

2001

Menz v. Menz : Brief of Appellant

Utah Court of Appeals

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Suzanne West; attorney for appellant.

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IN THE UTAH COURT OF APPEALS

vs.

WILLIAM J. ELLIOTT, JR.,

Respondent/Appellee/
Cross-A

Appellate No. 20010567-CA

BRIEF COMMUNICATION

Appeal from the Judge Leon A.

3365

ve. Suite 300

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FEEL

years

PARTIES

Gail Patricia Menz: Petitioner, Appellant, Cross-Appellee

William Jeffrey Menz: Respondent, Appellee, Cross-Appellant

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TABLE OF AUTHORITIES

Statutes Cited

Section 78-2a-3(2)(h), Utah Code Annotated 1953, as amended.

The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over: . . . appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity.

Treatises Cited

5 Corpus Juris Secundum §703. 2

Cases Cited

Burt v. Burt, 799 P.2d 1166 (Utah App. 1990). 2, 11, 15, 18

Dunn v. Dunn, 802 P.2d 1314 (Utah App. 1990) 2, 11, 15

Josephson v. Josephson, 772 P.2d 1236 (Id. App. 1989). 2, 11, 12, 15

Mortensen v. Mortensen, 760 P.2d 308 (Utah 1988). . . . 2, 11, 15

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603 P.2d 803 (Utah 1979). 2

Ron Case Roffing and Asphalt Paving
v. Bloomquist, 773 P.2d 1382 (Utah 1988). 2

Scharf v. BMG Corp., 700 P.2d 1068 (Utah 1985) 2

Utah State By and Through Div. of Consumer Protection
v. Rio Vista Oil, Ltd., 786 P.2d 1343 (Utah 1990). . . . 2

JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction in this matter pursuant to Section 78-2a-3(2)(h), Utah Code Annotated 1953, as amended:

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue: Whether the trial court erred as a matter of law in awarding Mr. Menz (Appellee) the sum of \$76,781 in the Fidelity Investment Account as his separate property instead of dividing it equally between the parties as marital property when Mr. Menz failed to present evidence at trial that the sum was separate property.

Standard of Review: On issues of law, the appellate court may freely review the trial court's ruling for correctness and is not required to accord deference to the trial court's ruling. Utah State By and Through Div. of Consumer Protection v. Rio Vista Oil, Ltd., 786 P.2d 1343 (Utah 1990); Ron Case Roffing and Asphalt Paving v. Bloomquist, 773 P.2d 1382 (Utah 1988); Scharf v. BMG Corp., 700 P.2d 1068 (Utah 1985); Provo City Corp. v. Nielson Scott C., Inc., 603 P.2d 803 (Utah 1979). An issue of law is presented when there are no disputed facts or substantial controversy as to the facts. Pacific Development Co. v. Stewart, 195 P.2d 784 (Utah 1948); 5 Corpus Juris Secundum §703.

Preservation of Issues in Trial Court:

1. Trial Transcript: Mr. Menz testified at the trial that the balance in the Fidelity Investment Account held in his name was \$277,992 as of January, 2000. Mr. Menz testified that he had records of the account which would show deposits or withdrawals to the account between December, 1998 and January, 2000, but Mr. Menz did not present any such records at trial. (Record, hereinafter "R", 1350, p. 200, ll. 1-23, p. 202. ll. 14-17, p. 204, ll. 15-20; R. 1348, p. 9, ll.14-25, p. 10, ll. 1-21, p. 19, ll. 1-12).

2. Transcript of Closing Arguments and Judge's Ruling of April 28, 2000: Counsel for both parties explained to Judge Thorne (the trial judge) that the \$277,992 Fidelity Investment Account held in Mr. Menz' name included his share of the Joint Fidelity Account and his inheritance, both of which sums, approximately \$201,000, were transferred from the parties' Joint Fidelity Account to Mr. Menz' Fidelity Investment Account. (R. 1348, p. 42, ll. 20-25, pp. 43-44, p. 45, ll. 1-8) (Addendum, hereinafter "Add.", No.1).

3. Petitioner's Objections to Respondent's Proposed Findings of Fact and Conclusions of Law: Mrs. Menz objected to Mr. Menz' proposed findings of fact on the basis that Judge Thorne, the trial Judge, in his oral ruling, and Mr. Menz in his Proposed Findings, only included in their

calculations \$116,000 of the \$277,992 Fidelity Investment Account held by Mr. Menz, leaving the unawarded balance in the hands of Mr. Menz, thereby distorting the balancing of the awards to the parties. (R. 1110, 1113-1115).

4. Petitioner's Motion to Amend Findings of Fact, Conclusions of Law and Decree of Divorce and Petitioner's Memorandum in Support of Motion to Amend Findings of Fact and Conclusions of Law and Decree of Divorce: Mrs. Menz moved to amend the Findings of Fact and Conclusions of Law and Decree of Divorce, or for a new trial, to include the entire \$277,992 Fidelity Investment Account in the calculations for property division rather than just \$116,000 of that account. (R. 1205-1206 and R. 1209-1213).

5. Transcript of Hearing on Motion to Amend: Mrs. Menz pointed out that although Judge Dever partially corrected the error of Judge Thorne by including \$201,211 of the \$277,992 Fidelity Investment Account in his amended calculations of property division, he should have equally split the remaining \$76,781 because Mr. Menz had offered no evidence (even though account documents were available to him) that the money was other than marital funds rather than earnings on his separate \$201,211.

Mrs. Menz also pointed out that Mr. Menz had failed and refused to produce documents to Mrs. Menz during the pendancy of the action that would have demonstrated whether the funds were marital or separate. (Transcript of Hearing on Motion to Amend, R. 1351, p. 12, ll. 5-25, p. 13, ll. 1-25, p. 14, ll. 1-10, p. 45, ll. 13-22; Add. No. 2)

STATEMENT OF CASE

This is a divorce case. It was tried before Judge Thorne on February 22 and 23, 2000 in the Third District Court. Appellant, Mrs. Menz, appeals from the June 6, 2001 Order Amending Findings of Fact, Conclusions of Law and Decree of Divorce entered by Judge Dever on June 6, 2001. (Addendum No. 8) It is Mrs. Menz' position that Judge Dever's award of the sum of \$76,781 to Appellee, Mr. Menz, as separate property (R. 1298; Add. No. 8, para. 1) was an error of law and that it should have been divided equally between the parties as marital property.

STATEMENT OF FACTS

The following facts are undisputed:

1. In October-November, 1998, Mr. and Mrs. Menz held a joint

account with Fidelity. This account has been referred to as the Joint Fidelity Account. (R. 1187, Add. No. 3; R. 1298, Add. No. 8). This account held monies the parties had earned during their marriage plus the sum of \$140,000 in monies inherited by Mrs. Menz and \$82,300 inherited by Mr. Menz. (Id.).

2. In approximately October-November, 1998, Mrs. withdrew from the Joint Fidelity Account the sum of \$261,000 which was comprised of Mrs. Menz' inheritance in the sum of \$140,000 plus \$121,000 of joint marital funds. (R. 1184-1196 at 1187, Add. No. 3).

3. Following Mrs. Menz' withdrawals, the Joint Fidelity Account held a balance of \$201,211 as of November 30, 1998. (Trial Exhibit "P18"; Add. No. 4)

4. The \$201,211 balance remaining in the Joint Fidelity Account included the sum of \$82,300 which was an inheritance of Mr. Menz. (R. 1187, Add. No. 3)

5. Sometime after November 30, 1998, Mr. Menz withdrew the balance remaining in the Joint Fidelity Account and deposited into an account held under his name which is referred to as Mr. Menz' Fidelity Investment Account. (R.1350, p. 201, ll. 9-16; R. 1198, para. 1; Add. No. 8)

6. Between November 1998 and January 2000, Mr. Menz withdrew and expended funds from the balance in the Joint Fidelity Account and the Fidelity Investment Account in the sum of at least \$20,000. (R.1350, p.204, ll. 11-12)

7. As of January, 2000, Mr. Menz' Fidelity Investment Account held a balance of \$277,992. (R. Exhibit "D6"; Add. No. 5) (Note that the trial transcript, R. 1350, p. 201, refers to Exhibit "P21" rather than Exhibit "D6". Exhibit "P21" is missing from the Court Record; however, Exhibit "D6" is the same document as as Exhibit "P21" as stated in the trial testimony at R. 1350, p. 217)

8. Mr. Menz was asked at trial whether he had records that would show the activity in the Fidelity Investment Account from the time he deposited into it the balance of the Joint Fidelity Account. He said he had such records except for the last month of two before trial and had given them to his attorney. He testified that he had none with him at trial. (R.1350, p. 202, ll. 3-17)

9. Judge Thorne ruled orally from the bench following the closing arguments of trial counsel. In his ruling, he made no reference to the Fidelity Investment Account balance of \$277,992; he credited Mr. Menz

with receiving \$116,000 of the balance of the Joint Fidelity Account after Mrs. Menz' withdrawals; he did not expressly award the balance of the \$277,992 Fidelity Investment Account to either party. (Add. No. 1; R. 1348, pp. 42-49)

10. Mr. Menz submitted proposed Findings of Fact and Conclusions of Law and Mrs. Menz submitted objections to portions of them. (R. 1110-1120) Included in her objections was an objection to Judge Thorne's and Mr. Menz' failure to address and award the \$277,992 Fidelity Investment Account. (Id.) Before Judge Thorne ruled on the objections, he left the bench and was replaced by Judge Leon Dever. Judge Dever ruled on the proposed Findings of Fact and Conclusions of Law and on Mrs. Menz objections to them. (R. 1160; Add. No. 6)

11. The final Findings of Fact and Conclusions of Law and the Decree of Divorce were entered by Judge Dever on January 16, 2001. (Add. No. 3 and Add. No. 7, respectively)

12. The Findings and Conclusions and the Decree of Divorce did not mention nor specifically award the Fidelity Investment Account. (Id.)

13. Mrs. Menz filed a Motion to Amend Findings of Fact and Conclusions of Law and Decree of Divorce and a Memorandum in Support

on January 25, 2001. (R. 1209-1230) Mr. Menz filed a Memorandum in Response. (R.1248-1254)

14. A hearing on the Motion to Amend was held on April 4, 2001. Again, counsel for Mr. Menz did not cite any evidence that would demonstrate that the sum of \$76,781 in the \$277,992 Fidelity Investment Account represented Mr. Menz' separate property. (R. 1351, pp. 1-49). Judge Dever ruled that because there was no evidence as to whether the \$76,781 was separate or marital property, the \$76,781 should be awarded to Mr. Menz as separate property. (Add. No. 2; R. 1351, pp. 38-49, Add. No 8). During the course of the hearing, counsel for Mrs. Menz pointed out that Mr. Menz had failed and refused prior to trial and during trial to turn over documentation that would have demonstrated whether the \$76,781 was separate or marital property. (Add. No. 2).

SUMMARY OF ARGUMENT

The sum of \$76,781 awarded to Mr. Menz as separate property was comprised of monies in the Fidelity Investment Account held in Mr. Menz' name over and above Mr. Menz' \$201,211 of separate funds. Judge Dever reasoned that because there was no evidence as to whether the sum of \$76,781 represented earnings in a "bull market" on the \$201,211 of separate

funds or represented marital funds or a combination of separate and marital the \$76,781 should be awarded to Mr. Menz as his separate property.

The trial court should have divided the \$76,781 equally between the parties as marital property because: (1) property held by one or both married parties is either marital or separate; if marital, it should be divided equally; if one claims it is separate, the burden is on the party so claiming to prove it; (2) it was Mr. Menz burden to demonstrate that the \$76,781 was "separate" and he failed to offer any evidence that it was "separate" despite the fact that he (or his attorney) was in possession of such information; (3) it is fair and equitable to divide the \$76,781 equally and it is highly unlikely the \$76,781 included any significant amount of separate "earnings"; and (4) it is appropriate that this court reverse the lower court and direct it to award the \$76,781 as marital property split equally.

ARGUMENT

POINT I

THE \$76,781 IN MR. MENZ' FIDELITY
INVESTMENT ACCOUNT WAS EITHER
MARITAL OR SEPARATE PROPERTY AND
MR. MENZ HAD THE BURDEN OF PROOF
THAT IT WAS SEPARATE PROPERTY

It is well-settled law that at the time of divorce, property held by

either or both spouses falls into one of two categories, marital or separate property; property should be awarded as separate to a spouse who owned it prior to marriage or inherited it during marriage, plus any appreciation in value; all other property acquired during marriage is marital property which generally should be divided equally between the spouses, absent special circumstances. See Dunn v. Dunn, 802 P. 2d 1314 (Utah App. 1990), Burt v. Burt, 799 1166 (Utah App. 1990), Josephson v. Josephson, 772 P. 2d 1236 (Id. 1989), Mortensen v. Mortensen, 760 P.2d 308 (Utah 1988).

The Court in Dunn, supra, stated that ". . .the court should first properly categorize the parties' property as part of the marital estate or as the separate property of one or the other. . .". Implicit in the holdings of Dunn, Burt and Mortensen was that the party seeking an award of property as separate must be able to demonstrate to the court that it was acquired before marriage, inherited, or represented gains/appreciation on such property; otherwise, it is marital and should be divided equally. See Burt, Dunn and Mortensen, supra.

The Idaho court in Josephson, supra, addressed a similar problem, i.e., inherited and marital funds had been combined in one account. The court stated that the ". . .party who asserts that property is separate has the

burden of persuasion, and must prove the property is separate with reasonable certainty and particularity. . .This is accomplished through evidence of tracing or accounting." Josephson, supra, at 1145 (Emphasis added).

Thus, in the instant case, Mr. Menz had the burden of going forward with some evidence of the activity in the Fidelity Investment Account (i.e., tracing or accounting) to show whether the sum of \$76, 781 represented earnings on his separate money of \$201,211.

POINT II

MR. MENZ FAILED TO MEET HIS BURDEN OF PROOF THAT THE \$76,781 WAS HIS SEPARATE PROPERTY

The undisputed facts are that Mrs. Menz withdrew the sum of \$261,000 from an account the parties had maintained during their marriage, the Joint Fidelity Account; that sum included an inheritance amount of \$140,000 and \$121,000 of funds the parties had jointly deposited from their earnings during marriage. (Facts No's. 1 and 2). Following the withdrawal of said sums by Mrs. Menz, the Joint Fidelity Account held a balance of \$201,211 on November, 30, 1998. (Facts No. 3). According to Mr. Menz, he ultimately transferred the balance of the Joint Fidelity Account into an

account held in his name, the "Fidelity Investment Account" (Facts No. 5), which as of January 2000 (just before trial of the action) had a balance of \$277,992. (Facts No. 7).

At no time during the trial of the action or during the hearing on Mrs. Menz' Motion to Amend did Mr. Menz offer any evidence that the \$76,781 in the Fidelity Investment Account was his "separate" property. A review of the transcripts of the trial, Judge Thorne's ruling from the bench, and the transcript from the hearing on Mrs. Menz' Motion to Amend clearly reveals that Mr. Menz did not offer any evidence to demonstrate whether the \$76,781 represented earnings/gain/appreciation on Mr. Menz' separate property of \$201,211 (which Mr. claims to have deposited into the Fidelity Investment Account).

It is significant to note that Mr. Menz did not even put a single document into evidence to demonstrate that the \$201,211 was in fact deposited into the Fidelity Investment Account. For all Mrs. Menz knew, those funds could have been deposited in any account somewhere else and the entire \$277,992 may be all joint/marital earnings to be equally divided. Obviously, Mr. Menz had the income and ability to create accounts in his own name and deposit earnings into those accounts during the marriage.

His ability to do so is evidenced by the fact that during the marriage, Mr. Menz created private "retirement" accounts which, at the time of trial, had amassed a total value of \$317,000. (Add. No. 5; R. Exhibit "D6")

Even though there was no evidence that the \$201,211 had actually been put into the Fidelity Investment Account, it was entirely possible and believable that it had been; thus, lacking any documentation and recognizing that Mr. Menz had at least a right to the sum of \$201,211, plus some reasonable gain, Mrs. Menz accepted Mr. Menz' assertion that he had put the balance from the Joint Fidelity Account into his Fidelity Investment Account. It was and is, however, too preposterous to accept the notion that the whole \$76,781 reflected soley earnings on the \$201,211, as more fully explained in POINT III below.

It is clear that Mr. Menz and his trial counsel did not simply forget to put any accounting or tracing documentation into evidence at the trial. Mr. Menz admitted that the documents regarding the activity in the Fidelity Investment Account were in the hands of his Attorney and that he did not have them with him at the trial. (Facts No. 8) Counsel for Mrs. Menz repeatedly objected to Mr. Menz testimony regarding his Fidelity Investment Account on the grounds that Mr. Menz had failed/refused to provide to

Mrs. Menz documentation as to his accounts, both before and during trial. (See, e.g., R. 1350, pp. 215, 217); if in fact it was an oversight by Mr. Menz or his counsel on the first day of trial, that mistake could easily have been remedied overnight by retrieving the documents and putting them into evidence the second day of trial. This failure of evidence defies rational explanation and speaks for itself.

Mr. Menz failed to meet his burden of proof that the \$76,781 was separate rather than marital property; thus, the trial court erred in awarding Mr. Menz the \$76,781 as "separate property. See Burt, Dunn, Josephson, Mortensen, supra.

POINT III

IT IS FAIR AND EQUITABLE THAT THE \$76,781
IN THE FIDELITY INVESTMENT BE EQUALLY
DIVIDED AND IT IS HIGHLY UNLIKELY THE
\$76,781 CONTAINED ANY SIGNIFICANT AMOUNT
OF EARNINGS ON "SEPARATE" FUNDS

Utah law requires that in dividing property, ". . . the ultimate division be equitable--that property be fairly divided between the parties given their contributions during the marriage and their circumstances at the time of divorce." Dunn, supra, quoting Newmeyer v. Newmeyer. 745 P.2d 1276, 1278 (Utah 1987).

Mrs. Menz concedes that some of the \$76,781 may consist of "earnings" on Mr. Menz' \$201,211 (assuming he put it into the Fidelity Investment Account); nevertheless, because Mr. Menz failed to meet his burden of proving that the sum reflected appreciation/earnings, the funds should be awarded as marital and split between the parties.

Even if the account does include some separate earnings of Mr. Menz, it is still fair and equitable that the \$76,781 be equally divided because Mr. Menz received a fair and equitable return on his \$201,211 during the 13 months prior to trial as more fully explained below.

Mr. Menz testified that between December, 1998 and January, 2000, (a time span of 13 months) he had withdrawn at least \$20,000 from his Fidelity Investment Account (Facts No. 6) and expended it on various items such as his new truck, \$13,000, and monthly expenses. (R.1350, p. 204) In fact, it is likely Mr. Menz actually withdrew more than \$20,000 of any earnings on the \$201,211 because he testified that during that time period, he was losing income on his daughter's home for which he had signed and the daughter and husband were unable to meet the obligations. (R. 1350, p. 224); Mr. Menz also entered into evidence at trial Exhibit "D8", which is entitled "Monthly Expenses" and purports to show his monthly expenses to

be about \$2,875. Mr. Menz had testified that his monthly income was only about \$1,300 per month (R. 1350, p. 197) and that he made up the difference by taking money from his "savings" with Fidelity.

Regardless of whether he withdrew more than \$20,000, that sum alone indicates that Mr. Menz received the benefit of at least an approximate 10 percent per annum return on his "separate property" which is a fair and equitable return to him. (The 10 percent was computed by dividing the \$20,000 by the \$201,211.) Thus, a split of the \$76,781 between the parties would be fair and equitable, considering that Mr. Menz had, at the time of trial, already received the benefit of at least an approximate 10 percent per annum return on his separate property.

Furthermore, it is highly improbable, that even in a "bull market", Mr. Menz could have earned \$96,781 (\$76,781 plus the \$20,000 withdrawn) on \$201,211--an approximate 48 percent per annum. (The 48 percent figure was computed by dividing the sum of \$96,781 by \$201,211.) Thus, while the \$76,781 may reflect some "earnings" on Mr. Menz' separate money, it is more than likely that it reflects other monies earned prior to the divorce and unlikely that it reflects any significant amount of appreciation on the \$201,211.

POINT IV

IT IS APPROPRIATE THAT THIS COURT
REVERSE THE TRIAL COURT RULING
AND REMAND IT WITH DIRECTIONS TO
ENTER THE APPROPRIATE EQUAL
DIVISION OF THE \$76,781

This Court confronted essentially the same issues in 1990 in the Burt and Dunn, cases. In both cases, there was a dispute as to whether property was marital or separate. This Court remanded both cases with instructions to the lower court to properly categorize the property as separate or marital in accordance with this Court's ruling and to enter appropriate orders to effectuate the categorization of the property.

APPELLANT REQUESTS AN AWARD OF ATTORNEY FEES

This Court has stated that ". . . when an appeal is frivolous, . . . we will award fees regardless of the trial court's ruling on fees." Burt, supra at 1171.

In this case, Mrs. Menz is the Appellant and the trial court did not award fees to either party; however, logically, the ruling of this Court in Burt should apply equally to the situation when the Appellee's opposition to the appeal is "frivolous".

The Appellee, Mr. Menz, has no valid opposition to Mrs. Menz'

appeal, either in fact or in law. As noted previously, Mr. Menz, was given every opportunity to do so, and in fact was beseeched to do so; nevertheless, he failed to offer any evidence that the \$76,781 was separate property; in fact he sat in the courtroom for two days and even though he and/or his attorney at their fingertips all of the documentation should have, could have and would have resolved the entire issue then and there. He did not offer any such evidence to the lower court. His strategy is obvious--he relied on the fact that there were so many dollar figures, accounts and transfers from account to account, that anyone, including the Judge, would be confused by it and the money might just slip through the cracks into his pocket unnoticed. That is exactly what happened.

Again, in regard to Mrs. Menz' Motion to Amend, Mr. Menz could not point to a single piece of evidence that would demonstrate that the \$76,781 was separate property: Yet he resisted the Motion to Amend.

This case has been in litigation since October of 1998. Mrs. Menz should not have to be put through this torture. Mr. Menz' resistance is without any merit, yet he continues to resist, while Mrs. Menz is forced to expend money in an effort to vindicate her rights and interests.

A party should not be allowed to force legal bills to skyrocket, and to

delay relief to the prevailing party by simply out-spending, delaying, and presenting frivolous defenses or offenses.

This Court should accept affidavits of Mrs. Menz and her counsel regarding the attorney fees and costs incurred in this appeal and should award to Mrs. Menz an amount which appropriately compensates her for her expenditures on this appeal.

CONCLUSION

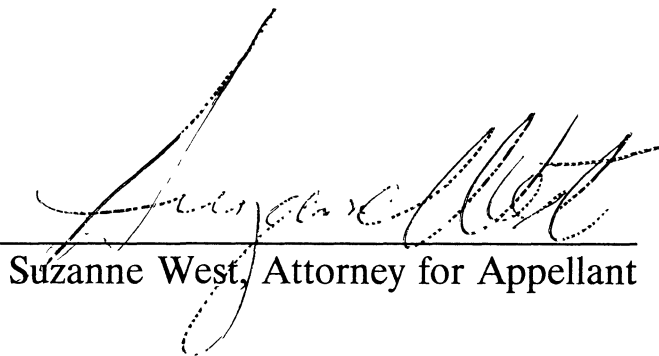
The law is crystal clear: a divorcing party claiming property as separate, when there is a question as to whether it is marital or separate, must present some accounting/tracing evidence as to its separate nature.

The pertinent facts are undisputed, thus, this is a question of law. This Court is not required to give any deference to the lower court's ruling. It is plain and simple: Mr. Menz failed to meet his burden of proof. It is appropriate that this Court reverse the trial court's decision regarding the \$76,781 award to Mr. Menz, direct the lower court to enter an order that the \$76,781 is to be awarded one-half to each party and to enter any other orders necessary to implement and effectuate the decision..

Mr. Menz should not be rewarded for failing to present the requisite

proof; rather, the sum should be divided equally between Mr. and Mrs. Menz which would be a fair and equitable result given that Mr. Menz has already received a reasonable return on his separate money (i.e., the approximate \$20,000 or more withdrawn from the account between 1999 and 2000).

RESPECTIVELY SUBMITTED this 21st day of August, 2002.



Suzanne West, Attorney for Appellant

IN THE UTAH COURT OF APPEALS

GAIL PATRICIA MENZ,)	
)	
Petitioner/Appellant/)	
Cross-Appellee)	
)	
vs.)	Appellate No. 20010567-CA
)	
WILLIAM JEFFREY MENZ,)	
)	
Respondent/Appellee/)	
Cross-Appellant.)	
)	

ADDENDUM TO BRIEF OF APPELLANT

Appeal from the Third Judicial District Court,
Judge Leon A. Dever

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08/80-4

IN THE THIRD DISTRICT COURT - SALT LAKE CITY
Third Judicial District

SALT LAKE COUNTY, STATE OF UTAH

MAY 15 2000

-000-

GAIL PATRICIA MENZ,

Plaintiff,

vs.

WILLIAM JEFFREY MENZ,

Defendant.

Case No. 984908014

CLOSING ARGUMENTS AND
JUDGE'S RULING

(Videotape Proceedings)

-000-

BE IT REMEMBERED that on the 28th day of April,
2000, the above-entitled matter came on for hearing
before the HONORABLE WILLIAM A. THORNE, sitting as Judge
in the above-named Court for the purpose of this cause,
and that the following videotape proceedings were had.

-000-

A P P E A R A N C E S

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FILED
Utah Court of Appeals

APR 22 2002

Pauletta Staggs
Clerk of the Court

ALAN P. SMITH, CSR
385 BRAHMA DRIVE (801) 266-0320
SALT LAKE CITY, UTAH 84107

ORIGINAL

20010567CA

1 that was filed with this Court by Mr. Menz entitled
2 Respondent's Current Financial Information. And in that
3 document, he has a budget of, depending on expenses and
4 so forth, of \$2,875 per month. It didn't just come out
5 of thin air, he presented that document to the Court and
6 filed it with the Court.

7 It's Mrs. Menz'--it is not Mrs. Menz' burden to
8 prove what job may have been available for him. Mr. Menz
9 has admitted he has not looked for a job, so we don't
10 know what he could earn, he does not know what he could
11 earn or what is even available.

12 THE COURT: Okay. Thank you.

13 MS. WEST: He looked a couple of places. Okay.

14 THE COURT: Okay. It was briefly--

15 MS. WEST: Finally--

16 THE COURT: --it wasn't to rehash everything.

17 MS. WEST: Okay. I think that was it.

18 Primarily the distortion of the figures are the main one.

19 Okay. Thank you.

20 Ruling: THE COURT: Counsel, I have a question for both
21 of you, the 116,000 was left in this Fidelity account
22 afterwards, where did that money go? Is that still
23 there? Is that what's counted under something else now?

24 MR. WALL: Anything she--that was left after
25 she took hers out is left, yes, if that answers the

1 question.

2 MS. WEST: (Inaudible)

3 THE COURT: Okay. Well, but how was that
4 counted in the different assets? Is that part of the
5 I.R.A. Fidelity of--counted at 317,000?

6 MR. WALL: No, that is for--that is not the
7 I.R.A. Fidelity at all.

8 THE COURT: Okay.

9 MR. WALL: That is the Fidelity investment.

10 THE COURT: Okay. Where is this 168? Is that
11 the--

12 MR. WALL: That is with the Fidelity investment
13 accounts, it's not Fidelity I.R.A. It's--

14 MS. WEST: It's--Mr. Menz testified it's a
15 Fidelity investment account, it's in this document that
16 was termed financial information that now shows a balance
17 of \$277,992. He transferred the money that has been in
18 that joint account of about, he thought about 201,000
19 (inaudible)

20 THE COURT: Okay. I'm not--I just want to
21 figure out where the assets are--

22 MS. WEST: --poured it into that account which
23 now has a balance--

24 THE COURT: Okay. Slow down, Ms. West.

25 Okay. Where is that 116 now?

1 MR. WALL: It's in the Fidelity Investment
2 account.

3 THE COURT: And what--what--where do I find
4 that in either of your documents that you've done for me?

5 MR. WALL: I could show you, I don't know
6 which--

7 THE COURT: Okay. Come on up and Ms. West, if
8 you can tell me where you think it is in your documents,
9 that's all.

10 In your list of joint assets, where, Ms. West,
11 is it?

12 MS. WEST: I didn't add that in to it, I only
13 added 116 in for him, I did not add the other hundred
14 and--

15 THE COURT: Okay. The--the 116 for him, where
16 is that in your asset distribution list?

17 MS. WEST: It was right at the--can I look at--
18 okay, the two of them have been totaled, 116 for each,
19 the 232. Proposed award to her--

20 THE COURT: So you've got that counted in the
21 joint savings, so you--

22 MS. WEST: Yes.

23 THE COURT: --you're claiming that's still
24 his--

25 MS. WEST: I'm saying that 116 of it was his.

1 THE COURT: Okay.

2 MS. WEST: And 116--

3 THE COURT: Okay. So, it doesn't show up in
4 one of the other accounts, though? That's what I'm--
5 that's--was my concern.

6 MS. WEST: Uh huh.

7 MR. WALL: Your Honor, this right here is our
8 statement, Page 2 (inaudible)

9 THE COURT: Okay. What I'm going to do for the
10 record is go through what I believe the joint assets are.

11 Let me state before I start that once inherited
12 income is placed into a joint account, it loses its
13 independent character and I'm not going to trace it back
14 beyond that. The parties make a decision to put it into
15 a joint account, it loses its separate identity and
16 becomes a joint asset.

17 As such, the assets are, of this marriage:

18 Home equity in the amount of \$313,000;

19 Mrs. Menz' car valued at 18,000;

20 Mr. Menz' truck valued at 28,000;

21 A trailer valued at 1,500;

22 Mrs. Menz' retirement valued at 20,000;

23 Mr. Menz' retirement valued at 137,200;

24 Mr. Menz' I.R.A. Fidelity account at 317,000;

25 Joint household goods I valued at 20,000;

1 Mrs. Menz' I.R.A. at 100,000;

2 That totals to \$954,700.

3 Plus, I then went back and calculated the value
4 of the joint savings account since I do not believe that
5 a separate--maintains any kind of separate identity. The
6 145 that was withdrawn, the 116 that was withdrawn shows
7 261 that was withdrawn, 116 left over, for a total of
8 377.

9 Adding that in to the prior assets comes up
10 with a total assets of \$1,331,700. Splitting that in
11 half is \$665,850.

12 The reason I've split it in half is I do not
13 believe that value is an issue in this marriage.
14 Certainly, each side can point fingers and say they're at
15 fault for this or they're at fault for that. This is
16 not, in my mind, the circumstance contemplated by the
17 legislature where it indicates that fault can be taken
18 into account in distributing the assets of the estate.

19 Therefore, my goal is to divide the assets in
20 half, coming up with \$665,850 for each.

21 Using that as the basis of the calculation, I
22 award Mrs. Menz the \$100,000 in her I.R.A., \$20,000 in
23 her retirement account. The \$20,000 in the combined
24 household goods--

25 MS. WEST: Excuse me, your Honor, that--that

1 20,000 isn't on household goods, that's on the Wild
2 Clover Lane equity--

3 THE COURT: No, it's household goods.

4 MS. WEST: (Inaudible) 500--

5 THE COURT: I'm not working off of your list,
6 Mrs. West.

7 MS. WEST: Oh.

8 THE COURT: I'm counting the total household
9 goods at \$20,000. I've specifically not included the
10 Wild Clover Lane property because I think that's--it was
11 the testimony of both parties that that was a gift to the
12 daughter and as such, it is not an asset of the marriage
13 and I'm going to require at some point, before I get done
14 here, that Mr. Menz quit-claim the interest in that to
15 those--the daughter and her husband so that that asset is
16 one of the children and not of the adults.

17 So, to go back, \$100,000 from Mrs. Menz'
18 I.R.S., \$20,000 from her retirement, 20,000 from
19 household goods, along with her savings withdrawal of, as
20 I calculate, \$261,000, that being the 145 plus the 116
21 that was withdraw, totals to 261. That means that if I
22 give those items to her, that's \$401,000 so far.

23 And then give her the house, less an equitable
24 lien in the amount of \$48,150 for Mr. Menz.

25 MR. WALL: I'm sorry? Again, what? 48,000--

1 THE COURT: \$48,150.

2 MR. WALL: Thank you.

3 THE COURT: That gives each party assets of
4 665,850. If I give Mrs. Menz what she has already
5 withdrawn in joint accounts and those remaining assets.

6 Now, to balance that out because what I've done
7 is I've--counted her living costs in what she's withdrawn
8 and to balance the question of the payments, the costs
9 and the other things, what I'm going to do is, on the
10 debts, the second mortgage, again, if it--if it's joint
11 funds that go to pay for that, I'm not going to count
12 that separately. Money, once it's put into a joint
13 account, loses its separate identity. I'm not going to
14 calculate this second mortgage pay-off.

15 The question is the debt from the credit cards,
16 which appears to be \$46,000. I'm going to split that
17 right in half and find that each has the ability to pay
18 half of that.

19 I'm not going to award alimony. I'm going to
20 find that with assets of \$665,000 each, they have the
21 ability to support themselves.

22 I'm going to find that Mr. Menz' lack of
23 employment is not entirely voluntary. He chose to change
24 jobs, the year after he did that, he was laid off
25 involuntarily. I'm not going to require, with assets of

1 this size and income that the parties can draw, that he
2 take a minimum wage job.

3 Mrs. Menz has some ability not to work full-
4 time. She has been substituting, there's some question
5 about whether or not she's going to be able to continue
6 to do that after she has medical procedures.

7 I'm going to find that neither one has an
8 ability to support the other beyond what their own
9 capabilities are. With assets of that size, it's not
10 necessary and I'm going to find that because of the
11 assets of that size, that there is no need to award
12 attorney's fees to either side, so each side will bear
13 their own attorney's fees.

14 Mr. Menz, as part of this asset division, I'm
15 going to require that you quit-claim Wild Clover Lane
16 equity to your daughter because I have not divided that
17 asset between the two. Everything else is awarded to Mr.
18 Menz.

19 Now, not for purposes of arguing but just
20 clarification, anything that you want to address?

21 MS. WEST: Yes, your Honor. In terms of the--
22 the equity as awarded to the daughter, since that was the
23 20,000 (inaudible) of Mrs. Menz, then--

24 THE COURT: No. It's my finding based on the
25 testimony of both parties that that was a gift they made,

1 it was a constructive trust that was created for them and
2 is not an asset of theirs and that's why it was not
3 divided up.

4 And I understood that the property is in Mr.
5 Menz' name and that's why I'm requiring him to quit-claim
6 it.

7 MS. WEST: Okay.

8 MR. WALL: The--the only ques--

9 MS. WEST: And (inaudible) the--the house, what
10 is--is--is he to quit claim that--

11 THE COURT: Subject to the \$48,150 lien.

12 And that's to be paid out within five years,
13 either by refinancing or selling the property.

14 MS. WEST: Your Honor, in terms of the 23,300,
15 half of the credit card debt, how is that to be paid by
16 Mr. Menz? Is that to be paid immediately to Mrs. Menz
17 to--

18 THE COURT: That's to be paid directly to the
19 credit card people. That's not to be paid to one party
20 or the other.

21 MS. WEST: Okay. And to the extent that Mrs.
22 Menz has paid it down below that amount--

23 THE COURT: No.

24 MS. WEST: --(Inaudible)

25 THE COURT: No, that's--each side owes that

1 much money towards that debt.

2 MS. WEST: And your Honor, in the event, which
3 appears the--that there is a possi--a good possibility of
4 Mrs. Menz being unable to work, maintain her employment,
5 I'm wondering if you could not award a minimum, maybe a
6 dollar a month for alimony so that at least she could
7 come back with a substantial change in circumstances in
8 income and ask for an adjustment of that?

9 THE COURT: It's not my intention to do that
10 because I think the division of the property is
11 sufficient to provide income for both parties and they
12 both have some ability to supplement that, limited, but
13 they do have some. So, I'm not--not awarding any alimony
14 at all.

15 MS. WEST: And I just have a question where
16 the--the \$40,000 in household assets, I don't know where
17 that figure came from.

18 THE COURT: I didn't say 40, I counted 20.

19 MS. WEST: Twenty, all awarded to her?

20 THE COURT: Yes.

21 MS. WEST: Where did the figure of 20,000 come
22 from?

23 THE COURT: Because I believe 8,500 is under-
24 valued and that was the number that your client testified
25 to. Given the value that was testified about the fancy

1 ranges and everything else that was put in there and
2 furniture, 8,500 is an under-value.

3 Okay. Mr. Wall, do you have questions?

4 MR. WALL: Well, I--I'm--the daughter is behind
5 on payments substantially on the home and I just want to
6 make sure, I think he's got the right to go in and make
7 the payments and if need be, foreclose against his
8 daughter. I'm just trying to protect his--his--

9 THE COURT: He can foreclose his interest, he
10 can have the mortgage, but any assets that are left up to
11 that \$20,000 have to be paid back into the daughter,
12 because it's the testimony of both that I've accepted
13 that that's not an asset of theirs, but was intended to
14 be a gift to her.

15 MR. WALL: I agree. I'm just trying to think
16 this through on how he could protect his interest and I
17 think that will be fine. Yes.

18 THE COURT: Any other questions on this?

19 MR. WALL: Nothing, your Honor.

20 THE COURT: Ms. West, any other questions?

21 MS. WEST: No, your Honor.

22 THE COURT: Okay. Mr. Wall, I'll ask you to
23 draft the documents to that effect and submit those to
24 Ms. West for approval as to form.

25 MR. WALL: I'll do that. Thank you, your

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Honor.

(Whereupon, this hearing was concluded.)

* * *

TRANSCRIBER'S CERTIFICATE


STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

I, Toni Frye, do hereby certify:

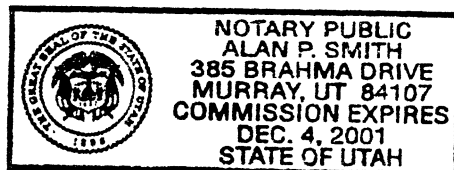
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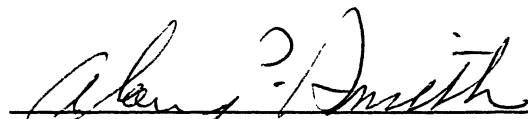
I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 8th day of May, 2000.


Transcriber

Subscribed and sworn to before me this 8th day of May, 2000.




Notary Public

(S E A L)

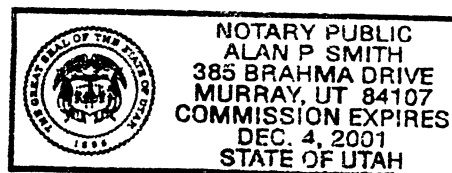
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STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

I, Alan P. Smith, Certified Shorthand Reporter, Notary Public and a Certified Court Transcriber of Tape Recorded Court Proceedings within and for the State of Utah, do certify that I received an electronically recorded videotape of the within matter and caused the same to be transcribed into typewriting, and that the foregoing pages, numbered from 1 to 53, inclusive, to the best of my knowledge, constitute a full, true and correct transcription, except where it is indicated the Videotape Recorded Court Proceedings were inaudible.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 9th day of May, 2000.





Notary Public

(S E A L)

IN THE THIRD DISTRICT COURT, SALT LAKE CITY

SALT LAKE COUNTY, STATE OF UTAH

-o0o-

GAIL PATRICIA MENZ,

Petitioner,

vs.

WILLIAM JEFFREY MENZ,

Respondent.

Case No. 984908014-

MOTION TO AMEND

(Videotape Proceedings)

-o0o-

BE IT REMEMBERED that on the 4th day of April, 2001, commencing at the hour of 3:10 p.m., the above-entitled matter came on for hearing before the HONORABLE L.A. DEVER, sitting as Judge in the above-named Court for the purpose of this cause, and that the following videotape proceedings were had.

-o0o-

A P P E A R A N C E S

For the Petitioner:

SUZANNE W. WEST
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Salmon, Idaho 83467

For the Respondent:

GREGORY B. WALL
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5200 South Highland Drive
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FILED DISTRICT COURT
Third Judicial District

SEP 24 2001

SALT LAKE COUNTY

By K. Shupe
Deputy Clerk

FILED **FILED**
Utah Court of Appeals

OCT 11 2001

SEP 29 2002

ALAN P. SMITH, Clerk
385 BRAHMA DRIVE (RD. 295-020)
SALT LAKE CITY, UTAH 84107

COURT OF APPEALS

Paulette Stagg
Clerk of the Court


ORIGINAL

1 This is the proper time to bring a Rule 59 motion,
2 your Honor. It's--it's stated under Rule 59 after the entry
3 of the order, ten days after the entry of the order. This
4 Court signed the divorce decree in January and within ten
5 days, this motion was filed to correct all of these errors.

6 And it--this is the proper place to decide it,
7 rather than taking it on appeal because it's--it's just
8 mostly calculation errors, that with all the numbers
9 floating around could very easily occur and did occur, with
10 the exception of the combining of the inherited funds, which
11 it is our position that there was never a chance to litigate
12 it and it was contrary to--to Utah law.

13 THE COURT: Okay.

14 MS. WEST: Thank you, your Honor.

15 THE COURT: Well, it seems to me that if I place
16 these issues in the calculation the way I think they should
17 be placed and the way that I believe that the evidence
18 should place them, we have awarded to Mr. Menz a \$28,000
19 automobile, a \$1,500 trailer, \$137,200 Longyear retirement
20 account, \$317,000 William Menz I.R.A. and then his share of
21 the Fidelity account.

22 Now, if we buy into--into Ms. West's argument that
23 his share of the Fidelity account is the \$118,911 because if
24 you take out his \$82,000, that's what's left because she's--
25 there's \$201,000 left after she has taken out \$261,000.

1 She's taken \$121,000 worth of Fidelity joint funds and left
2 him with \$118,911 joint funds. So, that would give him a
3 total of \$602,611.

4 Now, if you go down to her account, you have her
5 \$121,000 that she took out of the joint accounts, you have
6 her \$299,467 home equity, you have her \$8,500 worth of
7 furnishings, her I.R.A. account of \$100,000, her retirement
8 account of \$20,000 and \$18,000 in her automobile, for a
9 grand total of 566,976 is what I calculate that she has.

10 So, if he has 602,611, that leaves a difference
11 between the two of them of \$35,635. Divide that in two,
12 which I believe is the correct way of doing it, leaves
13 \$17,817.50 that would equalize the parties out.

14 The reason that I look at it this way is
15 (inaudible - coughing) talk about what the Fidelity account
16 is worth whenever it was--where this 277 came from, because
17 there's no evidence as to where that came from. It was
18 stated that the only monies that went into that were joint
19 account monies or his retirement account monies. We don't
20 know about that. All we know is that when the parties
21 divided this account that they had, the joint Fidelity
22 account, there was 261,000 to her and 201 for him and if you
23 subtract the retirement--I mean the inheritance accounts
24 which it seems to me that--I accept your argument that we
25 can do that, it would be proper to do it, that leaves her

1 receiving 121 and he receiving 118. I'm not going to
2 discuss what happened to the rest of it because there's no
3 evidence as to what that--where it came from.

4 We don't know whether or not in a two-year period
5 that the \$200,000 he put in there didn't accumulate to 277
6 based upon that income that it may have generated during the
7 bull market that was going on during that period of time.
8 There's no evidence on that. I can't determine whether or
9 not it didn't naturally increase by that sum of money in
10 that two-year period or 18-month period.

11 Questions?

12 MS. WEST: Excuse me, your Honor, but I--I'm
13 sorry, but I'm afraid we're making the same mistake. That
14 116,000--actually 118,911 that he was credited with, there
15 is no dispute, he also got his 82,300 in separate property
16 out of that account.

17 Now, if we leave that out--

18 THE COURT: Well, where is that--where--where--

19 MS. WEST: If--if I may, your Honor?

20 Okay. He--he got his 118,000--

21 THE COURT: Yeah. That's what I gave him.

22 MS. WEST: --plus his eighty-two three. Okay.

23 THE COURT: So, I gave him--I gave him his
24 118,911.

25 MS. WEST: Okay. And you put that figure over

1 here.

2 THE COURT: Right.

3 MS. WEST: Now, as far as in the valuation of Mrs.
4 Menz' accounts--

5 THE COURT: Uh huh.

6 MS. WEST: --what--you're--you're using--

7 THE COURT: \$121,000, her share.

8 MS. WEST: --121,000 there.

9 THE COURT: He got 118--

10 MS. WEST: Okay.

11 THE COURT: --she got 121. I just threw out the--
12 the 140 and the \$82,000. I just discounted them, like they
13 never existed.

14 MS. WEST: Your Honor, so what we're leaving here
15 is some--approximately \$60,000 in this Fidelity Investment
16 account?

17 THE COURT: Yeah. There's no evidence of where
18 that came from or where--what happened to it.

19 MS. WEST: There--the only evidence presented on
20 that, your Honor, was Mr. Menz' evidence and he testified--

21 THE COURT: And he said he put his \$201,000 into
22 that account.

23 MS. WEST: Yes. And he asked this Court to value
24 it as of the date of the trial, not prior to that time
25 because we think he made withdrawals from it.

1 THE COURT: There's no--

2 MS. WEST: We don't know why he asked--

3 THE COURT: --evidence of that, Ms. West.

4 MS. WEST: But he's--he got the valuation he
5 requested at the time of trial, your Honor. Now, if that
6 \$60,000 is in there and he preferred that the Court look at
7 that 60,000 sitting there rather than maybe what was in
8 there a month or two months or six months or a year before,
9 I don't know why; but we--all we know because he would not
10 provide the documents is that he asked the Court to value it
11 at that as of the time of trial when he filed his exhibit
12 with the Court. And he--

13 THE COURT: You can't have it both ways, Ms. West.

14 MS. WEST: I--we don't want it both ways, your
15 Honor.

16 THE COURT: You wanted the--you wanted the
17 retirement accounts out and you wanted to balance what was
18 there. And that's what I've done now.

19 MS. WEST: Your Honor, I'm not asking to take the
20 retirement accounts out. The retirement accounts are monies
21 and accounts which--

22 THE COURT: I'm taking out the--

23 MS. WEST: --other--

24 THE COURT: I'm taking out the inheritance tax
25 (sic).

1 MS. WEST: Inheritance. That's correct.

2 THE COURT: On both sides.

3 MS. WEST: And I--and I appreciate that; but we've
4 got the \$60,000 sum that is a windfall to Mr. Menz that
5 existed--

6 THE COURT: We don't know--

7 MS. WEST: --in his account.

8 THE COURT: --if that's a windfall. We don't know
9 where that came from.

10 MS. WEST: Mr. Menz testified that he put money
11 into this account from his earnings and from this joint
12 account. That was his testimony at trial. And he asked
13 this Court to value it as of that date rather than some time
14 prior to that. Apparently, that was advantageous to him to
15 value it at that date.

16 THE COURT: Well, it may or may not have been; but
17 you're--you're--you're asking me to award the properties
18 based upon the private accounts, inheritance accounts and
19 taking this into effect when all this happened and that's
20 what I have done here.

21 And I'm saying that the \$201,000 that he got and
22 the \$261,000 that she got, less each of their retirements
23 (sic) comes out to be 121 and 118. And that's what we're
24 going to have--total all these up as.

25 MS. WEST: All right. Thank you, your Honor.

1 THE COURT: And based upon that, it appears that
2 he owes her \$17,817.50.

3 MS. WEST: That was 17,858 and--

4 THE COURT: \$17,817.50.

5 Do you understand what I'm doing here, Mr. Wall?

6 MR. WALL: I do.

7 THE COURT: Do you have any problems with my
8 calculations? Speak now or forever hold your peace. I
9 don't want to--we're not doing this again. If you don't
10 like it, you all can appeal this time.

11 MR. WALL: I don't have a problem with your
12 calculations. I mean, your math is--is correct, so no, I
13 have no problem with that.

14 MS. WEST: Your Honor, that would--and then his--
15 and then his lien would be ordered to be removed from the--
16 from the home; correct? Thank you.

17 MR. WALL: Well--

18 THE COURT: How did the lien get on the home in
19 the first place?

20 MR. WALL: --that isn't correct.

21 MS. WEST: It was awarded by Judge Thorne in his
22 calculations at the time that he made his ruling, thinking
23 that that was what it would take to equalize the property,
24 but that's because some had been included that shouldn't
25 have been and some--and a great amount was left out that

1 shouldn't have been left out. That was the--so it came out
2 to show that a lien would be appropriate on the home, but--

3 THE COURT: Because according to this thing here,
4 she had 732,000 and he had 599.

5 MS. WEST: That--yes, according to that. Of
6 course, that included that additional \$25,000 awarded to her
7 in the--the home equity and the house furnishings, plus it
8 incurred--it included her inheritance, but his figure did
9 not include his inheritance, the eighty-two three, which
10 this Court has--has put back into the equation. So, it
11 eliminates that--that lien when you come up with your
12 figures.

13 The only--the only dispute we have with--I
14 understand exactly how you made this division. We believe
15 that--that that account, the balance that existed in that
16 Fidelity Investment account, that half of that also belongs
17 to Mrs. Menz.

18 THE COURT: Well, I don't agree with that.

19 MS. WEST: Okay.

20 THE COURT: Because there's no evidence of
21 anything other than the--his share of the joint account went
22 in there.

23 MR. WALL: Your--your Honor, I was following you
24 until you nodded your head and said yes, the lien comes off
25 the home. If he owes her 17,817 based on your calculation,

1 so be it; but if you take the lien off the home, then she's
2 being awarded over 80,000, not 17,000.

3 THE COURT: Well, he received \$602,000 according
4 to this. She received \$567,000. Right? Isn't that
5 correct?

6 MR. WALL: I--I'm not seeing where you're--the
7 602,000.

8 THE COURT: Well, his--his--his--add them up here.
9 Have you got your little chart? You've got 28,000 on an
10 auto, \$1,500 on a trailer, \$137,200 in Longyear, 317 in the
11 William Menz I.R.A. and \$118,911 in the Fidelity joint
12 account.

13 Now, if I added that up right and I'll check it
14 again to make sure I'm right here, sure would be nice to
15 have a calculator that had a little tape in it. That comes
16 to be \$602,611.

17 Now, you go down to her account. Have \$121--
18 121,000 out of the Fidelity account, plus the home equity of
19 299,467, \$8,500 in the furnishings, the \$100,000 in her
20 retirement account, \$20,000 in her retirement account and
21 \$18,000 for her automobile, for 566,9--well, 567, I guess is
22 what I have here.

23 Okay. So--

24 MR. WALL: What--what did you use--

25 THE COURT: 566--

1 MR. WALL: Did you use the 313--

2 THE COURT: --967. Is that right? I think that's
3 right. If he has 602,611. That leaves a difference to
4 equalize the estate out of \$35,644, I guess I made a mistake
5 here. Divide it by two, it comes out to be 17,822.

6 And it seems to me that the \$66,000 lien on the
7 house was Judge Thorne's way of equalizing the property.
8 Since I've equalized the property now by correcting what I
9 considered to be at least \$25,000 worth of error, it's
10 appropriate that he should pay her \$17,822.

11 That can't be right. This is 9--yes, it can be.

12 MS. WEST: Your Honor, it's because in the
13 calculation by Judge Thorne, he hadn't--he included Mrs.
14 Menz' inheritance in her total and didn't include Mr. Menz'
15 inheritance in his. That makes a major difference.

16 THE COURT: Okay. So that will correct
17 everything, I believe.

18 MR. WALL: So, what you're doing, if I get this
19 correct is, you're giving her credit for the home equity,
20 the Zions Bank account and you're giving her credit for the
21 home furnishings, you're having him pay her 17--17,822.
22 You're also stat--you're also--it's also your ruling that
23 the inherited property retained its separate character; is
24 that correct?

25 THE COURT: Yes. That's it.

1 Any questions?

2 So then the--Mr. Wall, prepare an amended or a
3 supplemental, I guess--when you do everything else, just
4 prepare the supplemental on these and send it to Ms. West
5 for her signature.

6 MR. WALL: What--how does the Court want the--I
7 mean, I--since the ruling seems to be in her favor, I mean,
8 I'll prepare it if the Court wants.

9 MS. WEST: I--I can prepare it, your Honor.

10 THE COURT: Okay. You prepare it.

11 MS. WEST: I'll do that.

12 MR. WALL: How should the--what--on--based on what
13 factual findings is the Court going to base the ruling that
14 the inheritances--excuse me--retain their separate
15 character?

16 THE COURT: Well, I think the law says that if you
17 can trace them and you can, and it appears to me that there
18 is more money in this account than was placed in there by
19 just the inheritance; therefore, it can be just deducted
20 from it.

21 It appears to me, Mr. Wall, that that is a--well,
22 decide which way you think should be the best thing for your
23 client, that's really to argument; it appears to me that it
24 can be justified by saying that there is sufficient sums to
25 deduct the inheritance from the joint account and still

1 leave a sufficient sum of monies of joint earnings in there
2 to be divided between the parties.

3 Okay. Thank you. We'll be in recess.

4 MS. WEST: Thank you, your Honor.

5 (Whereupon, this hearing was concluded.)

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STATE OF UTAH)
)
) ss.
COUNTY OF SALT LAKE)

That I am a transcriber for Alan P. Smith, Certified Shorthand Reporter and a Certified Court Transcriber of Tape Recorded Court Proceedings; that I received an electronically recorded videotape of the within matter and under his supervision have transcribed the same into typewriting, and the foregoing pages, numbered from 1 to 49, inclusive, to the best of my ability constitute a full, true and correct transcription, except where it is indicated the Videotape Recorded Court Proceedings were inaudible.

Dated at Salt Lake City, Utah, this 18th day of
September, 2001.

Subscribed and sworn to before me this 18th day
of September, 2001.



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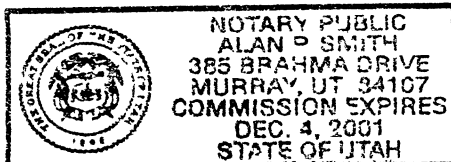
REPORTER'S CERTIFICATE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

I, Alan P. Smith, Certified Shorthand Reporter, Notary Public and a Certified Court Transcriber of Tape Recorded Court Proceedings within and for the State of Utah, do certify that I received an electronically recorded videotape of the within matter and caused the same to be transcribed into typewriting, and that the foregoing pages, numbered from 1 to 49, inclusive, to the best of my knowledge, constitute a full, true and correct transcription, except where it is indicated the Videotape Recorded Court Proceedings were inaudible.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

Dated at Salt Lake City, Utah, this 19th day of September, 2001.



(S E A L)


Notary Public

GREGORY B. WALL (3365)
WALL & WALL
Attorneys for Respondent
5200 S. Highland Dr., Ste 300
Salt Lake City, Utah 84117
801-274-3100

FILED
JAN 13 2001
By OF SALT LAKE COUNTY
CLERK

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

GAIL PATRICIA MENZ,)	
	:	
)	FINDINGS OF FACT AND
Petitioner	:	CONCLUSIONS OF LAW
)	
v.	:	
)	Civil No. 984908014
WILLIAM JEFFREY MENZ,	:	
)	Judge Leon A. Dever
Respondent	:	Comm. Thomas Arnett
)	

The above captioned matter came on for trial before the court sitting without a jury on February 22 and February 23, 2000, the Honorable William A. Thorne, district judge, presiding. The petitioner is Gail Patricia Menz and she was represented by her attorney Suzanne West. The respondent is William Jeffrey Menz and he was represented by his attorney Gregory B. Wall.

Each party was present, sworn and testified as to the issues in this matter. Other witnesses were also called, sworn and testified on behalf of the various parties. Various exhibits were also offered by each party and received into evidence by the court.

Closing arguments were held on April 28, 2000. Each of the parties was personally present and represented by their respective

counsel. Based upon the foregoing, and the court being fully advised in the premises and the law, does herewith make and enter the following:

FINDINGS OF FACT

1. The parties were married to each other on November 26, 1967, in Phoenix, Arizona, and ever since said date have been and are now husband and wife. Each party was a resident of Salt Lake County, State of Utah, at the time this action was commenced, and had been for at least three months immediately prior to the commencement of this action

2. There have been three children born as issue of this marriage, however, all three are over 18 years of age, are married and fully emancipated. There are no minor children and no other children are expected as issue of this marriage.

3. Irreconcilable differences have arisen between the parties making the continuation of the marriage impossible. In confronting their differences it appears that the parties have attempted to reach some resolution of their differences, but without success.

4. The petitioner has also alleged mental cruelty as a ground for her divorce. It appears from the evidence that there have been repeated disputes between the parties over finances during the months preceding the filing of this action. There have been claims on both sides of lack of interest and involvement by the other party in the marriage, and mutual claims of a lack of affection and failure to assist and support the other party with their duties and responsibilities in the marriage.

5. There appears that grounds for a divorce are present to award a divorce to the petitioner on the grounds of irreconcilable differences.

6. The parties separated in December, 1998, right after Christmas, and have not cohabitated with one another since that time.

7. During the course of the marriage the parties have acquired real property situated in Salt Lake County, State of Utah, at 4532 Crest Oak Circle, which property has been used as the primary family residence. That property is more particularly described as follows:

All of Lot 903 Mt. Olympus Hills No. 9 Subdivision,
according to the official plat thereof as recorded
in the office of the Salt Lake County Recorder.

Parcel No. 22-01-308-026

The petitioner still occupies the residence and has done so since the separation of the parties. It is the express desire of petitioner Gail Menz to retain possession and use of the family residence.

8. The fair market value of the residence is \$375,000.00. There is a mortgage balance of approximately \$62,000.00. The court finds that there is equity in the residence in the amount of \$313,000.00.

9. For the past number of years the parties have maintained a joint investment account with Fidelity Investments. This account is tied in with the stock market and therefore the value of the account can fluctuate depending upon the activity of the stock

market.

10. In August, 1995 Mr. Menz received an inheritance of \$82,300.00 which he invested into the joint Fidelity Investments account.

11. Approximately two years ago in 1997 Mrs. Menz received an inheritance of \$176,000.00 and invested \$140,000.00 into the same joint Fidelity Investments account.

12. Very shortly before the parties separated in late 1998, Mrs. Menz made a number of withdrawals from the joint Fidelity account that resulted in a net total to her of \$261,000.00, leaving \$116,000.00 in the account. The court therefore finds that using the above values, which reflect the amounts and values at the time Mrs. Menz made her withdrawals, is a fair and equitable point in time to value the account and the amounts taken.

13. The court finds that due to the joint uses, commingling of the inheritance monies of the parties, and the length of time which the inheritance monies were commingled in the joint Fidelity account, the separate investments of inherited funds have lost their separate and independent character and identity and are therefore jointly owned funds, and have been treated as such by the parties until the time Mrs. Menz began making unilateral withdrawals from the account.

14. Mrs. Menz has an automobile in her possession which she has used as her separate vehicle, a 1998 GMC Jimmy, with equity of \$18,000.00, based upon the fair market value of the vehicle and the testimony of Mrs. Menz.

15. Mr. Menz has purchased since the separation a 1999 pickup truck with a value of \$28,000.00. This is the equity amount since it appears that the vehicle has been paid for in full.

16. Mrs. Menz had 401(k) and 454 retirement accounts through her employment as a school teacher with Granite School District. The court finds that her retirement has a current value of \$20,000.00, which is the value the court is using for its computation of the division of assets.

17. The parties also own an old house trailer with a fair market value and equity of \$1,500.00.

18. The court has received evidence as to the nature and extent, generally and with some specifics, as to various items of the household contents. The court finds that the fair value of those contents, separate and apart from the personal effects of the parties, is \$20,000.00. The court finds that the petitioner's statement of value of \$8,500.00 understates the value.

19. Mr. Menz has a retirement account with one of his former employers, Boart Longyear Company. The value of the account is \$137,200.00. This is a fixed account which generates a gross monthly income for Mr. Menz of \$1,632.00, and a net after withholding to him each month of \$1,232.00. He is not able to withdraw additional funds from the account, but has a fixed monthly income from the account.

20. Mr. Menz has an IRA account with a value of \$317,000.00.

21. Mrs. Menz has an IRA account with a value of \$100,000.00.

22. The value of the foregoing assets, except for the joint

Fidelity Investment account, is \$954,700.00.

23. Since this court finds that the Fidelity Investments account has been used jointly and that the inheritance investments have lost their separate identity, the court finds a value of the \$145,000.00 withdrawn by Mrs. Menz, plus \$116,000.00 withdrawn by Mrs. Menz, and the balance at the date set by the court of the remaining \$116,000.00, for a total of \$377,000.00.

24. Adding this to the prior asset subtotal the court finds total assets of \$1,331,700.00.

25. This court finds that fault as it relates to value of assets is not an issue and each party can point fingers at the other in order to lay blame. The court does not find that the circumstances of blame are those contemplated by the legislature where it indicates that fault can be taken into account in distributing the assets of the estate.

26. The court therefore finds that a division of one-half to each party of the above total is appropriate, and that each party should be awarded property with a value of \$665,850.00.

27. During the marriage a home was purchased for one of the daughters of the parties, which property shall be designated as the Wild Clover Lane property, situated in Salt Lake County. Joint funds were used with the mutual consent of the parties for the down payment on the home. The daughter and her husband had invested time and labor into the construction of the home and the money was used to purchase the home so that the equity derived from their labors would not be lost. Due to the fact that the daughter and

her husband could not qualify for a loan, the home was purchased in the name of Mr. Menz. The daughter and her husband have since paid the monthly payments, except for an arrearage to date of approximately \$1,700.00 which Mr. Menz has had to pay, and they have maintained the home as their own.

28. The court finds that the home was purchased by mutual agreement and consent of the parties for the benefit of the one daughter and her husband with no intent that the home be the separate property of either of the parties. The title to the property is being held in what amounts to a constructive trust for the benefit of the daughter and husband who occupy the home. Therefore, the value of that home will not be included as an asset of the marital estate.

29. The major assets of the parties are listed below, and the values attached thereto the court finds are fair and reasonable values. To divide the marital estate in order to award values as set forth in paragraph 28 above, it is fair, just and reasonable that the petitioner, Gail Menz, should be awarded the following assets:

a. The household contents:	\$20,000.00
b. Mrs. Menz's IRA account:	\$100,000.00
c. Mrs. Menz's retirement:	\$20,000.00
d. The withdrawals by Mrs. Menz from the joint Fidelity account of \$116,000 and \$145,000:	\$261,000.00

e. The family residence at 4532
Crest Oak Circle, with an
equity value of \$313,000.00,
less an equitable lien due
Mr. Menz of \$66,150.00:

Value=	\$246,850.00
--------	--------------

f. GMC vehicle: \$18,000.00

TOTAL TO MRS. MENZ: \$665,850.00

30. Mr. Menz is entitled to the remaining property listed by
the court above as follows:

a. Equitable lien in home:	\$66,150.00
b. Mr. Menz's pickup truck:	\$28,000.00
c. The old house trailer:	\$1,500.00
d. Mr. Menz's Longyear retirement:	\$137,200.00
e. Mr. Menz's IRA account:	\$317,000.00
f. Balance left in joint Fidelity Investments acct:	\$116,000.00

TOTAL TO MR. MENZ: \$665,850.00

31. With regard to the equitable lien, that amount of
\$66,150.00 should be paid by Gail Menz to William Menz within five
(5) years from the date of the Decree of Divorce, either by
refinancing the property, selling the property, or by Mrs. Menz
drawing upon other assets to pay the amount due.

32. Each party should be awarded their personal effects, their
separate banking accounts, and any other items of personal property

presently in their respective possessions, all free and clear of any claim by the other party.

33. Mr. Menz should immediately convey by quit claim deed the Wild Clover Lane property to his daughter and her husband who occupy the home.

34. Joint debt in the form of credit card debt was incurred during the marriage in the sum of \$46,600.00. This amount should be split in half between the parties and this court finds that each has the ability to pay half of the credit card debt. The debt was incurred primarily for the benefit of the three adult daughters of the parties. Mr. Menz should pay the sum of \$23,300.00 directly to the credit card companies and not directly to Mrs. Menz. Mrs. Menz should pay the credit card companies directly and not Mr. Menz.

35. This court finds that alimony should not be awarded because with assets of \$665,000.00 each, each party has the ability to support themselves. Mr. Menz lack of employment is not entirely voluntary. He chose to change jobs, a year after he did that, he was laid off involuntarily. This court is not going to require, with assets of this size and income that the parties can draw, that he take a minimum wage job. Mrs. Menz has some ability not to work full time. She has been substituting, there is some question about whether or not she is going to be able to continue to do that after she has medical procedures performed. This court finds that neither party has an ability to support the other beyond their own capabilities. With assets of the size they have it is not necessary.

36. The court finds that each of the parties has received what essentially amounts to one-half of the primary assets of the parties, and each thus has a substantial measure of assets. Both have limited abilities to work that are roughly equivalent, and each receives earnings from their investment accounts and retirement funds.

37. Because of the factors set forth above the court does not find that alimony should be awarded to either party, each being able to support themselves at a comparable standard of living. Neither party has the ability to support the other beyond their own capabilities.

38. The court also does not find that the nature of fault causing the failure of the marriage is such that the grounds for the divorce should be taken into consideration in awarding alimony, it appearing to the court that both parties are to blame to some degree for the failure of the marriage.

39. The only testimony during trial regarding attorney's fees was the mention by Mrs. Menz of an amount in the neighborhood of \$30,000.00. There was no other evidence presented prior to the time the parties rested their cases.

40. Also due to the nature and extent of financial resources, the division of debts, and the described relatively equal abilities of the parties to meet their respective obligations, the court finds that each party should pay their own costs and attorney's fees incurred in this action.

41. Commissioner Thomas Arnett made a recommendation during

the early stages of the proceedings in this case that allowed Mrs. Menz to take from the joint Fidelity account up to \$1000.00 per month to meet her needs. This was not a flat amount she was granted by the Commissioner's own clarification minute entry. During that time Mr. Menz paid Mrs. Menz \$500.00 per month towards the amount she claimed she needed. Due to this fact, and the division of the debts and assets above described, Mrs. Menz is not entitled to any claim against Mr. Menz for an arrearage amount.

42. A temporary restraining order was entered freezing certain accounts of Mr. Menz. That order was released as to his Boart Longyear retirement account, but substituted another account. That restraining order should be vacated immediately in its entirety and any monies being held as back payments from Mr. Menz's Boart Longyear monthly pension account should be paid to him forthwith.

43. Any other debts incurred by the parties should be paid by the party that incurred the debt, and each should hold the other harmless from any such debts and obligations.

44. Each should be required to pay any obligations connected with any property awarded to them under the terms of the Decree of Divorce, including, but not limited, to the requirement that Gail Menz pay the monthly payments on the family residence to be awarded to her.

45. Each party should hold the other harmless from the debts each is required to pay. Each should notify their respective creditors of their obligations for debts under the terms of the Decree of Divorce to be entered by this court.

FROM THE FOREGOING, the court now makes and enters the following:

CONCLUSIONS OF LAW

1. The petitioner shall be granted a Decree of Divorce dissolving the marriage of the parties, the same to become absolute and final upon entry.

2. The relief more fully described above is a fair, just and reasonable division, and the parties shall therefore be awarded the relief as described in the Findings of Fact hereinabove in the Decree of Divorce to be entered by this court.

3. The temporary restraining order shall be vacated immediately and any funds due Mr. Menz from his Boart Longyear retirement that were withheld previously shall be paid at once to him.

DATED this 16 day of ~~December~~ January, 2000.

BY THE COURT:


LEON A. DEVER
District Judge

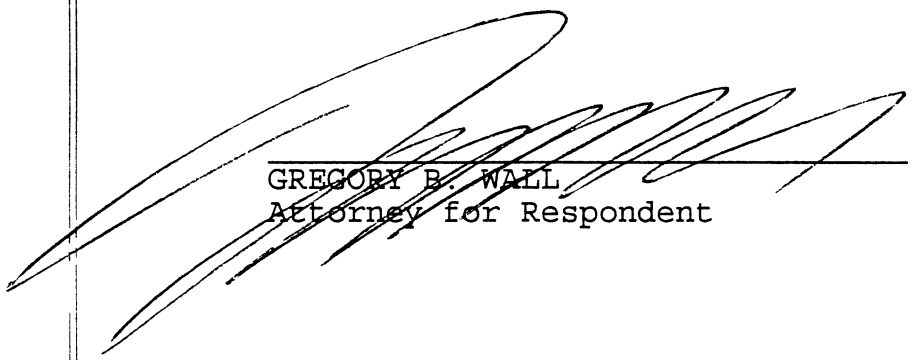
Approved as to Form:

SUZANNE WEST
Attorney for Petitioner

CERTIFICATE OF MAILING AND NOTICE OF INTENT TO SUBMIT

This is to certify that a true and correct copy and an original of the foregoing Findings of Fact and Conclusions of Law was mailed, postage prepaid, to Suzanne West, attorney for petitioner, 207 Neyman Street, Salmon, Idaho, 83467, and by facsimile to 208-756-8328, on the 19th day of December, 2000.

Notice is also given to the petitioner and her attorney that if the above Findings of Fact and Conclusions of Law are not approved as to form and returned to the office of respondent's counsel by Tuesday, December 19, 2000, an original copy will be submitted to the court for the judge's approval and signature.

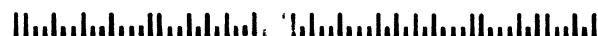


GREGORY B. WALL
Attorney for Respondent



ENV# 055772230

WILLIAM J MENZ
GAIL P MENZ
4532 CREST OAK CIR
SALT LAKE CTY UT 8 124-3825



Investment Report

November 1, 1998 - November 30, 1998

Customer Service

TouchTone Xpress 800-544-5555
Brokerage Services 800-544-8666

Visit us online at www.fidelity.com

► To find out about a new tax-advantaged way to save for a child's education, visit www.fidelity.com/unique or call 1-800-544-1914.

018

Ultra Service Account 129-104388 WILLIAM J MENZ AND GAIL P MENZ - WITH RIGHTS OF SURVIVORSHIP

Account Summary

Beginning value as of Nov 1 ① \$404,840.97
Additions 106,000.00
Withdrawals -222,000.00
Transaction costs, loads & fees -7.50
Margin interest paid -409.92
Change in investment value 18,205.52
Change in debit balance -105,417.48
Ending value as of Nov 30 \$201,211.59

Income Summary

	This Period	Year to Date
Taxable		
Dividends	\$0.00	\$4,233.52
St cap gain	0.00	346.74
Interest	21.12	1,810.74
Lt cap gain	0.00	531.11
Total	\$21.12	\$6,922.11

Realized Gain/Loss from Fund Sales

	This Period	Year to Date
Short-term gain	\$1,532.02	\$1,532.02
Short-term loss	-100.88	-223.47
Net short	\$1,431.14	\$1,308.55
Long-term gain	\$30,271.51	\$33,909.08
Long-term loss	0.00	-3,793.15
Net Long	\$30,271.51	\$30,115.93

As of November 30, 1998, the rate on your current debit balance is 8.75% and you can borrow an additional \$95,105.80 based on your current holdings.

Holdings (Symbol) as of November 30, 1998

Mutual Funds	Quantity November 30, 1998	Price per Unit November 30, 1998	Mutual Fund Total Cost Basis	Total Value November 1, 1998	Total Value November 30, 1998
M FIDELITY DISCIPLINED EQUITY (FDEQX)	1,250.9680	\$29.02000	\$24,618.75	\$89,071.43	\$36,303.09
M SELECT TECHNOLOGY (FSTX)	49.9630	67.55000	2,309.43	54,351.56	3,375.00
M ALPINE US REAL ESTATE FUND (XCOZX)	3,174.6030	12.40000		37,269.83	39,365.07
M MUTUAL SERIES FINCL SECURITIES CLASS Z (TEFAX)	1,772.4990	12.70000	25,320.79	21,553.58	22,510.73

Portfolio Summary

Total Portfolio Net Worth: \$595,002.45

Account	Net Worth
Personal Investing	

Account

X29116858 - Brokerage Account	\$277,992.08
----------------------------------	--------------

T022735364 - Mutual Fund	\$214,268.39
-----------------------------	--------------

Brokerage accounts reported as of: 01/11/2000, 4:04am.
Mutual Funds reported as of: 01/11/2000, 5:15am.

**THIRD DISTRICT COURT
SALT LAKE DIVISION
SALT LAKE COUNTY, STATE OF UTAH**

FILED DISTRICT COURT
Third Judicial District

NOV - 2 2000

SALT LAKE COUNTY

Deputy Clerk

GAIL PATRICIA MENZ,

Petitioner,

vs.

WILLIAM JEFFREY MENZ,

Respondent.

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MINUTE ENTRY

Case No. 984908014

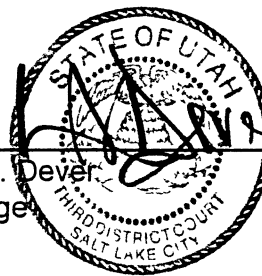
Judge: L.A. Dever

The Court has reviewed the memoranda of the parties objecting and responding to the Proposed Findings and Decree in the above named case. The Court has accepted a portion of the Petitioner's requests for change. Attached to this Minute Entry is a copy of the Proposed Findings and Decree. The Court has made corrections and deletions on the copy which are to be incorporated by Respondent's attorney.

In reviewing the division of property, it is the Court's position that Judge Thorne clearly expressed his intention to divide the marital estate equally. From the reading of the transcript, it is obvious that one item of property that was determined to be in the estate, the petitioner's auto, was omitted from the calculations. Judge Thorne equalized the estate by granting the respondent a lien on the home awarded to the petitioner. The lien should be in the amount of \$66,150 00 and not the \$48,150.00 stated in the transcript. A lien in the amount of \$66,150 00 would equalize the estate as intended by Judge Thorne.

Dated this 2nd day of November, 2000.

L. A. Dever
Judge



CERTIFICATE OF NOTIFICATION

I hereby certify that a true and correct copy of the foregoing Minute Entry was mailed on the 3 day of November, 2000, to the following:


Gregory B. Wall
5200 South Highland Drive, Ste 300
Salt Lake City, Utah 84117

Suzanne West
207 Neyman Street
Salmon, Idaho 83467


Deputy Court Clerk

GREGORY B. WALL (3365)
WALL & WALL
Attorneys for Respondent
5200 S. Highland Dr., Suite 300
Salt Lake City, Utah 84117
801-274-3100

FILED 516 1101 0000T
Third Judicial District

JAN 16 2001
By  SALT LAKE COUNTY
County Clerk

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

IMAGED

GAIL PATRICIA MENZ,

Petitioner

v.

WILLIAM JEFFREY MENZ,

Respondent

)
:
) DECREE OF DIVORCE
:
)
:
) Civil No. 984908014
:
) Judge Leon A. Dever
:
) Comm. Thomas N. Arnett

The above captioned matter came on for trial before the court sitting without a jury on February 22 and February 23, 2000, the Honorable William A. Thorne, district judge, presiding. The petitioner is Gail Patricia Menz, who was present and represented by her attorney, Suzanne West. The respondent is William Jeffrey Menz, who was present and represented by his attorney, Gregory B. Wall

Each party was sworn and testified as to the issues in this case. Other witnesses were also called, sworn and testified on behalf of the parties. Various exhibits were also offered by each party and received by the court into evidence. The court has jurisdiction over the issues and the parties in this proceeding. Venue is proper in this county.

Closing arguments were held on April 28, 2000. Each of the parties was personally present and represented by their respective attorneys. Based upon the foregoing, the court being fully advised in the premises and the law, and the court having heretofore made and entered its Findings of Fact and Conclusions of Law, the court does herewith ORDER, ADJUDGE AND DECREE AS FOLLOWS:

1. The petitioner is granted a Decree of Divorce dissolving the marriage of the parties, the same to become absolute and final upon entry.

2. The petitioner is awarded all right, title, interest and estate the parties may have in the real property situated at 4532 Crest Oak Circle, Salt Lake County, State of Utah, which property is more particularly described as follows:

All of Lot 903, Mt. Olympus Hills No. 9 Subdivision according to the official plat thereof as recorded in the office of the Salt Lake County Recorder.

Parcel No. 22-01-308-025

3. The petitioner is granted the sole and exclusive right to the use and occupancy of the said real property. She is ordered to pay the monthly mortgage payments and other taxes and fees connected with the property as they accrue and to hold the respondent harmless therefrom.

4. The above interest of the petitioner is subject to an equitable lien in the name of William Jeffrey Menz, the respondent, in the amount of \$66,150.00. This amount shall be payable by petitioner to respondent no later than five (5) years from the date of the entry of this Decree of Divorce. If the property must be

sold or refinanced to pay the lien then that shall be done.

5. Neither party is awarded any alimony.

6. Gail Menz is awarded the 1998 GMC Jimmy automobile free and clear of any claim by the respondent.

7. Gail Menz is awarded the contents of the home at 4532 Crest Oak Circle, free and clear of any claim by respondent.

8. Petitioner is also awarded her IRA account, her retirement accounts, her Fidelity Investments account, and any monies withdrawn previously from the joint Fidelity Investments account, all free and clear of any claim by the respondent.

9. The respondent William Menz is awarded his 1999 pickup truck, the old house trailer, his Boart Longyear retirement account, his IRA account, and the balance that was left in the Fidelity Investments account, all free and clear of any claim by the petitioner. All unpaid back amounts held shall be released.

10. Each party is awarded the said funds and accounts including any changes in the nature or location of the funds from such accounts, as well as any increases in the accounts or funds to which each is entitled. Some of the monies acquired by the parties have been reinvested with different investment firms, or placed in different accounts, but they are traceable to the original assets awarded herein, and it is the intention of the court that those assets derived or traceable from the original accounts go to the party who is awarded the asset as set forth above.

11. Each party is awarded their personal effects, their separate banking accounts, and any other items of personal property

market.

10. In August, 1995 Mr. Menz received an inheritance of \$82,300.00 which he invested into the joint Fidelity Investments account.

11. Approximately two years ago in 1997 Mrs. Menz received an inheritance of \$176,000.00 and invested \$140,000.00 into the same joint Fidelity Investments account.

12. Very shortly before the parties separated in late 1998, Mrs. Menz made a number of withdrawals from the joint Fidelity account that resulted in a net total to her of \$261,000.00, leaving \$116,000.00 in the account. The court therefore finds that using the above values, which reflect the amounts and values at the time Mrs. Menz made her withdrawals, is a fair and equitable point in time to value the account and the amounts taken.

13. The court finds that due to the joint uses, commingling of the inheritance monies of the parties, and the length of time which the inheritance monies were commingled in the joint Fidelity account, the separate investments of inherited funds have lost their separate and independent character and identity and are therefore jointly owned funds.

14. Mrs. Menz has an automobile in her possession which she has used as her separate vehicle, a 1998 GMC Jimmy, with equity of \$18,000.00, based upon the fair market value of the vehicle and the testimony of Mrs. Menz.

18. The temporary restraining order in effect is hereby vacated in its entirety, as to all property of the respondent William J. Menz, and effective immediately. Respondent William J. Menz is granted any unpaid monthly pension amounts due him from his Boart Longyear pension account.

19. Each party is ordered to pay any debts connected with any property awarded to them under the terms of this Decree of Divorce, and to hold the other party harmless therefrom.

20. Each party is ordered to notify their respective creditors as to the debts each is ordered to pay under the terms of this Decree of Divorce.

21. Each party is ordered to pay their own medical and dental bills that may now exist, or that may be incurred in the future, and to hold the other party harmless therefrom.

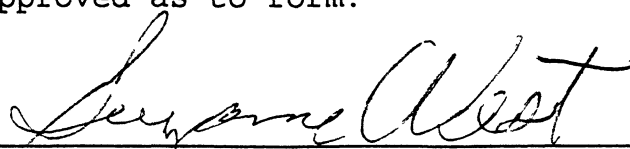
22. The parties are mutually restrained from harming, threatening, bothering, stalking, harassing, or intimidating the other party at any time or location.

DATED this 16 day of ~~December~~ January, 2001.

BY THE COURT:


LEON A. DEWITT
District Judge

Approved as to form:


SUZANNE WEST
Attorney for Petitioner

CERTIFICATE OF MAILING AND NOTICE OF INTENTION TO SUBMIT

This is to certify that a true and correct copy and an original of the foregoing Decree of Divorce was mailed, postage prepaid, to Suzanne West, attorney for petitioner, 207 Neyman Street, Salmon, Idaho, 83467, and by facsimile to 208-756-8328, on the 19th day of December, 2000.

Notice is also given to the petitioner and her attorney that if the above Decree of Divorce is not approved as to form and returned to the office of respondent's counsel by Tuesday, December 19, 2000, an original copy will be submitted to the court for the judge's approval and signature.



GREGORY B. WALL

Suzanne West
Attorney for Petitioner
908 Baker Avenue
Salmon, Idaho 83467
Telephone: (208) 756-4401

IMAGED

By 

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

GAIL PATRICIA MENZ,
Petitioner,

vs.

WILLIAM JEFFREY MENZ,
Respondent.

ORDER AMENDING FINDINGS OF
FACT, CONCLUSIONS OF LAW
AND DECREE OF DIVORCE

Civil No. 984908014 DA

Judge: Leon A. Dever

This matter came on for hearing before the Honorable Leon A. Dever on April 4, 2001. Suzanne West appeared for Petitioner, who was present. Gregory Wall appeared for Respondent, who was not present. The purpose of this hearing was to hear argument of counsel on Petitioner's Motion to Amend Findings of Fact, Conclusions of Law and Decree of Divorce.

This Court, having reviewed the file and documents presented to the Court, having heard the arguments of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Findings of Fact, Conclusions of Law and Decree of Divorce entered on

Order amending findings of fact, conclus



JD1891593

January 16, 2001 shall be and hereby are amended so that all provisions of said documents shall be consistent with the following provisions:

1. In regard to Petitioner's Motion, paragraph 1, the \$277,992 Fidelity Investment Account, this Court finds that Mr. Menz withdrew \$201,211 from the parties' Joint Fidelity Account and deposited that money into an account held in his name which is referenced in this action as the Fidelity Investment Account. The sum of \$201,211 was comprised of his inherited funds in the sum of \$82,300 and joint marital funds in the sum of \$118,911. At the time of trial, the Fidelity Investment Account held a balance of \$277,992.

There are no facts in evidence as to the balance of the Fidelity Investment Account at the time of the \$201,211 deposit, no evidence as to withdrawals or additional deposits and no evidence as to earnings on the \$201,211 deposit. This Court cannot determine which portion of the entire \$277,992 balance, as of the time of trial, constituted the \$201,211 deposit and earnings thereon and which portion constituted joint marital funds and earnings. Therefore, the \$118,911 of joint funds deposited to the Fidelity Investment Account is hereby awarded to Mr. Menz as part of his share of marital property. The \$82,300 of inherited funds is hereby awarded to Mr. Menz as his separate property. The remaining sum of \$76,781 is also hereby awarded to Mr. Menz as his separate property.

2. In regard to Petitioner's Motion to Amend, paragraph 2,

the \$13,533 Zions Mortgage, this Court finds that the evidence from the trial supports an adjustment to the award of marital property to Mrs. Menz. After Mrs. Menz withdrew the \$261,000 from the parties' Joint Fidelity Account, she used \$13,533 of those funds to pay Zions the balance owed on the second mortgage on the marital abode. The payment of that second mortgage increased the equity in the marital abode by the amount of \$13,500; therefore, the sum of \$13,533 should be included in either this Court's previous \$261,000 award to Mrs. Menz or the \$313,000 "Home Equity" award, but not in both. Accordingly, the previous \$313,000 "Home Equity" award to Mrs. Menz is hereby reduced by \$13,533 to the sum of \$299,467.

3. In regard to Petitioner's Motion, paragraph 3, the parties' inherited money, each party's inheritance should be awarded as separate property rather than as marital property.

Under Utah law, inherited property of a spouse which has been commingled with joint marital property shall remain "separate" property of the inheriting spouse if such inherited property can be traced. Mrs. Menz' inheritance of \$140,000 and Mr. Menz' inheritance of \$82,300 can both be traced into the Joint Fidelity Account. At the time Mrs. Menz withdrew \$261,000 from the Joint Fidelity Account, November, 1998, the account held more than the total of the two inheritances; therefore, both inheritances can be identified and traced as separate properties.

Each spouse's inheritance should be awarded as separate property to that spouse. The previous \$261,000 marital property award to Mrs. Menz is hereby reduced by \$140,000 to \$121,000, and

her inheritance of \$140,000 is awarded to her as separate property. Mr. Menz is hereby awarded his inheritance of \$82,300 as separate property. That sum was deposited into Mr. Menz' Fidelity Investment Account and is included in the award to him of the Fidelity Investment Account in paragraph 1 above.

4. In regard to Petitioner's Motion to Amend, paragraph 4, the "Household Furnishings" award, this Court finds that the evidence from the trial supports a reduction in that award to Mrs. Menz.

This Court previously awarded the marital household furnishings to Mrs. Menz and valued them at \$20,000, rather than the \$8,500 valuation given by Mrs. Menz at the trial. The additional \$11,500 valuation was based on the new furnishings purchased by Mrs. Menz after her \$261,000 withdrawal from the Joint Fidelity Account; thus, the additional \$11,500 should not have been included in both the award of the withdrawn funds and the valuation of the home furnishings award. The "Home Furnishings" award is hereby reduced to the sum of \$8,500.

5. The division of property between the parties shall be as follows:

A. Mrs. Menz is hereby awarded her inherited sums of \$140,000 as separate property;

B. Mr. Menz is hereby awarded his inherited sums of \$82,300 as separate property;

C. The \$66,150 lien on the marital abode at 4532 Crescent Oak Circle, Salt Lake City, Utah previously awarded to Mr. Menz is hereby canceled and released;

D. Mrs. Menz is hereby awarded the following:

\$121,000	Withdrawal from Joint Fidelity Account
\$299,467	Home Equity
\$ 8,500	Household Furnishings
\$100,000	Mrs. Menz' IRA
\$ 20,000	Mrs. Menz Retirement Account
<u>\$ 18,000</u>	Auto
\$566,967	TOTAL

E. Mr. Menz is hereby awarded the following:

\$118,911	Withdrawal from Joint Fidelity Account
\$137,200	Longyear Retirement
\$317,000	Mr. Menz IRA
\$ 28,000	Auto
<u>\$ 1,500</u>	Trailer
\$602,611	TOTAL

F. In order to balance the awards of marital property equally between the parties, Mr. Menz is hereby ordered to pay to Mrs. Menz in cash the sum of \$17,822;

G. Mr. Menz is awarded as his separate property the \$76,781 remainder of the Fidelity Investment Account in excess of the \$118,911 award of joint funds in paragraph 4 E. above and the \$82,300 award of his inheritance in paragraphs 1 and 4 E. above; and


H. Mr. Menz is hereby ordered, upon entry of this Order, to deliver to Mrs. Menz a quit claim deed of all of his

interest in the marital abode at 4532 Crest Oak Circle, Salt Lake City, Utah. If requested by Mrs. Menz, Mr. Menz shall also deliver to her a Lien Release for the \$66,150 lien on the marital abode previously awarded to Mr. Menz.

6. The Decree of Divorce entered January 16, 2001, incorporated by this reference, shall remain in full force and effect as to all terms except those which are inconsistent with and superseded by this Order.

DATED this 6 day of June, 2001.

BY THE COURT:



Leon A. Dever
District Court Judge

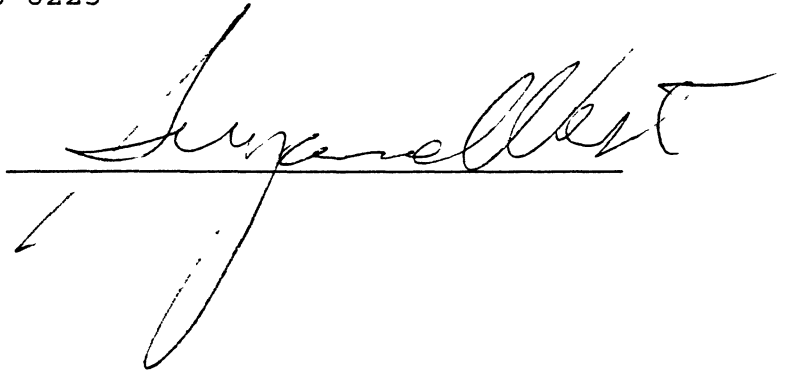
APPROVED:

Gregory Wall
Attorney for Respondent

CERTIFICATE OF TRANSMISSION BY FACSIMILE

I hereby certify that on the 18th day of April,
2001, I caused to be transmitted by facsimile a true and correct
copy of the foregoing proposed Order, to:


Gregory B. Wall
FAX number: 365-8223

A handwritten signature in dark ink, appearing to read "Gregory B. Wall", is written over a horizontal line. The signature is stylized with a large, sweeping initial 'G' and a long, horizontal stroke extending to the right.

PROOF OF SERVICE

I hereby certify that on the 22 day of August, 2002, I caused the foregoing document, BRIEF OF APPELLANT, to be deposited in the United States postal service, postage prepaid, addressed to:

Gregory B. Wall
Wall & Wall
5200 S. Highland Dr., Ste. 300
Salt Lake City, Utah 84117



Suzanne West