

1992

Lamar Greene Mitchell v. Marlene Carol Mitchell : Brief of Appellee

Utah Court of Appeals

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920489

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

LAMAR GREENE MITCHELL
Plaintiff and Appellant,

vs.

MARLENE CAROL MITCHELL,
Defendant and Appellee.

BRIEF OF APPELLEE

CASE #920489
DISTRICT COURT CASE
#90-4904611 DA
JUDGE HOMER F. WILKINSON
PRIORITY #15

This is in response to an appeal from the Third District Court, the Honorable Homer
F. Wilkinson, Judge.

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MAR 1 1993

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BEFORE THE UTAH COURT OF APPEALS

JURISDICTION

Jurisdiction is pursuant to Rule 3(a) of the Utah Rules of Appellate Procedure. This is an appeal from a final order of the Third District Court.

STATEMENT OF THE ISSUES

- 1. WAS THE COURT BELOW REQUIRED TO MAKE SPECIFIC FINDINGS OF FACT BASED ON EVIDENCE WHEN THE DIVORCE WAS GRANTED BY DEFAULT BASED ON APPELLANTS FAILURE TO OBEY COURT ORDERS.**
- 2. DO THE FINDINGS THE COURT MADE, BASED ON THE APPELLEE'S COUNTERCLAIM, SUGGEST AN ABUSE OF DISCRETION, OR WERE THEY FAIR IN SPITE OF THE DEFAULT.**
- 3. SHOULD THE APPELLEE BE AWARDED HER COSTS OF COURT AND ATTORNEY'S FEES ON APPEAL.**

STATUTORY PROVISIONS

The text of the statutory provisions relevant to this case are contained in Appendix A. Utah Rules of Civil Procedure 37 (b)(2)(C). Utah Code Annotated 30-3-3. Utah Code Annotated 30-3-5 (1).

STATEMENT OF THE CASE

Lamar Greene Mitchell ("Lamar"), the plaintiff/appellant in this matter, sued his wife Marlene Carol Mitchell ("Marlene"), the defendant/appellee, for divorce on November 14, 1990. (R. 2). Shortly thereafter Lamar's counsel withdrew and no longer represented him. (R. 41). Lamar appeared pro se for the pendency of his divorce proceedings. Lamar was sent notice to appoint new counsel on April 1, 1991. (R. 43). Lamar took no action toward appointing new counsel.

Because Marlene had virtually no information of Lamar's income a deposition was scheduled for June 27, 1991. Lamar was mailed a Notice of Deposition on June 4, 1991. (R. 45). The deposition was scheduled for three weeks after notice was mailed to Lamar. (R. 46). It was set three weeks in advance in order to allow Lamar time to obtain counsel if he so desired. Marlene's counsel mailed a letter to Lamar on June 20, 1991, prior to the deposition, advising Lamar of the importance of appearing at the deposition and informing Lamar that sanctions were available to Marlene if Lamar failed to appear. (R. 59). Lamar thereafter made statements to Marlene indicating he would not appear for deposition.

Marlene's counsel, in an effort to insure Lamar had adequate notice of the deposition, had Lamar personally served with the notice of deposition and a copy of the letter dated June 20, 1991. Service was accomplished on June 25, 1991, two days before the deposition. (R. 63). In spite of all of Marlene's efforts to assure Lamar's attendance his deposition, to wit, mailing Notice of Deposition, mailing letter, personal service of Notice of Deposition and letter, Lamar still failed to appear for deposition at the time scheduled.

Marlene made a motion to the District Court, to compel Lamar's attendance for deposition pursuant to Rule 37 of the Utah Rules of Civil Procedure. (R. 49). This motion requested the Court award her costs of court and attorney's fees incurred in scheduling, preparing for, and attempting to take Lamar's deposition. (R. 49). Additionally, Marlene asked the lower court to order Lamar to appear for deposition within ten (10) days of being notified of his second scheduled deposition, and requested that the Court grant her sanctions against Lamar, which included dismissing Lamar's Complaint should he again fail to appear for his scheduled deposition. (R. 51).

Copies of the Motion to Compel were sent to Lamar. He to provide any response. (R. 75). A Notice to Submit the matter for decision was subsequently filed by Marlene and a copy mailed to Lamar. (R. 76, 77). On August 20, 1991, the Court granted Marlene's Motion to Compel, awarded fees, and reserved sanctions. (R. 79).

Marlene scheduled Lamar's deposition a second time for September 17, 1991. (R. 81). Marlene mailed notice to Lamar at two separate addresses based on information that Lamar may have moved during the interim period. (R. 82). Neither of the Notices of Deposition sent to Lamar were ever returned to the office of Marlene's counsel. Lamar again failed to appear for his deposition on September 17, 1991.

Marlene filed a Motion for Sanctions based upon Lamar's second failure to appear at his deposition. (R. 109). The Motion for Sanctions requested that Lamar's Complaint be stricken, and that his default be entered with respect to Marlene's Counterclaim. (R. 113). The Motion for Sanctions further requested that a default hearing be set for the taking of testimony from Marlene in support of her Counterclaim. (R. 113). The motion also

requested that she be awarded all her costs of court and attorney's fees incurred in bringing and maintaining her Motion for Sanctions and that she be awarded further judgement at the time of the hearing on her Counterclaim for her reasonable costs of court and attorney's fees incurred in the action not previously reduced to judgment. (R. 113). Lamar was mailed a copy of this motion, and after the appropriate waiting period, a copy of a Notice to Submit for Decision. (R. 163, 164).

The Court granted Marlene's motion on January 15, 1992, striking the Plaintiff's complaint, and entering his default on Marlene's counterclaim. (R. 167). On February 25, 1992, a hearing was held before the Honorable Judge Homer Wilkinson to hear testimony on Marlene's Counterclaim. (R. 226). Marlene appeared and testified concerning jurisdiction, grounds, and other matters of interest to the lower court. The Findings of Fact and Conclusions of Law and the Decree of Divorce were signed by the Court on or about March 2, 1992. (R. 230, 235). Copies of the Findings of Fact, Conclusions of Law, and Decree were sent to Lamar.

The trial court made findings of fact based on to Marlene's Counterclaim that divided the real property. Marlene received the home which was her property prior to the marriage, free and clear of any interest of Lamar. (R. 228). Lamar received two pieces of property, which the parties acquired during their marriage with marital funds and which were held jointly by the parties. (R. 228). One was a five (5) acre lot in South Oquirrh Estates, and the other was a home located at Fifth North and Eighth West. (R. 228).

On March 12, 1992, Lamar, through his newly appointed counsel, Boyd M. Fullmer, filed a Motion for a New Trial or Motion to Vacate Judgment under Rules 59 and 60 of the

Utah Rules of Civil Procedure in an effort to obtain a different property division. (R. 236). Lamar did not file his Affidavit in support of his motion until more than two weeks later, after March 26, 1992. (R. 238). Lamar's Motion for a New Trial or Motion to Vacate Judgment was denied by Judge Wilkinson by minute entry on April 27, 1992. (R. 255). Lamar appealed to this court and has filed appellants brief. This brief is written in response.

SUMMARY OF THE ARGUMENT

It is a settled point of law that the findings of fact of a trial court in a divorce proceeding will not be disturbed unless they are clearly erroneous. This divorce was a default proceeding granted by way of sanctions imposed on Lamar for his failure to comply with discovery. Lamar should not now be able to use the judicial process to continue his dispute with Marlene because he is unhappy with a situation he created. There was no abuse by the trial court and therefore its ruling should be upheld.

In addition, Utah law requires that the division of property between the parties be fair, just and equitable. This does not in any way mean equal. There is no indication the trial court would have ruled any differently if Lamar had complied with discovery and there had been a full trial instead of a default proceeding.

The limited issues presented on appeal do not contain a "close question" of law. Lamar's position is without merit. Marlene should be awarded her costs of appeal and attorney's fees.

ARGUMENT

I. THE FINDINGS OF FACT OF THE TRIAL COURT WERE NOT CLEARLY ERRONEOUS. THE DIVORCE WAS GRANTED BY DEFAULT BECAUSE OF LAMAR'S FAILURE TO COMPLY WITH COURT ORDERS.

This court should uphold the findings of fact and the default judgment of the court below and let the property division stand. The findings made were based on the counterclaim. This was because, Lamar, by his behavior, caused his default to be entered.

The Utah Rules of Civil Procedure contemplate a situation where a party's complaint may be stricken and a judgment by default entered against a party who fails to comply with a court order to comply with discovery. UTAH R. CIV. P. 37 (b)(2)(C). Sanctions may be imposed when there is a showing of willful failure to comply with discovery. *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 961 (Utah Ct. App. 1989). Willful failure is defined as "any intentional failure as distinguished from involuntary noncompliance. No wrongful intent need be shown." *Id.*

As to the findings of fact found by the trial court, this court has stated that it "will not disturb the trial court's findings of fact in a divorce proceeding unless such findings are clearly erroneous." *Hagan v. Hagan*, 810 P.2d 478, 481 (Utah Ct. App. 1991).

On appeal, it is the burden of the party seeking to overturn the trial court's decision to "marshall the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'"

Id. (quoting *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989) (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987))); *see also Riche v. Riche*, 784 P.2d 465, 468 (Utah Ct.

App. 1989).

Hagan v. Hagan, 810 P.2d 478 (Utah Ct. App. 1991), involved a default divorce. In that case the husband filed the original complaint, findings of fact and conclusions of law and the decree of divorce. The wife gave her written consent to the allegations and default. Subsequent to the divorce both parties filed separated petitions to modify their divorce decree, both of which were denied. The specific finding of fact relating to the couples martial home, on which the court based its decision read as follows: "A residence located at 3699 South 2300 East, Salt Lake City, Utah" This finding reflected the description of the property in the original complaint. This court held that "in [default] proceedings, 'a defaulting party should expect that the relief granted will not exceed or substantially differ from that sought in the complaint.' . . . It is, therefore, abundantly equitable that [the parties] be strictly held to the provisions which [they] created." *Hagan*, 810 P.2d at 481 (quoting *Holt v. Holt*, 672 P.2d 738, 741 (Utah 1983)).

Such is the case presented to the court here. Lamar had adequate notice of the motion for sanctions filed against him, including the possibility a default would be entered against him based on his wife's Counterclaim. The findings of fact entered by the court were based on Marlene's Counterclaim. It is only fair to acknowledge the fact that Lamar himself created the situation that he is now complaining about. Lamar was under court order to appear at deposition, he failed to appear a two scheduled depositions. Lamar also failed to respond to any of the motions that were filed by Marlene. By doing nothing Lamar prolonged the divorce much longer than was necessary. This divorce might still be pending before the lower court if not for the sanctions granted by Judge Wilkinson. Because Lamar

himself made it impossible for the court to make findings that were any more specific than they were, and because his failure to comply with discovery was "willful" it is "abundantly equitable that [Lamar] be strictly held to the provisions" stated in the Counterclaim. *Id.* at 481.

Therefore, this court should affirm the ruling of the court below and let the property division stand.

II. A TRIAL COURT HAS CONSIDERABLE DISCRETION TO ENTER EQUITABLE ORDERS RELATING TO PROPERTY WHICH WILL NOT BE DISTURBED ABSENT AN ABUSE OF DISCRETION.

Lamar is not necessarily entitled to an equal division of property, but he is entitled to a equitable division of property. The trial court's division of real property is sufficiently equitable. The Utah Code provides that "[w]hen a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties." UTAH CODE ANN. section 30-3-5(1). "The overriding consideration is that the ultimate division be equitable--that property be fairly divided between the parties given their contributions to the marriage and their circumstances at the time of the divorce." *Burt v. Burt*, 799 P.2d 1166, 1172 (Utah Ct. App. 1990) (quoting *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987)). In entering an order dividing property the trial court should "consider the existence of exceptional circumstances and, if any be shown, proceed to effect an equitable distribution in light of those circumstances . . . " *Burt*, 799 P.2d at 1172 (emphasis added). "In entering equitable orders to divide the marital estate, the trial court has considerable discretion, which . . . will not [be] disturb[ed] on appeal, as long as the

trial court exercises this discretion in harmony with the standards set by the appellate courts." *Roberts v. Roberts*, 835 P.2d 193, 198 (Utah Ct. App. 1992).

In the instant case the trial court performed its job admirably given the difficulty presented by Lamar's refusal to comply with discovery. The trial court awarded Marlene the marital home, which belonged to her prior to her marriage to Lamar and on which she has made the majority of the mortgage payments. During the marriage this home was encumbered by a second mortgage in the amount of approximately \$8,000 plus interest to benefit Lamar in his business. Lamar was awarded two pieces of property, a five acre parcel located in South Oquirrh Estates, and a home located at Fifth North and Sixth West, Salt Lake City free and clear of any interest in Marlene.

It is difficult to see how the trial court abused its discretion in the distribution of the parties real property. Both parties were awarded a home and Lamar was awarded an additional five acre piece of property. Neither of the parties was prejudiced by the division, and given the exceptional circumstance of Lamar's uncooperation, the property division was equitable. Therefore, this court should uphold the ruling of the trial court and let the property division stand as presently divided.

III. MARLENE SHOULD BE AWARDED HER COSTS OF COURT AND ATTORNEY'S FEES ON APPEAL.

Marlene has incurred \$74.82 in costs on appeal and \$1,493.00 in attorney's fees (see appendix C, the affidavits of David A. McPhie and Lori Nelson, on costs and fees).

Lamar caused his default to be entered by not complying with orders on discovery,,

and then complains on appeal that Judge Wilkinson's findings are not specific enough. The court below awarded Marlene her reasonable attorney's fees and costs against Lamar.

Pursuant to Utah Code Ann. Section 30-3-3 the court has the power to award attorney fees on appeal, especially if the prevailing party was awarded fees in the proceedings below. "Ordinarily, when fees in a divorce were awarded below to the party who then prevails on appeal, fees will also be awarded to that party on appeal." *Bell v. Bell*, 810 P.2d 489 (Utah Ct. App. 1991) (quoting *Burt v. Burt*, 799 P.2d 1166, 1171 (Utah Ct. App. 1990)).

In addition, "when an appeal is frivolous, . . . , we will award fees regardless of the trial court's ruling on fees." *Burt v. Burt*, 799 P.2d 1166, 1171 (Utah Ct. App. 1990). Marlene was awarded fees by the court below. Therefore, if she indeed prevails before this court her fees should be awarded to her for defending this appeal. Especially in light of the fact that, in the opinion of the appellee, this appeal is without merit.

CONCLUSION


Because the divorce was a default proceeding and not a trial, the court's findings of fact reasonably reflect the Counterclaim on which they were based, and were therefore, not "clearly erroneous." Lamar had substantial notice his default would be entered as a sanction and it is more than fair that he be required to abide by the findings as reflected in his wife's Counterclaim.

A trial court has considerable discretion to enter equitable orders relating to the division of property. In entering these orders the court may look at any mitigating factors.

Lamar's refusal to comply with discovery prevented the lower court from being able to consider evidence. Lamar cannot now claim that the findings are unfair or lacking in specificity when it was Lamar who would not participate in the gathering of evidence.

Therefore, the decision of the trial court should be affirmed, and Marlene awarded her costs and fees on appeal.

RESPECTFULLY SUBMITTED,

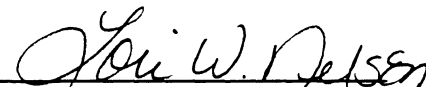
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David A. McPhie
Attorney for Appellee

CERTIFICATE OF HAND DELIVERY

I certify and affirm that I hand delivered four (4) copies of BRIEF OF APPELLEE to
the following:

Boyd M. Fullmer
2188 Highland Drive #201
Salt Lake City, UT 84106

DATED this 15th day of March, 1993.


Lori W. Nelson

APPENDIX A

UTAH RULES OF CIVIL PROCEDURE 37 (B)(2)(C).

UTAH CODE ANNOTATED 30-3-3.

UTAH CODE ANNOTATED 30-3-5 (1).

their authenticity, to accept a copy of defendant's written admissions served upon plaintiff as compliance with the rules; where the trial court chose the latter option, it was proper to permit plaintiff to recite defendant's admissions into the record. *Triple I Supply, Inc. v. Sunset Rail, Inc.*, 652 P.2d 1298 (Utah 1982).

—**Failure to respond.**

—**Objectionable matter.**

Even if a request for an admission is objectionable, if a party fails to object and fails to respond to the request, then that party should be held to have admitted the matter. *Jensen v. Pioneer Dodge Ctr., Inc.*, 702 P.2d 98 (Utah 1985).

—**Prison inmate.**

When inmate served requests for admissions and interrogatories on prison officials in action for recovery of value of personal property taken from him, on failure of officials to respond to the requests, apply for extension of time, or move to amend or withdraw their admissions pursuant to Subdivision (b), all the facts were

deemed admitted and the inmate was entitled to judgment against the officials. *Schmitt v. Billings*, 600 P.2d 516 (Utah 1979).

—**Motion to dismiss.**

—**Tolling.**

Filing a motion to dismiss did not toll effect of Subdivision (a), which treats requests for admissions which are not answered within 45 days as if admitted and as a proper basis for summary judgment. *Schmitt v. Billings*, 600 P.2d 516 (Utah 1979).

—**Punitive damages.**

Where plaintiff requests an admission of punitive damages in an amount unrelated to actual damages, the court, as a matter of equity, must intervene and examine the admission. *Jensen v. Pioneer Dodge Ctr., Inc.*, 702 P.2d 98 (Utah 1985).

Cited in *Utah Sand & Gravel Prods. Corp. v. Salt Lake County Comm'n*, 14 Utah 2d 151, 379 P.2d 379 (1963); *W.W. & W.B. Gardner, Inc. v. Park West Village, Inc.*, 568 P.2d 734 (Utah 1977).

COLLATERAL REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d Depositions and Discovery §§ 314 to 325.

C.J.S. — 27 C.J.S. Discovery §§ 88 to 110.

A.L.R. — Continuance sought to secure testimony of absent witness in civil case, admissions to prevent, 15 A.L.R.3d 1272.

Party's duty, under Federal Rule of Civil Procedure 36(a) and similar state statutes and rules, to respond to request for admission of

facts not within his personal knowledge, 20 A.L.R.3d 756.

Formal sufficiency of response to request for admissions under state discovery rules, 8 A.L.R.4th 728.

Permissible scope, respecting nature of inquiry, of demand for admissions under modern state civil rules of procedure, 42 A.L.R.4th 489.

Key Numbers. — Discovery ⇌ 121 to 129.

Rule 37. Failure to make or cooperate in discovery; sanctions.

(a) **Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) **Appropriate court.** An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) **Motion.** If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance

with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) **Evasive or incomplete answer.** For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) **Award of expenses of motion.** If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) **Sanctions by court in district where deposition is taken.** If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) **Sanctions by court in which action is pending.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in Paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) **Expenses on failure to admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) **Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) **Failure to participate in the framing of a discovery plan.** If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure. (Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule corresponds to Rule 37, F.R.C.P.

Cross-References. — Contempt generally, § 78-32-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Both parties at fault.
Cruel treatment.

Both parties at fault.

Marriage may be dissolved by making a grant of divorce to each party where each was equally at fault. *Mullins v. Mullins*, 26 Utah 2d 82, 485 P.2d 663 (1971).

Cruel treatment.

Acts constituting cruel conduct sufficient to cause great mental distress need not be aggravated and more severe when directed toward the husband than when directed toward the wife. *Hansen v. Hansen*, 537 P.2d 491 (Utah 1975).

30-3-3. Temporary alimony and suit money.

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

History: R.S. 1898 & C.L. 1907, § 1210; C.L. 1917, § 2998; R.S. 1933 & C. 1943, 40-3-3.

NOTES TO DECISIONS

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Stipulation and effect thereof.

Appealability of order.

Formal order made in divorce action, called a "judgment" directing that judgment be entered for benefit of defendant's attorneys, is not final and appealable. *Rolando v. District Court*, 72 Utah 459, 271 P. 225 (1928).

Appeal from order.

Where there were no findings or evidence in record as to attorney's fees, Supreme Court remanded issue for disposition by trial court but allowed wife's attorney \$100 for services rendered with reference to husband's appeal from judgment modifying divorce decree. *Parish v. Parish*, 84 Utah 390, 35 P.2d 999 (1934).

Supreme Court assumed that evidence supported award of suit money to wife where no testimony as to wife's need was before the court on appeal on judgment roll from the decree of no cause of action in husband and awarding of expenses of suit, attorney's fees

and temporary alimony to wife. *Weiss v. Weiss*, 111 Utah 353, 179 P.2d 1005 (1947).

Attorney fees.

Allowance of \$200 as wife's attorney's fee in divorce proceeding was not inadequate even though husband was worth approximately \$40,000, where proceedings from time of commencement until entry of decree lasted less than two months and trial itself was completed in less than two days. *Blair v. Blair*, 40 Utah 306, 121 P. 19, 38 L.R.A. (n.s.) 269, 1914D Ann. Cas. 989 (1912).

Where decree of divorce was obtained by mother of minor children against father, who was required to pay certain sum periodically for support, care, maintenance, and education of such children, and he, without sufficient cause, refused to comply with decree, as result of which mother was compelled to bring proceedings against him, father was required to pay counsel fees in such proceedings. *Tribe v. Tribe*, 59 Utah 112, 202 P. 213 (1921).

Court properly awarded attorney's fees to wife in subsequent proceeding on application of wife for arrears in alimony. *Christensen v. Christensen*, 65 Utah 597, 239 P. 501 (1925).

Fifty dollars was a reasonable fee where wife petitioned to require husband to show cause why he should not be punished for contempt for failure to pay support money and husband filed cross-petition for modification of decree and where it was shown that wife was without means to prosecute the cause or pay counsel. *Scott v. Scott*, 105 Utah 376, 142 P.2d 198 (1943).

While fact that wife is able to pay expenses

30-3-4.1 to 30-3-4.4. Repealed.

Repeals. — Laws 1990, ch. 230, § 4 repeals these sections, as last amended by L. 1989, ch. 104, §§ 2 to 5, providing for the appointment, authority, duties, and jurisdiction of court commissioners, effective April 23, 1990.

30-3-5. Disposition of property — Maintenance and health care of parties and children — Division of debts — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony — Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children; and

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

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide the day care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property and obligations for debts as is reasonable and necessary.

(4) In determining visitation rights of parents, grandparents, and other relatives, the court shall consider the welfare of the child.

(5) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(6) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

(7) When a petition for modification of child custody or visitation provisions of a court order is made and denied, the court may order the petitioner to pay the reasonable attorney's fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted in good faith.

History: R.S. 1898 & C.L. 1907, § 1212; L. 1909, ch. 109, § 4; C.L. 1917, § 3000; R.S. 1933 & C. 1943, 40-3-5; L. 1969, ch. 72, § 3; 1975, ch. 81, § 1; 1979, ch. 110, § 1; 1984, ch. 13, § 1; 1985, ch. 72, § 1; 1985, ch. 100, § 1; 1991, ch. 257, § 4.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, inserted "debts or obligations" in the introductory paragraph of Subsection (1), added Subsection (1)(c), and inserted "and obligations for debts" near the end of Subsection (3).

NOTES TO DECISIONS

ANALYSIS

Alimony.
 --Amount.
 --"Equitable restitution."
 --Modification.
 --Standard of living.
 --Termination.
 --Waiver.
 Appeal and review.
 --Findings required.
 Children.
 --Custody.
 --Modification.
 --Support.
 --Availability.
 --Effect of child's absence.
 --"In-kind" agreement.
 --Modification.
 Costs.
 --Partnership.
 Court's powers and jurisdiction.
 Property division.
 --Advanced degrees.
 --Antenuptial agreement.
 --Closely-held corporations.
 --Contributions.
 --Discretion of court.
 --Gifts.
 --Partnership.
 --Postnuptial agreement.
 --Professional practice.
 --Retirement funds.
 --Right to reproduce creative work.
 --Time of valuation.
 --Valuation.
 Res judicata.
 Stipulations and agreements of parties.
 Visitation rights.

Cited.

Alimony.

Alimony should, so far as possible, equalize the parties' standards of living. *Munns v. Munns*, 790 P.2d 116 (Utah Ct. App. 1990).

Proper distribution of property interests of one sort or another should come first, and only then would alimony need to be considered. *Burt v. Burt*, 799 P.2d 1166 (Utah Ct. App. 1990).

Exact equality of income is not required, but sufficient parity to allow both parties to be on equal footing financially as of the time of the divorce is required. *Howell v. Howell*, 806 P.2d 1209 (Utah Ct. App.), cert. denied, 817 P.2d 327 (Utah 1991).

Divorce decree provision requiring the husband to continue to pay utilities for as long as the wife lived at the marital residence was in the nature of continuing spousal support and, therefore, considered to be alimony. *Hagan v. Hagan*, 810 P.2d 478 (Utah Ct. App. 1991).

Usually the needs of the spouses are assessed in light of the standard of living they had during marriage. In some circumstances, it may be appropriate to try to equalize the spouses' respective standards of living. *Martinez v. Martinez*, 818 P.2d 538 (Utah 1991).

When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change, unless unrelated to the efforts put forward by the spouses during marriage, should be given some weight in fashioning the support award. Thus, if one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, it may be appropriate for the trial

APPENDIX B

DEFENDANT'S MOTION FOR SANCTIONS

ORDER ON DEFENDANTS MOTION FOR SANCTIONS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

DECREE

DAVID A. McPHIE (2216)
McPHIE, CONDIE & PECK
Attorneys for Defendant
2105 East Murray-Holladay Road
Salt Lake City, Utah 84117
(801) 278-3700

FILED
SALT LAKE COUNTY
DEC 13 3 20 AM '91
BY mf CLERK

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

-----ooOoo-----
LAMAR GREENE MITCHELL :
Plaintiff, : DEFENDANT'S MOTION FOR
 : SANCTIONS
vs. :
MARLENE CAROL MITCHELL :
Defendant. : Civil No. 904904611
 : Judge Homer F. Wilkenson
 :
-----ooOoo-----

COMES NOW the defendant by and through her attorney of record, David A. McPhie, and moves this honorable court to grant her sanctions against the plaintiff. Specifically, the defendant moves the court to dismiss the Complaint of the plaintiff, and grant her a Decree of Divorce based on her counter claim.

Defendant makes this Motion based on the fact that the plaintiff has now twice failed to appear for deposition.

The facts which justify granting the sanctions requested are as follows:

1. Plaintiff in this matter sued his wife for divorce on November 14, 1990.

2. Not long after the divorce commenced, plaintiff's counsel withdrew and no longer represents him. The plaintiff has been pro se in this matter ever since.

3. Mrs. Mitchell the defendant, had her counsel send the plaintiff a Notice to Appoint New Counsel on April 1, 1991. (A copy of that notice is attached hereto as exhibit "A").

4. The defendant sent a Notice of Deposition to the plaintiff on June 27th, 1991, because the defendant had virtually no information of the plaintiff's income. The defendant set the deposition more than a month away from the date of deposition so that the plaintiff would have plenty of time to obtain counsel, if he wished to, and attend the deposition. (A copy of the Notice of Deposition, including a mailing certificate is attached hereto as exhibit "B").

5. That before the time set for scheduled deposition, defendant's counsel became concerned that the plaintiff would not appear for deposition, and mailed to the plaintiff a letter advising him how important it would be for him to appear at the deposition, and telling him there could be sanctions against him for failure to appear. (A copy of that letter is attached hereto as exhibit "C").

6. The defendant and her counsel became increasingly concerned because of statements made by the plaintiff to his wife that he would not appear for deposition. To make sure that the plaintiff would have notice of the deposition, and to make sure that the plaintiff could not claim that he had not received the letter or the Notice of the Deposition, defendant's counsel had a copy of the Notice of Deposition and the letter explaining the importance of attending served on the plaintiff on the 25th day of June, 1991, two days prior to the deposition.

(A copy of Return of Service showing that the Notice of Deposition and the letter were served on the plaintiff is attached hereto as exhibit "D")

7. In spite of all the defendant's attempts to obtain information through interrogatories, notice to appoint counsel, notice of deposition, the letter in support of the notice of deposition, and service of the notice of deposition and letter by a constable, the plaintiff still failed to appear for deposition at the time scheduled, that being on Thursday the 27th day of June, 1991, at the hour of 10:00 a.m. (A copy of the transcript made by the court reporter at the time the deposition was scheduled is attached hereto as exhibit "E").

8. The defendant made a motion to this court to compel as provided in Rule 37 of the Utah Rules of Civil Procedure requesting the court award her costs of court and attorney's fees incurred in scheduling, preparing for, and attempting to take the plaintiff's deposition. Additionally, defendant asked this court to order the plaintiff to appear for deposition within ten (10) days of being notified of its second scheduled deposition, and requested that the court grant her sanctions against the plaintiff, including the dismissal of his Complaint should he fail to appear for deposition a second time.

9. Copies of the Motion for Sanctions were sent to plaintiff. No response or pleading was filed by the plaintiff. A Notice to Submit for Decision was filed by the defendant, and a copy mailed to the plaintiff.

10. The court granted defendant's Motion to Compel, (a copy of the Order granting the Motion to Compel is attached hereto as exhibit "F").

11. That in said Order granting defendant's Motion to Compel, defendant was awarded fees of \$310.00 and costs in the amount of \$69.50. The plaintiff was ordered to appear

before a certified shorthand reporter for his deposition within ten (10) days of being notified, and the court indicated that if the plaintiff failed to appear a second time for deposition, the court would then, pursuant to subsection B of Rule 37 consider sanctions and outlined them specifically.

One of the sanctions the court indicated in its Order that it would outline was striking the Complaint of the plaintiff and awarding the defendant judgment.

12. That the defendant then scheduled the deposition of the plaintiff again and made a new Notice of Deposition, setting the deposition of the plaintiff for September 17th, 1991, at the hour of 10:00 a.m. Further, that said Notice of Deposition was sent to two different addresses, in that there was some information available to defendant's counsel that the plaintiff may have moved during the interim period. Neither of the Notices of Deposition sent to the plaintiff on the 29th of August were ever returned to the office of defendant's counsel.

13. That a certified shorthand reporter from Capitol Reporters did appear on the 17th day of September, 1991, at the hour of 10:00 a.m. for the second deposition, as did the defendant herself and again, the plaintiff failed to appear. (See the transcript of the court reporter taken at the time of the second deposition noting that again the plaintiff failed to attend his deposition).

ARGUMENT

The plaintiff has failed to provide to the defendant any information whatsoever concerning his income by failing to answer interrogatories, failing to appear for deposition, and failing to provide documents for a period approaching one (1) year. The plaintiff has had his

deposition scheduled twice and has failed to appear twice, even after having been served by a constable, with notice to appear. The plaintiff has received copies of intervening Motion to Compel NNotice to Sumit for Decision and for sanctions, which he has ignored. He has been ordered by this court specifically to appear for deposition and has failed to do so.

WHEREFORE the defendant prays that this court now grant her relief pursuant to Rule 37(b) as previously requested, in her Motion to Compel, and grant the now appropriate sanction of dismissal of the plaintiff's Complaint in this matter, and enter an Order as follows:

A. Grant the defendant judgment again against the plaintiff for all of her costs of court and attorney's fees incurred in arranging, scheduling, preparing for, and appearing at the second deposition of the plaintiff in the amount of \$ 395⁰⁰, the affidavit of defendant's attorney's fees is attached hereto as exhibit "G".

B. Order that the Complaint of the plaintiff be stricken and that his default be entered.

C. Enter an Order that the defendant be granted a Decree of Divorce based on the counter claim of the defendant, subsequent to her appearing before the court and giving testimony concerning jurisdiction, grounds, and other matters of interest to the court.

D. Enter an Order awarding to the defendant all her attorney's fees incurred in bringing and maintaining this action against the plaintiff in amounts to be determined at the time of hearing.

DATED this 26th day of December, 1991.



DAVID A. McPHIE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Defendant's Motion for Sanctions to the following, postage prepaid this 26th day of December, 1991:

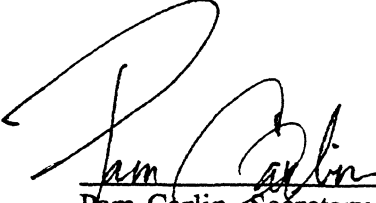
LaMar Green Mitchell
431 West Main
Herriman, Utah 84065

and/or

7198 West 13090 South
Riverton, Utah

and/or

262 West 11000 South
South Jordan, Utah 84065



Pam Carlin, Secretary

DAVID A. McPHIE (2216)
Attorney for Defendant
3450 South Highland Drive, Suite 301
Salt Lake City, Utah 84106
(801) 484-7632

FILE COPY

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

	—ooOoo—	
LaMAR GREENE MITCHELL,	:	
	:	NOTICE TO APPOINT COUNSEL
Plaintiff,	:	
	:	
vs.	:	
	:	
MARLENE CAROL MITCHELL,	:	Civil No. 90490611
	:	
Defendant.	:	Judge Homer F. Wilkenson
	:	
	—ooOoo—	

TO THE PLAINTIFF, LaMAR GREENE MITCHELL:

PLEASE TAKE NOTICE AND BE ADVISED that your former attorney of record, John Spencer Snow, has withdrawn as your legal representative in the above captioned divorce case.

You are hereby notified, pursuant to §78-51-36 of the Utah Code Annotated, to either be prepared to represent yourself, or obtain the services of a new lawyer to represent you in this divorce case.

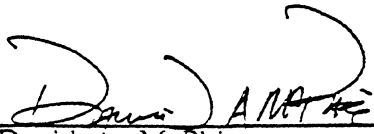
You are strongly advised to obtain the services of a new lawyer.

TAKE NOTICE AND BE ADVISED that among other things, there is pending, before the court, or will shortly be, Defendant's Motion for Temporary Orders. You must be prepared to either represent yourself, or have an attorney there to represent you

at the date and time of that hearing.

Govern yourself accordingly.

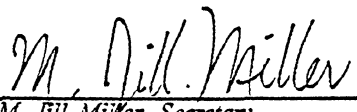
DATED this 1 day of April, 1991.


David A. McPhie

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing NOTICE TO APPOINT COUNSEL to the following, postage prepaid this 5 day of April, 1991:

*LaMar Greene Mitchell
262 West 11100 South
South Jordan, Utah 84065*


M. Jill Miller, Secretary

DAVID A. MCPHIE (2216)
Attorney for Defendant
3450 South Highland Drive, Suite 301
Salt Lake City, Utah 84106
(801) 484-7632

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

-----ooOoo-----

LA MAR GREENE MITCHELL, : NOTICE OF DEPOSITION
Plaintiff, :
vs. :
MARLENE CAROL MITCHELL, : Civil No. 90490611
Defendant. : Judge Homer F. Wilkenson

-----ooOoo-----

TO: LA MAR GREENE MITCHELL

YOU WILL PLEASE TAKE NOTICE that the defendant, Marlene Carol Mitchell, will take the deposition of plaintiff, La Mar Greene Mitchell on Thursday, the 27th day of June, 1991, at the hour of 10:00 o'clock a.m., at the offices of Defendant's counsel, located at 3450 South Highland Drive, Suite 301, Salt Lake City, Utah 84106, before a certified shorthand reporter and notary public.

Said deposition will be upon oral interrogatories and are taken pursuant to Rule 26 and 30 of the Utah Rules of Civil Procedure.

DATED this 4th day of June, 1991.

K/
DAVID A. MCPHIE
Attorney for Defendant

000119

MAILING CERTIFICATE

The undersigned hereby certifies that a true and correct copy of the foregoing Notice of Deposition was mailed, postage prepaid, on this 4th day of June, 1991, to the following, by depositing the same, postage prepaid, with the United States Postal Service:

Pam Smith
Certified Shorthand Reporter
3454 Creek Road
Salt Lake City, UT 84121

La Mar Greene Mitchell
262 West 11100 South
South Jordan, Utah 84065

K/
M. Jill Miller, Secretary

McPHIE, CONDIE & PECK
Attorneys and Counselors at Law
3450 South Highland Drive, Suite 301
Salt Lake City, Utah 84106
Telephone: (801) 278-3700

David A. McPhie

Telecopier: (801) 278-3717

June 20, 1991

LaMar Green Mitchell
262 West 11100 South
South Jordan, Utah 84065

RE: Notice of Deposition

Dear Mr. Mitchell:

You should have previously received from me a Notice of Deposition indicating that it is my intention to take your deposition in my office on Thursday, the 27th day of June, at the hour of 10:00 a.m. Your deposition will be at my offices, which are currently located at 3450 South Highland Drive, Suite 301, Salt Lake City, Utah. We may have moved our offices prior to the time of that deposition, and may be located at 2105 East Murray Holladay Road (4800 South) in Salt Lake City. You should call us at 278-3700 the day prior to the deposition, in order that you may find out exactly where our offices are located.

The other reason I send you this letter, is to make sure you understand the importance of attending this deposition. A court reporter will be there. That court reporter will be charging approximately \$50.00 for appearing at that deposition, whether you should show up or not. If you should fail to appear for the deposition, I would have to ask the court to not only award us a judgment against you for the cost of the reporters appearance, but also all of Mrs. Mitchell's attorneys fees incurred in compelling you to appear.

If you have any questions about this deposition, or feel that you may not be able to attend for any reason, call me advance so that we may discuss changing the date. To simply not appear is unacceptable.

I notice that we have previously sent you a Notice to Appoint New Counsel, but I have not as yet been contacted by any attorney representing you. You may attend this deposition without a lawyer, but it is my recommendation to you that you have a lawyer representing you at the time of deposition.

000122

LaMar Mitchell
June 20, 1991
Page 2

If you have any questions, please feel free to contact at
278-3700.

Sincerely

A handwritten signature in dark ink, appearing to read "David A. McPhie". The signature is fluid and cursive, with a large initial "D" and a stylized "A".

David A. McPhie

DAM/pc
cc: Marlene Mitchell

000123

JUN 25 1991

PSA

DAVID A. MCPHIE (2216)
Attorney for Defendant
3450 South Highland Drive, Suite 301
Salt Lake City, Utah 84106
(801) 484-7632 - 278-3700
501-8899-

70427

2 Sterns

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

-----ooOoo-----

LA MAR GREENE MITCHELL,

: NOTICE OF DEPOSITION

Plaintiff,

:

vs.

:

MARLENE CAROL MITCHELL,

: Civil No. 90490611

Defendant.

: Judge Homer F. Wilkenson

DATE 6-25-91 TIME 0957
B/R 262 C - 1110050
UPON Peterson
SINDT-DEPUTY CONSTABLE S.L. COUNTY, UTAH
DEPUTY

-----ooOoo-----

TO: LA MAR GREENE MITCHELL

262 West 11100 South

YOU WILL PLEASE TAKE NOTICE that the defendant, Marlene Carol Mitchell, will take the deposition of plaintiff, La Mar Greene Mitchell on Thursday, the 27th day of June, 1991, at the hour of 10:00 o'clock a.m., at the offices of Defendant's counsel, located at 3450 South Highland Drive, Suite 301, Salt Lake City, Utah 84106, before a certified shorthand reporter and notary public.

Said deposition will be upon oral interrogatories and are taken pursuant to Rule 26 and 30 of the Utah Rules of Civil Procedure.

DATED this 4th day of June, 1991.

KI

DAVID A. MCPHIE
Attorney for Defendant

000125

CONSTABLE'S RETURN

I am a duly appointed Deputy Constable of the Fifth Precinct, County of Salt Lake, State of Utah, a citizen of the United States over the age of 21 years at the time of service herein, and not a party to or interested in the within action.

I further certify that at the time of such service of the NOTICE OF DEPOSITION

I endorsed the date and place of service and added my
name and official title thereto.

JOHN A. SINDT
Chief Deputy-Fifth Precinct-Salt Lake County

Henry A. Roth

Subscribed and sworn to before me this 25 day of June, 1991
My commission Expires: April 1, 1992

Service: \$ 5.00
Mileage: \$ 17.00
: \$ _____
TOTAL: \$ 22.00

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NOTARY PUBLIC
JOHN A. SALT
Notary Public
SALT
County of Salt Lake
State of Utah
STATE OF UTAH

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"V 2 = 1991

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FILE COPY

McPHIE, CONDIE & PECK
Attorneys and Counselors at Law
3450 South Highland Drive, Suite 301
Salt Lake City, Utah 84106
Telephone: (801) 278-3700

David A. McPhie

Telecopier: (801) 278-3717

June 20, 1991

LaMar Green Mitchell
262 West 11100 South
South Jordan, Utah 84065

DATE 6-25-91 TIME 1957
B/R 202 W 11100 S
UPON 11
SINDT-DEPUTY-CONSTABLE S.L. COUNTY, UTAH
DEPUTY

RE: Notice of Deposition

Dear Mr. Mitchell:

You should have previously received from me a Notice of Deposition indicating that it is my intention to take your deposition in my office on Thursday, the 27th day of June, at the hour of 10:00 a.m. Your deposition will be at my offices, which are currently located at 3450 South Highland Drive, Suite 301, Salt Lake City, Utah. We may have moved our offices prior to the time of that deposition, and may be located at 2105 East Murray Holladay Road (4800 South) in Salt Lake City. You should call us at 278-3700 the day prior to the deposition, in order that you may find out exactly where our offices are located.

The other reason I send you this letter, is to make sure you understand the importance of attending this deposition. A court reporter will be there. That court reporter will be charging approximately \$50.00 for appearing at that deposition, whether you should show up or not. If you should fail to appear for the deposition, I would have to ask the court to not only award us a judgment against you for the cost of the reporters appearance, but also all of Mrs. Mitchell's attorneys fees incurred in compelling you to appear.

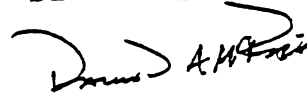
If you have any questions about this deposition, or feel that you may not be able to attend for any reason, call me advance so that we may discuss changing the date. To simply not appear is unacceptable.

I notice that we have previously sent you a Notice to Appoint New Counsel, but I have not as yet been contacted by any attorney representing you. You may attend this deposition without a lawyer, but it is my recommendation to you that you have a lawyer representing you at the time of deposition.

LaMar Mitchell
June 20, 1991
Page 2

If you have any questions, please feel free to contact at
278-3700.

Sincerely

A handwritten signature in dark ink, appearing to read "David A. McPhie", with a stylized flourish at the end.

David A. McPhie

DAM/pc
cc: Marlene Mitchell

000127

STATE OF UTAH)
)
COUNTY OF SALT LAKE) ss

CONSTABLE'S RETURN

I, K. Sato , being first duly sworn on oath deposes and says:

I am a duly appointed Deputy Constable of the Fifth Precinct, County of Salt Lake, State of Utah, a citizen of the United States over the age of 21 years at the time of service herein, and not a party to or interested in the within action.

I received the within and hereto annexed, LETTER
on the 25 day of June , 1991 and served the same upon,
 LaMar Green Mitchell the within name Plaintiff personally known to me
to be the Plaintiff mentioned in said LETTER
by delivering to and leaving a true copy of said LETTER
for Plaintiff with, LaMar Green Mitchell a suitable person over the
age of 14 years, residing at the usual place of residence of
said Plaintiff personally this 25 day of June 1991, at
 262 West 11100 South County of Salt Lake, State of Utah.

I further certify that at the time of such service of the LETTER

I endorsed the date and place of service and added my
name and official title thereto.

Dated this 25 day of June , 1991.

JOHN A. SINDT
Chief Deputy-Fifth Precinct-Salt Lake County

John A. Sindt

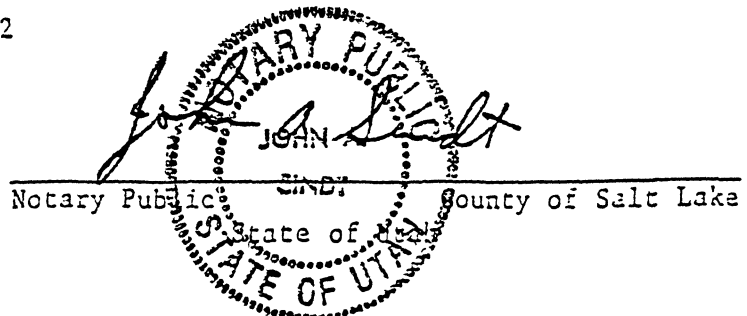
Deputy

Subscribed and sworn to before me this 25 day of June , 1991

My commission Expires: April 1, 1992

Fee's

Service: \$ 5.00
Mileage: \$ _____
 : \$ _____
TOTAL : \$ 5.00



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IN THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

LAMAR GREENE MITCHELL,)
)
Plaintiff,) Civil No. 90490611
)
vs.)
)
MARLENE CAROL MITCHELL,)
)
Defendant.)

DEPOSITION OF LAMAR GREENE MITCHELL, a witness
produced, sworn and examined on Thursday, the 27th day of June,
in the year of our Lord 1991, between the hours of 10:00 a.m.
and 10:15 a.m. of that day, in the Law Office of David A.
McPhie, Suite 301, 3450 South Highland Drive, in the City of
Salt Lake, County of Salt Lake, and State of Utah, before me,
Alan P. Smith, Certified Shorthand Reporter, License No. 38,
and Notary Public within and for said State of Utah, in a
certain cause now pending in the District Court of Salt Lake
County, State of Utah, wherein LaMar Greene Mitchell is the
plaintiff and Marlene Carol Mitchell is the defendant, on the
part of the defendant.

A P P E A R A N C E S:

For the Defendant: David A. McPhie
3450 South Highland Drive
Suite 301
Salt Lake City, Utah 84106

Also Present: Marlene Carol Mitchell



JAN 31 1992

SALT LAKE COUNTY

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

---ooOoo---

VS.

Defendant.

2171687

2-3-92-809am.

Civil No. 904904611

Judge Homer F. Wilkinson

---00000---

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000107

ORDER

1. The plaintiff's Complaint in the above matter is stricken, and his default with respect to the Counter Claim of the defendant is hereby entered.

2. The court orders that a default hearing date be set for the taking of testimony from the defendant in support of her Counter Claim.

3. The defendant is awarded all of her costs of court and attorney's fees incurred in bringing and maintaining her Motion for Sanctions in the amount of \$395.00.

4. It is the further order of the court that the defendant be awarded further judgement at the time of hearing on her Counter Claim in this matter for her reasonable costs of court and attorney's fees incurred in this action not previously reduced to judgement.

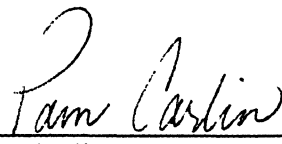
DATED this 31 day of Jan, 1992.


THE HONORABLE JUDGE HOMER F. WILKINSON

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Order on Defendant's Motion for Sanctions to the following, postage prepaid this 27th day of January, 1992:

LaMar Greene Mitchell
431 West Main Street
Harriman, Utah 84065



Pam Carlin, Secretary

MAR 02 1992

By _____ Deputy Clerk

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

The court having testimony of the defendant, having considered the file, and good cause

appearing therefore, now makes the following:

FINDINGS OF FACT

1. Plaintiff and defendant are husband and wife having been married on August 12, 1974 in Salt Lake City, Salt Lake County, State of Utah.
2. Both parties were residents of Salt Lake County for the three month period immediately prior to the filing of the Complaint in this matter.
3. That during the course of the marriage irreconcilable differences arose between the parties which make its continuation impossible.
4. The parties had born to them as issue of this marriage one minor child, namely Tyler LaMar Mitchell, who was born September 15, 1977, who is currently age 14.
5. The court finds that it is reasonable and equitable that the child's natural mother be awarded its care, custody, and control, subject to reasonable rights of visitation for the plaintiff.
6. The court further finds that the plaintiff should be required to pay to the defendant as and for child support the sum of \$122.00 per month in two equal installments, one due on the 5th and one of the 20th of each month. The court further finds that said child support should continue until the parties minor child, Tyler reaches the age of 18 or graduates with his regular high school class, which ever occurs later.
7. The court further finds that the plaintiff should be required to pay to the defendant

the sum of \$1.00 per year as alimony.

8. The court further finds that the defendant should be awarded the home and real estate of the parties located at 2183 Oneida Street, free and clear of any claim of the plaintiff, and that the plaintiff should be ordered to sign a Quit Claim Deed relinquishing to the defendant all of his right, title, and interest in said home and real estate. Further, that the defendant should deliver said Quit Claim Deed within 10 days of the entree of a Decree of Decree in this matter. Further, that the defendant should be awarded said home and real estate, subject to the indebtedness thereon, if any, and with the requirement that she hold the plaintiff harmless thereon.

9. The court further finds that the plaintiff should be awarded all the parties right, title, and interest in two pieces of real estate, one of which is a 5 acre parcel located in Salt Lake County, known as Lot 7, South Oquirrh Estates, and the other which is a property on approximately 5th North and 8th West, in Salt Lake County. Further, that the defendant should be ordered to execute and deliver to the plaintiff a quit claim deed relinquishing all of her right, title, and interest in said properties to the plaintiff, and the plaintiff should hold the defendant harmless from any liability thereon.

10. The court further finds that the parties have been separated for a lengthy period of time and that their personal property has already been divided between them in a manner they believe is fair and equitable. Specifically, the defendant should be awarded all of her IRA's, Tyler's college fund, her retirement benefits, and business interests free and clear of any claim of the plaintiff. Specifically, the plaintiff should be awarded the 1977 Ford deluxe pickup truck and camper, with the requirement that he pay the debt and obligation thereon. Further, the

plaintiff should be awarded the 1987 Toyota Camry and the Voltswagon free and clear of any claim of the defendant. Further, that the plaintiff should be awarded any retirement benefits he acquired during the course of the marriage as his sole and separate property. Otherwise, each of the parties should be awarded those items of personal property in their possession as if the date of this Decree as their sole and separate property.

11. The court further finds that the plaintiff should be awarded any and all proceeds which may come from the development of his ideas in progress concerning a curry brush for horses, and involving a powder which may be mixed with paint which keeps horses from chewing said paint.

12. The court further finds that the defendant should be awarded all of her costs of court and attorney's fees not previously reduced to judgement in this matter, in the amount of \$2,260.24.

13. The court furthers finds that the plaintiff should assume and pay all of the marital debts occurred by the parties prior to the date of their separation as his sole and separate debt with the requirements that he hold the defendant harmless from any liability thereon. This should specifically include but not limited to any and all judgements entered against the plaintiff or either of the parties prior to the date of separation and all state federal or local taxes owing to any taxing authority whatsoever.

14. The court further finds that each of the parties should be required to maintain and provide those policies of health and accident insurance on the parties minor child Tyler which may be available to them through their place of employment and that each of them should pay 1/2 of all medical dental orthodontic and optical expenses incurred on behalf of said child

that insurance will not pay for.

Based on the above Findings of Facts, the court now makes the following:

CONCLUSIONS OF LAW

1. That the defendant is entitled to a Decree of Divorced based on the terms of the Counter Claim on file herein dissolving the bonds of matrimony heretofore existing between the parties, the same to become final upon the signing and entry thereof.

2. That the terms of the Decree of Divorce should be consisted with the terms of the Counter Claim.

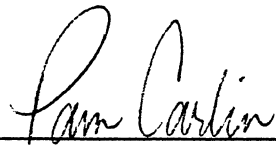
DATED this 2 day of March, 1992.


JUDGE HOMER F. WILKENS

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Findings of Fact Conclusions of Law and Decree of Divorce to the following, postage prepaid this 24th day of February, 1992:

LaMar Greene Mitchell
431 West Main Street
Harriman, Utah 84065



Pam Carlin, Secretary

FILED DISTRICT COURT
Third Judicial District

DAVID A. McPHIE (2216)
McPHIE, CONDIE & PECK
Attorneys for Defendant
2105 East Murray-Holladay Road
Salt Lake City, Utah 84117
(801) 278-3700

MAR 02 1992

SALT LAKE COUNTY
By DE Deputy Clerk

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

-----ooOoo-----
LAMAR GREENE MITCHELL, :
Plaintiff, : DECREE OF DIVORCE
vs. : 2172448
MARLENE CAROL MITCHELL, : 3-5-92-8.12am
Defendant. : Civil No. 904904611
: Judge Homer F. Wilkinson
: :
-----ooOoo-----

The matter of the above caption divorce came on for hearing on an uncontested basis before the Honorable Judge Homer Wilkinson in his courtroom located at 240 East 400 South, Salt Lake City, Utah, on Tuesday the 25th day of February, 1992 at the hour of 8:50 a.m.

The defendant appeared in person in support of her Counter Claim, and through her attorney of record, David A. McPhie.

The court noted that it had previously entered an Order on the defendant's Motion for Sanctions in which the original Complaint of the plaintiff in this matter was stricken, and his default entered. The court entertained testimony from the defendant supporting residency and grounds as alleged in her Counter Petition.

The court having received the testimony of the defendant, having considered the file, and

good cause appearing therefore, and having previously published its Findings of Fact and Conclusions of Law, the court now makes the following:

ORDER, JUDGEMENT, AND DECREE

1. The defendant is awarded a Decree of Divorce from the plaintiff dissolving the bonds of matrimony heretofore existing between the parties, the same to become final upon the signing and entree hereof.

2. The defendant is awarded the care, custody, and control of the parties minor child, Tyler, currently age 14, subject to reasonable rights of visitation for the plaintiff.

3. The plaintiff is ordered to pay to the defendant as and for child support the sum of \$122.00 per month, in two equal installments, one due on the 5th and one of the 20th of each month. The court further orders that said child support be continued until the parties minor child, Tyler reaches the age of 18 or graduates with his regular high school class, which ever occurs later.

4. The plaintiff is ordered to pay to the defendant \$1.00 per year as alimony.

5. The defendant is awarded the home and real estate of the parties located at 2183 Oneida Street, free and clear of any claim of the plaintiff. The plaintiff is ordered to sign a Quit Claim Deed relinquishing to the defendant all of his right title and interest in said home and real estate. Further, the defendant is ordered to execute and deliver to the plaintiff a quit claim deed within 10 days of the entree of a Decree of Decree in this matter. The defendant is awarded

said home and real estate, subject to the indebtedness thereon, if any.

6. The plaintiff is awarded all the parties right, title, and interest in two pieces of real estate, one of which is a 5 acre parcel located in Salt Lake County, known as Lot 7, South Oquirrh Estates, and the other which is a property on approximately 5th North and 8th West, in Salt Lake County. Further, the defendant is ordered to execute and deliver to the plaintiff a quit claim deed relinquishing all of her right, title, and interest in said properties to the plaintiff, and the plaintiff should hold the defendant harmless from any liability thereon.

7. The current distribution of personal property is hereby confirmed by the court. Each of the parties is awarded those items of personal property currently in their possession, as their sole and separate property free and clear of any claim of the other, subject to the debt thereon. Specifically, the defendant is awarded all of her IRA's, Tyler's college fund and her retirement benefits, and her business interests free and clear of any claim of the plaintiff. The plaintiff is awarded the 1977 Ford deluxe pickup truck and camper, with the requirement that he pay the debt and obligation thereon. The plaintiff is awarded the 1987 Toyota Camry and the Volts wagon free and clear of any claim of the defendant. Further, that the plaintiff should be awarded any retirement benefits he acquired during the course of the marriage as his sole and separate property.

8. The plaintiff is awarded any and all proceeds which may come from the development of his ideas in progress concerning a curry brush for horses, and involving a powder which may be mixed with paint which keeps horses from chewing said paint.


9. The defendant is awarded her costs of court and attorney's fees not previously reduced to judgement in this matter, in the amount of \$2,260.24.

10. The plaintiff is ordered to assume and pay all of the marital debts incurred by the parties prior to the date of their separation as his sole and separate debts, with the requirements that he hold the defendant harmless from any liability thereon. Specifically, the plaintiff is ordered to pay any and all judgements against the plaintiff or either of the parties entered prior to the date of their separation, and all state, federal, or local taxes owing to any taxing authority whatsoever, incurred during the marriage.

11. Each of the parties is ordered to maintain and provide those policies of health and accident insurance on the parties minor child, Tyler, which may be available to them through their place of employment, and that each of them should pay 1/2 of all medical, dental, orthodontic, and optical expenses incurred on behalf of said child that insurance will not pay for.

12. The defendant is awarded an Order to Withhold and Deliver as described in the Utah Code Ann. § 62A-11-401, et seq (1953, as amended).

DATED this 2 day of March, 1992.


JUDGE HOMER F. WILKENSON

APPENDIX C

ATTORNEY'S FEES AFFIDAVIT OF DAVID A. MCPHIE

ATTORNEY'S FEES AFFIDAVIT LORI W. NELSON

DAVID A. McPHIE
McPHIE, CONDIE & PECK
Attorneys for Defendant/Appellee
2105 East Murray-Holladay Road
Salt Lake City, Utah 84117
(801) 278-3700

IN THE UTAH COURT OF APPEALS

	-----oo0oo-----	
LAMAR GREEN MITCHELL	:	
	:	
Appellant,	:	AFFIDAVIT FOR ATTORNEY'S FEES
	:	
vs.	:	
	:	
MARLENE CAROL MITCHELL	:	Case No. 920489
	:	
Appellee.	:	
	:	
	-----oo0oo-----	
STATE OF UTAH)	
	:	ss.
COUNTY OF SALT LAKE)	

DAVID A. McPHIE, being first duly sworn upon oath, deposes and states:

1. That I am an attorney of record for the above named defendant appellee.

2. That pursuant to the courts equitable power as outlined in § 30-3-3 of the Utah code annotated this court may award appellee costs of court and attorney's fees. Case law also supports an award of appellees fees.

3. That the appellee has expended the following amounts as costs of court:

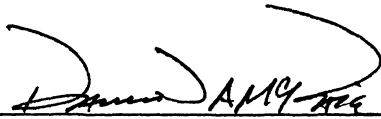
a. Printing of Brief:	\$ 52.82
b. Copies of Third District Court Documents	\$ 22.50

4. That David A. McPhie has done the following work, expending the amounts of time as indicated below. Further, that a reasonable rate for an attorney of my experience to bill his or her time in this community is \$110.00 per hour.

	TIME(Hrs)	BILLING
Motion to Dismiss appeal	<u> 1 </u> <u> 5 </u>	\$ <u>165.00</u>
Review two orders extending time to file appellants brief	<u> 1 </u> <u> 5 </u>	\$ <u>165.00</u>
Review of notice appeal Costs bond docketing statement etc.	<u> 1 </u> <u> 00 </u>	\$ <u>110.00</u>
Preparation of Appellees brief	<u> 3 </u> <u> 00 </u>	\$ <u>330.00</u>

TOTAL time expended by David A. McPhie counsel for the Appellee in this matter is 7 00 hours, which is a reasonable amount of time to have spent in a case of this nature. Further, that a reasonable fee to be awarded to the Appellee for the benefit of its counsel is \$770.00.

DATED this 1st day of March, 1993.

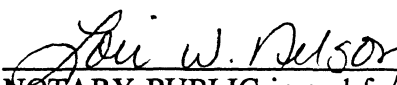


David A. McPhie
Attorney for Appellee

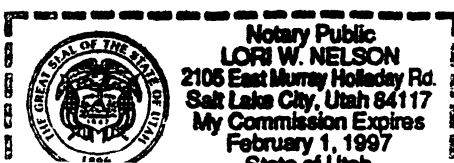
SUBSCRIBED and sworn to before me on this 1st day of March, 1993.

My Commission Expires:

 2/1/1997



NOTARY PUBLIC in and for
Salt Lake County



LORI W. NELSON
McPHIE, CONDIE & PECK
Attorneys for Defendant/Appellee
2105 East Murray-Holladay Road
Salt Lake City, Utah 84117
(801) 278-3700

IN THE UTAH COURT OF APPEALS

	----	oo0oo----
	:	
LAMAR GREEN MITCHELL	:	
	:	AFFIDAVIT FOR ATTORNEY'S FEES
Appellant,	:	
	:	
vs.	:	
	:	
MARLENE CAROL MITCHELL	:	Case No. 920489
	:	
Appellee.	:	
	:	
	----	oo0oo----

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

LORI W. NELSON, being first duly sworn upon oath, deposes and states:

1. That I am an attorney of record for the above named defendant appellee.
2. That pursuant to the courts equitable power as outlined in § 30-3-3 of the Utah Code Annotated 1953, as amended, this court may award appellee costs of court and attorney's fees. Case law also supports an award of appellees fees.
3. That Lori W. Nelson has done the following work, expending the amounts of time as indicated below. Further, that a reasonable rate for an attorney of my experience to bill her or her time in this community is \$60.00 per hour.

	TIME(Hrs)	BILLING
Preparation of Appellees brief	<u>12.05</u>	<u>\$ 723.00</u>

TOTAL time expended by Lori W. Nelson counsel for the Appellee in this matter is 12.05 hours, which is a reasonable amount of time to have spent in a case of this nature. Further, that a reasonable fee to be awarded to the Appellee for the benefit of its counsel is \$723.00.

DATED this 1st day of March, 1993.

Lori W. Nelson
Lori W. Nelson
Attorney for Appellee

SUBSCRIBED and sworn to before me on this 1st day of March, 1993.

My Commission Expires:
7-25-95

David A. McPhie
NOTARY PUBLIC in and for
Salt Lake County

