

1992

# Glen P. Willey v. Rosalind Ann Johnson Willey : Brief of Appellee

Utah Court of Appeals

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**BRIEF**

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IN THE COURT OF APPEALS

FOR THE STATE OF UTAH

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GLEN P. WILLEY,	)	
Plaintiff/Appellee,	)	
vs.	)	Case No. 920091CA
ROSALIND ANN JOHNSON	)	
WILLEY ,	)	Priority No. 16
Defendant/Appellant.	)	

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**BRIEF OF APPELLEE  
GLEN P. WILLEY**

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Appeal from a Final Decree of Divorce  
Entered by the Third Judicial District Court  
for Salt Lake County, State of Utah  
Honorable David S. Young  
District Judge

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## TABLE OF CONTENTS

JURISDICTION .....	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND STANDARD OF APPELLATE REVIEW .....	1
STATUTORY AUTHORITY .....	2
STATEMENT OF THE CASE .....	3
STATEMENT OF FACTS .....	3
SUMMARY OF THE ARGUMENT .....	7
ARGUMENT	
INTRODUCTION .....	8
I.    THE TRIAL COURT PROPERLY CONSIDERED AND APPLIED THE <i>JONES</i> FACTORS IN AWARDING ALIMONY HEREIN .....	10
II.   THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REQUIRING MRS. WILLEY TO SHARE THE RESPONSIBILITY FOR PAYMENT OF A MARITAL DEBT .....	19
III.  THE TRIAL COURT CORRECTLY FOUND THAT THE EQUITY FROM MRS. WILLEY'S PREMARITAL HOME HAD BEEN COMMINGLED AND HAD LOST ITS SEPARATE CHARACTER AS PREMARITAL PROPERTY .....	20
IV.   THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING \$5,000 IN ATTORNEY'S FEES TO MRS. WILLEY .....	23
CONCLUSION .....	24
CERTIFICATE OF SERVICE .....	25

## TABLE OF AUTHORITIES

### Cases Cited

<i>Alexander v. Alexander</i> , 737 P.2d 221 (Utah 1987) .....	2, 19
<i>Andersen v. Andersen</i> , 757 P.2d 476 (Utah App. 1988) .....	23
<i>Asper v. Asper</i> , 753 P.2d 978 (Utah App. 1988) .....	15
<i>Dunn v. Dunn</i> , 802 P.2d 1314 (Utah App. 1990) .....	2, 20, 23
<i>Gardner v. Gardner</i> , 748 P.2d 1076 (Utah 1988) .....	10, 15
<i>Howell v. Howell</i> , 806 P.2d 1209 (Utah App. 1991) .....	15
<i>Jones v. Jones</i> , 700 P.2d 1072 (Utah 1985) .....	10, 15
<i>Myers v. Myers</i> , 768 P.2d 979 (Utah App. 1989) .....	16
<i>Noble v. Noble</i> , 761 P.2d 1369 (Utah 1988) .....	20
<i>Olson v. Olson</i> , 704 P.2d 564 (Utah 1985) .....	10
<i>Paffel v. Paffel</i> , 732 P.2d 96 (Utah 1986) .....	1
<i>Rasband v. Rasband</i> , 752 P.2d 1331 (Utah App. 1988) .....	1, 2, 10, 15, 23
<i>Thronson v. Thronson</i> , 810 P.2d 428 (Utah App. 1991) .....	16
<i>Watson v. Watson</i> , 194 Utah Adv. Rep. 42 (Utah App. 1992) .....	9
<i>West Valley City v. Majestic Investment Company</i> , 818 P.2d 1311, (Utah App. 1991) .....	10
<i>Wiese v. Wiese</i> , 699 P.2d 700 (Utah 1985) .....	12

### Statutes

<i>Utah Code Ann.</i> § 30-3-5 .....	2
<i>Utah Code Ann.</i> § 78-2a-3(2)(i) (Supp. 1992) .....	1
<i>Utah Code Ann.</i> § 78-45-4.1 .....	2, 12

### Rules

Utah Rule of Appellate Procedure 24(a)(5) .....	9
Utah Rules of Appellate Procedure 24(a)(7) and (e) .....	9
Utah Rule of Appellate Procedure 24(a)(8) .....	9

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Defendant/Appellant.	)	
	)	

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**BRIEF OF APPELLEE  
GLEN P. WILLEY**

---

**JURISDICTION**

The Court of Appeals has jurisdiction of this appeal from a decree of divorce pursuant to *Utah Code Ann.* § 78-2a-3(2)(i) (Supp. 1992).

**STATEMENT OF THE ISSUES PRESENTED  
FOR REVIEW AND STANDARD OF APPELLATE REVIEW**

Appellee believes that the issues actually presented for review are as follows:

I. Issue: Whether the trial court properly applied the *Jones* factors in awarding alimony herein.

Standard of Review: The appellate court will not disturb the trial court's award of alimony absent a showing of a clear and prejudicial abuse of discretion. *Rasband v. Rasband*, 752 P.2d 1331, 1333 (Utah App. 1988) citing *Paffel v. Paffel*, 732 P.2d 96, 100 (Utah 1986).

II. Issue: Whether the trial court abused its discretion by requiring appellant to share responsibility for the payment of a marital debt.

Standard of Review: The trial court's adjustment of the financial interests of the parties is endowed with a presumption of validity and will not be disturbed upon appeal absent a clear abuse of discretion. *Alexander v. Alexander*, 737 P.2d 221, 224 (Utah 1987).

III. Issue: Whether the trial court correctly found that appellant's premarital equity in a residence had been commingled and had lost its separate character.

Standard of Review: A trial court's findings will not be disturbed unless they are clearly erroneous, that is, against the clear weight of the evidence, or unless the appellate court reaches a definite and firm conviction that a mistake has been made. *Dunn v. Dunn*, 802 P.2d 1314, 1317 (Utah App. 1990).

IV. Issue: Whether the trial court erred in failing to award appellant all the attorneys' fees claimed by her.

Standard of Review: Whether the trial court abused its discretion. *Rasband v. Rasband*, 752 P.2d 1331, 1336 (Utah App. 1988).

### STATUTORY AUTHORITY

In addition to *Utah Code Ann.* § 30-3-5, this case is governed by *Utah Code Ann.* § 78-45-4.1 which provides:

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

### STATEMENT OF THE CASE

This is an action for divorce which was tried to the court on November 21 and 22, 1991. Findings of fact, conclusions of law, and a decree were entered on January 14, 1992. The findings of fact submitted were drafted by counsel for appellee.

### STATEMENT OF FACTS

Appellant Rosalind Ann Johnson Willey ("Mrs. Willey") and appellee Glen Paul Willey ("Mr. Willey") were married April 29, 1982. [Record (hereinafter "R.") at 185]. Both parties had been previously married. *Id.* Mrs. Willey had three children from her prior marriage, Matthew who was 20 years old at the time of the divorce, John who was 17, and Emily who was 13. The parties had no children together. *Id.*

At the time of the divorce, Mr. Willey was 40 years old (R. at 185) and Mrs. Willey was 42 years old.

At the time the parties married, Mr. Willey was a stockbroker and Mrs. Willey was working full time at a retail clothing store. (R. at 387, l. 10; p. 450, l. 8).

The parties separated in November of 1990. (R. at 186).

During the marriage, Mr. Willey urged Mrs. Willey to work full time; her refusal to do so was the cause of major disagreement. (R. at 187). For much of the marriage, the parties lived beyond their means; instead of accumulating assets, they were required to borrow money to meet expenses. For example, the parties bought a Mercedes in 1987. They made payments on it for four years, then in 1991, refinanced it to obtain money to pay other debts. (R. at 206-207). They borrowed against Mr. Willey's 401K retirement savings plan.



(R. at 210). They liquidated Mr. Willey's Individual Retirement Account to pay expenses. (R. at 212-213). They borrowed money from First Interstate Bank, repaid it, and borrowed again. (R. at 225-227).

Mr. Willey has a bachelor's degree in Zoology. Mrs. Willey has a bachelor's degree in Education. (R. at 187-188).

As a stockbroker, Mr. Willey receives only commissions, not wages. (R. at 188). Thus, his income varies from year to year. (R. at 189). The court found that Mr. Willey's average yearly income was \$110,000. (Findings of Fact No. 12, R. at 138).

For the last several years of the marriage, Mrs. Willey chose to work part-time as a "hobbyist" in a book store. (R. at 389). Mrs. Willey also leads literature discussion groups and works at an expensive clothing store in trade for clothing. (R. at 460). Mrs. Willey could renew her teaching credential with one year additional education (R. at 457), but would "rather do something else." (R. at 457, l. 21). Mrs. Willey also testified that she is no longer interested in working in retail clothing stores. (R. at 460).

The trial court found that Mrs. Willey was capable of earning an income of between \$1,500 and \$2,000 per month and awarded her alimony of \$1,500 per month for one year after the date of trial and \$1,000 per month for three years thereafter. The court found that it was appropriate to take into account the fact that Mr. Willey had already been supporting Mrs. Willey for one year since their separation. Mr. Willey had also been providing housing for Mrs. Willey by making the house payment of approximately \$2,500 per month and would continue to do so until the house was sold. Mr. Willey had also paid all the marital debts during the separation and had paid maintenance on the

house. (R. at 248). Mr. Willey had also made Mrs. Willey's car payment during the separation. *Id.*

When the parties married in 1982, Mrs. Willey owned a home on Logan Avenue with an equity of approximately \$29,000. One year later, in April 1983, the home was sold and the net proceeds of sale were \$29,163.73. (Exhibit 4-P). The parties then bought a house on Lynwood Drive in their joint names, making a down payment of \$19,261.90. They made improvements to the Lynwood Drive home costing \$45,308.99. (R. at 201). In 1986, they sold that home, realizing cash proceeds of \$59,645.04 (R. at 201) and bought a home on Maywood Drive, making a down payment of \$65,082.83. (R. at 202). At the time of trial, the balance of the first mortgage on the Maywood Drive home was approximately \$230,000. There was also a second mortgage to Mrs. Willey's mother of approximately \$80,000. (Exhibit 4-P). The second mortgage was made up of three separate loans made to the Willeys for improvements to the various homes and operating capital. The court found that the funds received by the parties when the Logan Avenue home was sold had been commingled and had lost their separate character. The evidence at trial indicated that there would be no net proceeds after sale of the Maywood Drive house. (Exhibit 4-P).

Mrs. Willey requested that the court award her attorneys' fees totaling \$19,215 and costs and disbursements of \$961.80. The court awarded attorneys' fees of \$5,000.

In addition to alimony of \$1,500 per month for the first year, the court awarded Mrs. Willey one-half of certain bonuses to be received by Mr. Willey in the future. In early 1992, she received \$6,562.39, representing one-half of such a bonus.

Many of the "facts" set forth in Mrs. Willey's brief are not accurate and are not supported by citations to the record. Mr. Willey disagrees with the following:

1. Mr. Willey worked at Smith, Barney as a stockbroker at the time of the parties' marriage. (R. at 186). He had not been "out of work for a number of months."

2. Mr. Willey disagrees that his income for 1991 was \$126,095.62 to November 1. His clear testimony was that was all the income he was going to receive in 1991. (R. at 192). He actually received that amount to December 1, and any additional income was to be deferred to 1992.

3. Mrs. Willey implies that the Mr. Willey's income is distorted because he defers income over \$125,000. However, during the marriage, deferred income would carry over to the next year. Thus, the deferred income is taken into account by averaging.

4. Mrs. Willey repeatedly suggests that the loans from her parents, now owed to her mother Mrs. Johnson, were taken for Mr. Willey's separate benefit and should be paid by him alone. The evidence was to the contrary. The loans were taken for home improvements (R. at 284, ll. 8-10), to buy the Maywood Drive house (R. at 284, ll. 14-17), and for operating expenses (R. at 204, ll. 1-7).

5. Mrs. Willey asserts that the parties' separation required her to return to work full time in 1991. In fact, Mrs. Willey continued to work part-time up to the time of the trial. (R. at 231, ll. 14-15).

6. Mrs. Willey asserts that she receives \$332 as a "contribution to child support." In fact, she receives \$332 as child support from her former ~~Ma~~.

husband

Willey and has filed a petition for modification seeking to increase that amount, but had chosen not to pursue it.

7. On page 10 of her brief, Mrs. Willey sets forth a number of supposed facts concerning her health. None of those are supported by citations to the record. They also ignore the fact that Mrs. Willey is able to engage in athletic activities.

8. Mrs. Willey asserts that Mr. Willey enjoyed European and personal trips during the marriage. In fact, the trips that Mr. Willey made to Europe and elsewhere were for business purposes and were paid for by his employer. (R. at 491).

### SUMMARY OF THE ARGUMENT

I. The trial court properly applied the *Jones* factors in awarding alimony herein.

The trial court made adequate findings about the ability of Mr. Willey to pay alimony and the ability of Mrs. Willey to produce income. The trial court did not make findings about Mrs. Willey's needs because she presented conflicting, contradictory evidence on that issue.

A different analysis should be used in determining a reasonable alimony award after a relatively short, second marriage as contrasted with a long marriage that has produced children.

The trial court's award of alimony should be affirmed.

II. The trial court did not abuse its discretion by requiring Mrs. Willey to share responsibility for the payment of a marital debt.

The trial court's findings with respect to the payment of debt are supported by the evidence and should not be disturbed unless there has been a

clear abuse of discretion. Also, Mrs. Willey failed to marshal the evidence in support of her position that the findings are not supported by the evidence.

The trial court's ruling on the payment of debt should be affirmed.

III. The trial court correctly found that the equity from Mrs. Willey's premarital home had been commingled and had lost its separate character as premarital property.

At the time of the marriage, Mrs. Willey had \$29,000 in equity in a home located on Logan Avenue. When that house was sold, part of the \$29,000 was spent and part was used as a down payment on the parties' next home on Lynwood Drive. The parties made improvements to the home at Lynwood Drive using borrowed and earned funds, then sold that house and purchased one on Maywood Drive. Mr. Willey made payments on all three homes. No net equity will be realized on sale of the Maywood Drive home. Accordingly, Mrs. Willey's claim for premarital equity has been commingled and partially dissipated and the trial court did not err in so finding.

IV. The trial court did not abuse its discretion in awarding \$5,000 in attorney's fees to Mrs. Willey.

The decision to award or deny attorney's fees is within the trial court's discretion. In this case, Mrs. Willey failed to show that her claimed fees were reasonable and the trial court did not err in reducing them.

## **ARGUMENT**

### **INTRODUCTION**

Much of Mrs. Willey's argument is an attempt to retry this case, considering only those versions of the facts that support what she contends is

the proper result. Her brief violates the Utah Rules of Appellate Procedure in several respects:

(a) it does not indicate the proper standard of appellate review [Rule 24(a)(5)];

(b) it does not contain a summary of arguments [Rule 24(a)(8)];  
and

(c) it does not contain adequate references to the record to support its version of the facts and the references that are included are not properly paginated [Rule 24(a)(7) and (e)].

In addition, Mrs. Willey has failed properly to marshal the evidence.

“Findings of Fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.” Utah R. Civ. P. 52(a). Moreover, we have held:

To mount a successful attack on the trial court’s factual findings, an appellant must marshal all the evidence in support of the trial court’s findings and then demonstrate that, even viewing the evidence in the light most favorable to the findings, the evidence is insufficient to support the findings, *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985), or that its findings are otherwise clearly erroneous. A finding is clearly erroneous, when, even though there is evidence to support it, the reviewing court is “left with the definite and firm conviction that a mistake has been committed.” *State v. Walker*, 743 P.2d 191, 193 (Utah 1987).

*Schindler v. Schindler*, 776 P.2d 84, 88 (Utah App. 1989).

*Watson v. Watson*, 194 Utah Adv. Rep. 42, 46 (Utah App. 1992).

Thus, it is difficult to know whether to argue that the trial court’s findings are supported by the evidence, which they are, or that the trial court applied the proper legal standards, which it did. It is, of course, this court’s prerogative to affirm the lower court decision solely on the basis of failure to

comply with the Utah Rules of Appellate Procedure. *West Valley City v. Majestic Investment Company*, 818 P.2d 1311, 1313 n. 1 (Utah App. 1991) (citations omitted). Assuming that the court will not do so, however, Mr. Willey will show that the evidence does support the trial court's findings and that the trial court applied the proper legal standards.

**I. THE TRIAL COURT PROPERLY CONSIDERED AND APPLIED THE JONES FACTORS IN AWARDING ALIMONY HEREIN.**

This court and the Utah Supreme Court have repeatedly stated the three factors the trial court must consider in determining a reasonable alimony award:

- (1) The financial condition and needs of the requesting spouse;
- (2) The ability of the requesting spouse to produce a sufficient income for herself; and
- (3) The ability of the other spouse to provide support.

*Rasband v. Rasband*, 752 P.2d 1313 (Utah App. 1988) citing *Gardner v. Gardner*, 748 P.2d 1076, 1081 (Utah 1988); *Olson v. Olson*, 704 P.2d 564, 566 (Utah 1985); and *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985). These factors are referred to herein as the "*Jones factors*" because that case contains a full discussion of the rationale for alimony in marriages of long duration.

In this case, Mrs. Willey asserts that the trial court failed to make findings on all three factors and that it therefore abused its discretion. *Rasband* at 1333. However, what Mrs. Willey is really arguing is that the court did not make findings about what Mrs. Willey's specific needs were and that she disagrees with the findings about Mr. Willey's ability to provide support and her own ability to support herself. Clearly, the court did make

findings about Mr. Willey's ability to earn, finding that his average yearly income was \$110,000. This finding was rational and supported by the evidence. (R. at 359-360). The trial court also made findings about Mrs. Willey's ability to support herself, finding that she could earn between \$1,500 and \$2,000 per month. This finding was also supported by the evidence.

A review of the trial court record reveals the reason why the trial court did not make specific findings about Mrs. Willey's needs. On the first day of the trial, Mrs. Willey offered Exhibit 27-D as a summary of her monthly expenses. (R. at 395). In that exhibit, Mrs. Willey included her children's expenses. (R. at 397, ll. 16-22). At that time, Mrs. Willey testified that her expenses were \$6,905 per month, including the expenses of her children. She then stated that her expenses (again including those of the children) would be \$5,405 after the marital residence was sold. The second day of trial, Mrs. Willey offered different testimony and a new exhibit about her expenses. (Exhibit 36-D, R. at 440-442). Now she testified that her needs were \$2,678.40 per month, not including those of the children.

In argument, Mrs. Willey's counsel never suggested to the court what it should find her real needs to be and proposed no findings on that issue. It is now disingenuous for her to argue that the court erred in not making findings when she did not produce any competent evidence of what her legitimate needs were.

On the other hand, if Mrs. Willey now claims that her needs were \$2,678.41 as she testified the second day of trial, her income, together with the alimony awarded by the trial court is more than sufficient to meet those needs. The court found that she could earn \$1,500 to \$2,000 per month and ordered alimony of \$1,500, to decrease to \$1,000 per month for three years.



Mrs. Willey also argues that the court should have included the expenses of her children, at a very high level, in determining what her needs were. She reasoned that, because she must support her children, her contribution to their support is one of her legitimate expenses. This is simply an indirect way of arguing that a stepparent is obligated to continue to support stepchildren after a divorce. It is clear that Mr. Willey did much to benefit Mrs. Willey's children during this marriage. However, it is also clear that Utah law does not require him to continue to support those children after the marriage ends. *Utah Code Ann.* § 78-45-4.1 provides as follows:

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

The fact that Mr. Willey fulfilled this duty during the marriage does not provide a basis for requiring him to support the children after the marriage ends. In *Wiese v. Wiese*, 699 P.2d 700 (Utah 1985), a stepfather married a natural mother before her child was born. When the stepfather and natural mother divorced, the decree indicated that the child was issue of the marriage. The stepfather even took custody of the child for a period of time after the divorce and provided funds for his support. Even in these circumstances, the Supreme Court held that the mother must show that the stepfather had interfered with the natural father's support obligation before the stepfather would have any duty of support. No such showing was made or even attempted in this case.

Mrs. Willey also argues that the alimony award was inadequate because Mr. Willey was required to pay more support during the separation prior to the trial than the trial court ultimately awarded. Again, this argument is

disingenuous. It is entirely appropriate that support be at a higher level when the parties first separate in order to allow Mrs. Willey an opportunity to obtain employment and adjust her standard of living to reflect the parties' new circumstances. In this case, however, Mrs. Willey not only refused to adjust her standard of living, but refused to seek full time employment.

It is ironic that Mrs. Willey would argue that Mr. Willey's making the house payment during the separation should somehow entitle her to more support. To the contrary, Mrs. Willey could have used the year before trial and the months after trial, during which she had no housing expenses, to adjust her expenses, accumulate savings, obtain more education or job training or look for a job. The fact that she chose not to do so does not entitle her to additional support. The house payment was a substantial one at \$2,492 per month. In addition, under the temporary order Mr. Willey was required to pay the entire installment debt of \$360 per month, to pay support, and to pay Mrs. Willey's car payment.<sup>1</sup>

It is difficult to understand Mrs. Willey's argument that she is entitled to permanent support at the level of temporary support. In effect, she seems to be

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<sup>1</sup> In footnote 3 on page 13 of Mrs. Willey's brief, there is a reference to proceedings in this case after the entry of decree of divorce. This, of course, is highly improper, since none of the post trial proceedings are before this court. However, Mr. Willey feels compelled to respond. Pursuant to the court's order, Mr. Willey continued to make the mortgage payments on the marital home on Maywood Drive after the trial. The house remained on the market. In July of 1992, the parties finally received an offer to purchase the home. Mrs. Willey refused to accept it. A hearing was held before Judge Murphy, since Judge Young was absent, and Judge Murphy entered an order facilitating the sale of the home. However, as of the date of this brief, the closing of that sale has not taken place. Thus, Mr. Willey continues to provide housing for Mrs. Willey at a cost of \$2,492 per month.

At the time Mrs. Willey's brief was written, the sale of the home had not actually closed; thus, Mrs. Willey's calculations as to any deficiency are simply speculation and not evidence.

saying that Mr. Willey should be obligated to provide her housing at the level enjoyed by the parties during the marriage permanently. That argument is ludicrous.

There are two essential problems with Mrs. Willey's argument that the court should have ordered Mr. Willey to pay alimony to her at a level that would maintain the standard of living she had during this marriage. Notwithstanding certain language in the cases from this court and the Utah Supreme Court, it is impossible in many divorces to maintain the standard of living the parties had during the marriage. The reason for this is simply that the income which once paid for one household is now required to cover the expenses of two households. Thus, both parties usually have a lower standard of living.

In addition, in this case, the parties maintained the high standard of living only by borrowing. This way of life resulted in their leaving the marriage with large liabilities and few assets. It is a fiscal policy that could not continue indefinitely because there is a limit to Mr. Willey's ability to service the debt.

It is nearly impossible for Mr. Willey to have met the inflated needs Mrs. Willey claims. Mrs. Willey argues that she would need, after the divorce, \$5,405 per month to meet her expenses. She also claims that she would be able to contribute virtually nothing to that from her own income. However, Mr. Willey's uncontradicted testimony was that his net monthly income in 1991 was approximately \$7,300 per month. Thus, Mrs. Willey's position amounts to an argument that she should have available to her \$5,405 to meet her living expenses, while Mr. Willey should be required to pay all of the parties' debts and his own living expenses from approximately \$2,000 per month. This

hardly constitutes the equalization of income that Mrs. Willey seems to argue is appropriate.

Mrs. Willey also ignores the fact that the cases she relies on are factually dissimilar to this one. In most of those cases, the marriage was a very long one. For example, the parties in *Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988) were married for approximately 36 years. Mrs. Gardner had not been employed for 30 years. In that case, the Supreme Court said that, after a marriage of long duration, the parties' standards of living should be equalized to the extent possible. Likewise, the parties in *Asper v. Asper*, 753 P.2d 978 (Utah App. 1988) were married 27 years. In *Rasband v. Rasband*, 752 P.2d 1331 (Utah App. 1988), the parties were married approximately 30 years. In *Howell v. Howell*, 806 P.2d 1209 (Utah App. 1991), the parties were married 32 years.

In *Jones v. Jones*, *supra*, the parties were married 30 years. They had raised four children together. The wife had worked in minor clerical capacities during the early years of the marriage, but during the marriage, her primary occupation was raising children. The wife was 52 years old at the time of trial. The court held that, in this situation, decreasing rehabilitative alimony was not appropriate.

By contrast, in this case, each of the parties had been married before. Mrs. Willey's first marriage produced three children. By her own testimony, she was successfully supporting herself and the three children at the time of her marriage to Mr. Willey. By her own testimony, she had been offered managerial positions in the retail business. Although she had chosen to regard her work during the last several years of this marriage as a hobby, she is clearly talented. She has a college education and the ability to lead

literature discussions groups. She could renew her teaching credential in one year if she chose to do so, although she does not want to do that kind of work. She was 42 at the time of the divorce, not 52 as was the wife in *Jones*. She was in her thirties when the parties married.

This court has not discussed extensively the issue of whether alimony should be determined differently in a second marriage of short duration as contrasted to a marriage of long duration or a first marriage that produces children. *Thronson v. Thronson*, 810 P.2d 428 (Utah App. 1991). It is Mr. Willey's position that alimony analysis after a second marriage that does not produce children and does not last through a substantial portion of the parties' adult lives should be entirely different from a 30-year marriage which leaves the spouse who has not worked during the marriage unable to return to the work force or able to return only with great difficulty. In this marriage, alimony should be viewed as a transition device, not a lifetime annuity.

Pages 15 and 16 of Mrs. Willey's brief contain a series of arithmetic calculations indicating her resources before divorce, resources after divorce, and reduced resources by added burdens. All of these calculations assume that the trial court made the findings to support them. It did not. As indicated above, Mrs. Willey did not offer evidence to support such findings.

Mrs. Willey also argues that the court should have accepted, without question, the testimony of her expert witness. The trial court has discretion to reject expert testimony that is not credible. *Myers v. Myers*, 768 P.2d 979, 984 (Utah App. 1989). The testimony of Ellen Richardson, the witness in this case called by Mrs. Willey to describe her career future, was truly not credible. For example, Ms. Richardson testified that she did counseling with women reentering the job market on a volunteer basis (R. at 300-301), but that she

was going to charge Mrs. Willey \$100 per hour. Ms. Richardson testified that Mrs. Willey could make \$20,000 to \$25,000 per year (R. at 306) and testified that she must undertake education for three years without working in order to do so. She also testified that, if Mrs. Willey did not receive education or skills, she would be battling with a welfare situation (R. at 307, ll. 22-23). Ms. Richardson could not really explain, upon cross-examination, why additional education would take three years. She and Mrs. Willey did not discuss a specific career path (R. at 310). She admitted that Mrs. Willey could prepare to be an executive secretary at a salary of about \$22,000 in much less than three years (R. at 311). Ms. Richardson testified that she would not know whether Mrs. Willey had any opportunity for advancement in her current employment at the book store. She indicated she had no idea what incomes were available in the retail clothing business in which Mrs. Willey had worked before her marriage (R. at 314). Until cross-examination, she did not disclose that she was friendly with Mrs. Willey and had attended her literature discussion groups.

Judge Young commented that it was very unfortunate (R. at 321-322) that Mrs. Willey did not choose an independent witness “rather than a friend that attends book review classes.” (R. at 323, ll. 12-13). Under the circumstances, Judge Young was fully justified in rejecting this testimony.<sup>2</sup>

Mrs. Willey also criticizes the trial court for finding that Mr. Willey’s average income is \$110,000 per year. Given the radical fluctuations in Mr.

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<sup>2</sup> Mrs. Willey’s brief (fn. 7, p. 17) suggests that the court rejected the testimony of Ms. Richardson out of gender bias, asserting that when men have acquaintances, their testimony would not be discredited for that reason alone. In light of the flaws in the testimony and the attempt to hide the witness’ bias, this suggestion is insulting to the trial court.

Willey's income over the years of this marriage, it is appropriate to use an average figure, rather than the highest or lowest year. In making the argument that the trial court erred in finding that \$110,000 was the average, Mrs. Willey again distorts the facts indicating that Mr. Willey would have additional income in 1991, after the receipt of \$126,000. As Mrs. Willey herself pointed out, all income over that amount was deferred to the next year, as it was throughout the parties' marriage.

Mrs. Willey also argues that because Mr. Willey's needs were less than those of Mrs. Willey, he should be penalized and be forced to pay additional alimony. Mr. Willey's needs are not one of the factors to be considered under *Jones*. In addition, Mr. Willey was living in an apartment costing \$610 in part because he had to pay the mortgage payment on the marital home where Mrs. Willey was residing. Clearly, he will want to improve his standard of living to come closer to that Mrs. Willey enjoyed during the separation.

Mrs. Willey also argues that the court's finding deprives her of the ability to return to court to seek additional alimony based on change of circumstances. This reasoning is difficult to follow. An increase in Mr. Willey's income would not, alone, constitute an appropriate changed circumstances to justify an increase in alimony. The standard of living to be examined is the parties' standard of living during the marriage, not Mr. Willey's future income.

Mrs. Willey repeatedly argues that the temporary support order somehow governs alimony. Temporary orders are intended to be temporary. They are made without evidentiary hearings and the order lasts only until the decree is entered. The temporary order has no relevance to the issues in this appeal.

Mrs. Willey argues that the duration of these parties' marriage should not be significant in determining alimony. Mr. Willey obviously disagrees. Assuming that these parties will be adults for approximately 50 or 60 years, it does not seem appropriate for Mr. Willey to be compelled to support Mrs. Willey for the rest of her adult life because he was married to her for nine years. Mrs. Willey apparently did not receive alimony from her first husband.

## **II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REQUIRING MRS. WILLEY TO SHARE THE RESPONSIBILITY FOR PAYMENT OF A MARITAL DEBT.**

The trial court's distribution of property and orders with respect to payment of debt are endowed with a presumption of validity and will not be disturbed upon appeal unless they are clearly unjust or a clear abuse of discretion. *Alexander v. Alexander*, 737 P.2d 221, 224 (Utah 1987). In order to overturn the trial court's ruling, Mrs. Willey has the responsibility to marshal the evidence in support of her position. This she has not done. Mrs. Willey argues that she should not be required to pay any portion of the debt to First Interstate because it was incurred in part after the parties' separation. However, the evidence clearly showed that the credit line was increased to meet the parties' expenses and, in particular, Mrs. Willey's expenses, when Mr. Willey's income was inadequate.

Thus, this court must assume that the evidence supports the trial court's finding that it is equitable for the parties to share the First Interstate debt. Further, the transcript references made by Mrs. Willey do not support her position (one of them does not even deal with the issue), and she makes



unsupported assertions that the deficiency that may arise out of the sale of the home will be \$37,900.

Mrs. Willey also argues that she did receive adequate assets in the property settlement. In fact, she received one-half of the assets. The fact that there were not more assets is a reflection of the parties' excessive spending during the marriage.

Mrs. Willey cites *Noble v. Noble*, 761 P.2d 1369 (Utah 1988), in support of her position. *Noble* does not appear to deal with the allocation of debt.

Under the circumstances, the trial court did not err in allocating the debt as it did.

### **III. THE TRIAL COURT CORRECTLY FOUND THAT THE EQUITY FROM MRS. WILLEY'S PREMARITAL HOME HAD BEEN COMMINGLED AND HAD LOST ITS SEPARATE CHARACTER AS PREMARITAL PROPERTY.**

In *Dunn v. Dunn*, 802 P.2d 1314 (Utah App. 1990), the court said:

Generally, the rule for premarital property is that each party retain the separate property he or she brought into the marriage. *Haumont*, 793 P.2d at 424-25. Some exceptions include where the property has been commingled, so that it has lost its separate character, *id.*, or where it is fair, just and equitable to do otherwise. *Noble*, 761 P.2d at 1373 . . . .

*Id.* at 1321.

In this case, Mrs. Willey claims that she should have been awarded \$29,000, because, at the time of the marriage, she had \$29,000 in equity in a home on Logan Avenue.<sup>3</sup> There are two problems with Mrs. Willey's

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<sup>3</sup> Ironically, Mrs. Willey also argues that she had a good job at the time of the marriage. She does nothing to explain why she did not return to a good job or obtain another good job when she argues that she will be on welfare without alimony.

argument. First, the equity from her premarital home on Logan Avenue was commingled and partly dissipated. Second, there is no marital property out of which the award could be made to her. If she were to receive money, representing her premarital equity, it would have to be in the form of a debt that Mr. Willey would be required to pay. This in itself indicates that there is no premarital equity to return to her.

The parties married in April 1982. At that time, Mrs. Willey owned a house located on Logan Avenue. That house was sold in April of 1983. The cash proceeds of sale were \$29,163.73. The parties then purchased a house on Lynwood Drive making a down payment of \$19,266.90. (R. at 200-201, Exhibit 4-P). Ten thousand dollars of the proceeds of the sale of the Logan Avenue house were spent for remodeling, furniture, and possibly to pay off some of Mrs. Willey's premarital obligations. (R. at 200-202).

During the time the parties lived in the house on Lynwood Drive, they made improvements to it at a cost of \$45,308.99. (R. at 201). Those improvements were paid for by borrowing from Mrs. Willey's parents. (R. at 201, ll. 19-24).

In 1986, the Lynwood Drive house was sold and there were cash proceeds of \$59,645.04. The parties then purchased a house on Maywood Drive. They put down \$65,082.63. Part of those funds were borrowed from Mrs. Willey's parents. (R. at 202). Those borrowings were a second mortgage on the Maywood Drive house.

Mr. Willey made the mortgage payments on the Logan Avenue house after the marriage and made the mortgage payments on the Lynwood Drive house and the Maywood Drive house. Mrs. Willey's income was used for her own personal needs. (R. at 206).

Mrs. Willey also argues that Mr. Willey should be responsible for all or some part of the second mortgage owed to her mother and that the court should not consider it a lien on the Maywood Drive house, even though it is secured by a trust deed, and that there would thus be equity available to distribute to her. The first money borrowed from the Johnsons was used to finance improvements to the Lynwood Drive home. (R. at 284). The Willeys then borrowed money at the time they purchased the home on Maywood Drive and in 1987. The note they executed in 1987 incorporated the balance on the first two notes. At the time of trial, the total amount owed on the note was \$80,671.44. The parties had agreed that payment on the note would be deferred until the house was sold. The total amount was secured by a second trust deed on the house. (R. 292).

Mrs. Willey also argues that the last money borrowed from her parents was used to purchase Mr. Willey's Mercedes, and that he should, therefore, be responsible to repay it. Again, this assertion is not supported by the record. In 1987, the parties bought a 428 SEL Mercedes at a cost of about \$50,000. (R. at 206). They put \$10,000 down and financed the balance. *Id.* They made monthly payments on it for a period of about four years, and then resold the car to Mercedes Benz and leased it back. (R. at 206-207). They used the money they received from refinancing the Mercedes to pay down marital debts. (R. at 207). Thus, the amounts borrowed from Mrs. Willey's parents were not used to buy the Mercedes.

There is ample evidence to support the trial court's finding that the premarital equity Mrs. Willey had in her residence had been commingled and lost its separate character. Those findings should not be disturbed unless they are clearly erroneous, that is, against the clear weight of the evidence, or

unless this court reaches a definite and firm conviction that a mistake has been made. *Dunn v. Dunn*, 802 P.2d 1314, 1317 (Utah App. 1990).

#### **IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING \$5,000 IN ATTORNEY'S FEES TO MRS. WILLEY.**

The decision to award or deny attorney's fees is within the trial court's discretion. *Andersen v. Andersen*, 757 P.2d 476, 480 (Utah App. 1988). Mrs. Willey's attorney testified that her attorney's fees, as of the time of trial, amounted to \$19,215 (the brief indicates she now owes \$38,000) (Brief at p. 31). According to counsel's testimony, he had spent 128.1 hours on the case and had charged \$150 per hour. The trial court implicitly found those fees to be unreasonable, stating that combined attorneys' fees of \$31,000 to \$32,000 is an unfortunate use of funds.<sup>4</sup>

There is ample evidence to support that finding. Many of the fees appeared not to be necessary. For example, the billing submitted indicated that Mr. Sandack had spent one hour to review a two page divorce complaint.

Mrs. Willey has the burden to show that the attorney's fees were reasonable and necessary. *Rasband*, *supra* at 1336. Not having done so, she cannot now complain that the trial court abused its discretion in not awarding them.

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<sup>4</sup> Also implicit in this statement is a finding that Mr. Willey's attorney's fees were about half of Mrs. Willey's, another indication that Mrs. Willey's fees were unreasonable.

### CONCLUSION

Mrs. Willey argues that the trial court's decision was unfair because she received only her automobile, premarital gifted stock, one-half of the 401K plan and pension plan, furniture and personal property, as well as one-half of a bonus to be received in January of 1992. Mr. Willey, of course, received less because he had no premarital gifted stock.

Mrs. Willey repeatedly argues that the trial court's alimony award will make her a "public charge." This argument is ludicrous. For ten months after the trial, she had free housing at a cost of \$2,492 per month. She has alimony of \$1,500 per month to be reduced to \$1,000 per month. Many people raise entire families on smaller incomes and certainly do not become public charges.

At the trial of this matter, Mrs. Willey attempted to continue the financial strategy employed by the parties during their marriage, that is, spending more money than they made. She also apparently believes that she should not have to employ her considerable talents to produce income of her own now confirms that she faces bankruptcy because of her desire to spend more income than she has. The trial court did not accept her position and was not required, under the law developed by this court and the Utah Supreme Court, to do so. Accordingly, the decision of the trial court should be affirmed.

DATED this \_\_\_\_ day of September, 1992.

Respectfully submitted,

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By   
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**CERTIFICATE OF SERVICE**

I hereby certify that I caused four true and correct copies of the foregoing  
**BRIEF OF APPELLEE GLEN P. WILLEY** to be delivered by hand to the  
following, this 21st day of September, 1992:

Roger D. Sandack, Esq.  
500 Kearns Building  
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