistance, all of which gave the court a clear framework from which to determine her standard of living during the marriage and just subsequent to the parties' separation.

This case presents sufficient evidence to demonstrate Kathy's need for her award of attorney's fees. To recover attorney's fees, Kathy had to show that the award was reasonable and that her need compelled the award. The court specifically found that the evidence provided, clearly indicated that Deloy was employed; that Kathy was unemployed and had been unemployed for approximately two years; that Kathy is receiving public assistance by reason of her unemployed status and financial needs.

Regarding the 1978 Ford truck, the court specifically found that it, along with various other personal property items, should be awarded to Kathy. The court determined to award Deloy the specific items of personal property, including but not limited to those listed in his Exhibit 12. It is clear from the memorandum decision as well as the transcript, that the court attempted to make, taking all factors into consideration, an equitable distribution of the personal property. Although it is alleged in Appellant's summary argument that Kathy's own proposed Findings of Fact awarded the truck to Deloy, this is not the case.

Kathy's proposed findings simply stated that the 1978 truck was valued at \$2,000.00 and was currently being held by Deloy. Indeed the facts of Kathy's proposed findings are not relevant. The court accepted Deloy's findings, not Kathy's. The evidence including the transcript detail and the specificity of the personal property itemization demonstrate the court's careful analysis and consideration of those personal property items.

The Findings should not be disturbed. They are supported by sufficient, substantive evidence.

ARGUMENT

I. DELOY DOES HAVE THE FINANCIAL ABILITY TO PAY ALIMONY, AND THE EVIDENCE SUPPORTS THIS FACT AND THE COURT'S AWARD.

The transcript evidence establishes that although Deloy testified that his gross income was between \$2,019.76 and \$2,342.32 a month, his actual average monthly income was \$2,400.00. [Transcript 32, 33, 35-40, Ex. 9, 10]. The Trial Court Judge asked Deloy directly regarding his income and expenses as represented on his exhibits. [Trans. 39, 40]. Deloy testified that he sometimes lived in Mac's Motel in Heber City and at other times in his truck. He testified

that his motel rent was approximately \$600.00 a month, and that he currently paid medical expenses of \$177.00 a month. [Tr. 40-41].

A. The court's award of alimony and attorney's fees justified given its consideration of Deloy's debts.

Although Deloy argues that his net income does not allow him to pay alimony, the determination of alimony is not conditioned upon the net income of the payer. Deloy presented no evidence or supporting documents other than his exhibits to verify his allegation that his net income was between \$1,500.00 and \$1,700.00 per month. He presented no evidence or documents other than the exhibits to support his claimed monthly expenses of between \$3,000.00 and \$3,500.00.

The court found that Deloy's rent was approximately \$600.00 per month, [Mem. 2, Trans. 40, 41]; and that he paid \$159.00 a month for health insurance which included coverage for himself and his two children. [Trans. 70, 71]. Deloy also testified that he sometimes lived in his motor home camper at another residence and that he also stored much of his personal property at this same residence, paying \$150.00 per month for storage. He testified that he had no utilities costs. [Trans. 59, 70]. Deloy's testimony of \$700.00 to \$1,000.00 in rent was an estimate of what he might have to pay if he chose to move from Mac's

Motel or not live in his motor home camper. He testified that there was a \$50.00 per month payment for maintenance costs for his 1978 Ford pickup truck; that he paid \$167.00 per month toward a medical expense loan for medical expenses he had incurred; that personal expenses were \$50.00 per month, and that he budgeted an additional \$50.00 per month for entertainment and \$50.00 a month for food. [Trans. 72, 73]. He testified that he had a doctor bill between \$600.00 and \$612.00 that he was paying off a little per month. [Trans. 73, 74]. He testified that he received per diem amounts of money in the amount of \$.24 a mile in connection with his long-haul trucking employment. He testified that he sometimes traveled 14,000 miles a month and sometimes 7,000, depending upon the job. [Trans. 74-78]. He testified that for the first quarter of 1999, his income averaged \$2,423.00, and that for the last quarter of 1998 his income averaged \$2,644.00. [Trans. 99].

The court did consider Deloy's needs and expenditures such as housing, payment of debts and other living expenses. The court made a finding that certain items of personal property had been sold since the marriage, and the funds were used to provide for the support of the family. The court found that during the marriage each of the parties used marital monies for the purpose of paying debts or obligations which were incurred prior to the marriage. [Mem. 4]. The court found that inasmuch as the payment of such obligations was by way of agreement

between the parties, no offsets or credits of such payments would be allowed and that the parties were mutually responsible for any debts or obligations incurred since their separation in February, 1997. [Mem. 4]. The court found, after considering all this evidence; Deloy's present income and Deloy's ability to earn income; his debts and alleged expenses; Kathy's limited, state assistance and financial assistance from family, that Deloy should pay Kathy alimony in the sum of \$600.00 per month for a short period of two years, beginning August 1, 1999.

The transcript record clearly shows Kathy's counsel disputing by cross examination, Deloy's representations of income and expense.

In *Willey v. Willey*, 16165, 330 Utah Advance Report 8 (Utah 1997), the Court noted that,

"...in domestic relations cases the parties commonly submit statements of assets and expenses as exhibits. Trial courts also commonly accept into evidence exhibits constituting that parties' claim without objection. However, this procedure does not necessarily obviate the need for further evidence in support of some items listed on the exhibit . . .the trial court is not required to accept each item of expense as a proven fact just because it receives a statement of expenses into evidence." *Id.*

The court in the instant case accepted the exhibits and considered the testimony, then made a decision regarding alimony based upon those considerations.

The court specifically found that Deloy's gross income was \$2,400.00 per month to support himself only and that Kathy's income at the time of trial and for two years prior was zero. She was imputed to a minimum wage income for the purposes of calculating child support and determining an appropriate amount for alimony. Although she had been unemployed for two years, she had received little if any support from Deloy since their separation. She had supported herself and her two children.

II KATHY DEMONSTRATED HER INABILITY TO PROVIDE FOR HER OWN REASONABLE NEEDS.

The court found that Kathy's present income and subsequent income over the past two years was zero; that at one point she was required to sell her vehicle and use the proceeds for the financial support of herself and her children; that she was receiving financial aid from the State and from other individuals and entities as a direct result of her physical incapacity and inability to work. The evidence demonstrated that Kathy suffers from a condition of Fibromalaysia which effects her ability to hold onto things. [Trans. 125, 170-181]. Said physical condition increases with stress and is exacerbated by long periods of sitting or standing. [Trans. 126]. Evidence was received that the physical symptoms include tightening of muscles, increased arthritic conditions, bruising and bulging of the

muscle tissue inside the arms and calves of the legs. [Trans. 125, 126, 127, 129, 170, 80, 81]. The transcript shows that at the time Deloy left Kathy in 1997 there was no money left in the joint checking account. [Trans. 130]. Kathy had to borrow money to pay bills, and borrowed money from her mother, over \$10,000.00, to pay utilities, home mortgages and other monthly support amounts for herself and the children. [Trans. 130-133].

All these facts determined in the court's mind that she lacked the ability to provide for her own reasonable needs.

A. The financial conditions and needs of Kathy, and the ability of Deloy to produce sufficient income were considered by the court and justify the alimony award.

The court having established Deloy's monthly income of \$2,400.00 and Kathy's income equal to minimum wage of \$892.00, set child support in the amount of \$464.00. Alimony was awarded in the amount of \$600.00 per month. Although the court imputed income to Kathy, the reality of the circumstances as supported by the evidence and findings is that Kathy is unemployed because of her physical condition and has been for a period of three years. Her present and real income is zero. The court's findings articulate the following mathematical table:

Deloy's Monthly Income \$2400.00	Kathy's Monthly Income -0-
	(\$996.00 imputed)
-\$464.00 child support	+ \$464.00 child support
-\$600.00 alimony	+ \$600.00 alimony
<hr/> \$1,336.00	<hr/> \$ 1,064.00

Kathy's Income:

Based upon the evidence of the current situation and the prevailing income condition of Kathy for the previous two years, with the child support and alimony, Kathy would begin anew with an income of \$1,064.00. This \$1,064.00 is to be divided between three individuals, herself and the two children. Said amount averages out to \$354.66 per person, per month. On the other hand, Deloy's income after divorce would be \$1,336.00. In the event Kathy desires to supplement the \$1,064.00 monthly income for her and her children, she will have to seek employment.

Kathy's employable future:

The evidence suggests that she does not have the ability to work full-time and that any employment she might be able to obtain will be limited in hours and most likely limited by minimum wage. She will also continue her duties as the

primary custodian and care giver of the children, attending all their school and extra-curricular activities, helping with their homework. She will be forced to balance between working full-time or part-time jobs for a gross monthly amount of around \$892.00, and administering a household, functioning as a single parent. Kathy will find it extremely difficult to work long hours because of her debilitating physical condition. She will also find it extremely difficult to maintain her responsibilities at home as a mother and seek additional education to better her station in life. This is especially true, given her physical condition and inability to sit or stand for long periods of time and her advanced age.

Doyle's support patterns and Kathy's burden: Regarding Deloy's financial support to Kathy in the past, the evidence indicated that although Deloy would catch up eventually, he would not pay consistent child support for long stretches of time. [Trans. 134]. The evidence was that since the separation in 1997 Kathy had paid all the medical bills involving the children. [Trans. 139]. Kathy testified that she had at one time paid a \$2,500.00 past due delinquent child support amount for Deloy to his previous wife by using her own credit card, then making monthly payments to satisfy the credit card amount. [Trans. 144]. The court specifically asked Kathy what the balance of the existing mortgage was and she replied between \$51,000.00 and \$52,000.00. The court subsequently awarded

her the possession of the home subject to that indebtedness, charging her to preserve the home and the equity of which Deloy would receive one-half. [Trans. 144]. Kathy also testified that at one point she refinanced the entire marital debt, by putting it on a credit card in the amount of \$4,771.16 and then paying that off by herself. Trans. 163, 164].

Kathy testified that she has attempted to refinance the home or get a new mortgage in an effort to buy out Deloy's interest but has been unable to do so because of her inability to work and her physical limitations. [Trans. 165].

B. Deloy failed to marshal the evidence to show that Kathy could not provide for her own needs.

Based upon the above arguments, evidence in the transcript and Findings of Fact by the court, Deloy did not meet his marshaling obligation to find supporting evidence that Kathy did not have the ability to provide for her own reasonable needs. Deloy's argument in support of his marshaling efforts does not include the fact that Kathy received up to \$10,000.00 from her mother to pay monthly obligations and help support her and her children. Mrs. Ora Simpson, Kathy's mother, testified that the money was used to pay delinquent gas accounts, water

bills, house payments. [Trans. 167, 168]. Again, simply given the amount of income that this mother has had for the past two and a half years, compared with the amount of income available to Deloy establishes Kathy's financial need and the ability and responsibility of Deloy to help support that financial need. [Trans. 35-36].

The evidence is clear that she is receiving State aid as a result of her financial need and her unemployed status. Alimony is awarded based upon her need, the needs of the children, and her needs as they relate to her obligations as a primary physical custodian of the children to help provide for their support. It is very clear that Kathy needed the money from the State in order to survive.

Deloy makes no representation of the evidence regarding Kathy's physical condition. Nor did he contest or refute any evidence of her condition during the trial.

In light of the foregoing, the court's finding concerning Kathy's need for alimony and her ability to pay her reasonable expenses is proper and appropriate. With regard to Kathy's ability to provide for her own needs, the court did not reject her disability claim. The court specifically found that she was voluntarily unemployed, that her income was zero, and that because of her condition she was presently receiving assistance from the State and other individuals and entities.

[Mem. 3]. The court found that there was no evidence received from Kathy's treating physicians which would have bolstered her claim that she cannot work due to her present physical or emotional condition. However, evidence was received that Kathy was presently under the care of a physician addressing her medical needs. The court found that it was appropriate for the purposes of calculating child support to impute her at a minimum wage at the amount of \$892.00 per month.

The imputed income cannot be considered as a source of income for Kathy inasmuch as she is unable to work. Her sole income per month was child support in the amount of \$521.00 and State assistance of \$435.00, for a total income amount of \$956.00 per month. [Trans. 35-36, 133 R 36]. This \$956.00 is well below the poverty level in the State of Utah. Particularly when you consider that she is to support three individuals with said amount, or in other words, \$318.66 per individual per month.

There was no need for the trial court to assess the unreasonableness of Kathy's living expenses because the monthly income is at such a poverty stricken level. How unreasonable can a person's expenses become when she is trying to maintain a household of three persons on \$318.66 per month, per individual? What possible analysis could the court have made to determine whether her

income was sufficient to satisfy a reasonable need? It is blatantly clear that any reasonable monthly expenses are going to far exceed the amount of money and income that she was receiving for her and her children. \$521.00 per month plus \$600.00 in alimony would equal \$1,121.00 per month in support. No amount of clever accounting or frugal living will allow a person to live at a reasonable level on that amount of money per month.

Given Kathy's limited income and almost per se, judicial notice aspect, of what any reasonable minimum expenses would be, there is no burden to prove reasonable expenses or to prove a standard of living during the marriage. Given the evidence of the transcript and the findings of the court, the trial court was well within its discretion to award an alimony amount of \$600.00 per month. Specifically and most importantly given the fact that the alimony was limited to a short duration of two years.

C. The trial court did not abuse its discretion by awarding Kathy the use of the marital home along with a modest award of alimony.

The award of the marital home does not prevent Deloy from obtaining “**any benefit**” from his \$36,500.00 equity, as he argues. The court specifically provides in its finding that Kathy is awarded possession of the home **subject to the satisfaction of the indebtedness thereon.** Kathy is to protect and maintain the

equity of both parties in the marital home.

Allowing Kathy and her children to remain in the home does not alleviate the need for alimony. Again, especially where the alimony is restricted to such a short duration of two years. Kathy will have to maintain the home, will have to bear the day to day maintenance expenses of the home, and provide the necessary day to day components of running a household for not just one person, but three. The amount of food, commodities, toilet paper, toiletries, bedding, kitchen products, the list goes on and on, all fall within the obligation and cost to Kathy. Given the amount of her income and the amount of Deloy's income and the substantial day to day costs of administering a household, now on her own, in and of itself support the award of a two year alimony award.

Taking into account that the children will soon be entering teenage years, and will require additional monies for activities, for which Deloy may or may not participate, but most assuredly is not ordered to participate, these initial costs of administering the home and providing for her children will only increase with time. And the increase will be substantial. Coupled with these factors is the award to Deloy of the substantial tax benefit per child per year in the approximate amount of \$1,000.00. Given these factors, the award of alimony and attorney's fees is appropriate in this case. Such an award is far from an abuse of discretion.

III. THE COURT'S AWARD OF ALIMONY IS NOT CLEARLY ERRONEOUS AND IS NOT AN ABUSE OF DISCRETION.

In formulating alimony awards, the trial court has broad discretion, and its decisions will “not be overturned absent an abuse of discretion or manifest injustice.” *Watson v. Watson*, 837 P.2d 1,3 (Ut. Ct. App. 1992) (quoting *Schindler v. Schindler*, 776 P.2d 84, 90 (Ut. Ct. App. 1989)). In awarding alimony this appellate court requires the trial courts to consider each of the following 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 these three factors have been considered, the trial court’s alimony award should not be disturbed, unless such a serious inequity has resulted as to manifest a clear abuse of discretion. *Morgan v. Morgan*, 854 P.2d 559, (U. Ct. App. 1993). To review for abuse of discretion relevant to an alimony award, the appellate court should not reverse a trial court’s Findings of Fact unless they are “clearly erroneous.” *Young v. Young*, 1999, Utah 38, paragraph 15, 979 P.2d 338; accord Utah R. Civ.2929 Pacific 52nd, (a); *Pennington v. Allstate Insurance Company*, 973 P.2d 932, 937 (Utah 1998). Further, to determine if the Findings are against the clear weight of the evidence and thus clearly erroneous, the Appellate Court should

review the facts in the light most favorable to the Findings. See *State v. One 1984 Oldsmobile*, 892 P.2d 1042, 1043 (Utah 1995); *LeFavi v. Bertoch*, 2000 Utah App. 5 (17, 994 P.2d 817).

In the instant case, the transcript evidence as well as Findings in the Memorandum Decision show that the court considered each of these three factors in determining its alimony award. The court took evidence of Deloy's representations of income and expense, and admitted into evidence Deloy's exhibits showing monthly expenses. Particularly, the transcript demonstrates the court's careful and patient reception of detailed information regarding the financial strengths and weaknesses of both parties.

While the Appellate Court should review these determinations for abuse of discretion, said review should grant considerable deference to the trial court, due to its familiarity with the facts and its evidence. See *Pathel v. Pathel*, 732 P.2d 96, 100 (Utah 1986); *Owen v. Owen*, 579 P.2d 911, 913 (Utah 1978); see also *Harding v. Harding*, 26 Utah 2nd, 277, 280, 488 P.2d 308, 310 (1971). Pursuant to the transcript, the Judge specifically asked Deloy a question during Deloy's examination by his attorney regarding his income and expenses. The Judge also made inquiry regarding Deloy's offered income in Exhibit 9, and support checks in Exhibit 8. The Court inquired directly concerning the fact that Deloy

sometimes resided in his truck, while at other times in Mac's Motel in Heber City. The Court inquired as to Deloy's representations of his total monthly debt being between \$3,000.00 and \$3,500.00. [Tr. 7 through 42].

A. The findings demonstrate the court's consideration of evidence and specific supportive criteria which justify the court's ruling.

The findings demonstrate the court's consideration of evidence and specific supportive criteria which justify the court's ruling.

Regarding the factors to determine the alimony award, the court made the following findings:

1. Deloy has an average gross monthly income of \$2,400.00, and Kathy is voluntarily unemployed and has been unemployed, for approximately two years. [Mem. 3, 5].

2. Kathy is receiving public assistance by reason of her unemployed status and financial needs. [Mem. 5].

3. Kathy testified that she suffers from a medical condition identified as Fibromalaysia and sleep disorder. [Mem. 3].

4. Kathy testified that her condition is debilitating to the point that she is unable to hold a full-time job because of extreme difficulty in dealing with stress and pressure associated with work. [Mem. 3].

5. Because of Kathy's condition, she is presently receiving assistance from the State and other individuals and entities. As a result of no evidence being received by the court from Kathy's treating physicians, which establish that Kathy cannot work due to her present physical and emotional condition, the court allowed imputation of the minimum wage for Kathy to be used by counsel to calculate the statutory amount of child support. [Mem. 3].

6. At the time of the separation, Kathy had to sell a vehicle in order to obtain additional monies to live on to support herself and her children. The court addresses the short duration of the marriage, ten years. [Mem. 3].

7. Two children had been born of the marriage of the parties and Kathy had been the primary physical care provider for the children, with the children being in her custody since the parties' separation in February of 1997. [Mem. 2].

8. With the award of the home, alimony and child support Kathy possessed the individual abilities to provide the children a reasonable and appropriate place to live and the necessities of life. [Mem. 2].

9. Deloy was a truck driver, driving long-haul and local, which frequently takes him out of the State of Utah for many days a month. [Mem 2].

10. The children need an established environment where they can receive the care and nurturing necessary for their care and development, and that Kathy

had been and continues to be the appropriate parent to provide such care. [Mem 3].

11. The children are ages 10 and 7. Deloy should be awarded the dependent child deduction for both children for tax purposes. [Mem. 2]

12. For the purposes of determining child support and alimony, it was appropriate to impute income to the Defendant as a minimum wage earner recipient. [Mem. 2,3].

13. Each party would be awarded one-half of the equity in the marital home equaling \$36,500.00 each, and that Kathy be awarded possession of the home subject to her taking on the indebtedness thereof. [Mem. 4].

14. With regard to the items of personal property, the court found that Deloy would be awarded all of the personal property listed on his Exhibit 12. [Mem. 4].

15. Additionally, that Deloy would be awarded the Oceana trailer, the 1989 Yamaha Blaster 4-wheeler, the tool chest and tools. [Mem. 4].

16. Subsequent to the temporary order for payment of espousal support in this case, Deloy sold the two wave runners and trailer for \$3,500.00 without accounting to Kathy for those funds. [Mem. 4,5].

17. Although Kathy had been in possession of the 1985 Dodge Diplomat after the separation of the parties, by reason of her inability to meet the financial

needs of the family she was forced to sell the automobile and use the money to pay the family obligations and to support her and the children. [Mem. 5].

18. The court awarded Kathy the 1978 Ford truck. The court also found that the household furniture and furnishings should remain with Kathy and the minor children, except for those items listed in Deloy's personal property list. Kathy was also awarded the 1985 Yamaha 4-wheeler and the trampoline. [Mem. 4,5].

19. Specifically regarding attorney's fees, the court found that Deloy is employed and receives monthly compensation as a result of his employment; that Kathy is unemployed and has been unemployed for approximately two years. The court also found that Kathy is receiving public assistance by reason of her unemployed status and financial needs. [Mem. 5].

B. Kathy's evidence of her debilitating physical condition was not contested by Deloy. The court awarded alimony in part because of this evidence, imputing income to her in the calculation of child-support and to help determine a reasonable amount of alimony.

Kathy presented evidence of her physical and emotional conditions. She described the symptoms of Fibromyalgia and sleep disorder. This evidence was never opposed by Deloy. He presented no evidence to contradict Kathy's

testimony. He knew of her condition before the separation. He knew she had been unable to work for the two years prior to their separation.

Although the court found that there was no evidence from Kathy's treating physicians which established that she cannot work due to her present physical or emotional condition, he did not find that she was able to work given her condition. The Court simply imputed income to her as a minimum wage recipient for the purpose of determining child support and alimony. The court gave weight to her evidence. Not as much as it would have otherwise with the supporting physician testimony, but it granted nonetheless as a factor. Especially in light of the fact that Deloy did not contest her evidence. Had Kathy introduced a physician's evidence, the alimony and child support would have been increased.

Taking all these considerations and factors as a whole, the court limits the alimony to a short period of two years, applying retroactively in this case to August 1, 1999.

Kathy fits the profile that is described in *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985), and other cases in that she is 41 years old, has minimal marketable job skills, and has spent most of the years of the parties' marriage raising and caring for the parties' children and their home, presumably with the concurrence of Deloy. Her likelihood of achieving significant salary levels in the

future is slim. This profile was also used and articulated in the *Howell v. Howell*, 806 P.2d 1209 (Ut. Ct. App. 1991). The Utah Appellate Court has determined that alimony is appropriate after a long-term marriage, where the wife usually has worked primarily in the home, has limited job skills, and is in her late forties or fifties. See *Gardiner v. Gardiner*, 748 P.2d 1076 (Utah 1988) and *Rasband v. Rasband*, 752 P.2d 1331 (Utah Court of Appeals 1980). *Jones* defends the appropriateness of alimony given the specific profile found in this case when it held:

During most of the marriage, with the full consent and support of her husband, the wife devoted her time to raising the four children and donating her services to various social organizations . . . it is entirely unrealistic to assume that a woman in her mid-fifties with no substantial work experience or training will be able to enter the job market and support herself in anything even resembling the style in which the couple had been living. *Jones*, 700 P.2d at 1075.

C. No Specific Evidence Is Needed To Support A Finding That Kathy's Current Living Standard Is Less Than She Enjoyed During The Marriage.

Although the function of alimony is to provide support for the receiving spouse as nearly as possible at the standard of living she enjoyed during the marriage, the formula for review of this principal is adequately provided for

pursuant to the evaluation of three factors: (1) the financial conditions and needs of the spouse seeking support, (2) the ability of the spouse seeking support to produce a sufficient income for herself, and (3) the ability of the payer spouse to provide support. *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985).

When the trial court considers these three factors, the determination and analysis of the standard of living are performed in the selfsame evaluation.

This Court has repeatedly stated that the trial court has broad discretion in matters of alimony, and its decision will not be disturbed so long as it is exercised in accordance with the standards that have been set by this Court. *Stevens v. Stevens*, 28 P.2d 991 (Ut. Ct. App. 1986). *See also Jones*, 700 P.2d at 1075; In *Stevens*, the court, finding the Defendant to be a woman in her forties, who did not pursue her own career during the parties' marriage, who had few marketable skills, and earned one-third of her husband's salary, with little chance, absent further education, to increase that amount, determined that such criteria supported a finding of need for alimony and upheld the trial court's decision.

In the instant case, the trial court considered the fact that Kathy was voluntarily unemployed because of her medical condition of Fibromyalgia and sleep disorder. The court considered her testimony that her condition was debilitating to the point that she was unable to hold a full-time job; that she had

extreme difficulty in dealing with stress and pressure associated with work. The court recognized that she was receiving assistance from the State, other individuals and entities to help support her and her children. *See court's Memorandum Decision dated 8-2-99, page 3.*

The court considered evidence that Deloy had an income of \$2,400.00. The court based this information upon Exhibits 6, 9, and 10 to Deloy's W-2s of '98, '97, and '96, Deloy's pay stubs dated April 30, 1999 and May 31, 1999. [Mem. 3]. The court considered Deloy's present income, his ability to earn income, the ability of Kathy or the inability to produce income at a level of a minimum wage earner. The Supreme Court has held that consideration of these factors or similar factors as in the *Stevens* case, meets the standard established in *Jones* and articulated again in *English*.

The trial court in the instant case simply did not want Kathy to become a public charge. The Court determined it necessary that Deloy provide some temporary support for a period of two years to help Kathy get on her own feet. In view of the history of the parties and the modest amount of alimony and its short duration, the alimony award is appropriate and required for period of time to bridge Kathy into single life. *See Morgan v. Morgan*, 854 P.2d 559. 213 (Ut. Ct. App. 1993) (depending upon the specific facts and history of the parties, even

when the wife is able to produce a good income, a modest amount of alimony should be required for a period of time to bridge the gap from married life to single).

Deloy makes much of his argument that no alimony can be awarded without a specific finding and determination of standard of living. Determination of whether alimony is or is not *originally* appropriate does not turn upon the issue of the parties' similar or different standard of living following the divorce. The issue of whether to initiate an award of alimony is quite different from the issue of whether alimony should be terminated when the recipient spouse's standard of living becomes equal to the standard of living during the marriage, as set forth in *Bridenbaugh v. Bridenbaugh*, P.2d 241, 242-243 (Utah Court of Appeals 1990).

In *Schaumberg v. Schaumberg*, 875 P.2d 598 (Ut. Ct. App. 1994), this Court concluded that given the view of the trial court's equitable distribution of the marital assets and debts, the court's consideration of the wife's uncontroverted testimony regarding her needs and financial challenges, and the husband's ability to pay, those considerations effectively satisfied the requirement to consider the necessary factors to substantiate an alimony award. Accordingly, this Court determined that the trial court did not abuse its discretion in awarding her an \$800.00 per month alimony. It is also important to note that in the *Schaumberg*

case, the court made no specific findings regarding the wife's needs. The wife simply submitted living expenses and accruing debts to establish her needs and standard of living. The court taking into account her skills and past experience, imputed to her an earning ability of \$1,000.00 per month and awarded her a portion of her husband's military retainer amounting to \$580.00 a month. *Id.* at paragraph 19.

Deloy's argument that the record contains no evidence of the parties' standard of living during the marriage is without merit. According to the *Schaumburg* review, as long as the three factors articulated in *Jones* are considered, the standard of living can be determined by inference.

These three factors are (1) the financial conditions and needs of the wife, (2) the ability of the wife to produce sufficient income for herself, and (3) the ability of the husband to provide support. See *Jones*, 700 P.2d at 1075; *English v. English*, 565 P.2d 409 (Utah 1977). Here, as in *Stevens*, Kathy is a woman in her forties who has not substantively pursued her own career during the parties' marriage, has few marketable skills, and may earn in the future not much more than a third of her husband's salary, with little chance, absent further education, to increase that amount. This criteria, as in the Stevens case, well supports a finding of need for alimony and should be upheld by this court. (*See Stevens v. Stevens*,

728 P.2d 991 (Utah 1986), to see a discussion regarding the Jones factors where the trial court addressed said criteria, the Supreme Court supported the finding for a need of alimony.)

The evidence as well as the findings by the trial court specifically set forth Kathy's financial condition and need for support, including her earning capacity and Deloy's income and ability to pay. The findings as well as the transcript evidence are replete with the court's consideration of the parties' financial strengths and weaknesses. The record establishes a consideration by the court of the overall view of the combined income while they were married and standard of living during the eleven year marriage.

The most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage and to prevent the wife from becoming a public charge. *English*, 565 P.2d at 411. As discussed before, with this purpose in mind, the *English* court articulated three factors that must be considered in fixing a reasonable alimony award. Those factors were considered by the trial court. It is only when a trial court fails to consider these factors that it is an abuse of discretion. In the instant case, the evidence is clear that this trial court considered those factors. *Olsen v. Olsen*, 704 P.2d 564, 566, 567 (Utah 1985). (An appellate court will not disturb a trial court's

ruling if these factors are adequately addressed).

Regarding the parties' standard of living, as is apparent from the foregoing quotation, the receiving spouse's previous standard of living is not an independent factor to be quantified and incorporated into a formula for calculating alimony. Rather, it is a frame of reference for determining the reasonableness of the alimony award. *See generally 2H. Clark, Jr., The Law of Domestic Relations In The United States Section 17-5(8)(2d ed. 1987).*

In the instant case, the trial court was concerned with the risk of Kathy becoming a public charge, given the apparent current inability to cover her basic needs and provide adequate income. When the three factors from *Jones* and *English* are considered, the standard of living of the parties is deemed to have been discovered and addressed. *See Howell*, 806 P.2d 1209 (Ut. Ct. App. 1991). The findings in this case articulate and provide adequate grounds for determining alimony. The trial court need not provide subsidiary findings on Deloy's ability to pay alimony.

As discussed above, given the amount of Deloy's income compared with Kathy's income and the evidence provided pursuant to direct examination in the transcript and the findings of the court regarding his expenses, the court properly determined that Deloy had the ability to pay the alimony. As stated before, the

very fact that Kathy's income was so limited, that she was receiving public assistance, and depending upon the financial assistance of other entities and persons, justifies the awarding of alimony.

Consequently, the court need not make subsidiary findings on Kathy's ability to pay her living expenses. It is clear from the findings and from the transcript record, Kathy lacked the ability to provide for her own financial needs or to maintain herself as she had struggled to do during the marriage.

**IV. AN AWARD OF ATTORNEY'S FEES IS APPROPRIATE
GIVEN THE PARTIES' RESPECTIVE FINANCIAL
CONDITIONS.**

The factors to determine the appropriateness of awarding attorney's fees are almost identical to the factors in considering an alimony award. The third factor of the *Muir* case regarding the reasonableness of requested fees was clearly dealt with by the trial court. *Muir v. Muir*, 841 P.2d 736 (Ut. Ct. app. 1992).

The Memorandum Decision specifically indicates that Deloy shall pay reasonable attorney's fees incurred by Kathy in defending her claim, and that such fees and costs may be established by counsel for Kathy filing an affidavit setting forth the claimed attorney's fees and costs. The evidence and the findings establish that Kathy was unemployed and had been unemployed for approximately two years and that she was receiving public assistance by reason of her

unemployed status and financial needs. For the reasons stated above, the award of attorney's fees for Kathy was appropriate and judicious. [Mem. 5].

V. THE 1978 FORD TRUCK WAS PROPERLY AWARDED TO KATHY.

The trial court specifically found that after the separation of the parties, Kathy was in possession of the 1985 Dodge Diplomat. By reason of her inability to meet the financial needs of the family, that Dodge Diplomat was sold by Kathy to pay for family obligations and to provide support for her and her children. Kathy is in need of a vehicle. Kathy is the physical custodian of the children, which further necessitates her need for the vehicle. She is the one who is going to be, for the most part, attending the children's extra-curricular activities, dropping them off and picking them up from school, needing daily transportation to and from work. Whereas Deloy has a job as a long-haul trucker and for long periods of time will not need a vehicle. He is not the primary custodian of the children, and he has the far better ability to provide for his own transportation.

The 1978 Ford truck has not necessarily been Deloy's personal and separate personal property since its purchase and was not awarded to him as part of Kathy's proposed Findings of Fact.

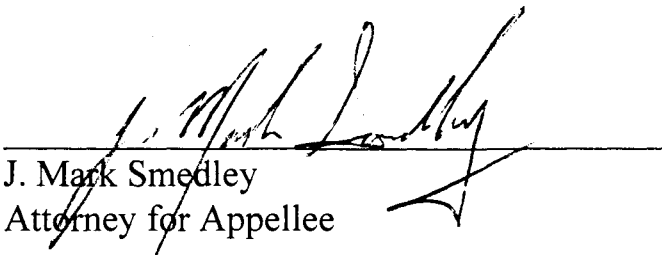
CONCLUSION

For the reasons discussed above, this Court should affirm the trial court's award of alimony and attorney's fees on behalf of Kathy.

This Court should affirm the trial court's award of the 1978 Ford truck on behalf of Kathy.

This Court should award attorney's fees and costs to Kathy in her defense of this appeal.

DATED this 28th day of September, 2000.



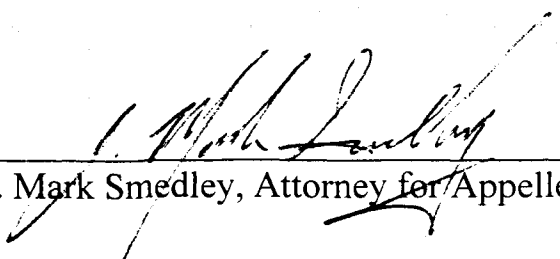
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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of September, 2000, I mailed via first class mail, postage pre-paid, two true and correct copies of the foregoing Appellee's Brief to:

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ATTACHMENTS

FILED
Fourth Judicial District Court of
Utah County, State of Utah.
CARMA B. SMITH, Clerk
8/2/99 Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT
WASATCH COUNTY, STATE OF UTAH**

CHARLES DELOY MCKENZIE, Plaintiff, vs. KATHY MCKENZIE, Defendant.	MEMORANDUM DECISION CASE NO. 97440041 DATE: 8/2/99 JUDGE: GARY D STOTT CLERK: SLW
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RULING

This matter came before the Court for trial on June 18, 1999. The parties were present and represented by counsel. Based upon the evidence presented, the Court hereby enters the following memorandum decision:

1. **Jurisdictional Facts and Grounds for Divorce:** Plaintiff and defendant are bona fide and actual residents of Wasatch County, State of Utah and have been for more than three months immediately prior to the commencement of this action. Plaintiff and defendant are husband and wife, having been married on March 1, 1989, in Reno, Nevada. There are irreconcilable differences between the parties, making continuance of the marriage impossible. More than 90 days have elapsed since the filing the complaint in this action and the parties have completed the educational course for divorcing parents as shown by their certificates offered into evidence.

2 Custody and Visitation: Two children have been born to this marriage, Kassie, born January 8, 1989, and Sierra, born April 19, 1992. Defendant has been the primary physical care provider for the children, with the children being in her custody since the parties' separation in February 1997. In deciding the issue of custody, the Court has considered evidence submitted by the parties with respect to their individual abilities to presently provide for the children a reasonable and appropriate place to live and to provided the necessities of life. The evidence in the case established that plaintiff is a truck driver, driving long haul and local, which frequently takes him out of the state of Utah for many days a month. From Mr. McKenzie's own testimony, he presently lives out of his truck or in a motel.

The children need an established environment where they can receive the care and nurturing necessary for their development. The children are ages ten and seven. Therefore, the Court finds the best interest and welfare of the children can be met by awarding to the mother primary custody of the children, subject to visitation by the father, pursuant to the statutory guidelines as provided in § 30-3 UCA.

The custodial parent shall notify the non-custodial parent within 24 hours of receiving notice of all significant school, social, sports and community functions which the children are participating in or being honored, and the non-custodial parent shall be entitled to attend and participate fully with the children. Furthermore the custodial parent will immediately notify the non-custodial parent of any medical treatment provided to the children. The plaintiff shall be awarded the dependent child deduction for tax purposes for both children since the mother currently has no income and would not benefit from the deduction.

3. Alimony and Child Support: For the purpose of determining child support and alimony, based upon the evidence provided, the Court believes it is appropriate to impute income to the defendant as a minimum wage recipient.

The Court finds that Mrs. McKenzie is voluntarily unemployed. She has testified that she suffers from a medical condition identified as fibro myalgia and sleep disorder. She indicated that her condition is debilitating to the point that she is unable to hold a full time job because of extreme difficulty in dealing with stress and pressure associated with work. Because of her condition, she is presently receiving assistance from the State and other individuals and entities.

However, there was no evidence received by the Court from Respondent's treating physicians which established that Mrs. McKenzie cannot work due to her present physical or emotional condition. Evidence was received which indicates Mrs. McKenzie is presently under the care of a physician addressing her medical needs.

Evidence has established that Plaintiff's income as a truck driver averages \$2400.00 per month. That figure is arrived at based upon the testimony provided and the evidence found in Exhibit's six, nine, and ten. The plaintiff's income of \$2400.00 per month and the minimum wage of the defendant as imputed to her are to be used by counsel to calculate the statutory amount of child support. Considering Plaintiff's present income, plaintiff's ability to earn income, ability of the Defendant to produce income as a minimum wage earner, it is the Court's opinion that the Defendant is in need of temporary spousal support. In fact, the Court notes that since the time of separation the Defendant has had to sell a vehicle in order to obtain additional monies to live on to support herself and the children. The Court also notes that the parties were married on March 1, 1988. They were separated in February of 1997. As a result of the shortness of the marriage, the evidence recited above and the factors referred herein with respect to issue of alimony, it is the Court's opinion that Plaintiff shall pay to Defendant for alimony the sum of \$600 per month for two years beginning August 1, 1999. In deciding the issue of alimony the Court must make findings and conclusions with respect to the following factors: a) the financial condition and needs of the party seeking alimony, b) the ability of the payer/spouse to provide support, and the ability of the receiving spouse to produce income, and © the length of the marriage. (See § 30-3-5 UCA, *Chambers v Chambers* 840 P.2nd, 841 (UCT.App.1992). The general purpose of alimony is to prevent the receiving spouse from becoming a probate charge and to maintain to the extent possible the standard of living enjoyed during the marriage.

4. **Real Property Division:** Defendant and the children have been living in the home which was purchased by the parties during the course of their marriage. From the evidence received at trial it was difficult for the Court to determine the actual value of the home. Nevertheless, the Court finds that the parties owe approximately \$52,000 on the home. The Court concludes that the present value of the home is \$125,000. Deducting the \$52,000 mortgage, the equity in the home is established as of the time of trial to be \$73,000. Each party is entitled to one-half of that sum which equals \$36,500. From the testimony provided, the Court believes it is reasonable that Defendant be awarded the home subject to the indebtedness. Should Defendant remarry or cohabitate, then in such event, whichever shall occur first, she shall either sell the home or refinance it and pay to Plaintiff his equity as established herein less any amounts to be deducted as set forth in this opinion. Such sum shall be paid within ninety days of the remarriage or cohabitation.

5. **Personal Property Division:** From the evidence provided the Court finds that the parties brought into the marriage items of personal property. Some of those items of personal property were subsequently sold and the funds used to provide for the support of the family. Therefore the Court finds that such funds were co-mingled for family use. Any items of personal or real property purchased by such funds then constituted marital property. The Court finds that during the course of the marriage each of the parties used money of the parties for the purpose of paying debts or obligations which were incurred prior to the marriage. In as much as the payment of such obligations was by way of agreement between the parties, no offsets or credits for such payments will be allowed. The parties are mutually responsible for any debts or obligations incurred since the time of the separation in February 1997. Furthermore each party shall be awarded any asset acquired by them after the time of separation and will remain that parties' sole and separate property.

The parties acquired various items of personal property during the course of their marriage. Plaintiff is awarded the following items: (a) the items of personal property listed on plaintiff's Exhibit 12. If those items are still in the residence of the defendant they shall be made available to the plaintiff within 30 days of the date of this ruling. Plaintiff is also given the Oceana Trailer. Plaintiff is also given the 1989 Yamaha Blaster 4-W. Plaintiff is awarded the tool chest and tools. The Court finds that subsequent to the Court's temporary order for the payment of

spousal support in this case the plaintiff sold the two wave runners and trailer for \$3500 without accounting to the defendant for such funds. Defendant is entitled to ½ of the \$3500 which plaintiff received in the sale of the wave runners and trailer. The amount shall be deducted from his equity interest in the home. The following items of personal property will be awarded to Defendant: the 1978 Ford truck, and all of the household furniture and furnishings shall remain in the home with the defendant and the minor children, except those items listed in plaintiff's exhibit 12. The defendant shall be given the 1985 Yamaha 4-w and the trampoline.

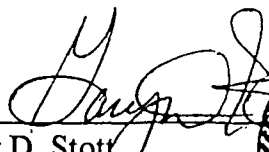
*Truck for
transportation
of children
activities* The Court finds that after the separation of the parties, the defendant was in possession of a 1985 Dodge Diplomat. By reason of her inability to meet the financial needs of the family, the defendant was forced to sell the automobile, using the money to pay the family obligations and to support her and the children. Therefore, the Court is not going to provide credit to Plaintiff for his claimed share of such proceeds.

6. Medical and Dental Insurance: In respect to medical and dental insurance for the children and the payment of medical expenses for the children not covered by insurance, the Court orders that the plaintiff shall be required to maintain insurance coverage for medical expenses for the benefit of the minor children until they reach age 18. Both parties shall share equally any uninsured medical expenses incurred for the minor children. Furthermore, the parent who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within 30 days of payment. The parent incurring medical expenses may be denied the right to receive credit for the expense or to recover the other parent's share of the expense if the parent fails to provide to the other parent written verification of the cost of the payment of such expenses as stated above.

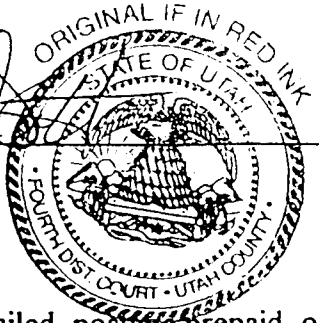
X **7. Attorney's Fees:** The evidence provided clearly indicates that the plaintiff is employed and does receive monthly compensation as a result of his employment. The evidence also indicates that the defendant is unemployed and has been unemployed for approximately two years. The evidence also indicates that the defendant is receiving public assistance by reason of her unemployed status and financial needs. In light of the parties' individual financial conditions, the Court finds that the plaintiff shall pay the reasonable attorney's fee incurred by the defendant in defending her claim. Such fees and costs may be established by counsel for the defendant filing an affidavit setting forth the claimed attorney's fees and costs.

Counsel for the plaintiff shall prepare appropriate findings of fact and conclusions of law and decree and submit the same to counsel for defendant for signature approved as to form. Such findings and decree shall be consistent with the rulings made in this memorandum decision.

DATED: August 2, 1999



Gary D. Stott
District Court Judge

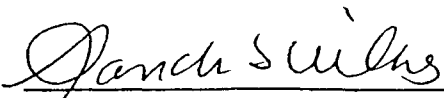


I do hereby certify that copies of the foregoing RULING were mailed, postage prepaid, on August 3, 1999 to the following parties:

Ruth Wagner, 860 Westwood Road, Park City UT 84098

Benjamin Davis, Hand Delivered

Joseph Dunbeck, 55 West Center Street, Heber City UT 84032



Doreen Smith
Deputy Court Clerk

FILED
Fourth Judicial District Court
of Utah County, State of Utah
2-12-00 Deputy

2. Plaintiff and Defendant are wife and husband having been married on March 1,

1989, in Reno, Nevada

3. There are irreconcilable differences between the Plaintiff and Defendant making the continuation of the marriage impossible

4. More than ninety days have passed since the filing of the complaint in this action and the parties have completed the educational course for divorcing parents as evidenced by the certificates offered into evidence

II. Findings Related to Children of this Marriage.

5. Pursuant to Rule 4-901(B) of the Utah Code of Judicial Administration, the Plaintiff and Defendant state, upon information and belief, that there are no proceedings for custody of the above-named minor children filed or pending in the Juvenile Court.

6. Utah is the home State of said minor children pursuant to U.C.A. 78-45c-3(1)(a) (1953).

7. The Plaintiff and Defendant do not know of any person, not a party to these proceedings who has physical custody of the subject minor children and who claims to have custody or visitation rights with respect to said children.

III. Real Property Division.

8. During the marriage the parties acquired a marital home.

9. The present value of the marital home is \$125,000.

10. The mortgage on the marital home is approximately \$52,000.

11. The equity in the home is \$73,000 of which each party is entitled to \$36,500 or one half of the equity.

12. The Defendant should be awarded the possession of the marital home until such

time as she (a) remarries, (b) cohabitates or (c) the youngest of the parties' children reaches the age of 18 or graduates from high school during the child's normal and expected year of graduation, whichever occurs first.

13. Upon the occurrence of the events referred to in the immediately preceding paragraph, Defendant shall pay to Plaintiff his equity less any amounts deducted as set forth in these findings of fact and conclusions of law. Such payment will be made within 90 days of the triggering event.

IV. Custody and Visitation.

14. Defendant has been the primary physical provider for the children, with the children being in her custody since the parties' separation in February 1997.

15. In deciding the issue of custody, the Court considered evidence submitted by both parties with respect to their individual abilities to presently provide a reasonable and appropriate place for the children to live and to provide them with the necessities of life.

16. The evidence in the case establish that Plaintiff is a truck driver, driving long haul and local, and is frequently out of the state of Utah for many days a month. From his own testimony, he indicates that he presently lives out of his truck or in a motel.

17. The children need an established environment where they can receive the care and nurturing necessary for their development.

18. Based upon the foregoing, the Court finds the best interests and welfare of the children require that the mother be awarded primary custody of the children, subject to visitation by the father, pursuant to the statutory guidelines in Section 30-3-32, 33, 34, 35. Copies of these statutory provisions are attached hereto as Exhibit A.

19. The parties are specifically directed to comply with the provisions of Section 30-3-33 of the Utah Code Annotated. In particular, the custodial parent shall:

a. Notify the non-custodial parent within 24 hours of receiving notice of all significant school, social, sports and community functions which the children are participating in or being honored, and the non-custodial parent shall be entitled to attend and participate fully with the children.

b. The custodial parent will immediately notify the non-custodial parent of any medical treatment provided to the children.

c. The court awards to the Plaintiff the dependent child deduction for tax purposes for both children because the mother currently has no income and would not benefit from the deduction.

V. Child Support.

20. For the purposes of determining child support, the Court finds that it is appropriate to impute income to Defendant at minimum wage. The Court finds that Defendant is voluntarily unemployed. She complains of certain medical conditions, but presented no evidence from her treating physician establishing that she cannot work due to her present physical condition. Based upon the foregoing, the Court finds that she is voluntarily unemployed and that income should be imputed to her at minimum wage.

21. For the purposes of determining child support, Plaintiff's gross monthly income as a truck driver averages \$2,400 per month. This finding is based upon the testimony provided and the evidence found in Exhibits 6, 9, and 10. Using these gross income amounts, and applying the Utah Uniform Civil Liability for Child Support Act guidelines, the Defendant's share of the child

support is \$464 00 a month

VI. Alimony.

22 For the purposes of determining alimony, the Court finds that the Defendant is voluntarily unemployed and that she should be treated as a minimum wage earner. This finding is supported by the evidence referred to in paragraph 20 above.

23. The Court finds that the Defendant is in need of temporary spousal support in light of the Plaintiff's present income, Plaintiff's ability to earn income, Defendant's ability to earn income as a minimum wage earner.

24. The Defendant's need for support is in part evidenced by the fact that she had to sell a vehicle in order to obtain additional monies to live on to support herself and the children. Because of the relative shortness of the marriage, and the factors described hereinabove, the Court finds that Plaintiff should pay Defendant \$600 per month for two years beginning on August 1, 1999, as alimony.

25. In resolving the alimony issue, the Court has considered that the general purpose of alimony is to prevent the receiving spouse from becoming a ward of the State and to permit her to maintain, to the extent possible, the standard of living during the marriage. The factors the Court considered in awarding alimony in this case included: (a) the financial condition and needs of the party seeking alimony, (b) the ability of the payor/spouse to provide support, and the ability of the receiving spouse to produce income and (c) the length of the marriage. *See generally, Utah Code Annotated § 30-3-5 and Chambers v. Chambers*, 840 P 2d 841 (Ut App 1992)

VII. Personal Property Division.

26 Both of the parties brought various items of personal property into the marriage

These items of personal property were subsequently sold and the proceeds were commingled and used for family purposes. As a result, any items of personal real property purchased by such funds should be treated as marital property and neither party should be entitled to a credit or debit related to such premarital assets.

27. With respect to assets acquired or debts incurred following the separation, each party should be responsible for the debts that they incurred following the separation and shall be awarded any assets that they acquired during that time period.

28. Plaintiff is awarded the following items of personal property:

- a. The items of personal property listed on Plaintiff's Exhibit 12. If those items are still in the residence of the Defendant, they shall be made available to Plaintiff within 30 days of the date of these findings of fact and conclusions of law.
- b. The Oceana trailer.
- c. 1999 Yamaha Blaster 4-wheeler.
- d. Tool chest and tools.

29. Following the parties' separation, Plaintiff sold two wave runners and a trailer for \$3,500.00 without accounting to Defendant for such funds. Defendant is entitled to one-half of the \$3,500.00 which Plaintiff received from the sale of the wave runners and trailer. This amount shall be deducted from his equity interest in the home.

30. Defendant is awarded the following items of personal property:

- a. 1978 Ford Truck.
- b. All household furniture and furnishings remaining in the home except those

items listed on Plaintiff's Exhibit 12

c. 1985 Yamaha 4-wheeler.

d. Trampoline

31. Following the parties' separation, Defendant sold the parties' 1995 Dodge diplomat. She sold the vehicle because of the financial needs of the family and used the money to pay family obligations and to support herself and the children. As a result, the Court finds that Plaintiff is not entitled to a credit for his share of the proceeds from the sale of the Dodge Diplomat.

VIII. Medical and Dental Insurance.

32. Plaintiff is ordered to maintain insurance coverage for medical expenses for the benefit of the minor children until they reach the age of 18. Pursuant to 78-45-7.15, the parties shall share equally the out-of-pocket costs of the premium actually paid by Plaintiff for the children's portion of the medical insurance.

33. Both parents shall share equally any uninsured medical expenses incurred for the minor children. The parent who incurred medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within 30 days of the payment. The parent incurring medical expenses may be denied the right to receive credit for the expenses or to recover the other parents share of the expenses if the parent fails to provide the other parent written verification of the cost of the payment of such expenses

IX. Attorney's Fees.

34. The Plaintiff is employed and receives monthly compensation as a result of his employment

35. Defendant is unemployed and has been unemployed for approximately two years

36. Defendant is receiving public assistance by reason of her unemployed status and financial needs

37. In light of the parties' individual financial conditions, the Court finds that Plaintiff shall pay the reasonable attorney's fees incurred by the Defendant in defending her claim

38. Such fees may be established by counsel for the Defendant by filing an affidavit setting forth the claimed attorney's fees and costs.

CONCLUSIONS OF LAW

To the extent not stated or implicit in the foregoing findings of fact, the Court makes the following conclusions of law.

1. This court has jurisdiction over this divorce because the Plaintiff and Defendant are bona fide and actual residents of Wasatch County, State of Utah, and have been for more than (3) months immediately prior to the commencement of this action.

2. There are irreconcilable differences between the Plaintiff and Defendant making the continuation of the marriage impossible. The parties are thus entitled to a decree of divorce and an order restoring the wife to her maiden name.

3. Based on the foregoing factual findings on the parties' marital and separate property and debts, the Court finds that it is fair and equitable to divide the parties' personal property as provided in paragraphs 26 through 31 of the Findings of Fact

4. Based on the foregoing factual findings on the parties' marital and separate property and debts, the Court hereby awards the marital home to Defendant subject to the restrictions in paragraphs 11 through 13 of the Findings of Fact.

5. Child support should be computed based on the husband's gross monthly income of \$2,400.00 and on the wife's income at minimum wage for a 40 hour week. Defendant is awarded support in the amount of \$464.00 per month. The child support obligations under the divorce decree will commence upon entry of the decree.

6. The husband shall be awarded the dependent child deduction for both children since the wife currently has no income and would not benefit from the deduction. *Utah Code Ann.* § 78-45-7.21(4) (An exemption may not be awarded to a parent unless the award will result in a tax benefit to that parent).

7. In setting alimony, the court must make findings and conclusions demonstrating that it has considered three factors: (1) the financial condition and needs of the party seeking alimony; (2) that party's ability to produce a sufficient income; and (3) the ability of the other party to provide support. *Noble v. Noble*, 761 P.2d 1369 (Utah 1988); *Chambers v. Chambers*, 840 P.2d 841 (Utah Ct. App. 1992).

8. Under this standard, Defendant is entitled to \$600/month for two years beginning August 1, 1999.

9. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the children and take into consideration the children's desires regarding the future custody, but the expressed desires are not controlling and the court may determine the children's custody otherwise. In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the non-custodial parent as the court finds appropriate.

Utah Code Ann. § 30-5-10.

10. Based on the factual findings and the applicable legal standard, the Court finds that the mother should be given primary custody of the children subject to visitation by the husband under the statutory guidelines as provided in Chapter 3, Title 30, of the Utah Code.

11. Each party shall be awarded any asset acquired by them after the separation or any asset in their possession and not specifically awarded as part of these findings.

12. Each party shall be liable for and shall pay all debts and obligations that he or she incurred after the parties' separation and shall indemnify and hold the other harmless from these debts and obligations.

13. Attorney fees may only be awarded based on "evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees." *Wilde v. Wilde*, 969 P.2d 438 (Ct. App. 1998). In the instant case, Defendant is entitled to an award of attorney's fees and costs.

14. The Court finds that the ongoing child support and alimony awards ordered at the trial of this matter shall commence in June, 1999.

15. The Court finds that the Plaintiff should make all payments to the Office of Recovery Services, P.O. Box 45011, Salt Lake City, Utah 84145-0011, unless the Office gives notice that payment should be sent elsewhere.

Dated this 12 day of Feb, 1999.

By the Court:

/S/ GARY D. STOTT

Judge Gary D. Stott

Approved as to form:

Ruth Wagner

Date

Benjamin Davis

Date

Joseph T. Dunbeck, Jr.

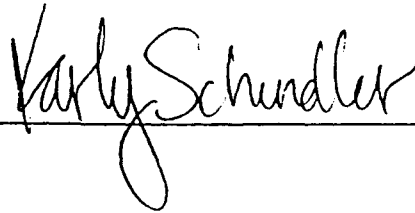
Date

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January, 2000, I mailed, postage prepaid, a true and correct copy of the foregoing Proposed Findings of Fact and Conclusions of Law to:

Ruth Wagner
860 Westwood Road
Park City, Utah 84098

Benjamin Davis
Assistant Attorney General
150 East Center Street, Suite 2100
Provo, UT 84606



North Jud:
Utah Cow
2-12-00

IT IS FURTHER ORDERED that Defendant shall be awarded possession of the marital home until such time as she (a) remarries, (b) cohabitates or (c) the youngest of the parties'

children reaches the age of 18 or graduates from high school during the child's normal and expected year of graduation, whichever occurs first.

IT IS FURTHER ORDERED that upon the occurrence of the events referred to in the immediately preceding paragraph, Defendant shall pay to Plaintiff his equity in the amount of \$36,500.00. Such payment shall be made within 90 days of the triggering event.

IT IS FURTHER ORDERED that the mother be awarded primary custody of the children, subject to visitation by the father, pursuant to the statutory guidelines in Sections 30-3-32, 33, 34, 35, of the Utah Code. Copies of these statutory provisions are attached hereto as Exhibit A.

IT IS FURTHER ORDERED that the parties comply with the provisions of Section 30-3-33 of the Utah Code Annotated. In particular, but without limiting the foregoing, the custodial parent shall:

- a. Notify the non-custodial parent within 24 hours of receiving notice of all significant school, social, sports and community functions which the children are participating in or being honored, and the non-custodial parent shall be entitled to attend and participate fully with the children.
- b. The custodial parent will immediately notify the non-custodial parent of any medical treatment provided to the children.

IT IS FURTHER ORDERED that Plaintiff's child support obligation is \$464.00 a month. The child support obligations under the divorce decree will commence in June, 1999.

IT IS FURTHER ORDERED that Plaintiff shall pay alimony to Defendant in the amount of \$600 per month for two years beginning on August 1, 1999.

IT IS FURTHER ORDERED that with respect to assets acquired or debts incurred

following the separation, each party should be responsible for the debts that they incurred following the separation and shall be awarded any assets that they acquired during that time period.

IT IS FURTHER ORDERED that Plaintiff is awarded the following items of personal property:

- a. The items of personal property listed on Plaintiff's Exhibit 12. If those items are still in the residence of the Defendant, they shall be made available to Plaintiff within 30 days of the date of these findings of fact and conclusions of law.
- b. The Oceana trailer.
- c. 1999 Yamaha Blaster 4-wheeler.
- d. Tool chest and tools.

IT IS FURTHER ORDERED that Defendant is entitled to one-half of the \$3,500.00 which Plaintiff received from the sale of the wave runners and trailer. This amount shall be deducted from his equity interest in the home.

IT IS FURTHER ORDERED that Defendant is awarded the following items of personal property:

- a. 1978 Ford Truck.
- b. All household furniture and furnishings remaining in the home except those items listed on Plaintiff's Exhibit 12.
- c. 1985 Yamaha 4-wheeler.
- d. Trampoline.

IT IS FURTHER ORDERED that Plaintiff shall maintain insurance coverage for medical expenses for the benefit of the minor children until they reach the age of 18. Pursuant to 78-45-7.15, the parties shall share equally the out-of-pocket costs of the premium actually paid by Plaintiff for the children's portion of the medical insurance.

IT IS FURTHER ORDERED that both parents shall share equally any uninsured medical expenses incurred for the minor children. The parent who incurred medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within 30 days of the payment. The parent incurring medical expenses may be denied the right to receive credit for the expenses or to recover the other parent's share of the expenses if the parent fails to provide the other parent written verification of the cost of the payment of such expenses.

IT IS FURTHER ORDERED that Plaintiff shall pay the reasonable attorney's fees incurred by the Defendant in defending her claim and that such fees may be established by counsel for the Defendant by filing an affidavit setting forth the claimed attorney's fees and costs.

IT IS HEREBY ORDERED that Plaintiff is awarded the dependent child deduction for both children.

IT IS FURTHER ORDERED that each party is awarded any asset acquired by them after the separation or any asset in their possession and not specifically awarded as part of the findings.

IT IS FURTHER ORDERED that each party shall be liable for and shall pay all debts and obligations that he or she incurred after the parties' separation and shall indemnify and hold the other harmless from these debts and obligations.

IT IS FURTHER ORDERED that the ongoing child support and alimony awards ordered at the trial of this matter shall commence in June, 1999.

IT IS FURTHER ORDERED that the Plaintiff shall make all payments to the Office of Recovery Services, P.O. Box 45011, Salt Lake City, Utah 84145-0011, unless the Office gives notice that payment should be sent elsewhere.

Dated this 12 day of Feb, 1999.

By the Court:

/S/ GARY D. STOTT

Judge Gary D. Stott

Approved as to form:

Ruth Wagner Date

Benjamin Davis Date

Joseph T. Dunbeck, Jr. Date

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 2000, I mailed, postage prepaid, a true and correct copy of the foregoing Proposed Divorce Decree to:

Ruth Wagner
860 Westwood Road
Park City, Utah 84098

Benjamin Davis
Assistant Attorney General
150 East Center Street, Suite 2100
Provo, UT 84606