

1982

Jana C. Christiansen v. Kent Christiansen : Brief of Appellant on Appeal

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

JANA C. CHRISTIANSEN,	:	
	:	
Plaintiff-	:	
Respondant.	:	Case No. 18,132
	:	
vs.	:	
	:	
KENT CHRISTIANSEN,	:	
	:	
Defendant-	:	
Appellant	:	

APPELLANTS BRIEF ON APPEAL

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT IN AND FOR UTAH COUNTY
STATE OF UTAH, HONORABLE GEORGE E. BALLIF, JUDGE

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FILED

FEB 25 1982

Clerk, Supreme Court, Utah

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	:	
Defendant-	:	
Appellant	:	

APPELLANT, KENT CHRISTIANSEN'S BRIEF ON APPEAL

STATEMENT OF THE NATURE
OF THE CASE

This is a post divorce modification proceeding in which plaintiff-respondent, Jana C. Christiansen, (hereinafter, "plaintiff") brought this modification proceeding to increase defendant-appellant Kent Christiansen's (hereinafter "defendant") child support obligations to plaintiff under a Decree of Divorce, dated July 17, 1979. Plaintiff also sought an award of attorneys fees (R.27-29). Other issues raised by plaintiff's initial order to show cause were disposed of prior to the trial date herein. Defendant filed a Counter-petition seeking primarily to: 1) reduce the amount of alimony payments to \$100.00 per month; 2) set a fixed date for termination of

alimony payments; and 3) eliminate the requirement from the Decree of Divorce that the defendant be required to maintain the plaintiff on his health and medical insurance policy (R.36-38)

DISPOSITION IN LOWER COURT

The matter came on for trial on September 3, 1981, before the Honorable George E. Ballif, District Judge presiding. Following the conclusion of the trial and introduction of evidence and testimony from both parties, the Court took the matter under advisement and rendered its Decision on October 8, 1981. A copy of the Court's Decision is attached hereto as Appendix "A" and incorporated by reference.

The trial court increased the amount of the defendant's child support payments from \$275.00 per month (R.22-23) to \$450.00 per month per child for each of the parties two minor children (R.46).

The trial court also ruled that the defendant had failed to show a sufficient change in circumstances to justify the reduction or elimination of the alimony previously ordered in the Decree of Divorce. The Court also concluded that the defendant should pay \$200.00 as attorneys fees for the use and benefit of the plaintiff's counsel. (R.46) The Court did not rule on the other issues raised by the defendant's order to show cause specifically that the defendant be released from the requirement to maintain the plaintiff on his health and medical insurance policies.

The trial court overruled and denied the defendant's objections to the Findings of Fact and Modified Decree and defendant's Notice of Appeal was filed on November 25, 1981 (R.56,57).

RELIEF SOUGHT ON APPEAL

Defendant seeks the following relief on appeal: (1) A reversal of the trial court's decision that the defendant failed to show a sufficient material change in circumstances to justify a reduction or elimination of the amount of alimony payments paid by the defendant to the plaintiff; or, alternatively a remand to the trial court to set an appropriate reduction in alimony payments. (2) A reversal of the trial court's decision increasing the amount of child support payments from \$275.00 per month per child to \$450.00 per month per child for each of the parties two minor children. (3) An order from this Court terminating the defendant's responsibility to maintain and pay for health and medical insurance coverage for plaintiff. (4) A reversal or alternatively a reduction of the court's award of attorneys fees.

STATEMENT OF FACTS

Plaintiff and defendant were married at Provo, Utah, on June 1, 1972. There were two children born as issue of the

said marriage to-wit: Alicia, who at the time of the Decree of Divorce was 3 years old; and Chad, who at the time of the Decree of Divorce was age 16 months (R.18). In July of 1979, the parties entered into a Stipulation and Property Settlement agreement (R.14-16) which formed the basis of a Decree of Divorce which was subsequently entered by the Court following a hearing on July 17, 1979. The stipulation and property settlement agreement is attached hereto, labeled Appendix "B" and incorporated by its reference herein. The lower court's Finding of Fact, Conclusions of Law and Decree of Divorce approved the previously executed Stipulation and Property Settlement Agreement (Appendix "B") which granted the plaintiff alimony in the amount of \$650.00 per month, and child support in the amount of \$275.00 per month for each of the parties two minor children (R.22,23).

At the time of the original divorce hearing and the entry of the Decree of Divorce, the lower court specifically found that "Plaintiff has no income" see Finding of Fact number 9, (R.20), and Stipulation and Property Settlement Agreement, paragraph 9, (R.16). The minute entry entered by the court at the time of the hearing on the Decree of Divorce reflects the presence of the plaintiff and her counsel, Noall T. Wootton, and further reflects that the defendant was not present, but was represented by his counsel, Wayne B. Watson. The trial court further reflects in its minute entry of July 17, 1979, that "counsel stated for the record that plaintiff has "0"

income at this time" (R.25). A copy of the court's minute entry dated July 17, 1979 is attached hereto as Appendix "C" and incorporated by reference.

The defendant is a self-employed dentist, with a specialty in endotonics (R.78,124). At the time of the Decree of Divorce, the Court made specific findings that the defendant's net income was approximately \$30,000.00 for the calendar year 1978 (R.19). It should be noted that the Decree of Divorce was granted on July 17, 1979 at a time when defendant's income had probably increased slightly. Defendant opened a private practice in dentistry in Provo, Utah on approximately May 1, 1978, a little more than one year prior to the entry of the Decree of Divorce (R.125).

At the time of the modification hearing, defendant testified that he was drawing a base monthly salary of approximately \$3,000.00 per month from his business which is now a professional corporation (R.134). Defendant's 1980 individual income tax return demonstrated that he had an adjusted gross income of \$30,538.00 for the year 1980 (see exhibit #5). In response to an order of the court, the defendant produced his complete individual income tax returns for the years 1979 and 1980 and his corporate income tax return for the year beginning June 1, 1980, and ending March 30, 1981. While not all of those documents were marked as exhibits, they were produced following the trial pursuant to the request of

counsel for the plaintiff and are included in the court's record in the exhibit file.

At the time of the entry of the Decree of Divorce, plaintiff had no income (R.16,20,25 and 145). Plaintiff testified that she had obtained a Masters Degree in Educational Psychology and at the time of the modification hearing was making \$779.50 per month gross and approximately \$550.00 net by working three days per week as an Educational Psychologist in the Provo School District (R.80,89 See also, plaintiff's Exhibit #4).

The court further heard testimony from both the plaintiff and the defendant to the effect that full time employment may be available to the plaintiff through the Provo School District provided that her arthritic condition would permit her to accept such full time employment (R.80,141). Both plaintiff and defendant testified that the plaintiff's arthritic condition had stabilized since the time of the Decree of Divorce and that the plaintiff was able to function fairly well by taken medication that was prescribed for the arthritic condition (R.82,142): Plaintiff was presently very active and had recently taken up skiing (R. 142,143).

Both parties introduced evidence and were cross-examined concerning their monthly current expenses. Plaintiff listed monthly current expenses of \$2,197.00 which she claimed had increased approximately \$1,400.00 since the date of the entry of the Decree of Divorce (See plaintiff's exhibit #3, R.110, 112). Defendant claimed monthly current expenses of \$3,166.24 including the alimony and support payments imposed by the Decree of Divorce.

(See defendant's exhibit #6).

Both parties testified that the parties contemplated the \$16,000.00 in cash property settlement referred to in paragraph #7 of the Decree of Divorce (R.23) would be used in purchasing the condominium that plaintiff presently resides in, and further, that the condominium was purchased contemporaneously with the entry of the Decree of Divorce (R.100,145). The plaintiff's own testimony in that regard is particularly revealing:

Q: (By Mr. Snyder) Now, at the time of the Decree of Divorce, you also had made plans to purchase the condominium that you are presently living in, hadn't you?

A: (By Mrs. Christiansen) The deal wasn't finalized. I had hoped that I could.

Q: But you were going to pay \$16,000.00 in cash settlement that you received from your husband, and had already made an offer to purchase the condominium in American Fork, subject to your getting that money and closing the rest of the financial arrangements, hadn't you?

A: Yes.

Q: And you did, in fact, make that \$16,000.00 settlement and purchased the condominium that you are presently living in, isn't that true?

A: Yes, that is true.

Q: So these additional living expenses that you are pointing to, these additional house payments, totaling \$315.00 in increases, were something that you contemplated at the time of the Decree of Divorce?

A: Yes. (R.100, 101)

Plaintiff further testified with regard to her expenses that at the time of the Decree of Divorce, she was driving

a 1975 Mustang II automobile which was paid for and that since the entry of the Decree of Divorce, she had gone out and purchased a 1980 Camaro (R.102). Plaintiff further testified in accordance with her exhibit #3 that she had \$100.00 per month in medical expenses but later conceded that her husband pays for all of her bills for medication and her doctors expenses, (R.92). Furthermore, since the entry of the Decree of Divorce, she had purchased drapes and a refrigerator for the house, and had taken out a loan with a monthly payment of \$131.50 on that amount. (R.114).

In connection with the loan payment in the amount of \$131.50 for the drapes and refrigerator, plaintiff testified as follows:

Q: (By Mr. Snyder) Let me ask you just briefly about the loan payment. That was something you contemplated in connection with the purchase of your condominium, isn't that true?

A: (By Mrs. Christiansen) No.

(By Mr. Snyder) You knew--excuse me. Go ahead.

A: I guess I really didnt have any idea how much things cost at the time of the divorce. I realized we had nothing. But I had no idea as to the cost of the drapes and a fridge and just the bear necessities.

Q: But in truth and in fact, you knew that you were going to have to buy a refrigerator for that condominium, and you were going to have to put some drapes in it, and that type of thing, and you knew that in connection with the purchase of the condominium, and you contemplated doing that at the time of the Decree, isn't that true? You may not have known the price, but you knew you were going to have to get a refrigerator and drapes?

A: I knew I was going to have to get a refrigerator. Kent gave me \$16,000.00, and I paid down \$15,000.00, so I figured

the extra \$1000.00 I could use on a fridge and a few things. But I just didn't - I guess I figured that, but I didn't realize that the drapes and all those things would come to so much. Am I saying too much? (R.113,114)

It is interesting to note that the court in its decision cited the increased expense of \$250.00 per month for child care, necessitated by the plaintiff obtaining employment, but failed to consider or recognize the fact that plaintiff had increased income which would more than off-set that expense. (R.45,89. See also, exhibit #4). Plaintiff also introduced evidence concerning increased expenses necessitated by the purchase of the washer and dryer which were purchased by the plaintiff following the initiation of the order to show cause proceeding and which washer and dryer had not even been delivered to the plaintiff at the time of the trial of this matter (R.104).

Plaintiff claimed additional increases in expenses due to inflation, but the only dollar amounts presented as evidence with respect to increases in the expenses of the children were an additional \$10.00 per month charge, for pre-school costs for the parties son (R.93).

Plaintiff also claimed increased expenses attributed to the children's recreation, and the daughter's clothing, but failed to present any evidence concerning amounts (R.92,94).

ARGUMENT

POINT I.

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT THE DEFENDANT A DECREASE IN THE AMOUNT OF ALIMONY PAYMENTS BASED UPON THE PLAINTIFF'S INCREASED INCOME.

It is axiomatic that the district courts of this state are vested with considerable discretion with regard to alimony, child support and attorney's fees. On appeal, the decisions of the the district courts are accorded great deference:

In a divorce case, even though the proceedings are equitable and this court may review the evidence, this court accords considerable deference to the findings and judgment of the trial court due to its advantageous position. On appeal this court will not disturb the action of the trial court unless the evidence clearly preponderates to the contrary, or the trial court has abused its discretion, or misapplied principles of law... Fletcher v. Fletcher, 615 P.2d 1218 at 1222 (Utah 1980).

Mindful of the burden he bears on appeal, defendant requests this court to reverse the lower court's decision that a sufficient change in circumstances was not shown to justify the reduction or elimination of alimony paid by defendant to the plaintiff (R.46), upon the grounds that the lower court misunderstood and/or misapplied the law, resulting in substantial and prejudicial error, and/or perpetrated such a serious inequity as to constitute an abuse of the court's discretion. This concept was explained by the court in McCrary v. McCrary, 599 P.2d 1248, at 1250 (Utah 1979):

In these matters, a party seeking a reversal of the trial court must prove a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, or that the evidence clearly preponderated against the findings or that such a serious inequity resulted from the order as to constitute an abuse of the trial court's discretion

The purpose 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 v. English, 565 P.2d 409 (Utah, 1977). This calls for determining "the financial conditions and needs of the wife, the ability of the wife to procure sufficient income for herself, and the ability of the husband to provide support". *Id.* at 412.

The courts have held that the factors to be considered in determining whether to modify an alimony award are the same as the factors taken into consideration when granting an award for support and alimony. See Scott v. Scott, 591 P.2d 980 (Arizona, 1979).

In Gramme v. Gramme, 597 P.2d 134 (Utah, 1978), this court stated the purpose of an award of alimony and the criteria upon which an award of alimony may be based:

The purpose of alimony is to provide post-marital support; it is intended neither as a penalty imposed upon the husband nor as a reward granted to the wife. Its function is to provide support for the wife as nearly as possible at the standard of living she enjoyed during marriage and to prevent her from becoming a public

charge. Important criteria in determining a reasonable award for support and maintenance are the financial conditions and needs of the wife, considering her station in life; her ability to produce sufficient income for herself; and the ability of the husband to provide the support.

(Emphasis is added) Id. at 147 (footnotes omitted)*

By applying the criteria as described in Gramme the plaintiff herein is no longer entitled to an award of alimony. Her present earnings are sufficient to support her at the standard of living she enjoyed during her marriage to the defendant. There is no indication that her financial situation could deteriorate to the point of making her a public charge. The lower court should have considered her young age, her ability to work and her present income with regard to the issue of reduction of alimony.

In that regard, at the time of the Decree of Divorce, the plaintiff, Jana Christiansen was unemployed. The court entered a specific findings to that regard (R.16,20,25 and 142). Since that time she has used her Masters Degree in Educational Psychology (R.80) to become gainfully employed at the Provo School District as an educational psychologist working three days a week. Both plaintiff and defendant testified that the plaintiff could obtain full time employment through the Provo School District (R.80, 141). Both plaintiff and defendant also testified that the plaintiff's arthritic

condition had stabilized with medication since the time of the entry of the Decree of Divorce. The uncontroverted evidence introduced at the time of the trial in this matter indicated that the plaintiff was earning approximately \$800.00 per month gross, and \$550.00 per month net (R.89,141, see also, plaintiff's exhibit #4).

Quite clearly, the plaintiff is now earning a substantial salary which she was not earning at the time of the entry of the Decree of Divorce and is capable of earning even more if she chooses to accept full time employment.

The trial court chose to ignore the Findings of Fact, Stipulation and Property Settlement Agreement, and the court's own minute entry from the divorce hearing setting for the fact that the plaintiff had no income at the time of the Decree of Divorce. The rationale behind the court's ruling is found in a discussion between the Court and counsel for the defendant which occurred during argument and following the conclusion of the evidence. That discussion is set forth in the transcript as follows:

(Argument by Mr. Snyder): I think the evidence demonstrates a material change in circumstances with regard to her income that justifies decreasing the amount of the alimony. I think that that's a material change.

The Findings of the Court clearly reflect--

THE COURT: If she can't go up, why should we

refuse it?

MR. SNYDER: If she can't go up where?

THE COURT: If she can't get an increase in alimony because he's earning additional money, why can't she be subject, then, to a reduction?

MR. SNYDER: That was all done, as far as the stipulation--

THE COURT: --I know. Why should she, then also be restricted and reduced?

MR. SNYDER: Because the Court made a specific finding concerning the fact that she had no income, and she now does have an income.

THE COURT: I know, but it was set at a certain amount of money.

MR. SNYDER: Yes.

THE COURT: And she could not use his increased income to go up.

MR. SNYDER: Right.

THE COURT: Nothing was said that if she increased her income, she could go down.

MR. SNYDER: No, but that, in my opinion, is a material change of circumstances which justifies the Court in reducing the amount of that alimony. She had no income at the time of the divorce. She had no income at that time, and she has income now. That's a change in circumstances which is material to the issues of alimony and the amount

that it was set at, and justifies it being decreased.

Furthermore, I think there is merit in the position that this Court ought not to let that alimony go on interminably forever. She is now employed; she is now able to earn her own way; she is not contributing to the income and the needs of the children, which she has not done before.

I think those issues mandate a change in the amount-- reducing the amount--

THE COURT: --You want the benefit of that, then, when it comes to the support of the children, the fact that she is working, in addition to the fact that that should reduce her income, and also reduce--

MR. SNYDER: --I think that the Court should definitely--

THE COURT: --Mr. Snyder, when the Court is talking don't cut in on me, will you, please.

MR. SNYDER: Excuse me.

THE COURT: Did you hear what I said?

MR. SNYDER: Yes I did.

THE COURT: All right. You may respond to it.

MR. SNYDER: I think that if the Court is not going to consider it in the question of alimony, which I think the Court should, then I think the Court should definitely consider it with regard to the matter of the child support, and her claims for needs for an increase. (R.161 line 21 through

R163 line 20).

The trial court's concerns reflect his interpretation of a portion of paragraph 9 of the Stipulation and Property Settlement, (R.16)(Appendix "B") which is incorporated into the Findings of Fact and Conclusions of Law, paragraph 9 (R.20). The Property Settlement Agreement (Appendix "B") reads, in pertinent part

9. The parties further stipulate that they hereby request the Court to make a finding of fact that the plaintiff presently has no income, and that future increases in alimony shall be based solely upon plaintiff's economic needs without any regard whatsoever to a possible increase in defendant's income status." (Emphasis added) (R.16).

It was the trial judge's opinion that if the plaintiff cannot use the defendant's increased income to seek future increases in her alimony payments, then the defendant should not be able to use plaintiff's increased income to justify reductions in the alimony payments.

The trial court's interpretation of paragraph 9 of the Findings of Fact and the Property Settlement Agreement, clearly ignores the language contained in the first part of paragraph 9 to the effect that the plaintiff has no income and indeed, the language set forth by both parties' counsel on the record in the Minute Entry (Appendix "C") to the effect that the plaintiff has "0" income at this time. (R.25).

Utah courts have long held that increases in income constitute a material change in circumstances sufficient to

justify the increase or decrease in the amount of alimony payments. In the case of Dehm v. Dehm, 545 P.2d 525 (Utah, 1976) the husband sought to reduce or eliminate alimony payments. In Dehm, at the time the Divorce Decree was entered, the wife had income of approximately \$220.00 per month, and the husband earned \$1,300.00 per month. By the time of the modification proceedings those numbers had increased to \$946.00 and \$2,200.00 respectively. Also, during the period of time between the entry of the Decree of Divorce and the modification hearing the wife had received her Bachelors and Masters Degree and had become employed on a full time basis. The Utah Supreme Court affirmed the trial court's decision reducing the alimony from \$300.00 per month to \$1.00 per year and found that under the circumstances, alimony was neither necessary nor reasonable.

The written Decision (See Appendix "A") entered by the trial court in this matter sheds further light on the trial court's unilateral attempt to modify the provisions of the Stipulation and Property Settlement Agreement and the Findings of Fact entered by the trial court. It is clear from the language of the Stipulation and Property Settlement Agreement that the plaintiff in this case agreed as part of that Stipulation and Property Settlement that she would not seek increased alimony based upon increases in the defendant's income. The trial court apparently felt

that "What is good for the goose must be good for the gander". No such element of reciprocity can be inferred from the Stipulation or from the Findings of Fact, yet the trial judge in the modification hearing found that the plaintiff's agreement to not seek increased alimony based upon increases in the defendant's income should be applied in reverse to the defendant. In other words, he should not be able to claim decreases in alimony based upon increases in the plaintiff's income. The trial court's Decision (Appendix "A") reveals some additional information concerning the court's analysis with regard to paragraph 9 of the Findings of Fact and the Stipulation and Property Settlement Agreement. Judge Ballif in his Decision states:

"Based upon the above and foregoing findings, and upon the finding in the Decree of Divorce that only the plaintiff's economic needs, without regard to defendant's income, is the sole basis for increase in alimony and the further finding by the Court that the plaintiff's personal needs have not materially increased in that she has now obtained employment and is providing partially for her own support, the court concludes as follows:

2. The Court further concludes that a sufficient change of circumstance has not been shown to justify the reduction or elimination of the alimony paid by defendant to plaintiff and the amount provided in the original decree shall continue." (R.46).

It is axiomatic the provisions of a Stipulation and Property Settlement Agreement which are approved and incorporated into a Decree of Divorce cannot be subsequently modified or changed absent a showing of substantial injustice, fraud

or some other compelling reason. See Lay v. Lay, 162 Colo. 143, 425 P.2d 704 and Foulger v. Foulger, 626 P.2d 412 (Utah 1981).

In the instant case the trial court has attempted to impose its own judgment effectively modifying the parties' Stipulation and effectively undertaking to unilaterally modify the parties' Stipulation and Property Settlement Agreement by making a provision that is clearly applicable only to increases in alimony apply in reverse to decreases in alimony. The trial court has ignored the other findings of the court concerning plaintiff's income at the time of the entry of the Decree of Divorce and the uncontroverted evidence concerning the plaintiff's increases in income at the time of the modification hearing.

Defendant submits that alimony is not a matter of right. When the wife has the ability to earn a living, it is not the policy of the law to give her a perpetual lien on her divorced husband's future income. See Morgan v. Morgan, 369 P.2d 516 (Washington, 1962).

Utah courts have long recognized the principal that increased earning capacity of the wife, following the entry of the Decree of Divorce, constitute a material change in circumstances which is sufficient to justify the court in reducing alimony payments. See King v. King, 495 P.2d 823, (Utah, 1972). (A case similar to the instant case in that the former wife had a health condition at the time of the divorce which prevented

her from seeking and accepting gainful employment. That situation was at least partially resolved, and alimony payments were reduced from \$250.00 per month to \$100.00 per month for a period of six months and thereafter to the sum of \$50.00 per month for a period of one year, after which, alimony was to terminate entirely). See also, Carter v. Carter, 584 P.2d 904, (Utah 1978), (Carter is a case that is significant in that it was tried in the same district court and by the same trial judge as the instant case. In Carter, the court reduced the defendant wife's alimony from \$350.00 per month to \$100.00 per month on the basis that the defendant, who was not employed at the time of the entry of the Decree of Divorce, had become employed and had a monthly salary of \$636.27. The Utah State Supreme Court in Carter held that one of the important factors to be considered is that it should be the policy of the law to encourage a person receiving alimony to seek employment. Id, at 905.)

Other case citations having similar holdings have been omitted for the sake of brevity.

Defendant submits that he is entitled to have the Court consider plaintiff's increased income as bearing on the question of reducing the defendant's alimony payments herein and that the trial court abused its discretion by imposing its own interpretation of paragraph 9 of the Stipulation and Property Settlement Agreement and the Findings of Fact and Conclusions of Law to effectively hold that if the plaintiff had could not claim future increases in alimony based upon increases in the defendant's income status, that the defendant could not base a decrease in alimony payments upon the plaintiff's income status. Such a holding by the trial court clearly controverts the expressed provisions of the parties' Stipulation, (Appendix "B"), and the findings made by the trial court at the time of the entry of the Decree of Divorce and constitutes an abuse of discretion.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN INCREASING CHILD SUPPORT PAYMENTS FROM \$275.00 PER MONTH PER CHILD TO \$450.00 PER MONTH PER CHILD FOR EACH OF THE PARTIES' TWO MINOR CHILDREN.

A. THE TRIAL COURT IMPROPERLY CONSIDERED PLAINTIFF'S INCREASED STANDARD OF LIVING AND INFLATED EXPENSES IN ORDER TO JUSTIFY INCREASED CHILD SUPPORT PAYMENTS.

As indicated previously, it is well settled in this State that the modification of a divorce decree is a matter of equity and that it is the duty and prerogative of the Supreme Court to review both the facts and the law in each case. Furthermore, the burden rests with the party seeking the modification of a divorce decree to show a substantial change in circumstances such as to warrant a modification. See Christensen v. Christensen, 628 P.2d 1297 (Utah 1981). In the same way that the defendant has the burden of demonstrating a material change in circumstances such as to justify a decrease in the amount of alimony payments, the plaintiff has the burden of demonstrating a material change in circumstances such as would justify an increase in the child support payments.

In the trial court's Decision (Appendix A), the court found that the expenses of the plaintiff in rearing the minor children had increased by virtue of inflation since the time of the entry of the Decree of Divorce on July 17, 1979, and correctly pointed out that the expenses of the minor children were not established by any Findings of Fact

or stipulations on file herein at the time the decree was entered. The court further found that there were other increases in expenses in that the plaintiff has acquired new living facilities for herself and the children and had obtained employment which created an increased expense of \$250.00 per month for child care. (R. 45) The court further observed that other expenses such as dancing and other lessons for the children were given only minimal weight by the court in arriving at an increase in child support that is justifiable under the changed circumstances of the children's needs. (R. 45-47)

Addressing first the issue of the plaintiff's increased expenses, it is significant to note that the plaintiff claims total monthly living expenses of \$2,197.29 and that her monthly living expenses have increased by \$1,397.29 in the two years between the entry of the Decree of Divorce and the modification hearing. (See Plaintiff's Exhibit 3.) When questioned on cross-examination concerning the figures recited on Exhibit 3, plaintiff responded as follows:

Q (By Mr. Snyder) And you have listed that you have total monthly expenses of roughly \$2200.00, \$2197.29, right?

A (By Mrs. Christiansen) Yes.

Q And you say that those expenses have increased since the divorce by roughly \$1400.00, \$1397.29?

A Yes.

Q So at the time of the Decree of Divorce you must have had monthly expenses of approximately \$800.00, is that correct?

A Approximately.

Q And yet at that time, at the time of the Decree of Divorce, you and your husband had alimony and support payments--your husband began paying you support payments and alimony totaling \$1200.00, is that right?

A Yes.

Q He has been paying you that amount since the time of the Decree, hasn't he?

A Yes.

Q Did you spend all of that money each month when it would come in?

A No, because I started with a house payment the next month after we were divorced, and that house payment was \$590.00. So I didn't have any spending money.

(R. 111-112)

The significance of the above testimony from the plaintiff is two-fold. One, it indicates that at the time of the entry of the Decree of Divorce, that the plaintiff had expenses only of \$800.00 and yet she and the defendant agreed in a Stipulation and Property Settlement Agreement that the defendant would pay a total of \$1,200.00 (\$550.00 child support and \$650.00 alimony) towards the support and maintenance of the plaintiff and the minor children. The plaintiff further indicates by her testimony that the payment of \$1,200.00 in total support and maintenance considered the fact that she was going to be moving into the condominium which has a house payment of \$590.00 per month together with increased utility expenses that were testified to by the plaintiff. (See Plaintiff's Exhibit 3 and R. 118). The

plaintiff further testified as follows:

Q (By Mr. Snyder) Now, at the time of the Decree of Divorce, you also had made plans to purchase the condominium that you are presently living in, hadn't you?

A (By Mrs. Christiansen) The deal wasn't finalized. I had hoped that I could.

Q But you were going to pay \$16,000.00 in cash settlement that you received from you husband, and had already made an offer to purchase the condominium in American Fork, subject to your getting that money and closing the rest of the financial arrangements, hadn't you?

A Yes.

Q And you did, in fact, make that \$16,000.00 settlement and purchased the condominium that you are presently living in, isn't that true?

A Yes, that's true.

Q So these additional living expenses that you are pointing to, these additional house payments totaling \$315.00 in increases, were something that you contemplated at the time of the Decree of Divorce?

A Yes.

(R. 100-101)

Similarly, the defendant testified:

Q (By Mr. Snyder) Now, at the time of the signing of the Stipulation, just prior to the divorce in this matter, you were living in a rented house, is that correct?

A (By Mr. Christiansen) Right. She moved into the condominium, and then I moved back into the home where we were residing for a couple of months until they got home in the middle of December, or whatever.

Q She had been living in that house while you had been separated, is that correct?

A Correct.

Q And is it true that she received some settlement funds in the Decree in the amount of \$16,000.00, and she used those funds partially for the down payment on the condominium?

A Correct.

(R. 144-145)

Plaintiff also testified concerning a loan payment in the amount of \$131.50 which was used to pay for drapes and a refrigerator which were purchased for the condominium. (See Plaintiff's Exhibit 3). On cross-examination, plaintiff stated as follows:

Q (By Mr. Snyder) But in truth and in fact, you knew that you were going to have to buy a refrigerator for that condominium, and you were going to have to put some drapes in it, and that type of thing, and you knew that in connection with the purchase of the condominium, and you contemplated doing that at the time of the Decree, isn't that true? You may not have known the price, but you knew you were going to have to get a refrigerator and drapes?

A (By Mrs. Christiansen) I knew I was going to have to get a refrigerator. Kent gave me \$16,000.00, and I paid down \$15,000.00, so I figured the extra thousand I could use on a fridge and a few things. But I just didn't--I guess I figured that, but I didn't realize that the drapes and all those things would come to so much. Am I saying too much?

(R. 114)

It is clear from the plaintiff's own testimony that the loan to pay for drapes and refrigerator in connection with the purchase of the condominium came about largely because of the plaintiff's own expensive taste and was a discretionary expense rather than something that was necessary for the welfare and benefit of the children.

It is even more clear that the purchase of the condominium

by the plaintiff was contemplated by and took place contemporaneously with the entry of the Decree of Divorce. It should be abundantly clear from the plaintiff's own testimony that her monthly expenses were \$800.00 at the time of the Decree of Divorce and that they increased by approximately \$365.00 (See Plaintiff's Exhibit 3) for the home and utility expenses immediately upon the purchase of the condominium. Furthermore, parties contemplated that the \$1,200.00 paid by the defendant as alimony and support took into consideration the increased expenses incurred by the plaintiff in the purchase of the condominium. The trial court cannot now use those new living facilities and the increased expenses in connection therewith to justify further increases in child support for the parties' two minor children.

The trial court also considered the plaintiff's increased expenses for child care of \$250.00 per month which were necessitated by her obtaining employment (R. 45). The difficulty with that proposition is that the trial court again completely disregarded the increased income of the plaintiff and the plaintiff's current ability to participate in and provide funds for the support of the parties' minor children. It is redundant to continue to note the previous findings of the court that the plaintiff had no income at the time of the Decree of Divorce and that at the time of the modification hearing, she had gross income of approximately \$800.00 and net income of approximately \$550.00, but certainly if the court is not going to consider the plaintiff's

increased income as bearing on the issue of decreasing the alimony, then the court ought to consider the plaintiff's increased income as bearing on her ability to provide for the financial support of the parties' minor children. It is difficult to understand how the trial court can only consider expenses which are necessitated by the plaintiff's obtaining employment without considering income that is generated and inures to the benefit of the plaintiff and the parties' minor children resulting from that employment.

The only other increased expenses that were considered by the court in connection with the modification and increase in the amount of child support payments were a general observation about inflation and dancing and other lessons for the children which were given only minimal weight by the court. (R. 45-46). Considering the length of time between the entry of the Decree of Divorce and the subsequent modification hearing (a total time period of slightly more than two years), it is difficult to justify a sixty-four percent (64%) increase in the total amount of child support based upon inflationary increases which probably totaled something in the neighborhood of ten percent (10%) per year.

Although they are not mentioned in the trial court's Decision (Appendix A), plaintiff also claimed increased automobile expenses resulting from her trading in a 1975 Mustang II automobile which was fully paid for and purchasing a 1980 Chevrolet Camaro automobile which was not. (R. 102).

Similarly, the washer and dryer referred to on Plaintiff's Exhibit 3, and for which plaintiff claimed increased expenses in the amount of \$65.00 per month, was not even purchased until after the filing of the Order to Show Cause in Re Modification by the plaintiff and had not been delivered to the defendant's residence at the time of the trial of this matter. (R. 103-104). The medical bills and expenses incurred by the plaintiff have been continuously paid for by the defendant as a courtesy to his former wife. (R. 148).

Clearly, such expenses are either discretionary expenses (in the case of the automobile and the washer and dryer) or are expenses which are not properly chargeable to the defendant since he was already paying for them anyway (such as the medical expenses) and were properly excluded from the trial court's consideration in connection with the Decision rendered by the court. (See Appendix A).

B. THE TRIAL COURT ABUSED ITS DISCRETION IN CONSIDERING DEFENDANT'S PRESENT GROSS INCOME AND COMPARING THAT WITH HIS NET INCOME AT THE TIME OF THE DECREE OF DIVORCE.

Paragraph 19 of the original Findings of Fact entered on July 17, 1979 herein provides:

8. The defendant is a self-employed dentist with a net income of approximately \$30,000.00 for the calendar year 1978.
(Emphasis added, R. 19).

The trial court's Decision (Appendix A) contains the following paragraph:

In addition to the foregoing, the defendant has increased his gross income considerably since the Decree of Divorce was entered when his net income was approximately \$30,000.00 per year. His present mode of doing business through a professional corporation and payment of a salary is not indicative of the real earnings of the defendant. This especially true in the 1980-81 period since 1979 included a \$41,000.00 loss item which does not appear in subsequent returns. In addition, an increase of approximately \$19,000.00 has been established in the gross earnings in the 1980-81 period.

(R. 46).

At the conclusion of the trial of this matter, defendant was ordered to furnish the court with copies of his 1979 and 1980 individual income tax returns as well as his 1980 corporate income tax return. Those tax returns were furnished to the court by counsel for the defendant and appear in this Court's Exhibit Packet although, with the exception of the 1980 individual tax return, they are not labeled as exhibits.

The defendant testified that he incorporated his business as a professional corporation in June of 1980 (R. 129). He further testified that he was paying himself a salary which amounts to approximately \$36,000.00 net per year (R. 134). Defendant further testified that his alimony and child support payments are made from out of his salary and that he pays the other expenses which were listed on defendant's Exhibit 6 from out of his net earnings (R. 134-136). Defendant also testified that the corporation had not paid any dividends excepting an amount that was used to fund the tail-end of a Keogh retirement program. The defendant has received no dividends whatsoever and he is still living in a

rented apartment and off of his relatively modest salary which has increased approximately \$6,000.00 over a two year period (R. 134). There is certainly no evidence of lavish or luxurious living on the part of the defendant and it is clear that the gross income from his dental practice is put right back into the corporation to pay leases, salaries, equipment, retirement plans, taxes, etc. (R. 135). The trial court's Decision (Appendix A) concerning the defendant's income and ability to pay increases in child support should have been based on his annual net income as was considered in the original Findings of Fact, not on the defendant's gross earnings and particularly not on the gross earnings of the defendant's corporation.

It is clear from the record that the defendant's increase in net income has only been approximately twenty percent (20%) over a two year period and that his income barely satisfies his own expenses, including his alimony and child support obligation, as well as the cost of the medical expenses that he pays on behalf of the plaintiff. The monthly budget submitted by the defendant on Exhibit 6 contains few, if any, luxury items and was not even cross-examined by counsel for the plaintiff. Comparing the net income of the defendant recited in the original Findings of Fact entered at the time of the Decree of Divorce and the gross income referred to in the trial court's Decision (Appendix A) is tantamount to comparing apples and oranges

and should not form a basis upon which child support can be increased.

Defendant submits that the evidence when properly considered by the trial court compels the conclusion that the plaintiff's expenses have not increased significantly since the time of the entry of the Decree of Divorce. In addition, any major increases in connection with the acquisition of new living facilities by the plaintiff were contemplated by the parties at the time they entered into the Stipulation and Property Settlement Agreement and occurred contemporaneously with the entry of the Decree of Divorce. Furthermore, the court's finding that the plaintiff's personal needs have not materially increased in that she has now obtained employment and is partially providing for her own support mandates that the court either consider the plaintiff's income in reducing alimony payments or that the court consider plaintiff's income as bearing on her ability to provide some of the economic support for the parties' minor children. Defendant further submits that the defendant's net income has had only a marginal increase which is consistent with the inflationary economy and that the trial court's attempts to compare the net income referred to in the Findings of Fact entered at the time of the Decree of Divorce with gross income reflected on the defendant's personal and corporate tax returns is like attempting to compare apples and oranges. Defendant respectfully requests this Court to reverse the increase in

child support payments ordered herein.

POINT III

DEFENDANT IS ENTITLED TO HAVE THE REQUIREMENT THAT HE MAINTAIN THE PLAINTIFF ON HIS HEALTH AND MEDICAL INSURANCE ELIMINATED FROM THE DECREE OF DIVORCE.

In the Affidavit and Order to Show Cause filed by the defendant herein, defendant requested that the court eliminate the requirement from the Decree of Divorce that the defendant be required to maintain the plaintiff on his health and medical insurance policy (R. 38). The trial court in its Decision did not specifically rule on that question but presumably denied defendant's request.

With regard to the question of insurance, plaintiff testified as follows:

Q (By Mr. Snyder) And you, in fact, have had your own medical insurance during that period of time available through your own employment, isn't that true?

A (By Mrs. Christiansen) Yes, sir. . . .

(R. 108).

Defendant submits that the need for defendant to obtain medical insurance for the plaintiff's benefit has been obviated by reason of the plaintiff's obtaining employment and her employment providing that medical insurance for her. Plaintiff has voluntarily chosen to purchase medical insurance covering herself through her employment and the coverage provided by the defendant herein merely duplicates that coverage. Defendant should not be forced to pay for

plaintiff's out-of-pocket medical expenses and provide major medical insurance coverage for the plaintiff if she has her own insurance available and if that insurance provides duplicate coverage (R. 92, 108, 148).

POINT IV

THE TRIAL COURT ERRED IN MAKING AN AWARD OF ATTORNEY FEES OR ALTERNATIVELY THE ATTORNEY FEES AWARDED HEREIN SHOULD BE REDUCED.

Section 30-30-3 Utah Code Annotated 1953 as amended provides:

The court may order either party to pay to the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action.

That section follows the provisions of Section 30-3-1 which defines the procedure, residence and grounds for obtaining a decree of divorce and Section 30-3-2 which indicates that a husband shall have the same rights as a wife to obtain a decree of divorce. There is nowhere in any of the statutes that defendant's counsel has ever found a provision that authorizes an award of attorney's fees in a post divorce modification proceeding. Defendant submits that the provisions of Section 30-3-3 were drafted for the purpose of authorizing an award of costs or attorney fees to enable a party to pursue or defend a divorce action and that the provisions of Section 30-3-3 were not intended to apply in modification proceedings. Defendant submits that this Court should clarify whether or not provisions of Section

30-3-3 should apply to permit awards of attorney fees in post divorce modification proceedings.

The court herein received evidence from plaintiff's counsel that his time and attorney's fees in this matter were worth \$180.00 (R. 152). There was contrary evidence introduced by the defendant to the effect that the plaintiff had indicated to the defendant that she was not being charged attorney's fees because the individual she had been dating prior to the initiation of the Order to Show Cause was an attorney and had arranged with Mr. Allen K. Young, attorney for the plaintiff, to represent her on a "freebee" basis (R. 151). In spite of that testimony, the court awarded attorney fees of \$200.00 which exceeds the amount requested by counsel for the plaintiff. Defendant submits that the award of attorney fees herein should be eliminated or at least reduced to the amount of \$180.00.

CONCLUSION

Defendant submits that he has demonstrated a material change in circumstances which justifies the court in reducing the amount of alimony payments as set forth in the original Decree of Divorce. The specific findings of the trial court entered at the time of the Decree of Divorce as reflected in the Stipulation and Property Settlement Agreement, (Appendix B), the Minute Entry, (Appendix C), and the Findings of Fact and Conclusions of Law, together with the uncontroverted evidence of the plaintiff's present earning capacity, justify

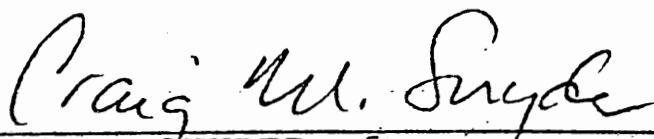
a reversal of the trial court's refusal to reduce the alimony award or alternatively mandate the conclusion that the case should be remanded to have the trial court determine an appropriate amount for the reduction of alimony.

The expenses cited by the plaintiff to justify a need for increases in child support are either in the nature of expenses that were contemplated by the parties at the time of the Stipulation and Property Settlement Agreement and were in connection with the purchase of the plaintiff's new condominium, or are in the nature of discretionary expenses incurred by the plaintiff, and should not be used to penalize the defendant by ordering increased child support. The trial court's observations in its Decision, (Appendix A), that the plaintiff's personal needs have not materially increased in that she now has obtained employment and is providing partially for her own support (R. 46), further compel the conclusion that either the plaintiff's income must be considered in reducing the amount of alimony ordered hereunder or must be considered in connection with the child support payments ordered herein since the plaintiff is now clearly capable of participating in and providing for the economic support of the parties' minor children. Furthermore, the court has engaged in a convoluted analysis which compares the defendant's net income at the time of the Decree of Divorce with his present gross income uses that analysis to justify an increase in child support based upon

the defendant's increased earning capacity.

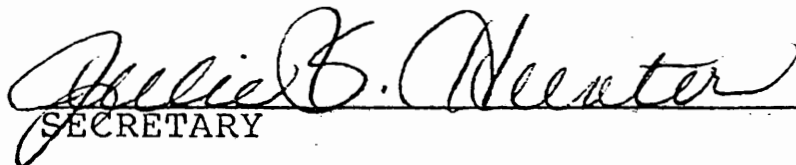
Defendant further submits that he is entitled to an order of this Court eliminating the requirement that he maintain the plaintiff on his health and medical insurance policy and for a reduction or elimination of the attorney fees as awarded herein.

DATED this 24th day of February, 1982.



CRAIG M. SNYDER, for:
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah
Attorneys for Defendant-Appellant

MAILED two (2) copies of the foregoing Brief of Appellant to Mr. Allen K. Young, Attorney for Plaintiff-Respondent, 350 East Center, Provo, Utah, 84601, this 24th day of February, 1982.


SECRETARY

APPENDIX "A"

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JANA C. CHRISTIANSEN,

Civil Case No. 51,095

Plaintiff,

vs.

KENT CHRISTIANSEN,

D E C I S I O N

Decision.

APPENDIX "A"

This matter came before the Court on the 3rd day of September, 1981, Allen K. Young, Esq., appearing for the plaintiff and Craig M. Snyder, Esq., appearing for the defendant. Plaintiff first applied to the Court for an Order to Show Cause why the support provision of the Decree of Divorce should not be increased for the two minor children of the parties, to which the defendant has counter-petitioned for a reduction of the alimony or child support awarded by the Decree of Divorce, which was stipulated to by the parties. The parties presented their evidence and copies of the defendant's income tax returns were secured for the Court's inspection, and the Court having taken the matter under advisement and having fully considered same, now enters the following:

DECISION

The Court finds that the expenses of plaintiff in rearing the minor children have increased by virtue of inflation since the entry of the Decree herein on July 17, 1979, although the expenses of the minor children were not established by any findings of fact or stipulations on file herein at the time the Decree was entered.

The Court further finds that there have been other increases in that the plaintiff has acquired new living facilities for herself and the children and having obtained employment has an increased expense of \$250.00 per month for child care. Other expenses such as dancing and other lessons for the children are

APPENDIX "A"

given only minimal weight by the Court in arriving at the increase in child support that is justifiable under the changed circumstances of the children's needs.

In addition to the foregoing, the defendant has increased his gross income considerably since the Decree of Divorce was entered when his net income was approximately \$30,000.00 per year. His present mode of doing business through a personal corporation and payment of a salary is not indicative of the real earnings of the defendant. This especially true in the 1980-81 period since 1979 included a \$41,000.00 loss item which does not appear in subsequent returns. In addition, an increase of approximately \$19,000.00 has been established in the gross earnings in the 1980-81 period.

Based upon the above and foregoing findings, and upon the finding in the Decree of Divorce that only the plaintiff's economic needs, without regard to defendant's income, is the sole basis for increase in alimony and the further finding by the Court that plaintiff's personal needs have not materially increased in that she has now obtained employment and is providing partially for her own support, the Court concludes as follows:

1. That the child support payable by the defendant to plaintiff for the support and maintenance of his two minor children should be increased the additional sum of \$175.00 per month per child, making the total sum per month of \$450.00 per month per child, the same payable semi-monthly together with alimony at such time as in the original Decree provided.

2. The Court further concludes that a sufficient change of circumstance has not been shown to justify the reduction or elimination of the alimony paid by defendant to plaintiff, and the amount provided in the original Decree shall continue.

3. The Court further finds that the defendant should pay to the plaintiff for the use and benefit of her attorney, Allen K. Young, the sum of \$200.00 for his services herein, which the Court

APPENDIX "A"

finds *is* reasonable. Defendant to pay the costs incurred herein.

Counsel for the plaintiff is directed to prepare an appropriate amendment to the Decree of Divorce consistent with the foregoing Decision.

Dated at Provo, Utah County, Utah this 8th day of October, 1981.


GEORGE E. BALLIF, JUDGE

WAYNE B. WATSON, OF
GROW & WATSON
Attorneys for Defendant
1325 South 800 East
Suite 310
Orem, Utah 84057
Telephone: 225-8300

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

JANA C. CHRISTIANSEN,

Plaintiff,

vs.

KENT CHRISTIANSEN,

Defendant.

: STIPULATION AND PROPERTY
SETTLEMENT AGREEMENT

: Civil No. 51,095

:

WHEREAS, the Plaintiff above named has commenced an action
for divorce against the Defendant, and

WHEREAS, it is the desire and intention of the parties
hereto to dispose of their property rights and other rights and
obligations arising out of their marriage in the event a Decree
of Divorce is granted by the Court on the Plaintiff's Complaint.

NOW, THEREFORE, in consideration of the mutual execution
of this Agreement, the parties hereto hereby Stipulate and Agree,
subject to the approval of the above-entitled Court, that in the
event a Decree of Divorce is entered on the Plaintiff's Complaint,
that the said Decree may contain the following provisions and
that the same may be incorporated therein.

1. The Defendant hereby agrees that the Answer previously
filed in this matter may be withdrawn and requests the Court to
treat this matter as a default, requiring no further notice to
him.

2. The Plaintiff shall be awarded the care, custody and
control of Alicia Christiansen and Chad Christiansen, the two
minor children of the parties hereto, subject to the rights of
the Defendant to visit with said children at reasonable times and
places, and under reasonable circumstances.

3. The Defendant shall pay to the Plaintiff the sum of
\$275.00 per month per child, child support, to assist in the

support and maintenance of each of the minor children of the parties hereto, together with \$650.00 per month alimony. Said payments shall be made in equal semi-monthly installments of \$600.00 each, on or before the 1st and 15th days of each month commencing August 1, 1979, and continuing thereafter on the 1st and 15th days of each month until the Court otherwise orders.

4. The Defendant shall pay and discharge any and all outstanding debts and obligations of the parties hereto incurred prior to their separation and shall hold the Plaintiff harmless from further liability thereon.

5. That the Defendant shall maintain hospital and medical insurance policies in full force and effect on the Plaintiff and the minor children of the parties with an annual deductible not to exceed \$100.00. It is expressly understood that in the event Plaintiff remarries, Defendant will not be responsible for maintaining a hospital and medical insurance policy for her benefit.

6. The Plaintiff shall be awarded as her sole and separate property the 1975 Ford Mustang automobile, together with any and all personal property in her possession as of the date of this Stipulation.

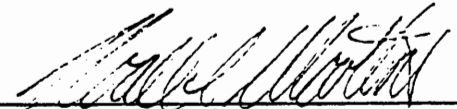
7. The Defendant shall be awarded as his sole and separate property the 1978 Oldsmobile Cutlass automobile, together with any and all personal property in his possession as of the date of this Stipulation, including all business property accounts and equipment. In lieu of any claims upon the business or any other property acquired by the parties during their marriage, except for such properties as the Plaintiff has in her possession, the Defendant shall pay to her the sum of \$16,000.00 cash upon approval of this Stipulation by the Court.

8. The Defendant shall pay to the Plaintiff the sum of \$375.00 for the use and benefit of her attorney herein, together with costs in the amount of \$25.00.

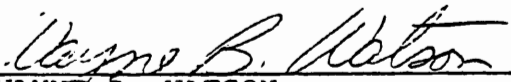
9. The parties further stipulate that they hereby request the Court to make a finding of fact that the Plaintiff presently has no income, and that future increases in alimony shall be based solely upon Plaintiff's economic needs without any regard whatsoever to a possible increase in Defendant's income status.

10. Each of the parties acknowledge that they have read the foregoing Stipulation and Property Settlement Agreement and understand the contents thereof; that there have been no promises or representations made by either party to the other to induce the execution of this Agreement which are not specifically set forth herein.

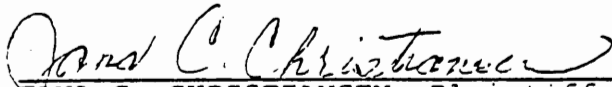
DATED this 13 day of July, 1979.



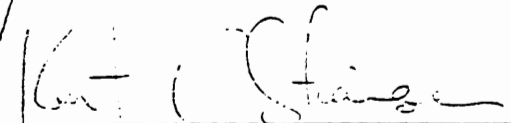
NOALL T. WOOTTON
Attorney for Plaintiff



WAYNE B. WATSON,
Attorney for Defendant



JANA C. CHRISTIANSEN, Plaintiff



KENT CHRISTIANSEN, Defendant

APPENDIX "C"

In the Fourth Judicial District Court

of the State of Utah
In and For Utah County

JANA C. CHRISTIANSEN,

Plaintiff

vs.

KENT CHRISTIANSEN,

Defendant

MINUTE ENTRY

CASE NUMBER 51,095

DATED July 17, 1979

George E. Ballif JUDGE

Reported by Myron A. Frazier, C.S.R.

DIVORCE

APPENDIX "C"

This was the time set for trial in the above captioned matter. The plaintiff was present and represented by counsel Noall T. Wootton. The defendant was not present but was represented by counsel Wayne B. Watson.

Mr. Wootton addressed the court and represented the defendant has withdrawn his answer & agreed to his default being entered through the stipulation and property settlement agreement. Mr. Watson concurred in those representations.

Jana C. Christiansen was sworn and testified in her own behalf.

The court finds the material allegations are true and correct and the plaintiff is awarded a decree of divorce from the defendant on the grounds of mental cruelty.

The court approved the stipulation and property settlement agreement and ordered the decree entered consistent therewith. Counsel stated for the record that plaintiff has "0" income at this time.

For good cause shown the decree to become final upon its signing by the court and entry by the clerk in the register of actions.