

2001

# Adamson v. Adamson : Brief of Appellant

Utah Court of Appeals

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## Recommended Citation

Brief of Appellant, *Adamson v. Adamson*, No. 20010516 (Utah Court of Appeals, 2001).

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IN THE UTAH COURT OF APPEALS

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RAE ADAMSON,

**BRIEF OF APPELLANT**

Petitioner/Appellant,

-vs-

Appellate Case No. 20010516-CA

RANAE ADAMSON,

Respondent/Appellee.

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**BRIEF OF APPELLANT**

Appeal from the Judgment and Order entered

in the Third Judicial District Court in and for Salt Lake County,

State of Utah, on May 18, 2001.

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FILED  
Utah Court of Appeals

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**BRIEF OF APPELLANT**

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PETITIONER/APPELLANT (hereinafter "Petitioner") submits the following as his brief in the above matter:

**JURISDICTIONAL AUTHORITY**

Jurisdiction to review the final judgment and order herein, which is the Order Denying Petition to Modify Decree of Divorce ("Order Denying Petition to Modify"), is vested in the Utah Court of Appeals pursuant to the Rules of the Utah Court of Appeals, Rules 3 and 4, and Utah Code Annotated, §78-2a-3(2)(h).

**NATURE OF THE PROCEEDING**

The matter below is a proceeding to modify a decree of divorce, and the order appealed from is the Order Denying Petition to Modify.

### STATEMENT OF THE ISSUES

The following issue is presented on appeal: For purposes of modifying Respondent's alimony award, did the trial court abuse its discretion in finding Petitioner's impending retirement was not a substantial material change of circumstances not foreseeable at the time of the divorce?

### DETERMINATIVE PROVISIONS, CASES, STATUTES AND RULES

The following statute and two cases dispose of the issue outlined above: Section 30-3-5(7)(g)(i) (1998 and Supp. 2001); Bolliger v. Bolliger, 997 P.2d 903 (Utah App. 2000); Johnson v. Johnson, 855 P.2d 250 (Utah App. 1993).

### STANDARD OF REVIEW

Section 30-3-5(7)(g)(i) (1998 & Supp. 2001) gives the trial court "continuing jurisdiction to make substantive changes and new orders regarding alimony based upon a substantial material change in circumstances not foreseeable at the time of divorce."

"The determination of the trial court that there [has or has not] been a substantial change of circumstances is presumed valid." Bolliger v. Bolliger, 997 P.2d 903, 906 (Utah App. 2000). The Appellate Court reviews "the ruling under an abuse of discretion standard." Id.

### STATEMENT OF THE CASE

This is an appeal from an order denying a petition to modify an alimony award. The alimony award had been granted in a divorce decree twelve years earlier. The case arose in the Third Judicial District Court in and for Salt Lake County, State of Utah. The parties were husband and wife but were divorced pursuant to a decree entered in 1989. Ten years later, because Petitioner was reaching retirement age, he brought a petition to modify the alimony

award on the grounds that his impending retirement was a substantial material change in circumstances not foreseeable at the time of the divorce. The case was tried before the bench on April 17, 2001. The trial court rendered its decision on the record and, on May 18, 2001, entered the Order Denying Petition to Modify.

The trial court denied the petition because:

[T]he rule that Judge Rigtrup [the judge who entered the divorce decree] made in the original divorce decree certainly contemplates retirement. If it didn't, [Respondent] would not have been awarded a percentage of [Petitioner's] retirement. At the same time, it awards alimony that goes past age 65. That's clear, too. So I would surmise that Judge Rigtrup meant that the alimony payment should go on [sic] retirement. Judge Rigtrup obviously understood that Ms. Adamson was going to be totally unproductive. When the court says you can take the child support out of the equity in the home, that's a recognition that the person who should be the payer of the child support is never going to pay.

Record, at 53, lines 5-16.

Although the trial court found no substantial material change in circumstances, it went on to find that Respondent would be better off if alimony, in fact, were terminated. The trial court stated:

[A]t the same time, if because of this ruling, [Petitioner] decides not to retire, then I think [Respondent] ought to initiate discussions to figure out a way to trade his retirement and the percentage he gets for the alimony that she's receiving, because as I've said, even though my ruling is that there is not a change in circumstances to warrant changing the alimony award in the petition, [Respondent] would be better off if there was. So (inaudible) ruling very much. It's sort of an unsatisfactory situation.

MS. CORPORON: Your Honor –

THE COURT: I'm not over. I'm saying he should... he ought to be able to retire. I'm not ordering him to retire, and he can work as long as the State would let him work, and she'd be better off if he'd retire and she gave up the alimony.

Record, at 53, lines 22-25, and at 54, lines 1-10.



Petitioner now brings this appeal. No motions are pending in the trial court pursuant Rules 50(a), 50(b), 52(b), 54(b) or 59 of the Utah Rules of Civil Procedure.

### **STATEMENT OF THE FACTS**

The parties to this action were husband and wife, but were divorced by a decree of divorce entered by the original trial court on February 9, 1989. See Exhibit "C." Effective beginning the date the decree was entered, the original trial court awarded Respondent \$200.00 per month in alimony. Decree of Divorce at para. 11. The entire reference to alimony contained in the Findings of Fact reads as follows:

Both parties to this action are able-bodied and employable. However, Defendant [Respondent] is in need of support. It is reasonable, just and proper that Plaintiff [Petitioner] be ordered to pay to Defendant the sum of Two Hundred Dollars (\$200.00) per month, as and for alimony, commencing with the month of February 1989, and continuing until the death of the Plaintiff or Defendant, or until Defendant's remarriage or cohabitation, whichever first occurs, or until further order of this court. This award of alimony is subject to review by the court on July 7, 1989 at 8:30 a.m. before the assigned judge.

Findings of Fact at para. 13. The alimony award did not change.

The original trial court also divided Petitioner's retirement benefits. The entire reference to retirement benefits contained in the Findings of Fact reads as follows:

Plaintiff has acquired an interest in a retirement plan through his employment with the State of Utah, which should be divided equally between the parties, according to the Woodward Formula, and a Qualified Domestic Relations Order should issue from this Court.

Findings of Fact at para. 12.

Petitioner brought his petition to modify because he was reaching retirement age and wanted to retire. By the time of trial, he had reached retirement age. The trial court found:

The Petitioner was 65 years of age at the time of trial in this action and will achieve the age of 66 years within approximately one month from the date of trial herein.

Order Denying Petition at para. 8.

Based upon the court's observations of the Petitioner at trial, his demeanor and appearance, and based upon this court's finding that there is a cultural expectation in our society that persons can retire from full-time employment at the age of 65, the court finds that it is reasonable, just and proper that the Petitioner retire at this time.

Id.

Despite being of retirement age and wishing to retire, Petitioner had not retired because he could not afford to both retire and continue to pay alimony to Respondent. The trial court found:

The Petitioner has not retired from his employment, to date, despite his eligibility to do so, because he alleges he is concerned that the obligation to pay alimony will continue past his retirement, and he is concerned that he will be unable to meet his expenses on a reduced income from retirement, if the alimony obligation continues. This was the Petitioner's stated purpose for bringing his petition to modify the alimony obligation to terminate that obligation.

Id.

Even though the trial court did not find Petitioner's impending retirement was a substantial material change in circumstances, the trial court did enter numerous findings of fact concerning Respondent's needs and Petitioner's ability to pay. See Order Denying Petition at paras. 11-19. The trial court included among its findings, calculations of the income Respondent would receive from Social Security benefits to which she was entitled already, but for which she had not yet applied; and calculations of the income Respondent would receive from Petitioner's retirement, if Petitioner did, in fact, retire. Id. Given the much more favorable financial situation Respondent would realize if Petitioner retired, the trial court concluded:

The Respondent's refusal to waive further alimony in this case, in order to induce the Petitioner to retire, so that she can receive his retirement benefits which are greater than the alimony, is not reasonable in the premises.

However, the court cannot require the parties to behave reasonably in settlement discussions.

Id. at 20. On the record at the conclusion of trial, the trial court insisted Respondent would be better off if Petitioner retired and stopped paying alimony. The trial court stated:

[Respondent's] better off if [Petitioner] retires, though. [Petitioner's counsel] is right. [Respondent] is going to qualify for social security, and that's going to happen whether he retires or not, but her percentage of his retirement should be close to two-and-a-half, three times the amount of alimony that she receives under the alimony [sic]. So, if I show that they haven't shown a material change in circumstances and the Petition is denied, and he chooses to continue working because of that, she's in worse shape than she is if he retires, even if I say he doesn't have to pay alimony anymore. The numbers can't be argued with.

Record at 51, lines 5-14.

As stated above, the court did find that Petitioner had not shown a material change in circumstances. The trial court denied Petitioner's petition for the following reasons:

[T]he rule that Judge Rigtrup made in the original divorce decree certainly contemplates retirement. If it didn't, [Respondent] would not have been awarded a percentage of [Petitioner's] retirement. At the same time, it awards alimony that goes past age 65. That's clear, too. So I would surmise that Judge Rigtrup meant that the alimony payment should go on [sic] retirement.

Record, at 53, lines 5-16. Regarding the trial court's reasons for denying the petition, the single finding of fact that addresses the trial court's reasons states:

The [original trial court] did not order initially that alimony would terminate upon the Petitioner's retirement, or at any other time, other than the Petitioner's death or Respondent's death, remarriage or cohabitation, and from this, this court concludes that the trial court originally did not intend alimony ever to terminate.

Order Denying Petition to Modify at para. 23.

### SUMMARY OF THE ARGUMENT

Petitioner brought a petition to modify the alimony award contained in his divorce decree. Petitioner sought the court's continuing jurisdiction to modify the alimony award on the

grounds that his impending retirement was a substantial material change in circumstances not foreseeable at the time of the divorce. He requested that the trial court terminate his obligation to pay alimony. However, the trial court denied Petitioner's petition to terminate alimony.

The trial court found that Petitioner's impending retirement was not a substantial material change in circumstances not foreseeable at the time of the divorce. Specifically, the trial court found that the original trial court, the court which entered the decree, had foreseen Petitioner's retirement in making the original alimony award. The trial court based its conclusion on two facts: first, the original trial court had awarded permanent alimony which would continue beyond Petitioner's attaining the age of 65; and second, the original trial court had divided Petitioner's retirement benefits between the parties. From these two facts, the trial court concluded that the original trial court must have foreseen Petitioner's retirement.

Apparently, to the trial court, because the original trial court ordered "permanent alimony," it had to have foreseen Petitioner's retirement. If the original trial court had intended alimony ever to end, it would not have entered an alimony award that continued indefinitely, beyond Petitioner's attaining the age of 65, and ending only when a party died or remarried. Additionally, the original trial court must have foreseen Petitioner's retirement because, if the original trial court had not foreseen Petitioner's retirement, it could not have divided Petitioner's retirement benefits. The original trial court divided the retirement benefits; therefore, the original trial court must have foreseen Petitioner's retirement at the time of the divorce.

Given these two facts, the original trial court foresaw Petitioner's retirement at the time of the divorce, the current trial court believed it could not regard Petitioner's attainment of retirement age, his intention to retire, and his loss of income resulting from his proposed retirement as a substantial material changes in circumstances not foreseeable at the time of

the divorce. Consequently, the trial court denied Petitioner's petition. However, the trial court abused its discretion when it found that the bare award of permanent alimony, and the simple fact of allocating a retirement benefit, indicated that the original trial court foresaw Petitioner's retirement at the time of divorce.

Two cases from the Court of Appeals are directly on point in holding that the foreseeability of a parties' retirement, in the sense that the original trial court considered retirement in making its alimony award, cannot be inferred from the two facts stated above. Bolliger v. Bolliger, 997 P.2d 903 (Utah App. 2000), held that a trial court, knowing only that an award of alimony was permanent, could not infer that, at the time of divorce, the original trial court contemplated a parties' retirement in making its alimony award. See id. at 908. In addition, concerning whether a trial court made adequate findings that it foresaw a parties' retirement in making an original alimony award, Johnson v. Johnson, 855 P.2d 250 (Utah App. 1993), held that a trial court, in simply allocating retirement benefits between the parties, did not make sufficient findings to inform a later trial court, when faced with a petition to modify, whether the original trial court considered retirement in its alimony award or not. The court in Johnson further held it to be against public policy to have trial courts, on petition's to modify brought years after the fact, trying to divine what, in making their alimony awards, original trial court's did or did not contemplate years earlier. Id. at 253.

Finally, because the trial court found that Respondent would be better off if Petitioner retired and alimony were terminated, it is not necessary to remand this case to the trial court for further findings regarding an alimony award. This Court should find Petitioner's retirement to be a substantial material change in circumstances not foreseeable at the time of the divorce; and this Court should terminate Petitioner's alimony obligation.

## ARGUMENT

**POINT 1. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING PETITIONER'S PETITION TO MODIFY BECAUSE PETITIONER'S PENDING RETIREMENT WAS A SUBSTANTIAL MATERIAL CHANGE OF CIRCUMSTANCES NOT FORESEEN AT THE TIME OF THE PARTIES' DIVORCE.**

Petitioner was almost 66 years old when Petitioner's petition to modify came to trial. The decree of divorce was then twelve years old. Based upon its assessment of Petitioner, personally, and based upon a general finding that people expect to retire at age 65, the court found it to be "reasonable, just and proper" that Petitioner retire. Order Denying Petition at para. 9. The trial court further found that Petitioner's income would be reduced if he retired, and that he could not afford to retire if his obligation to pay alimony continued. *Id.* at 16. Despite this, the trial court concluded Petitioner's retirement was not a substantial material change of circumstances not foreseeable at the time of divorce. Record, at 54, lines 1-5. Instead, the trial court found that the original trial court, which made the alimony award in 1989, did foresee Petitioner's retirement. Record, at 53, lines 5-6.

The trial court has continuing jurisdiction over alimony awards. However, in order to invoke the court's continuing jurisdiction, a petitioner must show there has been a substantial material change of circumstance not foreseeable at the time of divorce. §30-3-5(7)(g)(i), Utah Code Ann. (1998 & Supp. 2001) (which provides "the court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of divorce"). *Id.*

In the instant case, the trial court found that because the original trial court contemplated Petitioner's retirement, Petitioner's retirement was foreseeable at the time of divorce. Thus, the court concluded it could not make a new order terminating alimony.

In the instant case, the trial court found that because the original trial court contemplated Petitioner's retirement, Petitioner's retirement was foreseeable at the time of divorce. Thus, the court concluded it could not make a new order terminating alimony.

This Court reviews the trial court's determination whether there has not been a substantial material change in circumstances not foreseeable at the time of divorce under an abuse of discretion standard. Bolliger v. Bolliger, 997 P.2d 903, 906 (Utah App. 2000); Johnson v. Johnson, 855 P.2d 250, 252 (Utah App. 1993).

The trial court abused its discretion in finding Petitioner's retirement was an event foreseeable, or contemplated, at the time of the parties' divorce.

**A. The Trial Court Abused Its Discretion in Finding that, Simply Because the Divorce Decree Made a "Permanent Alimony" Award, Which Did Not Specify a Particular Termination Date, the Divorce Decree Contemplated Petitioner's Retirement.**

The trial court based its finding of foreseeability on the fact that the original trial court awarded "permanent alimony." The alimony award contained in the decree of divorce continued beyond Petitioner's attaining the age of 65. In fact, it continued on, through time, terminating only when one or the other party died or remarried. Record, at 53, lines 5-16. From the mere "permanency" of the alimony award, the trial court concluded that the original trial court intended alimony to continue beyond Petitioner's retirement; and, thus, the original trial court foresaw Petitioner's retirement in making its alimony award.

The Bolliger case is directly on point. 997 P.2d 903. In Bolliger, the parties divorced pursuant to a decree entered in 1987. Under the decree, Mrs. Bolliger was awarded \$685 per month alimony from April 1987, onward, and she was awarded one-half of the military pension Mr. Bolliger was then receiving. The alimony award would be payable to Mrs. Bolliger "so long

as she lives with the exception that [it would] cease upon [Mrs. Bolliger's] remarriage, cohabitation, or death." Bolliger, 997 P.2d at 905. It is interesting to note that both the Bolliger case and the instant case come from the same court and the same trial judge.

In 1997, ten years after the entry of the divorce decree, Mr. Bolliger petitioned the court to modify the alimony award because he faced unexpected retirement from his job, and because Mrs. Bolliger had begun receiving social security. Mr. Bolliger argued that neither of these events, not his forced retirement nor Mrs. Bolliger's receipt of social security, were anticipated by the divorce decree or were considered in calculating the amount of Mrs. Bolliger's alimony award. Mrs. Bolliger argued that both events were anticipated by the divorce decree. Id. at 906.

The trial court found that Mr. Bolliger's retirement and Mrs. Bolliger's receipt of social security, and the changes these may bring about, were foreseeable events. And, like the trial court in the instant case, the Bolliger trial court found that the parties' agreement to a permanent alimony award evinced the foreseeability both of Mr. Bolliger's retirement and of Mrs. Bolliger's receipt of social security. Id. at 908.

In holding that the Bolliger trial court had abused its discretion in finding the events foreseeable or contemplated, the Court of Appeals reiterated its former articulation of what is meant by "contemplated" in a divorce decree. The court said:

The fact that the parties may have anticipated [a substantial material change in circumstances] in their own minds or in their discussions does not mean that the decree itself contemplates the change. In order for a material change in circumstances to be contemplated in a divorce decree there must be evidence, preferably in the form of a provision in the decree itself, that the trial court anticipated the specific change. Id. at 906 (quoting Durfee vs. Durfee, 796 P.2d 713, 716 (Utah App. 1990). Id. at 906.

The Bolliger court continued:



Accordingly, if both the divorce decree and the record are bereft of any reference to the changed circumstance at issue in the petition to modify, then the subsequent changed circumstances was not contemplated in the original divorce decree. Id. (Emphasis added).

The Bolliger court concluded, based upon its review of precedent, that “a party’s retirement or receipt of social security, unless expressly foreseen at the time of the divorce, may amount to a substantial and material change of circumstances entitling a petitioner to a determination of whether the alimony should be modified.” Id. at 908. The Bolliger court held that “[Mr. Bolliger’s] forced retirement and resulting income reduction and [Mrs. Bolliger’s] receipt of social security benefits were substantial material changes of circumstances not foreseen at the time of divorce. Thus the [Bolliger] trial court abused its discretion when it denied [Mr. Bolliger’s] Petition to Modify Alimony on that basis.” Id.

Like the trial court in the instant case, the Bolliger trial court found evidence of the foreseeability of retirement and social security in the permanent nature of the alimony award. The Court of Appeals in Bolliger assumed the Bolliger trial court determined “neither the parties nor the court could modify a permanent alimony award.” However, “even if permanent alimony is awarded, a later material change of circumstances not foreseen at the time of divorce can provide grounds for modifying the permanent alimony upon appropriate petition.” Id. at 908 (citing Munns v. Munns, 790 P.2d 116, 122 (Utah App. 1990)). Consequently, the Court of Appeals held that the trial court’s denial of Mr. Bolliger’s petition to modify on the basis that the alimony award was permanent, was an abuse of discretion. Id.

In the instant case, the trial court did not conclude that permanent alimony could not be modified by the court. Instead, the trial court found that the award of “permanent

alimony”—continuing, as it did, beyond the date of Petitioner’s retirement—expressly indicated that the original trial court foresaw these events. Record, at 53, lines 5-11.

However, the mere permanency of alimony, by itself, does not give any indication that the original trial court contemplated retirement at the time of divorce. The court in Bolliger held that the Bolliger trial court’s reliance on the “permanency” of the alimony award was an abuse of discretion. 997 P.2d at 908. The court did not suggest that while a permanent alimony award could be modified, still, a trial court might be able to rely on the permanency of the award as evidence that the original trial court foresaw a party’s retirement. Consequently, the instant trial court’s reliance on the permanency of the alimony award as justifying the foreseeability of Petitioner’s retirement was an abuse of discretion. See Id.

**B. The Trial Court Abused Its Discretion in Finding that, Because the Divorce Decree Allocated Petitioner’s Retirement Benefits, the Divorce Decree Contemplated Petitioner’s Retirement.**

The second reason the trial court gave not finding Petitioner’s retirement to be a substantial material change of circumstances not foreseeable at the time of divorce was that the divorce decree allocated Petitioner’s retirement benefits. Because retirement was mentioned in the decree, the court below concluded the original trial court must have contemplated Petitioner’s eventual retirement. Record, at 53, lines 6-8.

Regarding this finding, Johnson v. Johnson, 855 P.2d 250 (Utah App. 1993) is on point. In that case, the trial court awarded one-half of the parties’ pension plan to each party. This particular award was not part of an earlier appeal, therefore, the award remained in force for a second appeal of the case. The parties first had appealed the trial court’s property division, child support, and alimony awards for entry of adequate findings. Upon entry of the court’s alimony findings, Respondent appealed two particulars of the alimony award. Id. at 251.

Even though the trial court allocated the parties' retirement benefits, Mr. Johnson claimed the trial court abused its discretion by not contemplating in its alimony award the retirement benefits Mrs. Johnson would receive in the future. The Johnson court agreed. Id. at 251. The Johnson court stated, "[i]n awarding alimony, the trial court made no findings with regard to Mrs. Johnson's future ability to withdraw income from the pension plan, and how this additional income would affect her financial condition and her ability to provide for her own needs." Id. at 253. The Johnson court anticipated the instant trial court's argument regarding foreseeability. It pointed out:

Since the trial court in the instant case [Johnson] divided the pension plan between the parties, it was cognizant of Mrs. Johnson's ability to receive additional income in the future that would alter her financial condition and needs. Thus . . . Mrs. Johnson could argue that her receipt of retirement benefits was an anticipated event and the trial court considered it when making the alimony award. Therefore, Mrs. Johnson's receipt of retirement benefits might not be considered a material change of circumstances. Id.

In refuting this argument the court stated:

We do not believe it makes for good law or sound policy to have parties arguing years after the fact over what a trial court may or may not have considered when making an alimony award. Id.

This is precisely the kind of speculation in which the trial court in the instant case indulged. The trial court searched for language which might be construed as expressly indicating what the original trial court may have considered in making its alimony award. But, the court in Johnson stated that even though the trial court allocated the parties' retirement benefits, the trial court "fail[ed] to expressly indicate whether the future retirement benefits were considered in making the alimony award." Id. at 254. Therefore, the court held the trial court's findings to be inadequate and remanded the case back to the trial court for further findings. Id. Because the trial court's findings in Johnson were inadequate to indicate whether

the trial court had considered alimony in making its alimony award, a future trial court, ruling on a petition to modify alimony, would have insufficient evidence to conclude that the earlier trial court had contemplated retirement in its alimony award. See Id.

Therefore, under Johnson, the original trial court's mere allocation of retirement benefits in this case, without an express indication by it that it had considered retirement in making its alimony award, did not give the instant trial court sufficient evidence to conclude that the original trial court contemplated retirement. Consequently, to the extent that the lower court based its foreseeability determination upon the original trial court's allocation of retirement benefits, the trial court abused its discretion. See Id.

Under case law, neither the permanency of alimony nor the allocation of retirement benefits provide sufficient express evidence that Petitioner's retirement was foreseen by the original trial court. Therefore, because the original trial court did not foresee retirement, and did not expressly incorporate into the Decree, its effect on alimony, the trial court abused its discretion in not finding Petitioner's retirement to be a substantial material change in circumstances not foreseeable at the time of divorce.

**POINT 2. REMAND IS UNNECESSARY IN THIS CASE BECAUSE, ONCE A SUBSTANTIAL MATERIAL CHANGE IN CIRCUMSTANCES IS FOUND, THE TRIAL COURT'S FINDINGS ARE ADEQUATE TO RECALCULATE ALIMONY: ALIMONY SHOULD TERMINATE.**

Once it is determined a substantial material change of circumstances not foreseeable at the time of divorce has taken place, the trial court must then consider at least the following factors in determining alimony: (i) the financial condition and needs of the recipient spouse; (ii) the recipient's earning capacity or ability to provide income; (iii) the ability of the payor spouse to provide support; and (iv) the length of the marriage. These factors apply not only to an

initial award of alimony, but also to a redetermination of alimony during a modification proceeding. The trial court must then make findings of fact based on these factors. 997 P.2d at 909 (citing Williamson v. Williamson, 983 P.2d 1103 (Utah App. 1999) (quoting §30-3-5(7)(a), Utah Code Ann. (1998) (original omits other citations)).

In the instant case, the trial court made numerous findings concerning the factors cited above. Chiefly, the trial court found that, if Petitioner were to retire from his employment with the State of Utah; and were Respondent to receive social security disability, social security, and her portion of the Petitioner's retirement, Respondent would be in a significantly better economic position than she is at the present time, in which she receives social security disability benefits and alimony from the Petitioner in the sum of \$200.00 per month. Order Denying Petition at para. 15. The court, further, expressly found it to be unreasonable for Respondent to refuse to waive alimony in order to induce Petitioner to retire; so that, in turn, Respondent could receive her percentage of Petitioner's retirement benefits, and be better off. Id. at 20.

Given these findings, this Court need not remand the issue of alimony to the trial court for its determination of a new alimony award pursuant to the factors. It is appropriate for the Court of Appeals in this case to enter an order terminating Petitioner's alimony obligation on appeal. To remand would waste the parties' time because the evidence is clear. Remand would serve only to delay the obvious result.

The appellate court can exercise its equitable powers in modification cases to make findings of fact. See Owen v. Owen, 579 P.2d 911, 913 (Utah 1978). In deciding remand is unnecessary, this court would be supporting the factual findings of the trial court.

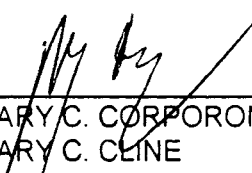
In the instant case, had the trial court not abused its discretion, and had it correctly found that a substantial material change of circumstances had occurred, based on its findings of fact, the trial court would have terminated Petitioner's alimony in order to make Respondent "better off." Because the trial court already has made sufficient findings based on the evidence, in this case the appellate court is in an equal position with the trial court. As a result, the Court of Appeals simply should terminate Petitioner's obligation to pay alimony.

#### CONCLUSION

The trial court abused its discretion in not finding that Petitioner's retirement was a substantial material change in circumstances not foreseeable at time of the parties' divorce. In not finding a substantial material change in circumstances, the trial court abused its discretion in basing its decision on the fact that the original trial court awarded permanent alimony, and on the fact that the original trial court had allocated Petitioner's retirement benefit. However, the trial court made findings sufficient to justify terminating the alimony award on appeal. For these reasons, this court should reverse the trial court's refusal to invoke the continuing jurisdiction of the court to modify alimony; and this court should order the alimony award terminated.

RESPECTFULLY SUBMITTED this 17 day of April, 2002.

CORPORON & WILLIAMS

  
\_\_\_\_\_  
MARY C. CORPORON  
MARY C. CLINE  
JARROD H. JENNINGS  
Attorneys for Petitioner/Appellant

**CERTIFICATE OF MAILING**

I, the undersigned, hereby certify that I caused two true and correct copies of the foregoing to be mailed to and one true and correct copy faxed to:

NATHAN PACE  
Attorney for Respondent  
136 South Main, #404  
Salt Lake City, Utah 84101

on this 17<sup>th</sup> day of April, 2002.

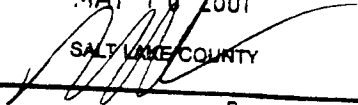
Luane Romero  
Secretary

# **Exhibit “A”**



**FILED DISTRICT COURT**  
Third Judicial District

MAY 18 2001

By   
SALT LAKE COUNTY  
Deputy Clerk

MARY C. CORPORON #734  
Attorney for Petitioner  
CORPORON & WILLIAMS, P.C.  
808 East South Temple  
Salt Lake City, Utah 84102  
(801) 328-1162

---

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

---

RAE ADAMSON,

Petitioner,

-vs-

RANAE ADAMSON,

Respondent.

**FINDINGS OF FACT AND CONCLUSIONS OF  
LAW AND ORDER DENYING PETITION TO  
MODIFY DECREE OF DIVORCE**

Civil No. 874904654DA

Judge Stephen L. Henriod  
Commissioner Thomas N. Arnett, Jr.

---

THE ABOVE-ENTITLED MATTER having come before the court for trial on April 17, 2001, Petitioner appearing in person and by and through his counsel of record, Mary C. Corporon, Respondent appearing in person and by and through her counsel of record, Nathan Pace, the court having proceeded to hear the testimony of the parties and having received the exhibits of the parties, the court having heard the arguments of counsel and having reviewed the file and the pleadings contained therein, based thereon and for good cause appearing, the court now makes and enters the following:

### FINDINGS OF FACT

1. The parties to this action were divorced by a decree of divorce entered in the above-entitled case in 1989.
2. At the time of the divorce of the parties, they had been married for a period of time between 17 and 18 years.
3. At the time of the divorce, the parties were the parents of minor children, all of whom have now achieved their majority. However, the Petitioner testified and the court finds that the Petitioner has an adult son residing with him, and that the Petitioner is supporting the youngest child of these two parties in serving a religious mission for the Church of Jesus Christ of Latter-Day Saints. Pursuant to the decree of divorce, the Petitioner was awarded custody of the parties' children, subject to Respondent's rights of visitation. The Respondent was ordered to pay child support for the parties' children of \$75.00 per month per child, and the court, within the decree of divorce, specifically awarded Respondent an interest in the marital residence, but provided that her child support obligation would be set off against her home equity. The court now finds that the trial court's prior determination to allow a set-off of child support against home equity constituted a finding by the court in the initial proceedings herein that the

Respondent could not be relied upon to pay support regularly to the parties' children.

4. Pursuant to the decree of divorce, the Respondent was awarded alimony from the Petitioner in the sum of \$200.00 per month. The Petitioner failed to pay any of his alimony timely, and a judgment for alimony arrearages was previously entered against him in the above-entitled court, in the sum of \$16,900.00. The Petitioner paid that to Respondent in a lump sum to satisfy this judgment early in the year 2000. Respondent has testified and the court finds that the Respondent has expended the entirety of the lump sum payment for these alimony arrearages in repaying a loan to her brother and, in paying her utilities and her usual and routine living expenses.
5. The Respondent did not pay any of her child support to the Petitioner, and eventually the entire amount of her child support was withheld from her equitable lien in the marital residence. As a result thereof, the Respondent's equitable lien in the residence was extinguished, and Respondent has no remaining interest in the equity in the marital residence.

6. The court finds that each party has been a "deadbeat," to some extent, the Petitioner for failure to pay alimony timely as previously ordered -- the Respondent for failure to pay child support for the parties' minor children during their minority when they were in need of actual support.
7. The court ordered the Petitioner to be taken into a holding cell to show him what the court can do with men who refuse to obey court orders.
8. The Petitioner was 65 years of age at the time of trial in this action and will achieve the age of 66 years within approximately one month from the date of trial herein.
9. Based upon the court's observations of the Petitioner at trial, his demeanor and appearance, and based upon this court's finding that there is a cultural expectation in our society that persons can retire from full-time employment at the age of 65, the court finds that it is reasonable, just and proper that the Petitioner retire at this time.
10. The Respondent herein is 58 years of age. The Respondent is not currently employed and has not been employed at all since the entry of the decree of divorce herein. The Respondent testified and the court finds that the Respondent did not ever make any application for any employment since the entry of the decree of divorce, as previously

ordered by the court. The Respondent has testified that she did not make application for employment because of her disability. The court finds that she has not endeavored to improve her situation. The court finds Respondent could have done so, if she had tried and if she had wanted to.

11. The Respondent receives Social Security Disability benefits in the sum of \$530.00 per month. The Respondent testified that she did not receive any other income from any other source, including food stamps or public assistance. However, the Respondent does receive the benefit of public housing, and her rent for her apartment is approximately \$87.00 per month after the subsidy, for an apartment usually renting for \$500.00 per month.
12. The Respondent has reasonable and necessary living expenses, in addition to \$87.00 per month for rent, of \$150.00 per month for utilities, \$250.00 per month for food and household supplies, and that she is entitled to incur reasonable expenses for such things as clothing or transportation. The Respondent does not have a motor vehicle nor does she have a telephone. She testified to the court from the witness stand that she is physically able to ride the city bus.

13. The Respondent was married to the Petitioner for a period of time in excess of 10 years and the Petitioner has now achieved the age of 65. Accordingly, the court finds that the Petitioner is entitled to obtain Social Security retirement benefits from the Social Security Administration, based upon the Petitioner's receiving Social Security retirement benefits. However, the Respondent has failed to make application for these benefits. The court finds that, were she to apply for Social Security retirement benefits, those benefits would be received by her in the sum of approximately \$500.00 to \$700.00 per month.
14. The Respondent is entitled to receive a portion of the Petitioner's retirement benefits, based upon her marriage to the Petitioner during a period of time when he was also employed by his current employer, the State of Utah. The court finds that, therefore, the Respondent would be entitled to receive approximately 25% of the actual retirement benefit awarded to the Petitioner, or approximately \$6,500.00 per year or \$541.66 per month, upon the Petitioner's retirement from full-time employment.
15. The court finds that, were the Petitioner to retire from his employment with the State of Utah and were Respondent to receive Social Security

retirement benefits and her portion of the Petitioner's retirement, the Respondent would be in a significantly better economic position than she is at the present time, receiving Social Security disability benefits and alimony from the Petitioner in the sum of \$200.00 per month.

16. The Petitioner has not retired from his employment, to date, despite his eligibility to do so, because he alleges he is concerned that the obligation to pay alimony will continue past his retirement, and he is concerned that he will be unable to meet his expenses on a reduced income from retirement, if the alimony obligation continues. This was the Petitioner's stated purpose for bringing his petition to modify the alimony obligation to terminate that obligation.
17. The Petitioner is employed by the State of Utah Division of Child and Family Services as a social worker. His gross annual income is approximately \$40,000.00, or \$3,333.33 per month. From this is withheld federal and state taxes of approximately \$848.00, and his net income is \$2,485.33 per month.
18. In addition to the foregoing income from his employment, the Petitioner has requested and has begun to receive Social Security retirement

benefits by reason of his having achieved his 65<sup>th</sup> birthday, and those benefits are paid to him in the sum of approximately \$1,250.00 per month.

19. The Petitioner has reasonable and necessary monthly living expenses as follows:

Rent/Mortgage:	\$ 400.00 to amortize the loan or \$280.00 to pay interest only.
Property Taxes:	\$ 110.00
Insurance:	\$ 45.00
Maintenance:	\$ 100.00
Food/Supplies:	\$ 460.00
Utilities (water/gas/ electric/heat:	\$ 150.00
Telephone:	\$ 55.00
Laundry/Dry Clean:	\$ 10.00
Clothing:	\$ 50.00
Medical and Dental	\$ 125.00
Medical Insurance	\$ 30.00
Life Insurance	\$ 35.00
Union Dues	\$ 14.00
Entertainment:	\$ 100.00
Incidentals:	\$ 100.00
Auto expenses:	\$ 250.00
Installments:	\$1,176.00
Other expenses:	\$ 200.00 (alimony)
Other expenses:	\$ 380.00 (missionary cost for son on mission)
Attorney's fees:	\$ 150.00

TOTAL EXPENSES: \$3,940.00

20. The Respondent's refusal to waive further alimony in this case, in order to induce the Petitioner to retire, so that she can receive his retirement



benefits, which are greater than the alimony, is not reasonable in the premises. However, the court cannot require the parties to behave reasonably in settlement discussions.

21. Each party to this action has incurred substantial attorney's fees, and each party should be ordered to pay and assume his or her own court costs and attorney's fees incurred in this action.
22. Petitioner has requested that this court order that alimony terminate after the duration of the parties' marriage, given the adoption of new statutory law generally limiting the duration of alimony to the length of a marriage. The court declined to grant this request.
23. The court did not order initially that alimony would terminate upon the Petitioner's retirement, or at any other time, other than the Petitioner's death or Respondent's death, remarriage or cohabitation, and from this, this court concludes that the trial court originally did not intend alimony \_\_\_\_\_ever to terminate.

BASED UPON the foregoing and for good cause appearing the court now makes and enters the following:

### CONCLUSIONS OF LAW

1. The court has jurisdiction over the subject matter to this action and over the parties to this action.
2. There has not been a substantial and material change in circumstances warranting a modification of alimony.
3. The Petitioner does not come to this court with clean hands, and is therefore not entitled to the relief which he is seeking.
4. The court should not modify the duration of the alimony, to terminate after the duration of the parties' marriage.

### ORDER


BASED UPON the foregoing findings of fact and conclusions of law and for good cause appearing;

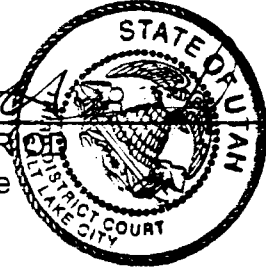
IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

The Petitioner's petition to modify the decree of divorce is hereby dismissed, each party to pay and assume his or her own court costs and attorney's fees incurred in this action.

DATED THIS 18 day of May, 2001.

BY THE COURT:

  
STEPHEN L. HENRY  
District Court Judge

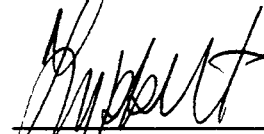


**CERTIFICATE OF MAILING**

I, the undersigned, hereby certify that I caused a true and correct copy of the foregoing to be mailed to:

NATHAN PACE  
Attorney for Respondent  
136 South Main, #404  
Salt Lake City, Utah 84101

on this 7<sup>th</sup> day of May, 2001.

  
\_\_\_\_\_  
Secretary

# **Exhibit “B”**

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

**FILED DISTRICT COURT**  
Third Judicial District

MAR 20 1989

SALT LAKE COUNTY  
*[Signature]*  
By \_\_\_\_\_ Deputy Clerk

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

---

RAE ADAMSON,  
Plaintiff,

FINDINGS OF FACT and  
CONCLUSIONS OF LAW

-vs-

Civil No. D87-4654

RANAE ADAMSON,  
Defendant.

Judge Kenneth Rigtrup

---

THE ABOVE-CAPTIONED MATTER having come on for trial before the above-entitled court on Thursday, the 9th day of February, 1989, the Honorable Kenneth Rigtrup, Judge presiding; the plaintiff appearing in person and by and through counsel, Mary C. Corporon, and the defendant appearing in person and by and through counsel, Jeffrey C. Hunt, the Court having heard the sworn testimony of the parties and their witnesses and the arguments of counsel, and the Court having reviewed the file and the pleadings contained therein; based thereon, the Court being fully advised in the premises and more than 90 days having elapsed since the filing of the Complaint in this action, the Court now makes and enters the following:

**FINDINGS OF FACT**

1. Plaintiff and defendant are now, and were for a period

of three months or more immediately prior to the filing of the Complaint in this action, residents of Salt Lake County, State of Utah.

2. The parties to this action are husband and wife, having been married on April 17, 1970.

3. Irreconcilable differences have arisen between the parties, making continuation of the marriage impossible.

4. There have been two children born as issue of this marriage, namely: Shandrae, age 15, and Tracy, age 8. Plaintiff is a fit and proper person to be awarded the permanent care, custody and control of said minor children, subject to defendant's rights of visitation.

5. Defendant should be awarded visitation weekly with the minor children, with the exact times and dates to be arranged directly between the defendant and the parties' children. The Court recommends that this visitation occur either on a Saturday or on a Sunday. In addition, defendant should have visitation with the minor children on alternate state and federal holidays, on her birthday, and on the children's birthday, as she may arrange between herself and the children. Further, defendant should have reasonable and liberal telephone access with the minor children. The defendant's visitation with the children should be unsupervised; however, in the event that the defendant should be intoxicated at the commencement of the visitation or become so during the course of the visitation, then the children need not remain for the balance of the visitation.

6. Plaintiff should be ordered to maintain health and accident insurance coverage for the benefit of the minor children

of the parties, as it is available to him through his employment.

7. It is reasonable, just and proper that the entire family, including plaintiff, defendant and the parties' minor children, be ordered, to submit to counseling with a qualified family therapist, either through Salt Lake County Mental Health, the Utah State Department of Social Services, or another qualified counselor or therapist, for purposes of resolving the conflict between the defendant and the minor children of the parties.

8. The parties have acquired an interest in a pickup truck and a Ford automobile, which the Court finds to be of relatively equal value, with no indebtedness owing on either. Plaintiff should be awarded the truck, free and clear of any interest of the defendant and the Ford Granada should be awarded to the defendant free and clear of any interest of the plaintiff.

9. During the course of their marriage the parties have incurred various debts and obligations. Plaintiff should be ordered to pay and assume all debts and obligations incurred by the parties until the date of the divorce herein, including, specifically, any debt incurred by defendant for her living accommodations.

10. During the course of their marriage the parties have acquired certain items of personal effects, jewelry, clothing and belongings, and household furnishings, fixtures and appliances. Defendant should be awarded the grandfather clock, one set of bathroom linens, her sister's couch, a reasonable portion of the tableware, pots and pans and bedroom linens, and the casual table and chairs as her sole and separate property, free and clear of



any interest of the plaintiff. Other than as set forth herein, the parties' previous division of their items of personalty and furniture, fixtures and appliances should be confirmed each and each party should be awarded those items currently in his or her possession.

11. During the course of their marriage the parties have acquired an interest in certain real property located in Salt Lake County, State of Utah, commonly known as 4195 South 1865 East. Plaintiff should be awarded the permanent use and possession of said real property, and all right, title and interest therein, including the right to any reserve account, free and clear of any interest of the defendant, subject to the first and second mortgage indebtedness owing thereon, which plaintiff should be ordered to pay and assume and hold defendant harmless thereon, and defendant should be ordered to execute a Quit-Claim Deed, quit-claiming all interest she may have in said real property to the plaintiff, <sup>PR subject to the \$10,000 lien.</sup> Defendant should be awarded an equitable lien on said real property, in the sum of Ten Thousand Dollars (\$10,000.00), representing her one-half share of the equity in the real property, said lien to be non-interest-bearing and to become payable to defendant on the first to occur of the following events:

a. plaintiff's remarriage or cohabitation in the home with a woman other than the defendant;

b. the youngest child of the parties attaining the age of 18 years or graduating from high school in due course, whichever last occurs;

c. the death of the plaintiff;

d. the sale of the real property at plaintiff's election;

e. plaintiff's ceasing to use said real property as his primary place of residence.

12. Plaintiff has acquired an interest in a retirement plan through his employment with the State of Utah, which should be divided equally between the parties, according to the Woodward formula, and a Qualified Domestic Relations Order should issue from this Court.

13. Both parties to this action are able-bodied and employable. However, defendant is in need of support. It is reasonable, just and proper that plaintiff be ordered to pay to defendant the sum of Two Hundred Dollars (\$200.00) per month, as and for alimony, commencing with the month of February 1989, and continuing until the death of the plaintiff or defendant, or until defendant's remarriage or cohabitation, whichever first occurs, or until further order of this Court. This award of alimony is subject to review by this Court on July 7, 1989 at 8:30 a.m., before the assigned judge.

14. Defendant should be ordered to pursue all employment opportunities and all job training opportunities available to her, including, but not limited to, making application for assistance with the following: the Phoenix Institute, Job Service, Utah State Department of Vocational Rehabilitation, the Utah State Department of Social Services and colleges and universities in the Salt Lake area for a PELL grant. Further, defendant should be ordered to make a reasonable and concerted effort to obtain employment, including making contacts through

Job Service, private employment agencies, and making a minimum of three applications for employment per week with prospective employers. Defendant should be ordered to report her job search efforts to this Court at the hearing on July 7, 1989.

15. It is reasonable, just and proper that the Court impute a minimum wage income earning capability to the defendant in assessing the defendant's obligation for child support. The Court does so, and imputes to defendant the ability to earn income in the gross sum of Six Hundred Dollars (\$600.00) per month. Further, the Court finds that the plaintiff's gross monthly income is in the sum of Two Thousand One Hundred Ten Dollars (\$2,110.00) per month. Based upon these income figures, the Court calculates defendant's child support obligation to be Seventy-Five Dollars (\$75.00) per month, per child, commencing with the month of February 1989 and continuing until such time as the minor children achieve the age of 18 years or graduate from high school in the normal course of their high school educations, whichever event occurs later. In any month when the defendant fails to make an actual monetary payment to plaintiff for child support, the child support shall be deducted from defendant's lien upon the marital residence of the parties.

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

16. It is reasonable, just and proper that each party pay and assume his or her own court costs and attorney's fees.

17. Each party should be ordered to execute and deliver all

necessary documents to transfer the title and ownership of the property of the parties pursuant to the Decree entered herein.

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

CONCLUSIONS OF LAW

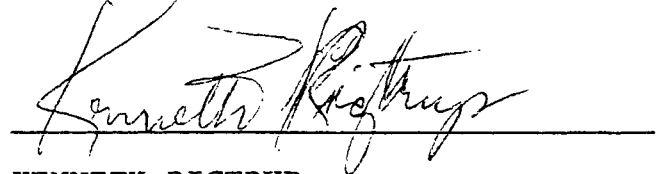
1. This Court has jurisdiction over the parties to this action and over the subject matter of this action.

2. Plaintiff is entitled to a Decree of Divorce from the defendant, dissolving the bonds of matrimony heretofore existing between the parties, the same to become final and effective immediately upon being signed by the Judge and entered by the Clerk in the register of actions.

3. The Decree of Divorce granted to plaintiff should be in conformance with the foregoing Findings of Fact.

DATED THIS 20<sup>th</sup> day of March, 1989.

BY THE COURT

A handwritten signature in cursive script, reading "Kenneth Rigtrup", written over a horizontal line.

KENNETH RIGTRUP  
District Court Judge

CERTIFICATE OF MAILING

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

JEFFREY C. HUNT  
Attorney for Defendant  
225 South 200 East  
Suite 230  
Salt Lake City, Utah 84111

and depositing the same, sealed, with first-class postage pre-paid thereon, in the United States mail at Salt Lake City, Utah on the 22 day of February, 1989.

Jerisa K. Beynon  
Secretary

# **Exhibit “C”**

MARY C. CORPORON #734  
Attorney for Plaintiff  
CORPORON & WILLIAMS  
Suite 1100 - Boston Building  
#9 Exchange Place  
Salt Lake City, Utah 84111  
(801) 323-1162

**FILED DISTRICT COURT**  
Third Judicial District

MAR 20 1989

By MICHAEL G. [Signature]  
SALT LAKE COUNTY  
Deputy Clerk

---

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

---

RAE ADAMSON,  
Plaintiff,

2146642  
3-21-89-302am  
DECREE OF DIVORCE

-vs-

Civil No. D87-4654

RANAE ADAMSON,  
Defendant.

Judge Kenneth Rigtrup

---

THE ABOVE-CAPTIONED MATTER having come on for trial before the above-entitled court on Thursday, the 9th day of February, 1989, the Honorable Kenneth Rigtrup, Judge presiding; the plaintiff appearing in person and by and through counsel, Mary C. Corporon, and the defendant appearing in person and by and through counsel, Jeffrey C. Hunt, the Court having heard the sworn testimony of the parties and their witnesses and the arguments of counsel, and the Court having reviewed the file and the pleadings contained therein; based thereon, the Court being fully advised in the premises and more than 90 days having elapsed since the filing of the Complaint in this action, and the Court and having heretofore made and entered its Findings of Fact and Conclusions of Law, now, therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff is hereby granted a Decree of Divorce, dissolving the bonds of matrimony heretofore existing between the parties, the same to become final and effective immediately upon being signed by the Judge and entered by the clerk in the register of actions.

2. Plaintiff is hereby awarded the permanent care, custody and control of the minor children of the parties, Shandrae and Tracy.

3. Defendant is hereby awarded visitation weekly with the minor children, with the exact times and dates to be arranged directly between the defendant and the parties' children, taking into consideration the Court's recommendation that this visitation occur either on a Saturday or on a Sunday. In addition, defendant is awarded visitation with the minor children on alternate state and federal holidays, on her birthday, and on the children's birthday, as she may arrange between herself and the children. Further, defendant is awarded reasonable and liberal telephone access with the minor children. The defendant's visitation with the children shall be unsupervised; however, in the event that the defendant should be intoxicated at the commencement of the visitation or become so during the course of the visitation, the children shall not be required to visit with the defendant on that occasion.

4. Plaintiff is ordered to maintain health and accident insurance coverage for the benefit of the minor children of the parties, as it is available to him through his employment.

5. Plaintiff, defendant and the parties' minor children, are hereby ordered to submit to counseling with a qualified



family therapist, either through Salt Lake County Mental Health, the Utah State Department of Social Services, or another qualified counselor or therapist, for purposes of resolving the conflict between the defendant and the minor children of the parties.

6. Plaintiff is hereby awarded the truck, free and clear of any interest of the defendant and defendant is hereby awarded the Ford Granada, free and clear of any interest of the plaintiff.

7. Plaintiff is ordered to pay and assume all debts and obligations incurred by the parties until the date of the divorce herein, including, specifically, any debt incurred by defendant for her living accommodations.

8. The parties' previous division of their items of personal effects, jewelry, clothing and belongings, and household furnishings, fixtures and appliances is hereby confirmed in each and each party is awarded those items currently in his or her own possession, with the exception of the following items, which are hereby awarded to the defendant: the grandfather clock, one set of bathroom linens, her sister's couch, a reasonable portion of the tableware, pots and pans and bedroom linens, and the casual table and chairs.

9. Plaintiff is hereby awarded the permanent use and possession of the real property of the parties located at 4195 South 1865 East in Salt Lake City, State of Utah, and all right, title and interest therein, including the right to any reserve account, free and clear of any interest of the defendant, subject to the first and second mortgage indebtedness owing thereon, which plaintiff is hereby ordered to pay and assume and hold

defendant harmless thereon. Defendant is hereby ordered to execute a Quit-Claim Deed, quit-claiming all interest she may have in said real property to the plaintiff, <sup>K.R. subject to the \$10,000 lien.</sup> Further, defendant is hereby awarded a non-interest bearing equitable lien on said real property, in the sum of Ten Thousand Dollars (\$10,000.00), representing her one-half share of the equity in the real property, payable upon the first to occur of the following events:

- a. plaintiff's remarriage or cohabitation in the home with woman other than the defendant;
- b. the youngest child of the parties attaining the age of 18 years or graduating from high school in due course, whichever last occurs;
- c. the death of the plaintiff;
- d. the sale of the real property at plaintiff's election;
- e. plaintiff's ceasing to use said real property as his primary place of residence.

10. Plaintiff's retirement plan through his employment with the State of Utah, is ordered to be divided between the parties, according to the Woodward formula, and a Qualified Domestic Relations Order shall issue from this Court.

11. Plaintiff is hereby ordered to pay to defendant the sum of Two Hundred Dollars (\$200.00) per month, as and for alimony, commencing with the month of February 1989, and continuing until the death of the plaintiff or defendant, until defendant's remarriage or cohabitation, whichever first occurs, or until further order of this Court. This award of alimony is subject to

review by this Court on July 7, 1989 at 8:30 a.m., before the assigned judge.

12. Defendant is hereby ordered to pursue all employment opportunities and all job training opportunities available to her as set forth in the Findings of Fact entered by this Court. Further, defendant is ordered to make a reasonable and concerted effort to obtain employment, including making contacts through Job Service, private employment agencies, and making a minimum of three applications for employment per week with prospective employers and is ordered to report her job search efforts to this Court at the hearing on July 7, 1989.

13. Defendant is hereby ordered to pay to plaintiff the sum of Seventy-Five Dollars (\$75.00) per month, per child, commencing with the month of February 1989 and continuing until such time as the minor children achieve the age of 18 years or graduate from high school in the normal course of their high school educations, whichever event occurs later. In any month when the defendant fails to make an actual monetary payment to plaintiff for child support, said child support shall be deducted from defendant's lien on the marital residence of the parties.

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

14. Each party is ordered to pay and assume his or her own court costs and attorney's fees.

15. Each party should be ordered to execute and deliver all necessary documents to transfer the title and ownership of the

property should be returned<sup>5</sup> to parties  
(herewith under the decree)