

1992

# Marcus P. Randolph v. Mary E. Randolph : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

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BRIEF

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920623

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IN THE UTAH COURT OF APPEALS

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MARCUS P. RANDOLPH,	:	
Plaintiff/Appellee, and	:	
Cross-Appellant,	:	
vs.	:	Case No. 920623-CA
MARY E. RANDOLPH,	:	
Defendant/Appellee, and	:	Priority No. 15
Cross-Appellee.	:	

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BRIEF OF APPELLEE AND CROSS-APPELLANT

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AN APPEAL FROM THE THIRD DISTRICT COURT'S SUPPLEMENTAL AND  
JUDGMENT DECREE OF DIVORCE ENTERED ON OR ABOUT AUGUST 21, 1992,  
THE HONORABLE JUDGE JAMES S. SAWAYA, PRESIDING.

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**FILED**

Utah Court of Appeals

MAY 11 1993

*Mary T. Noonan*  
Mary T. Noonan  
Clerk of the Court

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IN THE UTAH COURT OF APPEALS

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MARCUS P. RANDOLPH,	:	
Plaintiff/Appellee, and	:	
Cross-Appellant,	:	
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### STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this case pursuant to Utah Code Ann. §78-2a-3(2)(i) (Supp. 1992) which provides: "The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over, . . . (i) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity . . . ."

### NATURE OF THE PROCEEDINGS

The matter below is a divorce action and this appeal is from the final Supplemental Decree of Divorce and certain provisions of that Decree of Divorce, heard by the Third Judicial District Court, and the issues raised by the Cross-Appellant regarding those provisions within the Supplemental Decree of Divorce, which did not equally divide the marital debts or equally divide the marital assets, and which ordered the Plaintiff to pay one-half of the cost of private school in addition to child support and day care expenses, and which ordered Plaintiff to maintain life insurance, naming Defendant as beneficiary, in excess of the alimony award. Further, this is an appeal from the Order on Commissioner's Recommendation, entered on or about June 23, 1992, which denied

Plaintiff's motion to set aside his stipulation regarding child custody.

**STATEMENT OF THE ISSUES AND DETERMINATIVE CONSTITUTIONAL  
PROVISIONS, STATUTES OR APPLICABLE CASES.**

The following are the issues presented on appeal by the Plaintiff herein:

1. Did the trial court err or abuse its discretion in failing to equally divide the marital debts and in failing to equally divide the marital assets? Utah Code Ann. §30-3-5(1), Dunn v. Dunn, 802 P.2d 1314 (Utah App. 1990), Woodward v. Woodward, 656 P.2d 431 (Utah 1982).

2. Did the trial court err or abuse its discretion in ordering the Plaintiff to pay one-half of the cost of private school in addition to the award of child support and one-half of the cost of school-related day care expenses? Utah Code Ann. §78-45-7, et. seq., In re Marriage of Stern, 789 P.2d 807 (Wash. App. 1990).

3. Did the trial court err or abuse its discretion in ordering the Plaintiff to maintain life insurance which named Defendant as beneficiary in excess of the alimony award? Utah Code Ann. §30-3-5(1).

4. Did the trial court err or abuse its discretion in denying Plaintiff's motion to set aside the stipulation regarding



child custody? Utah Code Ann. §30-3-5(1), Utah Code Ann. §30-3-10, Moon v. Moon, 790 P.2d 52 (Utah App. 1990), Maughn v. Maughn, 770 P.2d 156 (Utah App. 1989), Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982).

#### STANDARD OF REVIEW

The standard of review on appeal in this case is an abuse of discretion standard as to all issues. The trial court has broad discretion and so long as that discretion is exercised within the confines of proper legal standards as set by the appellate courts of the State of Utah, and so long as the facts and reasons for the decision are set forth fully in appropriate findings of fact and conclusions of law, the appellate court should not disturb the resulting order.

The appellate court should review the factual findings of the trial judge under the "clearly erroneous" standard. A finding is "clearly erroneous" when "although there is evidence to support it, the review court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." State v. Walker, 743 P.2d 191, 193 (Utah 1987).

### STATEMENT OF THE CASE

This is an appeal from the final Supplemental Judgment and Decree of Divorce, entered by the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, presiding, which, among other things, entered orders regarding the division of debt, division of marital assets, payment of child support, payment of private school costs, maintenance of life insurance, payment of alimony and attorney's fees. The Supplemental Decree of Divorce from which the Defendant appealed and Plaintiff cross-appealed was signed and entered by the Third District Court on August 21, 1992. A Notice of Appeal was filed by Defendant and a timely Notice of Appeal was filed by Plaintiff on or about October 2, 1992.

This appeal is also from a final order entitled Order on Commissioner's Recommendations, dated June 23, 1992, which order denied the Plaintiff's motion to withdraw his stipulation regarding custody of the minor children.

The Plaintiff filed for divorce in the lower court. Responsive pleadings were filed. There was a bifurcation of the divorce proceedings, and a Decree of Divorce was awarded on February 18, 1992. All issues attendant to the divorce came on regularly for trial on March 24, 1992. The court took the matter under advisement and on June 22, 1992, at the hour of 11:30 a.m.,

the court informed counsel as to the court's decision on the matters under advisement. The Supplemental Decree of Divorce and Supplemental Findings of Fact and Conclusions of Law were signed and entered by the court on or about August 21, 1992.

Subsequent to the divorce trial on March 24, 1992, and prior to the June 22nd hearing in chambers at which time the court made its decision and findings, Plaintiff filed a Verified Motion to Withdraw Stipulation of Plaintiff. That motion was filed on or about April 17, 1992, and requested the Plaintiff be permitted to withdraw his stipulation relating to physical custody of the minor children. That matter came on for hearing before the Honorable Sandra N. Peuler, Third District Court Commissioner, on May 22, 1992. The Commissioner recommended denial of the Plaintiff's motion and Plaintiff filed a timely Objection to the Commissioner's Recommendation and a request for hearing was made to the Honorable Judge James S. Sawaya. The lower court denied hearing and, by Minute Entry, dated July 16, 1992, denied Plaintiff's motion and adopted the Order on Commissioner's Recommendation, which had been signed by the court and entered by the court as a final order on June 23, 1992, and which was later contained in the Supplemental Findings of Fact and Conclusions of Law and Supplemental Decree of Divorce, which awards Defendant the physical care, custody and control of the minor children. From the Order on Commissioner's

Recommendation and final Supplemental Decree of Divorce, the appellee has filed a timely cross-appeal herein. (Said Supplemental Findings of Fact and Conclusions of Law and Supplemental Decree of Divorce and Order on Commissioner's Recommendations are attached hereto, designated as Addendum "A", Addendum "B" and Addendum "C" respectively.)

#### STATEMENT OF THE FACTS

The parties were married to each other in May, 1977 (TR, p. 3, ll. 21 and 22.) The parties have two children born as their issue, Kira, who was age 10 at the time of trial, and Erika, who was age 5 at the time of trial (TR, p. 4, ll. 1-4). The parties separated in June of 1991 (TR, p. 4, ll. 5-7).

The parties stipulated to physical custody in Defendant at the time of trial (TR, p. 4, ll. 15-57).

Plaintiff was employed by Kennecott Corporation at the time of trial and testified regarding his base salary and the fact that he received commissions which varied each year. (See TR, pp. 12-21.) His 1992 income, as testified to at trial, was \$114,500.00 (One Hundred Fourteen Thousand Five Hundred Dollars), which included a substantial bonus of \$14,500.00 (Fourteen Thousand Five Hundred Dollars). (See TR, p. 18, ll. 21-32, TR., p. 21, ll. 18-24.) Based upon that annual income, the Plaintiff offered to pay child

support pursuant to the Child Support Obligation Worksheet which was marked as Plaintiff's Exhibit "5". The Plaintiff's gross monthly income of \$9,542.00 (Nine Thousand Five Hundred Forty Two Dollars), pursuant to the guidelines, required a monthly child support award from Plaintiff to Defendant of \$1,361.00 (One Thousand Three Hundred Sixty One Dollars). A copy of that exhibit is appended hereto, and designated as Addendum "D".

The Defendant worked at different jobs during the marriage, including running a day care center out of the parties' home from 1988 to 1990 (TR, p. 19, ll. 4-8). However, Plaintiff was the primary wage earner and at the time of trial, Defendant was enrolled at the University of Utah. Defendant enrolled at the University of Utah in September of 1990 and at the time of trial, was pursuing a degree in Elementary Education with an expected graduation date within three years of the date of trial. She also testified that she would like to pursue a Masters Degree, which would take an additional two years. (See TR, p. 154, ll. 19-25, and p. 155, ll. 1-16.) Defendant admitted on the stand that she intended to complete her educational process with a Masters in five years from March, 1992, when the matter was tried before Judge Sawaya. (See TR, p. 155, ll. 3-16.)

Defendant testified that with the classes that she had left to complete that she would have a Bachelors in Education with a

teaching certificate if she took two classes per quarter, in three years. (See TR, p. 182, ll. 21-25, p.183, ll. 1-10.) Again, she further indicated that she would have her Masters in an additional two years. (See TR., p. 183, ll. 11-16.)

When questioned about her health, the Defendant testified that she did not agree that there was any concern about her health problems impacting on her ability to function as a mother and single parent. (See TR., p. 148, ll. 14-20.) She indicated that with her medication, her medical condition was controlled. (TR, p. 186, l. 25, p. 187, ll. 1-7.)

Defendant testified further, as follows:

Q But you definitely plan on graduating in five years with a master's?

A Yes.

Q And entering the work force at that time?

A Yes.

(TR, p. 186.)

Defendant testified at the time of trial that her monthly expenses were \$3,198.00 (Three Thousand One Hundred Ninety Eight Dollars), and she submitted an exhibit setting forth those expenses. A copy of that exhibit is attached hereto as Addendum "E".

The Defendant apparently stipulated to the child support award offered by Plaintiff, as there was no request for anything other than the \$1,361.00 (One Thousand Three Hundred Sixty One Dollars) offered at trial. However, the Defendant requested also that Plaintiff pay in addition thereto, one-half of the cost of the tuition to the children's private school, Cosgriff. (See TR, p. 140, ll. 6-8.) The Plaintiff contested that request and specifically testified that the support award that he was offering adequately covered and met the needs of the children, including the private school. (See TR, p. 22, ll. 18-25, p. 23, ll. 1-7.)

At one point during her testimony, the Defendant requested an award of alimony of \$1,837.00 (One Thousand Eight Hundred Thirty Seven Dollars). (See TR, p. 157, ll. 20-25, p. 158, ll. 1-2.) At another time during her testimony, she asked for \$2,000.00 (Two Thousand Dollars) per month alimony. (See TR, p. 170, ll. 13-16.)

Plaintiff offered to pay the Defendant alimony of \$1,100.00 (One Thousand One Hundred Dollars) per month in addition to her receiving the parties' marital asset, which was a receivable which the parties called the "Troy Receivable." (See TR, p. 25, ll. 1-25, p. 26, ll. 1-3.) In addition, the Plaintiff offered an exhibit showing an allocation of the income of Plaintiff and the monthly income available to Defendant which was marked and admitted as

Plaintiff's Exhibit "7", a copy of which is attached hereto as Addendum "F".

The parties had previously divided their other assets and property, and the only asset, other than retirement and IRAs, was the item referred to as the "Troy Receivable" which was explained to the court as follows:

THE COURT: Let me see if I understand before we go too far and I lose track of this--they receive payments on a sale of a piece of property?

MS. WILLIAMS: Property in Troy, Montana, it has over a fourteen thousand, five hundred balance. It pays out at the rate of two hundred dollars a month and his offer is that she receive that asset so that she can receive that two hundred per month income.

Q This income is expected to be received for another eight or nine years--there;s no balloon due on it?

A No.

Q And based upon your allocation of earnings that would be your proposal?

A Yes, it is.

TR, p. 26, ll. 7-20.



When the parties separated, they sold their house and Defendant had received approximately \$25,000.00 (Twenty-Five Thousand Dollars). (See TR, p. 38, ll. 8-18.)

At the time of trial, Plaintiff testified that there existed two remaining marital debts. A debt for \$7,500.00 (Seven Thousand Five Hundred Dollars), representing a loan taken out by him to cover marital expenses incurred and a tax obligation of approximately \$4,300.00 (Four Thousand Three Hundred Dollars). (See TR, p. 31, l. 25, p. 32, ll. 1-11.) The Defendant did not dispute the existence of those debts in her testimony.

Upon review of the transcript of trial, Plaintiff can find no request or testimony by Defendant regarding life insurance naming her as beneficiary.

At the time of trial, Defendant testified that the initial \$1,500.00 (One Thousand Five Hundred Dollars) that she paid as a retainer for attorney's fees for her counsel came from joint marital funds. (See TR, p. 171, ll. 6-11.) Counsel for Defendant was sworn and testified that his attorney's fees were approximately \$4,300.00 (Four Thousand Three Hundred Dollars), but was unspecific as to any expenses or costs incurred and had no statement or bill to verify any costs or his testimony regarding fees. (See TR, p. 20, ll. 233-25, p. 201, p. 202, ll. 1-19.)

At the close of trial, the court took the matter under advisement, indicating that the court clerk would provide counsel with a written list of issues to be addressed by Plaintiff's counsel and Defendant's counsel, in writing in lieu of closing arguments. (See TR, p. 213, ll. 9-25, p. 214, ll. 1-24.) No such written list of issues was presented to either counsel, and the court set the matter for hearing on June 22, 1992, at the hour of 11:30 a.m., at which time the court informed Plaintiff's counsel and Defendant's counsel of the court's decision on the matters under advisement. The Supplemental Decree of Divorce and Supplemental Findings of Fact and Conclusions of Law were signed and entered by the court on or about August 21, 1992.

Prior to the June 22, 1992 hearing in chambers, however, and prior to the court making its decision and findings and after the divorce trial on March 24, 1992, the Plaintiff filed a Verified Motion to Withdraw Stipulation of Plaintiff. That motion was filed on or about April 17, 1992, and requested that Plaintiff be permitted to withdraw his stipulation relating to physical custody of the minor children. (A copy of that motion is appended hereto and designated as Addendum "G".) Subsequent to the Defendant's reply to the Plaintiff's motion, the matter came on for hearing before the Honorable Sandra N. Peuler, Third District Court Commissioner, on May 22, 1992. The Commissioner recommended the

denial of Plaintiff's motion. Plaintiff filed a timely Objection to the Commissioner's Recommendation and a Request for Hearing was made. The lower court denied hearing and, by Minute Entry, dated July 16, 1992, denied Plaintiff's motion. That Minute Entry adopted the Order on Commissioner's Recommendations, which was signed by the court and entered by the court as a final order on June 23, 1992, and which contents were further contained in the Supplemental Findings of Fact and Conclusions of Law and Supplemental Decree of Divorce, which awards Defendant the physical care, custody and control of the minor children. In addition, within the Supplemental Decree and Findings of Fact, the court awarded the sole legal custody of the children to Defendant, subject to Plaintiff's specified rights of visitation (FOF 1, Index 248). Further, the court ordered the Plaintiff to pay child support in the sum of \$1,361.00 (One Thousand Three Hundred Sixty One Dollars) per month (FOF 3, Index 250). The court acknowledged that the Defendant was currently unemployed and was pursuing a college degree and that no income should be imputed to her (FOF 3, Index 250). In addition, the court ordered the Plaintiff to pay Defendant one-half of all day care expenses paid by Defendant while she was working or attending classes at an accredited educational institution (FOF 4, Index 250). Further, the court ordered the Plaintiff to pay 50% (fifty percent) or one-half of the cost of

private school tuition through high school, which sum was to be in addition to base child support (FOF 4, Index 250).

The court ordered Plaintiff to maintain a life insurance policy naming the minor children as beneficiaries in the base sum of \$100,000.00 (One Hundred Thousand Dollars). In addition thereto, the court ordered the Plaintiff to maintain a \$100,000.00 (One Hundred Thousand Dollar) life insurance policy during the period in which alimony is paid by Plaintiff to Defendant naming Defendant as beneficiary (FOF 8, Index 251).

The court found, as well, that based upon the Plaintiff's income and based upon the Defendant's pursuit of her educational degree and considering her prior health conditions and her ability to support herself at the end of the educational term, that it was reasonable that the Plaintiff pay alimony to the Defendant at the rate of \$1,500.00 (One Thousand Five Hundred Dollars) per month for a period of 24 (twenty four) months, commencing June 1, 1992. The court further ordered that the alimony would reduce to the sum of \$1,000.00 (One Thousand Dollars) per month for an additional 24 (twenty four) months and terminate at the end of the four (4) year period. (FOF 10, Index 252.)

The court also found that it was reasonable that the Defendant be awarded the "Troy Receivable," for an additional \$200.00 (Two Hundred Dollars) per month. (FOF 14, Index 253.)

The court also found that it was reasonable that Plaintiff should pay the two debts testified to which were the RediCredit debt of \$7,500.00 (Seven Thousand Five Hundred Dollars) and the 1991 tax obligation. (FOF 17, Index 254.)

The court, lastly, found that Plaintiff should contribute the further sum of \$1,000.00 (One Thousand Dollars) to the Defendant's attorney's fees and costs incurred. (FOF 19, Index 254.)

The Defendant filed her appeal to the Supplemental Decree of Divorce, appealing the amount and term of alimony and the award of attorney's fees. The Plaintiff cross-appealed from the Supplemental Decree of Divorce on the division of debts, payment of private schooling for the minor children, the obligation of Plaintiff to maintain life insurance for Defendant, and the post trial ruling and denial of Plaintiff's motion to withdraw or set aside his stipulation to child custody.

#### ARGUMENT

I. THE TRIAL COURT ERRED OR ABUSED ITS DISCRETION BY FAILING TO EQUALLY DIVIDE THE PARTIES' DEBTS AND/OR THE MARITAL ASSETS GIVEN THE LEVEL OF ALIMONY AWARDED.

As noted in the Statement of Facts, the parties sold their marital residence prior to the time of trial and divided the equity between them. The Defendant received slightly more than did

Plaintiff, and received approximately \$25,000.00 (Twenty-Five Thousand Dollars). (See TR, p. 38, ll. 8-18.) The only other assets of the parties were their IRAs and retirements and the "Troy Receivable." The court found that it was reasonable to equally divide all IRAs and retirements that had accrued during the marital period (FOF 16, Index 253).

The "Troy Receivable" was from the sale of the parties' property in Troy, Montana, a different property than the marital residence, and there was a balance owing to the parties of over \$14,500.00 (Fourteen Thousand Five Hundred Dollars), payable at \$200.00 (Two Hundred Dollars) per month (TR, p. 28, ll. 7-20). Plaintiff offered that receivable to Defendant to assist her in lieu of further alimony, when the offer was made at the time of trial to pay alimony at the rate of \$1,100.00 (One Thousand One Hundred Dollars) per month (TR, p. 25, ll. 1-25, p. 26, ll. 1-3, and also Addendum "F"). However, the Plaintiff also requested that there be an equal division of the marital debts, which included a debt of approximately \$7,500.00 (Seven Thousand Five Hundred Dollars), representing a loan taken out by Plaintiff to cover marital expenses and a tax obligation owing by the parties of approximately \$4,300.00 (Four Thousand Three Hundred Dollars) (TR, p. 31, l. 25, p. 32, ll. 1-11).

While the court equally divided the retirements, and the parties had previously equally divided the proceeds from the marital residence, the court then awarded \$1,500.00 (One Thousand Five Hundred Dollars) in alimony, awarded the Defendant the entire asset known as the "Troy Receivable", at a value of \$14,500.00 (Fourteen Thousand Five Hundred Dollars), and ordered the Plaintiff to pay the debts and obligations which totaled approximately \$11,800.00 (Eleven Thousand Eight Hundred Dollars). The court made this inequitable division of the assets and debts, without issuing findings or statements as to the reasonableness of that inequitable division.

In dividing marital assets, "the overriding consideration is that 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." Newmeyer v. Newmeyer, 745 P.2d 1276, 1278 (Utah 1987). "Each party is presumed to be entitled to all of his or her separate property and 50% of the marital property." Burt v. Burt, 799 P.2d 1166, 1172 (Utah App. 1990). The court must issue sufficient findings to demonstrate an award otherwise. Id.

It is acknowledged that "the trial court is allowed considerable discretion in the division of marital property, so long as it exercises its discretion in accordance with the

standards set by this state's appellate courts." Dunn v. Dunn, 802 P.2d 1314, 1322 (Utah App. 1990), citing Munns v. Munns, 790 P.2d 118 (Utah App. 1990). The court in Dunn set forth various factors for the trial court to consider in fashioning an equitable property division and articulated those factors as follows:

The amount and kind of property to be divided; whether the property was acquired before or during the marriage; the source of the property; the health of the parties; the parties' standard of living, respective financial conditions, needs and earning capacity; the duration of the marriage; the children of the marriage; the parties' ages at the time of the marriage and of divorce; what the parties gave up by the marriage; and the necessary relationship the property division has with the amount of alimony and child support to be awarded.

Dunn, at 1322, citing Burke v. Burke, 733 P.2d 133, 135 (Utah 1987).

In the instant case, the court did not issue any findings regarding why the Plaintiff should be ordered to pay all of the outstanding debt and Defendant be awarded the entirety of the asset known as the "Troy Receivable" of \$14,500.00 (Fourteen Thousand Five Hundred Dollars). In the instant matter, after payment of child support and the award of alimony of \$1,500.00 (One Thousand Five Hundred Dollars), the Defendant had monthly income to her of \$2,861.00 (Two Thousand Eight Hundred Sixty One Dollars). She also had equal division of the other marital cash and retirement assets. Given the fairly equivalent net income then available to the parties, it was neither fair nor equitable to not equally divide



the assets and debts. As in the case of Woodward v. Woodward, 656 P.2d 431 (Utah 1982), the court should find that an equitable division is a one-half share of accrued marital assets. Admittedly, the Woodward case was referring to retirement assets, however, the concept and spirit of the case of Woodward v. Woodward, is that each party should receive 50% (fifty percent) of those assets acquired during the marriage, barring some unusual circumstance. Likewise, equity requires that if the parties are sharing the income received by the wage earner, that there should be some sharing of the marital debts. The trial court abused its discretion in awarding the Defendant \$1,500.00 (One Thousand Five Hundred Dollars) in alimony, while failing to then divide the "Troy Receivable" and the marital debts.

II. THE TRIAL COURT ERRED OR ABUSED ITS DISCRETION IN ORDERING THE PLAINTIFF TO PAY ONE-HALF OF THE COSTS OF PRIVATE SCHOOL IN ADDITION TO THE AWARD OF CHILD SUPPORT, ONE-HALF OF SCHOOL RELATED OR WORK RELATED DAY CARE, AND 60% (SIXTY PERCENT) OF THE MEDICAL EXPENSES.

The Plaintiff submits that the trial erred and abused its discretion in failing to comply with Utah Code Ann. §78-45-7, et. seq. The Uniform Civil Liabilities for Support Act specifically provides a child support obligation table, which table was used in the instant matter to calculate the appropriate level of support. (See Addendum "F".) In the instant matter, the court found that

the appropriate level of child support was \$1,361.00 (One Thousand Three Hundred Sixty One Dollars) pursuant to the guidelines. (FOF 3, Index 250.) The trial court also found that it was reasonable that the Defendant be paid one-half of all day care expenses incurred while she was working or attending classes. (FOF 4, Index 250.) In addition, the court found that it was fair and equitable that Plaintiff pay 60% (sixty percent) of non-routine medical expenses not covered by insurance (FOF 7, Index 251).

Each of the foregoing provisions are contemplated and provided for within §78-45-7, Utah Code Ann. However, the Child Support Guidelines, as they have come to be known, are presumptive, even though that presumption can be rebutted if the court awards an amount different than the guideline amount. (Utah Code Ann. §78-45-7.2.) The foregoing provision requires that a written finding or specific finding on the record support the conclusion that complying with the Guidelines would be unjust, inappropriate or not in the best interests of the child in a particular case, if the Guidelines are to be rebutted. (§78-45-7.2[3].)

In the instant case, there was no specific finding that it was appropriate to deviate from the Guidelines or that the Guidelines were rebutted. In addition, given the fact that the Guidelines specifically provide for the calculation of base child support (§78-45-7.14), specifically provide for the sharing of medical and

dental expenses (§78-45-7.15), and the sharing of child care expenses (§78-45-7.16), it is apparent that to award support in addition to the foregoing is contrary to the Guidelines, and would require a rebuttal of the Guidelines and a specific finding and reason therefore.

In the instant case, the court, in addition to the awards set forth above, ordered the Plaintiff to pay one-half of all costs of private school tuition through high school. (FOF 4, Index 250.) Again, it is Plaintiff's contention that the Finding and Order is in error in that it does not comply with §78-45-7, and is support in addition thereto, and was not supported by the evidence adduced at trial. While Defendant testified that it was her desire that the court order the Plaintiff to pay one-half of private school costs (See TR, p. 140, ll. 6-8), the Plaintiff contested that request and specifically testified that the support award that he was offering adequately covered and met the needs of the children, including the cost of private school (See TR, p. 22, ll. 18-25, p. 23, ll. 1-7). The trial court made no findings that the child support was inadequate, and that the court should then deviate from the Guidelines and award support on top of the support set forth in §78-45-7. Plaintiff would submit that since the legislature provides explicitly for awards of medical expenses and day care, that the legislature must have intended for all other costs and

expenses attendant to the needs of the child or children to be covered by the Guideline table.

There are no cases in Utah on point. However, the Court of Appeals in Washington has addressed this issue in the case of In re Marriage of Stern, 789 P.2d 807 (Wash. App. 1990). In that matter, the husband had been ordered to pay and contribute to the costs of private school tuition. In that case, the court found that there were no findings regarding the children's need for a private education or any findings that there would be a benefit that would inure to the children from attending a private school that would not inure to them from attending a public one. Because of that, the court found that the trial court had exceeded the limits of its discretion. Id. at 813, 814. (A copy of In re Marriage of Stern is attached as Addendum "H".)

Based upon the foregoing, it is clear that the court abused its discretion and erred in ordering the Plaintiff to bear one-half of the cost of private schooling in addition to payment of day care, medical expenses and base child support of \$1,361.00 (One Thousand Three Hundred Sixty One Dollars) per month.

III. THE TRIAL ERRED OR ABUSED ITS DISCRETION IN ORDERING THE PLAINTIFF TO MAINTAIN LIFE INSURANCE WHICH NAMED THE DEFENDANT AS BENEFICIARY AND IN DOING SO IN EXCESS OF THE ALIMONY AWARDED.

The trial court awarded alimony in the sum of \$1,500.00 (One Thousand Five Hundred Dollars) per month, for a period of two (2) years, then reducing to \$1,000.00 (One Thousand Dollars) per month for an additional two (2) years. (FOF 10, Index 252.) The total of that sum is \$60,000.00 (Sixty Thousand Dollars). The trial court found that it was reasonable that Plaintiff maintain a \$100,000.00 (One Hundred Thousand Dollar) life insurance policy during the period in which alimony is paid by Plaintiff to Defendant, naming Defendant as beneficiary (FOF 8, Index 251). It is apparent that the amount ordered to be maintained is unjustified and not supported by the fact of the court's own order relating to alimony. Further, and of greater importance, is the fact that the court entered this order without evidence before it justifying the award. Utah Code Ann. §30-3-5, governs the right of the court to make equitable orders relating to the children, property, debts or obligations and the parties. However, the award must be based upon the facts presented at the time of trial and based upon the needs and equities. In the instant case, the court made no findings as to the reason that it was ordering \$100,000.00 (One Hundred Thousand Dollar) life insurance policy to be maintained, when the

total alimony award was \$60,000.00 (Sixty Thousand Dollars). There was no specific request or testimony on the part of the Defendant requesting that life insurance be maintained, and there existed no basis for the award. The order that Plaintiff maintain life insurance naming Defendant as the beneficiary was an abuse of the court's discretion and in error.

IV. THE TRIAL COURT ERRED OR ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S MOTION TO SET ASIDE THE STIPULATION RE: CHILD CUSTODY.

Subsequent to the time of trial and on or about April 17, 1992, Plaintiff filed a Verified Motion to Withdraw Stipulation of Plaintiff (Addendum "G"). The basis of the motion was that the premises upon which the Stipulation to Custody were based, were found to be inaccurate premises in that subsequent to trial, the Defendant, who suffers from bipolar manic depression, was behaving in an irrational fashion, preventing visitation, verbally abusing Plaintiff's new spouse, and unnecessarily and inappropriately involving the children in the difficulties between Plaintiff and Defendant. That motion specifically outlines the behavior and basis for the motion to set aside the stipulation.

Given the fact that the court had not made its decision on all other substantive issues, and given the fact that no decision was made by the court until June, it is obvious, in retrospect, that

the motion was timely and, more importantly, that the best interests of the minor children were at issue and should have been addressed. Utah Code Ann. §30-3-10 specifically states that "the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties" in determining the care and custody of minor children in a divorce (§30-3-10[1]). Further, that statutory provision goes on to state that "in awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the non custodial parent as the court finds appropriate" (§30-3-10[2]). Given the basis for the Plaintiff's motion, which included Defendant's irrational acts, irrational behavior in the presence of the children, and her failure to provide Plaintiff access to the children, it was and should have been clear at that time that the issue of best interests should have been addressed by the court. Our court has provided us with a number of factors to look at considering and determining what is in the "best interest" of the children for custody purposes. They include the following factors:

The need for stability in custodial relationship and environment; maintaining an existing primary custodial bond; the relative strength of parent bonds,  
The relative abilities of the parents to provide care, supervision, and a suitable environment for the children and to meet the needs of the children;

Preference of a child able to evaluate the custody question;

The benefits of keeping siblings together, enabling sibling bonds to form;

The character and emotional stability of the custodian; and

The desire for custody; the apparent commitment of the proposed custodian to parenting.

Moon v. Moon, 790 P.2d 52 (Utah App. 1990) (See also Hutchison v. Hutchison, 649 P.2d 38 (Utah 1982)).

Given the Defendant's psychiatric history and the important issues raised in Plaintiff's motion, it was an abuse of the court's discretion to ignore the best interests issue and to not allow the court to investigate what was and is in the best interests of the minor children, Erika and Kira. By failing to permit Plaintiff to set aside the stipulation, the trial court put the Plaintiff in the position of having to file a Petition for Modification and having to overcome the substantial burden of changed circumstances required by the case of Hogge v. Hogge, 649 P.2d 51 (Utah 1982). Further, the case of Maughn v. Maughn, 770 P.2d 156 (Utah App. 1989), specifically states "our reading of Hogge and its progeny suggests that on a petition for custody modification, the trial court should carefully scrutinize the facts behind the original award of custody. If the initial award was based on a thorough examination by the trial court of the various factors pertaining to the child's welfare, a rigid application of the change in



circumstances prong is in order." Maughn at 160. It is unknown, given the review of the custody issue and Plaintiff's motion to set aside his stipulation as to physical custody, whether the court would then feel it necessary to apply the rigid Hogge standard as articulated in Maughn or the less rigid standard later adopted in Elmer v. Elmer, 776 P.2d 599 (Utah 1989).

Regardless of the burden of proof and burden placed upon Plaintiff by virtue of the court's failure to set aside his stipulation regarding physical custody of the children; since the focus of the court was to have been, and should have been, and should always be, the best interests of the minor children, the court abused its discretion in failing to allow Plaintiff to withdraw the stipulation and look into the issue of best interests of Kira and Erika.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN THE AWARD OF ALIMONY.

The Plaintiff was 36 (thirty six) years of age at the time of trial (Financial Declaration, Index 104). Defendant was 35 (thirty five) years of age at the date of trial (Financial Declaration, Index 119). While the parties had been married for, approximately, 14 (fourteen) years, Defendant was still youthful, engaged in a course of education, attending school in a part-time fashion and would obtain her Masters in Early Childhood Special Education

within five (5) years of the time of trial attending school part-time. (See TR, p. 155, ll. 3-16.) Given the ages of the children at the time of trial, of ten (10) and five (5) (TR, p. 4, ll. 1-4), there was no apparent constraint prohibiting Defendant from attending school full time and thus completing her educational process in a much shorter period.

Regardless, Defendant indicated that her mental infirmity did not prohibit her from continuing her educational process or functioning as a mother and single parent (TR, p. 148, ll. 14-20, p. 186, l. 25, p. 187, ll. 1-7).

Based upon the age of the Defendant and her ability to attain a Masters Degree in five (5) years or less, it was obvious to the court that she had no mental or physical infirmity or family obligation which would prohibit her from obtaining work and entering the work force within a reasonable period of time.

Based upon all of those facts and circumstances, the trial court certainly did not abuse its discretion in awarding rehabilitative alimony.

It is well settled and established law in the State of Utah that a trial court must consider the three prong test in determining an award of alimony:

1. the financial conditions and needs of the wife;

2. the ability of the wife to produce a sufficient income for herself; and

3. the ability of the husband to provide support.

See Jones v. Jones, 700 P.2d 1072 (Utah 1985). In the instant case, the trial court fairly and reasonably considered each of those factors. The court awarded \$1,500.00 (One Thousand Five Hundred Dollars) per month in alimony, \$1,361.00 (One Thousand Three Hundred Sixty One Dollars) in child support and \$200.00 (Two Hundred Dollars) per month (the "Troy Receivable") for a total monthly income to her of \$3,061.00 (Three Thousand Sixty One Dollars), for a period of two years, to reduce to \$2,561.00 (Two Thousand Five Hundred Sixty One Dollars) at the end of that two-year period and for an additional 24 (twenty four) months.

As indicated, the Defendant, though unemployed, and though her children were school age, was voluntarily attending school only part-time. (See TR, p.155, ll. 3-7.) Attending part-time, it was anticipated that she would obtain her degree in Elementary Education with a Teaching Certificate within three (3) years, attending part-time. It was fair for the court to consider her ability to actually attend full-time and to give her incentive to complete her educational process by reducing the alimony after a period of two (2) years, at which point in time she could complete

a Bachelors Degree with a Degree in Elementary Education, and commence employment or part-time employment.

The terminable alimony is appropriate in this case and has certainly been found to be reasonable in other cases of a like length marriage. In Osguthorpe v. Osguthorpe, 804 P.2d 530 (Utah App. 1990), the Utah Court of Appeals upheld an award of alimony of \$150.00 (One Hundred Fifty Dollars) per month for five (5) years' duration after a marriage of 14 (fourteen) years. Again, in the case of Turner v. Turner, 649 P.2d 6 (Utah 1989), the Utah Supreme Court found that a 24 (twenty four) month award of alimony after a nine (9) year marriage was not an abuse of discretion.

The amount of alimony awarded was fair and equitable, given the fact that the Defendant's total income for the first two (2) years after the entry of the Decree would be \$3,061.00 (Three Thousand Sixty One Dollars). Defendant testified to monthly expenses of \$3,198.00 (Three Thousand One Hundred Ninety Eight Dollars) per month. It is obvious that her request for \$2,000.00 (Two Thousand Dollars) per month alimony was more than her monthly expenses justified. The Plaintiff testified that the Defendant's monthly expenses were inflated, as well, and that Defendant's real monthly expenses were \$2,556.00 (Two Thousand Five Hundred Fifty Six Dollars) (TR, p. 23, ll. 8-25), which expenses were contained in Plaintiff's Exhibit "6", attached hereto as Addendum "I".

It is evident from the testimony adduced by Plaintiff and by Defendant's own exhibit, that she did not need the alimony that she requested, and that the award of alimony more than paid her monthly needs and expenses.

Defendant has asserted that the award of alimony should equalize the parties' respective post-divorce living standards. As set forth above, the award that the court made was sufficient to meet the Defendant's monthly needs as articulated at the time of trial, both by Defendant, although somewhat inflated, and by Plaintiff and his exhibit provided to the court. The Plaintiff disagrees that the award of alimony should equalize the parties' income, however, footnote 3 of the case of Howells v. Howells, 806 P.2d 1209 (Utah App. 1991), reads as follows:

Exact mathematical equality of income is not required, but sufficient parity to allow both parties to be on an equal footing financially as of the time of divorce is required. That is what has occurred in the instant case.

Based upon the facts and circumstances of this case, and a relatively short term marriage, age of the Defendant, her proceeding through school, and the substantial income that would come to her through the award of alimony, child support and the receipt of the "Troy Receivable," the award of alimony made by the court, and the declining award and the term of that alimony is fair and equitable and should be affirmed by this court. Even if the court finds that there were not sufficient findings made as to the

issue of alimony, the court need not reverse, and can sustain and affirm the trial court's findings, as the record is clear and uncontroverted that the award of alimony in this case is appropriate, and the court applied the Jones factors, articulated above. (See Asper v. Asper, 753 P.2d 978, 981 (Utah App. 1988.)

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR ERR IN THE AWARD OF ATTORNEY'S FEES.

At the time of trial, the Defendant testified that she had paid attorney's fees and that the initial \$1,500.00 (One Thousand Five Hundred Dollars) that she had advanced were from joint funds of both parties. (TR, p. 171, ll. 3-11.) Defendant acknowledges that \$1,500.00 (One Thousand Five Hundred Dollars) should not be considered as part of the requested award of attorney's fees as it was from joint funds. The Defendant also testified that she had savings and testified as follows:

Q Other than your reserves and savings, do you have any funds to pay your attorney's fees?

A No.

Q You don't desire to invade those funds do you?

A No, I don't.

TR, p. 171, ll. 15-19.

It is obvious to each of us that we would prefer not invading savings to pay bills and debts. However, the court ordered the Plaintiff to pay all marital debts and the Defendant was left with no marital debts, but her ongoing monthly expenses. In addition, the court awarded her one-half of the retirement and she had already been awarded more than one-half of the proceeds from the sale of the marital residence. The court also awarded her the "Troy Receivable" which had a value of \$14,500.00 (Fourteen Thousand Five Hundred Dollars). The Defendant did not establish, nor was there any evidence, that Plaintiff had any savings or funds available with which to pay attorney's fees or costs. The fact that Defendant received more than one-half of the marital assets and received a total award of monthly income from alimony, child support and the receivable of \$3,061.00 (Three Thousand Sixty One Dollar), was certainly considered by the court in the appropriate level or need for attorney's fees. The Defendant simply did not establish a need to have her fees paid. The simple fact that she was unemployed was not sufficient as, after the payment of alimony and child support and receipt of the marital assets and estate, she was on an equal footing with Plaintiff. The Plaintiff disputes Defendant's allegation that there was any uncontroverted evidence or evidence at all that the Defendant had a need for financial assistance in her attorney's fees.

In addition, there was no evidence in the record that indicated that the Plaintiff had the ability to pay attorney's fees.

Lastly, the testimony of Defendant's counsel did not permit the court to establish, with any specificity, what the exact fees were. In fact, Defendant's counsel testified that "this has not been an exceptionally difficult case other than the fact that there were numerous bank accounts which required discovery . . . the reasonableness amount of fees would be \$4,300.00 as of the end of trial today." (TR, p. 201, ll. 15-24.) Upon question, the Defendant's counsel stated as follows:

MS. WILLIAMS I would ask if you have a statement?

MR. FANKHAUSER I don't have a total. I have been sending her periodic statements and I have a ledger statement. I can prepare one if the court desires.

MS. WILLIAMS I would ask if there were earlier representations that there was a bill owing at the time of the pre-trial of \$300.00, a bill owing to you at the time of pre-trial?

MR. FANKHAUSER I don't know if that was the amount. I would check again on the ledger. I would have to look and see how much was charged back against the \$1,500.00, plus whatever costs incurred. I can't tell you exactly.



MS. WILLIAMS No questions.

TR, p. 202, ll. 6-20.

It was evident from the cross-examination of Defendant's counsel that he was uncertain as to the exact bill. He merely testified that he thought that \$4,300.00 (Four Thousand Three Hundred Dollars) was a reasonable fee. He did not state that was his bill, he had no bill to present to the court, and he could not identify what his bill was at any particular time. There was not sufficient evidence presented to the court to establish what the reasonable fees were, or even to establish what the fees were. While Utah Code Ann. §30-3-3 (1989) provides that the court can order either party to pay attorney's fees incurred, "before a court will award attorney's fees, the trial court must find that the requesting party is in need of financial assistance and that the fees requested are reasonable." (See Osguthorpe v. Osguthorpe, 804 P.2d 530 [Utah App. 1990] citing Bagshaw v. Bagshaw, 788 P.2d 1057, 1061 [Utah App. 1990].) Again, the Defendant failed both in her direct testimony to establish need, and in the testimony of her counsel to establish what the actual fee was. The case of Muir v. Muir, 841 P.2d 736 (Utah App. 1991) cited by Defendant is not applicable to the case at hand, as that case required undisputed evidence of the reasonable of the requested attorney's fees and the needs of the individual requesting the same. Again, the

Defendant's counsel was unclear in his testimony as to the actual fees incurred and what was a reasonable fee. In addition, Defendant failed completely to show that she was in need of a contribution to her attorney's fees or in any different position or situation than was the Plaintiff, after the division of the marital estate and award of alimony and support.

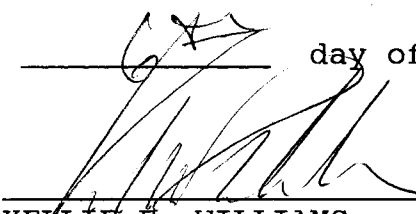
Based upon the facts and circumstances of this case, the trial court's award of attorney's fees should be affirmed or the court should enter its own order, ordering that each party should pay his or her own attorney's fees.

#### CONCLUSION

For the foregoing reasons, this court should affirm the trial court's determination regarding alimony and attorney's fees. The orders of the court that Plaintiff pay one-half of the cost of private schooling and maintain life insurance naming Defendant as beneficiary should be reversed. This matter should be remanded to the trial court for the entry of a judgment and a second amended decree for a redistribution of the marital debts and obligations and a reconsideration of the issue of best interests of the minor children Kira and Erika, and in whose physical custody they should be placed. Further, it is reasonable that each party be

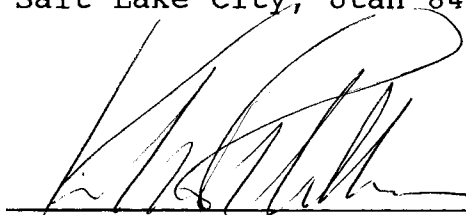
responsible for his or her own court costs and attorney's fees on appeal.

Respectfully submitted this 6<sup>th</sup> day of May, 1993.

  
KELLIE F. WILLIAMS  
Attorney for Plaintiff

CERTIFICATE OF HAND DELIVERY

I, KELLIE F. WILLIAMS, hereby certify that two copies of the foregoing Appellee's Brief, were HAND DELIVERED to E. H. Fankhauser, 243 East 400 South, Salt Lake City, Utah 84111, this 6<sup>th</sup> day of May, 1993.

  
KELLIE F. WILLIAMS  
Attorney for Plaintiff

## **ADDENDUM "A"**

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AUG 21 1992  
SALT LAKE COUNTY  
Deputy Clerk

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

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MARCUS P. RANDOLPH,

Plaintiff,

-vs-

MARY E. RANDOLPH,

Defendant.

SUPPLEMENTAL FINDINGS OF FACT  
and CONCLUSIONS OF LAW

Civil No. 914902308DA

Judge James S. Sawaya

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THE ABOVE-CAPTIONED MATTER having come on regularly for trial before the above-entitled Court on March 24, 1992, at the hour of 10:00 o'clock a.m., the Honorable James S. Sawaya, District Court Judge presiding, and the plaintiff being present in person and being represented by counsel, Kellie F. Williams, and the defendant being present in person and being represented by counsel, E. H. Fankhauser, and the court having heard the testimony of the parties, and having received exhibits, and having taken the matter under advisement, and a bifurcated Decree of Divorce being previously entered on February 18, 1992, and the court having issued it's findings and order to the parties' counsel on June 22, 1992, at the hour of 11:30 a.m., and based thereon, the court now makes and enters the following:

the day before the FINDINGS OF FACT: 00

1. There have been two children born as issue of this marriage, namely: Kira A. Randolph, whose date of birth is December 15, 1981; and, Erika C. Randolph, whose date of birth is June 2, 1986. The defendant is a fit and proper person to be awarded the permanent physical and legal care, custody, and control of said minor children.

2. It is reasonable that the plaintiff be awarded visitation with the minor children as follows:

a. Alternate weekends from Friday at 6:00 p.m. until Sunday at 6:00 p.m.

b. Midweek visits, each Wednesday from 5:30 p.m. until 8:30 p.m.

c. Christmas visitation on Christmas Day, beginning at 1:00 p.m. and continuing for a period equal to one-half of the children's total school vacation.

d. Thanksgiving visitation in even years, which Thanksgiving visitation shall commence Wednesday at 6:00 p.m. until Sunday at 6:00 p.m. and Easter visitation in odd years, which Easter holiday shall be defined as from Friday from 6:00 p.m. until Sunday at 6:00 p.m.

e. The parties shall alternate the other holidays, and plaintiff shall have alternate holiday visitation on New Year's Day, Martin Luther King Day, President's Day, Memorial Day, July 4th, July 24th, and Labor Day. The visitation shall begin 6:00

p.m. the day before the holiday until 6:00 p.m. on the day of the holiday.

f. Holiday visitations take precedence over weekend visitation and no changes shall be made to the regular rotation of the alternating weekend schedule.

g. On Father's Day from 6:00 p.m. the day before Father's Day until 6:00 p.m. the day of Father's Day.

h. One evening from 5:30 p.m. until 8:30 p.m. during the week each child's birthday and the plaintiff's birthday.

i. Summer visitation for a period of four continuous weeks. Plaintiff is to provide written notice of those dates to defendant by May 1. The defendant shall have alternate weekend holiday and phone visitation during that period. However, each party shall be allowed two weeks per year of uninterrupted possession of the children for the purposes of vacation, provided that the same does not interfere with holiday visitation as set forth above. Each party shall provide the other, in writing, notice of that two week period at least thirty (30) days in advance.

j. Should either or both of the children be involved in year-round school, then plaintiff shall have visitation for two two week periods, with written notice of those dates to the defendant at least thirty (30) days prior to visitation. Defendant would then have holiday and phone visitation during that time.

k. Reasonable telephonic visitation before 8:00 p.m.

l. Other times as agreed by the parties.

3. The plaintiff should pay child support to defendant at the rate of One Thousand Three Hundred Sixty-One Dollars (\$1,361.00) per month, which support shall continue until the children attain the age of eighteen (18) years. Said support is based upon the plaintiff's monthly income of Nine Thousand Five Hundred Forty-Two Dollars (\$9,542.00) per month, which income includes wages, benefits, bonuses, and insurance benefits amortized over the year. Further, said sum acknowledges that defendant is currently unemployed and pursuing a college degree, and no income is imputed to her. The support is calculated pursuant to the plaintiff's worksheet, which is attached hereto and designated as "Exhibit A" and incorporated herein by reference.

4. The plaintiff, in addition to the foregoing base child support, shall reimburse defendant one-half of all day care expenses paid by defendant while defendant is working or attending classes, at an accredited educational institution. If any actual expense attendant to the day care ceases to be incurred, the plaintiff may suspend making monthly payment of that expense while it is not being incurred without obtaining a modification of the child support order. Further, each party is ordered to pay fifty percent, or one-half of the costs of private school tuition through high school, which sum shall be in addition to base child



~~Plaintiff should maintain~~  
insur5: If the plaintiff falls in arrears in his child support obligation, the defendant shall be entitled to mandatory income withholding relief pursuant to Utah Code Annotated, Section 62A-11-401, et. seq.

6. Plaintiff should be awarded the right to claim the parties' children as dependents for the purposes of the calculation of his state and federal income tax deductions.

7. Plaintiff shall continue to maintain health insurance for the benefit of the minor children of the parties, as available through his employment, during the period of minority of each child. Any insurance premium costs paid by plaintiff for the minor children and attributable to the minor children, shall be deductible from base child support pursuant to statute. Defendant shall pay all routine medical and dental expenses, including routine office visits, physical examinations, immunizations, and prescriptions. The parties will share non-routine expenses not covered by insurance, with plaintiff paying 60% of that cost and defendant paying 40%.

8. Plaintiff should maintain in full force and effect, a policy of insurance on his life, having a benefit payable on death in the minimum sum of One Hundred Thousand Dollars (\$100,000.00), with the parties' minor children named as beneficiaries until the children have attained the age of eighteen (18) years or graduated from high school in due course, whichever last occurs. Further,


[REDACTED]

plaintiff should maintain in full force and effect, a policy of insurance on his life, having a benefit payable on death in the minimum sum of One Hundred Thousand Dollars (\$100,000.00), during the period in which alimony is paid by plaintiff to defendant. The defendant should be named as the beneficiary thereof until the termination of alimony.

9. The bonds previously purchased for the minor children should be held in a formal trust agreement for the education and benefit of the minor children, and preserved and utilized for their education and benefit.

10. Based upon the current income of the plaintiff and the lack of income on the part of defendant, and based upon the defendant's pursuit of an educational degree, and the prior health conditions of the defendant, and defendant's ability to then support herself at the end of that educational term, it is reasonable, necessary, and proper that the plaintiff pay alimony to defendant at the rate of One Thousand Five Hundred Dollars (\$1,500.00) per month for a period of twenty-four (24) months, commencing June 1, 1992. Thereafter, the alimony shall reduce to the sum of One Thousand Dollars (\$1,000.00) per month for an additional twenty-four months. At the end of the four year period, the alimony should terminate. Further, the alimony should terminate upon the death of the defendant, or defendant's remarriage or cohabitation, whichever first occurs.

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11. The personal property of the parties acquired during their marriage, and prior to the parties' separation should be divided one-half to each. The parties should toss a coin, and the party winning the coin toss, should choose the first item, and the parties should then alternate and take turns choosing each personal property item until all items of personalty acquired by the parties during their marriage are divided, one-half to each.

12. Plaintiff should be awarded his Ford Explorer and defendant should be awarded her Dodge Caravan.

13. The parties have previously divided all marital banking accounts, and each party should be awarded any monies or accounts currently in his or her own name.

14. The parties real property has previously been sold, and the proceeds divided. However, there also exists a receivable, known as the Troy House receivable, which should be awarded to defendant for her additional support. The defendant should also be awarded one-half of all monies received by the parties from the Troy House receivable, since the parties' separation.

15. That the costs of the storage of the personal property previously stored, and until the property is divided, should be divided one-half to each, and defendant should receive no reimbursement for the costs previously withheld by plaintiff.

16. Each party should be awarded one-half of the plaintiff's IRA, 401K, ASARCO retirement, and Kennecott retirement, as of March 24, 1992. Any necessary Qualified Domestic Relations Orders

should issue to divide those funds.

17. Plaintiff should pay the debts and obligation owing to Redi Credit and the 1991 tax obligation.

18. Defendant should have her maiden name returned, and she should be known hereafter as "Mary E. Fox."

19. Plaintiff should contribute the sum of One Thousand Dollars (\$1,000.00) to defendant's attorney's fees and costs incurred in this matter.

20. Each party should execute and deliver any necessary documents to transfer the title and ownership of the property of the parties pursuant to the decree entered in this action.

BASED UPON the foregoing findings of fact, the court now makes and enters the following:

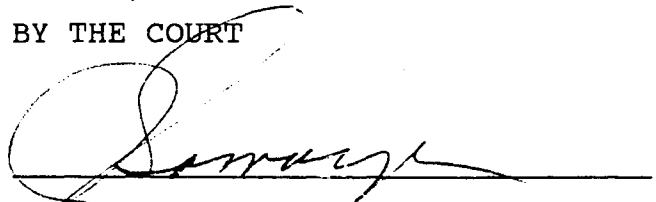
CONCLUSIONS OF LAW

1. The parties have previously been divorced by a Decree of Divorce dated February 18, 1992.

2. A supplemental Decree of Divorce should be granted in conformance with the foregoing Findings of Fact.

DATED THIS 21 day of August, 1992.

BY THE COURT



JAMES S. SAWAYA  
District Court Judge

Approved as to form and content:

\_\_\_\_\_  
EPHRAIM H. FANKHAUSER  
Attorney for Defendant  
DATED: \_\_\_\_\_

CERTIFICATE OF HAND-DELIVERY

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

EPHRAIM H. FANKHAUSER  
Attorney for Defendant  
243 East 400 South  
Suite 200  
Salt Lake City, Utah 84111

on the 7 day of August, 1992.

Richelle Hamner  
Secretary

000255

## **ADDENDUM "B"**

KELLIE F. WILLIAMS #3493  
Attorney for Plaintiff  
CORPORON & WILLIAMS, P.C.  
310 South Main Street  
Suite 1400  
Salt Lake City, Utah 84101  
(801) 328-1162

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

---

MARCUS P. RANDOLPH,

Plaintiff,

-vs-

MARY E. RANDOLPH,

Defendant.

SUPPLEMENTAL DECREE OF DIVORCE

Civil No. 914902308DA

Judge James S. Sawaya

2172136

---

THE ABOVE-CAPTIONED MATTER having come on regularly for trial before the above-entitled Court on March 24, 1992, at the hour of 10:00 o'clock a.m., the Honorable James S. Sawaya, District Court Judge presiding, and the plaintiff being present in person and being represented by counsel, Kellie F. Williams, and the defendant being present in person and being represented by counsel, E. H. Fankhauser, and the court having heard the testimony of the parties, and having received exhibits, and having taken the matter under advisement, and a bifurcated Decree of Divorce being previously entered on February 18, 1992, and the court having issued it's findings and order to the parties' counsel on June 22, 1992, at the hour of 11:30 a.m.; and the court

having heretofore rendered it's Findings of Fact and Conclusions of Law; now, therefore, and for good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Defendant is hereby awarded the permanent physical and legal care, custody, and control of the parties' minor children.

2. Plaintiff is hereby awarded visitation with the minor children of the parties as follows:

a. Alternate weekends from Friday at 6:00 p.m. until Sunday at 6:00 p.m.

b. Midweek visits, each Wednesday from 5:30 p.m. until 8:30 p.m.

c. Christmas visitation on Christmas Day, beginning at 1:00 p.m. and continuing for a period equal to one-half of the children's total school vacation.

d. Thanksgiving visitation in even years, which Thanksgiving visitation shall commence Wednesday at 6:00 p.m. until Sunday at 6:00 p.m. and Easter visitation in odd years, which Easter holiday shall be defined as from Friday from 6:00 p.m. until Sunday at 6:00 p.m.

e. The parties shall alternate the other holidays, and plaintiff shall have alternate holiday visitation on New Year's Day, Martin Luther King Day, President's Day, Memorial Day, July 4th, July 24th, and Labor Day. The visitation shall begin 6:00 p.m. the day before the holiday until 6:00 p.m. on the day of the holiday.



f. Holiday visitations take precedence over weekend visitation and no changes shall be made to the regular rotation of the alternating weekend schedule.

g. On Father's Day from 6:00 p.m. the day before Father's Day until 6:00 p.m. the day of Father's Day.

h. One evening from 5:30 p.m. until 8:30 p.m. during the week each child's birthday and the plaintiff's birthday.

i. Summer visitation for a period of four continuous weeks. Plaintiff is to provide written notice of those dates to defendant by May 1. The defendant shall have alternate weekend holiday and phone visitation during that period. However, each party shall be allowed two weeks per year of uninterrupted possession of the children for the purposes of vacation, provided that the same does not interfere with holiday visitation as set forth above. Each party shall provide the other, in writing, notice of that two week period at least thirty (30) days in advance.

j. Should either or both of the children be involved in year-round school, then plaintiff shall have visitation for two two week periods, with written notice of those dates to the defendant at least thirty (30) days prior to visitation. Defendant would then have holiday and phone visitation during that time.

k. Reasonable telephonic visitation before 8:00 p.m.

l. Other times as agreed by the parties.

3. Plaintiff is ordered to pay child support to defendant at the rate of One Thousand Three Hundred Sixty-One Dollars (\$1,361.00) per month, which support shall continue until the children attain the age of eighteen (18) years. In addition, plaintiff is ordered to reimburse defendant one-half of all day care expenses paid by defendant while defendant is working or attending classes, at an accredited educational institution. If any actual expense attendant to the day care ceases to be incurred, the plaintiff may suspend making monthly payment of that expense while it is not being incurred without obtaining a modification of the child support order. Each party is ordered to pay one-half of the cost of private school tuition through the children's high school education.

4. Defendant is entitled to mandatory income withholding pursuant to Utah Code Annotated, Section 62A-11-401, et. seq., if plaintiff falls in arrears in his child support obligation.

5. Plaintiff is hereby awarded the right to claim the parties' minor children as dependents for the purposes of the calculation of his state and federal income tax deductions.

6. Plaintiff is ordered to continue to maintain health insurance for the benefit of the minor children as available through his employment, during the period of minority of each child. Any insurance premium costs paid by plaintiff for the minor children and attributable to the minor children, shall be deductible from base child support pursuant to statute. Defendant

is ordered to pay all routine medical and dental expenses, including routine office visits, physical examinations, immunizations, and prescriptions. The parties are ordered to share non-routine expenses not covered by insurance, with plaintiff paying 60% of that cost and defendant paying 40%.

7. Plaintiff is ordered to maintain in full force and effect a policy of insurance on his life having a benefit payable on his death, in the minimum sum of One Hundred Thousand Dollars (\$100,000.00), naming the minor children of the parties as beneficiaries until the children have attained the age of 18 years or graduated from high school in due course, whichever last occurs. Further, the plaintiff is ordered to maintain in full force and effect, a policy of insurance on his life having a benefit payable on death in the minimum sum of One Hundred Thousand Dollars (\$100,000.00), with the defendant named as beneficiary thereof, which policy shall remain in effect until the termination of alimony.

8. The bonds previously purchased for the minor children are ordered to be held in a formal trust agreement for the education and benefit of the minor children and preserved and utilized for their education and benefit.

9. Plaintiff is ordered to pay alimony to defendant at the rate of One Thousand Five Hundred Dollars (\$1,500.00) per month, for a period of Twenty-Four (24) months, commencing June 1, 1992. Thereafter, the alimony shall reduce to the sum of One Thousand

Dollars (\$1,000.00) per month, for an additional Twenty-Four (24) months. At the end of the four year period, alimony shall terminate, or upon the death of the defendant, defendant's remarriage, or cohabitation, whichever first occurs.

10. The personal property of the parties acquired during their marriage, and prior to the parties' separation shall be divided one-half to each. The parties are ordered to toss a coin, and the party winning the coin toss should choose the first item, and the parties shall then alternate and take turns choosing each personal property item until all items of personalty acquired by the parties are divided.

11. Plaintiff is hereby awarded his Ford Explorer and defendant is hereby her Dodge Caravan.

12. Each party is awarded any other monies or accounts currently held in his or her name.

13. Defendant is hereby awarded the Troy House receivable.

14. Each party is ordered to pay one-half of the past and ongoing costs of the storage of the personal property of the parties.

15. Each party is awarded one-half of the plaintiff's IRA, 401K, ASARCO retirement, and Kennecott retirement from the date of the parties marriage and up until March 24, 1992. Any necessary Qualified Domestic Relations Orders shall issue to divide those funds.

16. Plaintiff is ordered to pay the Redi Credit debt and the 1991 tax obligation.

17. Plaintiff is ordered to pay One Thousand Dollars (\$1,000.00) to defendant for her attorney's fees and costs incurred in this matter.

18. Defendant is hereby restored her maiden name, and she shall be known hereafter as "Mary E. Fox."

19. Each party is hereby ordered to execute and deliver any necessary documents to transfer the title and ownership of the property of the parties pursuant to the Decree entered in this action.

DATED THIS 21<sup>st</sup> day of Aug, 1992.

BY THE COURT

  
JAMES S. SAWAYA  
District Court Judge

Approved as to form and content:

\_\_\_\_\_  
EPHRAIM H. FANKHAUSER  
Attorney for Defendant  
DATED: \_\_\_\_\_

CERTIFICATE OF HAND-DELIVERY

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

EPHRAIM H. FANKHAUSER  
Attorney for Defendant  
243 East 400 South  
Suite 200  
Salt Lake City, Utah 84111

on the 1 day of August, 1992.

Richelle Hammer

Secretary

## **ADDENDUM "C"**

E. H. FANKHAUSER  
Bar No. 1032  
Attorney for Defendant  
243 East 400 South, Suite 200  
Salt Lake City, Utah 84111  
Telephone: 534-1148

SALT LAKE COUNTY  
By S. P. Dinsley  
Deputy Clerk

---

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

---

MARCUS P. RANDOLPH,  
Plaintiff,

vs.

MARY E. RANDOLPH,  
Defendant.

\*

\*

ORDER ON COMMISSIONER'S  
RECOMMENDATIONS

\*

Civil No. 914902308 DA  
Judge Sawaya

\*

\*

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Plaintiff's Verified Motion to Withdraw Stipulation, Motion to Strike and Motion to Enforce Visitation came on for hearing at a regular term of the above entitled Court, pursuant to Notice, May 29, 1992 before Domestic Relations Commissioner, Sandra N. Peuler. Plaintiff was present in person and represented by his Attorney, Kelly F. Williams. Defendant was present in person and represented by her Attorney, E. H. Fankhauser. The Court, having received the proffers of testimony and arguments of counsel, took the matter under advisement. The Domestic Relations Commissioner, after



~~review of the pleadings filed in this matter, being advised in the~~  
premises, made recommendations pursuant to written Minute Entry  
dated June 4, 1990, to-wit:

IT IS HEREBY ORDERED AS FOLLOWS:

1. Plaintiff's Motion to Strike having been withdrawn by Plaintiff, no recommendation is entered thereon and the Motion to Strike is stricken.

2. The Plaintiff's Motion to Withdraw his Stipulation to Custody should be denied. Although no ruling has been issued by the Court from the trial held in this matter, evidence on all disputed matters has been received by the trial Judge. Plaintiff's Motion is therefore untimely. In addition, Plaintiff's Motion is prejudicial to the Defendant, who relied on the Stipulation for Custody in preparing and presenting her case at trial.

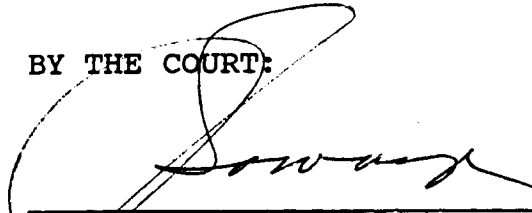
3. Pending a ruling by the Trial Court on Plaintiff's request for summer visitation, the Plaintiff should be awarded thirty (30) continuous days of summer visitation, consistent with the Temporary Order entered in this matter. Consistent with Plaintiff's request, the visitation should commence on June 13, 1992.

4. Both parties should be and are hereby enjoined from making derogatory remarks about the other in the presence of the children and both parties should be enjoined and are hereby enjoined from


~~discussing custody or visitation disputes with the children.~~

DATED this 23 day of June, 1992.

BY THE COURT:

  
\_\_\_\_\_  
JAMES S. SAWAYA  
DISTRICT JUDGE

APPROVED:

  
\_\_\_\_\_  
SANDRA N. PEULER  
DOMESTIC RELATIONS COMMISSIONER

Pursuant to Article 4 "DOMESTIC RELATIONS" Section 6-401(2) (E), Utah Code of Judicial Administration, each party shall have ten (10) days from the date of the recommended Order made by Minute Entry to file written objections thereto; and further, the recommendations of the Commissioner shall be in effect as an Order.

**MAILING CERTIFICATE**

I certify a true and correct copy of the foregoing was mailed to Kellie F. Williams, Attorney for Plaintiff, 310 South Main Street, Suite 1400, Salt Lake City, Utah 84101 in accordance with Rule 4.504(2), Code of Judicial Administration, on this 12<sup>th</sup> day of June, 1992.

  
\_\_\_\_\_

## **ADDENDUM "D"**

KELLIE F. WILLIAMS #3493  
Attorney for Plaintiff  
CORPORON & WILLIAMS, P.C.  
310 South Main Street  
Suite 1400  
Salt Lake City, Utah 84101  
(801) 328-1162

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

MARCUS P. RANDOLPH,

Plaintiff,

-vs-

MARY E. RANDOLPH,

Defendant.

CHILD SUPPORT OBLIGATION  
WORKSHEET (Sole Custody)

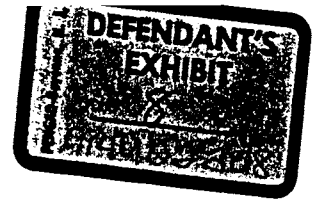
Case No. 914902308

Judge James S. Sawaya

**BASE AWARD CALCULATION:**

	<u>Mother</u>	<u>Father</u>	<u>Combined</u>
Number of Children			2
Gross Monthly Income	\$ 0	\$9,542	
Previously Ordered & Paid Alimony	\$ 0	\$ 0	
Previously Ordered Child Support	\$ 0	\$ 0	
Present Family Obligation	\$ n/a	\$ n/a	
Adjusted Gross Monthly Income	\$ 0	\$9,542	\$ 9,542
Base Combined Child Support Obligation			\$ 1,361
Proportionate Share	0%	100%	
Share of Base Child Support	\$ 0	\$1,361	
Children's Portion of Medical and Dental Insurance Premiums	\$ --	\$ --	
Day Care Expenses			\$ 0
<b>BASE CHILD SUPPORT AWARD</b>		\$1,361	
<b>ADJUSTED BASE CHILD SUPPORT AWARD</b>		\$1,361	
<b>Adjusted Base Child Support Award Per Child</b>			\$ 681

## **ADDENDUM "E"**



MONTHLY EXPENSES

Defendant, Mary Randolph and 2 minor children

Rent	750.00
Renter's Insurance	20.00
Food and household supplies (average \$125.00 per week)	540.00
Utilities	75.00
Telephone	50.00
Laundry and cleaning	50.00
Clothing	150.00
Medical/Defendant's therapy & medication (not covered by insurance)	200.00
Dental	50.00
Insurance - Medical Premiums (COBRA)	138.00
(*) Child care (1/2 of \$260 average)	130.00
School - Private school for children Books, etc. - Cosgriff	140.00
Entertainment, travel, recreation	200.00
Incidentals (grooming, gifts, etc)	161.00
Auto expense (estimated)	150.00
Other Expenses	394.00
Defendant's College - U of U	368.00
Newspaper	16.00
Magazines	10.00
<hr/>	
TOTAL	\$ 3,198.00

(\*) Summer camp \$650.00 each child  
8 weeks comparable to child care

## **ADDENDUM "F"**



**MARCUS P. RANDOLPH v. MARY E. RANDOLPH**  
**Civil No. 914902308DA**

**ALLOCATION OF EARNINGS / PLAINTIFF'S INCOME**

Plaintiff's Gross Annual Income	\$114,500
Less Alimony (\$1,100 per month)	13,200
Less Personal Exemption	<u>2,050</u>
<b>Taxable Annual Income</b>	<b>\$ 99,250</b>
 Estimated Annual Federal and State Income Tax (\$99,250 x .35)	 \$ 34,738
Annual FICA and Medicare	5,101
<b>Total Annual Deductions</b>	<b><u>(\$ 39,839)</u></b>
<b>NET ANNUAL INCOME</b>	<b>\$ 59,411</b>
 Annual Debts and Child Support:	
Child Support (\$1,361 per month)	\$ 16,332
Zions Bank / car loan (\$648 per month)	7,776
Zions Bank / overdraft (\$250 per month)	3,000
<b>Total Annual Debts and Child Support</b>	<b>\$ 27,108</b>
 Net Annual Income (after payment of alimony @ \$1,100/mo)	
Less Total Annual Debts and Child Support	\$ 59,411.00 <u>-\$ 27,108.00</u>
<b>Actual Annual Income Available to Plaintiff</b>	<b>\$ 32,303.00</b>
	: <u>12</u>
<b>Actual Monthly Income Available to Plaintiff</b>	<b><u>\$ 2,691.92</u></b>

**Monthly Income Available to Defendant:**

Alimony	\$1,100
Child Support	\$1,361
Receivable	<u>\$ 200</u>
	<b>\$2,661</b>

**ADDENDUM "G"**

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

---

MARCUS P. RANDOLPH,

Plaintiff,

-vs-

MARY E. RANDOLPH,

Defendant.

VERIFIED MOTION TO WITHDRAW  
STIPULATION OF PLAINTIFF

Civil No. 914902308DA

Judge James S. Sawaya

---

COMES NOW THE PLAINTIFF, by and through counsel, Kellie F. Williams, pursuant to Rule 4-501 of the Code of Judicial Administration, and hereby moves the above-entitled court to enter an order permitting plaintiff to withdraw his stipulation to the issue of custody in the above captioned matter.

SAID MOTION is made for the following reasons:

1. That the plaintiff originally filed a Complaint for Divorce requesting custody of the parties' two minor children, Kira, whose date of birth is December 5, 1981, and Erika, whose date of birth is June 2, 1986. Prior to an evaluation being completed the plaintiff withdrew his request for custody and stipulated at the time of trial that defendant may be awarded the

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~~Care, custody and control of the children. Plaintiff withdrew~~  
his request for custody and entered into the stipulation based upon faulty premises. One premise was that the defendant, who has previously been involuntarily hospitalized for her mental illness, had stabilized with medication and was able to care adequately for the children. A second premise was that the defendant, who, except for Christmas, had been permitting visitation, would not inhibit visitation between the plaintiff and the minor children. Thirdly, the stipulation was premised upon the fact that the plaintiff had formed a new relationship with a woman, to whom he is now married, and with whom the children were not acquainted and plaintiff was concerned that it would be difficult for the children to bond with a step-mother, under the circumstances.

2. The defendant suffers from an incurable mental illness that is currently being treated with Lithium Carbonate. Her symptoms have included irrational acts, an inability to make decisions, and paranoia. While the defendant is under prescription for Lithium, plaintiff understands that if she does not continue to take it on a regular basis, it will bring on another episode.

Defendant's first episode occurred in the middle of January 1990. At that time, she became deeply religious and began attending mass at least once a day, spent large quantities of money on religious ornaments, ignored the children and her family responsibilities and became very difficult to communicate with.

Her condition worsened until February when she began psychiatric counseling. The recommendation was that she be committed to a psychiatric hospital. She voluntarily consented, reluctantly, and was admitted to McLean's Hospital in Belmont, Massachusetts, in February. She was diagnosed as manic, treated with antipsychotics, and released six weeks later. Her ongoing treatment upon release was to continue monthly sessions with a psychiatrist, take daily medication of Lithium, avoid stress and get a lot of sleep.

Defendant's second manic episode occurred in February 1991, after she began experimenting with reduced dosage of Lithium. The defendant commenced becoming manic and completely discontinued taking the Lithium. She also quit taking her thyroid medication, called Synthroid, which could have been life-threatening. She began skipping her psychiatric counseling. On March 18, without warning, she drove to Denver with the children, having left without packing any clothes for the children. Plaintiff was contacted by defendant's family, who asked that plaintiff pick up defendant immediately because her conduct was upsetting a sister who was then eight months pregnant. Plaintiff went to Denver to pick up his family. Upon returning to Salt Lake City, defendant immediately left the household and spent several nights in a women's shelter with one of the minor children, claiming she was afraid to go home because plaintiff would beat her. That has never occurred. She refused to be admitted to the hospital, but agreed to a counseling session with

~~her psychiatrist on March 22, 1992. She was thereafter admitted to~~  
Western Institute of Neuropsychology and remained there for  
several days. During that time she refused all medication.  
Further, while she was at Western Institute she was evaluated by  
two psychiatrists, both of whom recommended that she be required  
to submit to a competency hearing. The bases for that  
recommendation included a physical attack on her doctor and the  
hospital staff, an attempt to light a garbage can on fire, her  
continual refusal to take medication and physical violence which  
required her to be placed in physical restraints and isolation.  
On April 5, after a hearing before the Third District Court  
Mental Health Commissioner, defendant was involuntarily committed  
to the psychiatric ward at the University of Utah Hospital for a  
period of 30 days. Upon first being committed and despite a court  
order to force medication upon her, defendant refused medication  
and was required to be restrained and injected with Haldol.  
After a period of approximately one week she recommenced taking  
Lithium and was subsequently released.

3. The parties were divorced pursuant to a bifurcated  
divorce proceeding on February 18, 1992. Thereafter, the  
plaintiff introduced the children to his now wife and made  
defendant aware of the expected permanency of that relationship.  
This matter proceeded to a trial, including testimony, on March  
24, 1992.

4. By the time of the trial, the plaintiff began having  
concerns regarding the defendant's mental health and her

willingness to permit plaintiff access to and visitations with the children. Due to the previous stipulation entered into regarding custody, plaintiff pursued joint legal custody of the children but was silent regarding physical custody of the children.

5. Since the parties' divorce and since the defendant's discovery that the plaintiff had a new relationship which has now resulted in marriage, the defendant has become increasingly difficult and irrational. Plaintiff believes that the defendant is unwilling to accept the fact that the children are developing a relationship with plaintiff's spouse, Lee. Plaintiff believes that the defendant is attempting to do everything she can to prevent the children from being with plaintiff. For example:

a. Defendant has denied plaintiff visitation rights with the minor children thereby requiring plaintiff to obtain a court order.

b. Defendant has failed to have the children ready for plaintiff at the agreed time and has failed to be at her home when plaintiff was required to return the children, thereby causing distress to the minor children.

c. Defendant has repeatedly been verbally abusive to plaintiff, and his wife, in the presence of the minor children and thereby causing the children emotional distress. For example, defendant has made derogatory statements to or about plaintiff in front of the children such as, "Did you know that you have little brothers and sisters all over South America?"

~~Your father did that and I just found out about it," and "Does~~  
she give good blow jobs?" Additionally, defendant recently left  
a message on plaintiff's telephone answering machine laughing and  
calling plaintiff's wife "plain and uncouth". The children can  
be heard protesting in the background. On other occasions  
defendant left insulting messages on plaintiff's answering  
machine while the children could be heard protesting in the  
background.

d. Defendant has required the minor child Kira  
Randolph to attend counseling sessions, over Kira's objection,  
stating that Kira must go because of plaintiff's new  
relationship.

e. Defendant has caused the minor children emotional  
distress by threatening to cut off plaintiff's visitation rights.  
The minor child Kira has discussed her distress about not having  
enough time with her father and with her counselor and her  
father.

f. Defendant has stated that she will not allow  
visitation if plaintiff or his wife discuss visitation or custody  
issues with the minor child Kira.

g. Defendant has told the minor children that she will  
move the Denver, Colorado, so that "I can have you all to  
myself," and to make visitation with plaintiff as difficult as  
possible. This has upset the minor children.

h. Defendant has repeatedly acted in a manner to  
intentionally upset the minor children when plaintiff picks them



up, and by the defendant from scheduled visitations. Defendant has left messages on plaintiff's answering machine insulting and demeaning plaintiff's wife.

6. The minor children have been greatly upset by defendant's continuing antagonistic and irrational behavior. Both children have stated their fears that their mother will keep them from their father.

7. Plaintiff has observed the minor children interact with his wife Lee. Both children are very comfortable and affectionate with plaintiff's wife. The minor children have expressed to plaintiff, and to others, their excitement and happiness about plaintiff's recent marriage and have stated that they are glad to have Lee as part of their family.

8. The plaintiff and his current spouse, Lee, who married April 10, have discussed the situation and have agreed that it is in the best interest of the children that plaintiff request custody of the children. Plaintiff believes that defendant is not mentally or emotionally stable and that she is unable to control her emotions in dealing with her current circumstances, which results in emotional distress to the children. In addition, the defendant will continue to attempt to prevent plaintiff from having regular and healthy visits with the children.

9. Plaintiff believes that the children are being harmed, emotionally, by the irrational and unstable acts and mania of the defendant. Plaintiff firmly believes that there should be a

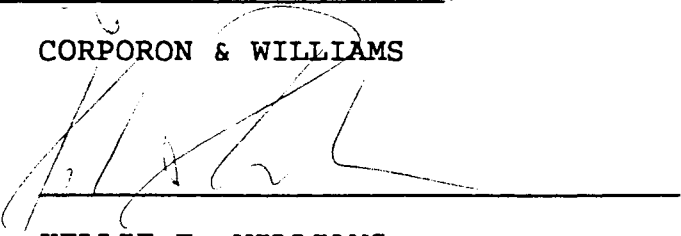
custody<sup>2</sup> evaluation performed in this matter, including psychological evaluations, and that this Court should have an opportunity to make a determination as to the appropriate placement of the children and what is in the children's best interest.

10. While conducting a custody evaluation and pursuing the custody action will require an additional court proceeding, it will not negate or invalidate the trial previously held relating to financial and property issues. Therefore, the defendant will not have been harmed by the previous trial proceeding.

WHEREFORE, the plaintiff respectfully requests that the Court permit him to withdraw his stipulation to physical custody in defendant, and that he be permitted to move the Court for a custody evaluation and to proceed accordingly.

DATED THIS 16<sup>th</sup> day of April, 1992.

CORPORON & WILLIAMS

  
KELLIE F. WILLIAMS  
Attorney for Plaintiff

000167

STATE OF UTAH : ss.  
COUNTY OF \_\_\_\_\_ )

MARCUS P. RANDOLPH, being first duly sworn upon oath, deposes and states as follows: That he is the plaintiff to the above-captioned matter; that he has read the foregoing Motion to Withdraw Stipulation of Plaintiff, and that he understands the contents thereof, and that the same is true of his own personal knowledge, except as to those matters stated upon information and belief, and as to those matters, he believes the same to be true.

Marcus P. Randolph

MARCUS P. RANDOLPH  
Plaintiff

DATED: 4/16/92

ON THE 16 day of April, 1992, personally appeared before me, the undersigned notary, MARCUS P. RANDOLPH, the signer of the foregoing MOTION TO WITHDRAW STIPULATION OF PLAINTIFF, who duly acknowledged to me that he signed the same voluntarily and for its stated purpose.



Tracy Stratton

NOTARY PUBLIC  
Residing at Salt Lake County

My Commission Expires:

4/25/95

000168

**CERTIFICATE OF MAILING**

\_\_\_\_\_, ~~Attorney for Plaintiff~~  
CORPORATION HEREBY CERTIFY that I am employed in the offices of  
Corporon & Williams, attorneys for the plaintiff herein, and that  
I caused the foregoing VERIFIED MOTION TO WITHDRAW STIPULATION OF  
PLAINTIFF to be served upon defendant by placing a true and  
correct copy of the same in an envelope addressed to:

EPHRAIM H. FANKHAUSER  
Attorney for Defendant  
243 East 400 South  
Suite 200  
Salt Lake City, Utah 84111

and depositing the same, sealed, with first-class postage pre-  
paid thereon, in the United States mail at Salt Lake City, Utah  
on the 17<sup>th</sup> day of April, 1992.

Martina Williams  
Secretary

000103

## ADDENDUM "H"

### C. CPR-DR 3-102 Violations

Gillingham next contends that the trial court erred in concluding that his agreement to divide fees with Jennings was an impermissible fee-splitting agreement. He argues that attorneys may disburse fees paid by their clients as they choose, and further points out that APR 9(c)(2) permits payment of Rule 9 interns. He reasons that APR 9(c)(2) would be abrogated if dividing a contingent fee with a Rule 9 intern constituted impermissible fee-splitting.

DR 3-102 prohibits a lawyer from sharing fees with a nonlawyer except under certain narrow exceptions. The purpose of this rule is to prevent the possibility of control of a lawyer by a nonlawyer. See C. Wolfram, *Modern Legal Ethics* 510 (1986). On its face, the rule does prohibit dividing fees with a Rule 9 intern, since Rule 9 interns are "nonlawyers."

Although the issue presented here is an important one not yet decided by our courts, it has not been adequately briefed by either party. Thus, because as discussed below, we need not resolve this issue in deciding this appeal, we decline to decide whether DR 3-102 prohibits sharing fees with a Rule 9 intern.

### D. Damages

[4] Gillingham contends that even if sharing his contingent fee with Jennings did constitute impermissible fee-splitting, the trial court erred in concluding both that the fee-splitting affected his representation of the plaintiffs and that there was resultant damage to them. We agree.

The trial court found that the plaintiffs were damaged, reasoning that "disclosure [the trial judge of] the true rate paid to Mr. Jennings more probably than not would have resulted in [the trial judge] awarding greater attorneys' fees to the plaintiff than were otherwise obtained...." The court then reduced Gillingham's contingent fee by 25 percent. This was based on the court's determination that "each plaintiff on a more probable than not basis could have received a sum equal to a \$25-30/hr. charge for Mr. Jen-

nings' services instead of an award based on \$20/hr."

When courts are measuring contract damages, uncertainty as to the extent or amount of damages will not preclude recovery of damages where there is no uncertainty as to the existence of damage or as to causation. *Jacqueline's Washington, Inc. v. Mercantile Stores Co., Inc.*, 80 Wash.2d 784, 786, 498 P.2d 870 (1972). The trial judge in the plaintiffs' original action based the award of attorneys' fees on Gillingham's fee affidavit. It is undisputed that this affidavit set forth a reasonable hourly rate for the services of the Rule 9 intern at \$20 per hour and accurately set forth his true hours. The trial court here determined that the trial judge in the previous action would have accepted a higher hourly rate. Because there was no evidence to support this determination, it was purely speculative.

In sum, there is nothing in the record to support the court's conclusion that the later division of fees was the proximate cause of any harm to plaintiffs, nor any evidence of what damage amount might have been sustained. Gillingham's decision to share a portion of his fee appears only to have diminished Gillingham's share of attorneys' fees. We therefore hold that the trial court erred in reducing Gillingham's contingent fee by an additional 25 percent.

In conclusion, we affirm the trial court's allocation of the court-awarded attorneys' fees and computation of the contingent fee but reverse the reduction of the contingent fee by an additional 25 percent.

GROSSE, Acting C.J., and BAKER, J., concur.



57 Wash.App. 707

In re The MARRIAGE OF Laura Lelia STERN, Respondent,

and

Harold Loyd Singleton, Appellant.

No. 22733-5-1.

Court of Appeals of Washington,  
Division 1.

April 30, 1990.

Former wife brought motion to modify decree of dissolution, seeking sole legal and residential custody of children. The Superior Court, King County, Robert Dixon, J., entered a decree of modification in favor of wife. Former husband appealed. The Court of Appeals, Baker, J., held that: (1) trial court finding that joint custodial arrangement was not harmful as it existed prior to spanking incident was supported by the evidence, (2) trial court finding that joint custodial arrangement was no longer workable was supported by the evidence, and (3) grant of income-proportionate contribution to childrens' private education expenses was not supported by the evidence.

Affirmed in part, reversed and remanded in part.

### 1. Appeal and Error $\S$ 766

The appropriate remedy for noncompliance with rule which requires a party to set out material portions of challenged finding in its brief or an appendix thereto is sanctions, which may include a refusal to consider the claimed errors. RAP 10.3(g), 10.4(e).

### 2. Appeal and Error $\S$ 740(2), 758.3(9)

The intended purpose of the rules which require separate assignments of error for each challenged finding, and require party to set out material portions of challenged finding in his brief or an appendix thereto, is to add order to and expedite appellate procedure by eliminating the laborious task of searching through the record for such matters as findings claimed

to have been made in error. RAP 10.3(g), 10.4(c).

### 3. Appeal and Error $\S$ 762, 766

Appellate court considered appeal on the merits, despite fact that appellant did not set forth verbatim findings and conclusions in his opening brief, where appellant cured the defect in his reply brief, and appellee offered no evidence suggesting she had been prejudiced by appellant's error. RAP 1.2(b), 10.3(g), 10.4(c), 18.9.

### 4. Divorce $\S$ 164

The courts' powers in a proceeding to modify a decree of dissolution are limited to those which may be inferred from a broad interpretation of the legislation that governs the proceeding.

### 5. Infants $\S$ 19.3(5)

Failure by trial court to make findings that reflect application of each statutorily relevant factor in a proceeding to modify a custody award is error. West's RCWA 26.09.260.

### 6. Divorce $\S$ 303(8)

Trial court finding determined that joint custodial arrangement was not harmful only as it existed prior to former husband's spanking of daughter, despite fact that finding stated that "custodial arrangement established by decree of dissolution" was not harmful to the children, where other findings of fact and conclusions of law confined "not harmful" language in finding to period between entry of original decree and spanking incident. West's RCWA 26.09.200 et seq., 26.09.260.

### 7. Parent and Child $\S$ 2(18)

While parental fitness is a primary concern of the court when considering modification of residential and legal custody, in a joint custody situation the court must be equally mindful of the joint custodial environment and whether changed circumstances have rendered joint custody unworkable and detrimental.

### 8. Divorce $\S$ 303(7)

Trial court finding that joint custodial situation was unworkable and detrimental to children was supported by the evidence, and thus trial court order modifying custo-



dy to establish sole legal and residential custody in mother was affirmed, even though both parties were fit and able parents, where relationship between parties decayed so that children's well-being was at risk, father's spanking of child had left large bruise, father had used a favorite stuffed animal to wipe up urine, and reports of social worker and child psychiatrist indicated that children's care was negatively impacted by differences between parents and that joint parenting was an unworkable option.

#### 9. Parent and Child $\S$ 2(18)

Parental fitness is just one part of the analysis when considering modification of child custody in a joint custody situation. West's RCWA 26.09.260.

#### 10. Parent and Child $\S$ 3.3(10)

Court of Appeals will not substitute its own judgment for that of the trial court in awarding child support where the record shows that the trial court considered all relevant factors and the award was not unreasonable under the circumstances.

#### 11. Divorce $\S$ 303(7)

Trial court order requiring former husband to make income-proportionate contribution to private educational expenses of children was not supported by the evidence, where there were no findings regarding need for private education, no showing of a want of availability of public schooling, and only testimony regarding comparative educational costs was that at time eldest child was in kindergarten and attending school half days it was economically practical to place child in full-day private school program.

#### 12. Parent and Child $\S$ 3.1(12)

There is no per se prohibition against award of private school tuition for a minor child.

#### 13. Parent and Child $\S$ 3.1(12)

Where acceptable public schools are available, and there is no showing of special circumstances justifying the need for private school education, the noncustodial parent should not be obligated to pay for

the private education of his or her minor children.

#### 14. Divorce $\S$ 312.7

Remand was required to determine costs and attorney fees appropriate to be awarded to former wife on former husband's appeal, in action brought by wife seeking modification of joint custodial decree, in which mother had been granted sole legal and residential custody of two children, even though husband's appeal was neither frivolous nor devoid of merit; record was lacking sufficient evidence as to relative needs and abilities of the parties. West's RCWA 26.09.140.

1708David J. Ordell, Seattle, for appellant.  
Lowell Halverson, Halverson & Strong, Seattle, for respondent.

BAKER, Judge.

Harold Loyd Singleton appeals from an order modifying a decree of dissolution and awarding sole legal and residential custody of his two children to his former wife, Laura Lelia Stern. Two primary issues are raised on appeal: (1) was modification of the parties' original joint custody arrangement sufficiently supported by the findings of fact, and (2) was Singleton properly ordered to pay an 1709income-proportionate share of the minor children's private school education expenses. Stern challenges the adequacy of Singleton's appeal on procedural grounds and seeks attorney fees.

#### I. FACTS

The parties had been married for 6 years when their marriage was dissolved in 1986. By agreement, the decree of dissolution established joint legal and residential custody of the two children, who are now aged 6 and 8. During the first year after the decree, residential custody was to alternate quarterly between the parties, with the noncustodial parent having liberal rights of visitation. This arrangement functioned smoothly for approximately 6 months.

In March 1987, Stern noticed a large bruise on the younger daughter's bottom.

#### IN RE MARRIAGE OF STERN

Cite as 789 P.2d 807 (Wash.App. 1990)

Wash. 809

She questioned the elder child and learned that the younger daughter had been spanked by her father. She also learned that the father had used a favorite stuffed animal to wipe up urine from the floor after the younger daughter had wet herself.

Stern confronted Singleton, and he admitted both incidents occurred. During later counselling, he also disclosed two previous incidents in which the stuffed toy was used similarly as a method of toilet training. Singleton assured Stern that such incidents would not recur. He subsequently enrolled in and completed both parenting and anger management classes.

The March incident precipitated a period of vigorous antagonism and noncooperation between the parties. Ultimately, Stern brought this action to modify the decree, seeking sole legal and residential custody. Singleton counter-petitioned, asking the court to award exclusive custody to him because the present joint custodial environment had become detrimental to the children's welfare.

A temporary order was entered which maintained the parties' joint legal custodial status but vested residential care of the children in Stern. After a trial, the court entered 1710a decree of modification in favor of Stern. This appeal followed. We affirm in part, reverse in part, and remand to the trial court for disposition consistent with this opinion.

#### II. PROCEDURE

Stern argues this court should not consider the merits of Singleton's appeal because Singleton failed to comply with RAP 10.3(g) and 10.4(c).

[1] RAP 10.3(g) requires separate assignments of error for each challenged finding and further requires that each assignment include reference to the finding by number. RAP 10.4(c) requires a party to set out the material portions of the challenged finding in its brief or an appendix

1. In 1987 the legislature amended former RCW 26.09.260. However, because the entry of the decree of dissolution in the instant case pre-

thereto. The appropriate remedy for non-compliance is sanctions, which may include a refusal to consider the claimed errors. See *Thomas v. French*, 99 Wash.2d 95, 100, 659 P.2d 1097 (1983).

[2.31] The intended purpose of these rules is to add order to and expedite appellate procedure by eliminating the laborious task of searching through the record for such matters as findings claimed to have been made in error. See *French*, at 100, 659 P.2d 1097. While appellant did not set forth verbatim findings and conclusions in his opening brief, he cured this defect in his reply brief, obviating any potential inconvenience to this court. Moreover, Stern offers no evidence suggesting that she has been prejudiced in any way by appellant's error. Thus, in the exercise of this court's discretion, pursuant to RAP 1.2(b) and RAP 18.9, we will consider the appeal on the merits. Sanctions are not appropriate. See *Wiseman v. Goodyear Tire & Rubber Co.*, 29 Wash.App. 883, 884, 631 P.2d 976 (1981); *Minert v. Harsco Corp.*, 26 Wash. App. 867, 870, 614 P.2d 686 (1980).

#### III. MODIFICATION OF CUSTODY

Singleton contends the trial court erred by modifying the custodial provisions of the decree of dissolution without finding that the custodial environment was detrimental to 1711the physical, mental, or emotional health of the parties' minor children. We disagree.

[4] Procedures relating to the modification of a decree of dissolution are statutorily prescribed. The courts' powers, therefore, are limited to those which may be inferred from a broad interpretation of the legislation that governs the proceeding. In *re Marriage of Soriano*, 44 Wash.App. 420, 421, 722 P.2d 132 (1986); *Arneson v. Arneson*, 38 Wash.2d 99, 227 P.2d 1016 (1951).

RCW 26.09.260<sup>1</sup> sets forth the criteria for modification of custody awards and provides in relevant part that:

dates the amendment, the changes therein are not applicable to this appeal. See RCW 26.09.907.

(1) The court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that modification is necessary to serve the best interests of the child. In applying these standards the court shall retain the custodian established by the prior decree unless:

(a) The custodian agrees to the modification;

(b) The child has been integrated into the family of the petitioner with the consent of the custodian; or

(c) The child's present environment is detrimental to his physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

[5] Compliance with these criteria is mandatory. Failure by the trial court to make findings that reflect the application of each relevant factor is error. *Anderson v. Anderson*, 14 Wash.App. 366, 368, 541 P.2d 996 (1975), *review denied*, 86 Wash.2d 1009 (1976); *In re Marriage of Murray*, 28 Wash.App. 187, 622 P.2d 1288 (1981); *In re Marriage of Raugust*, 29 Wash.App. 53, 627 P.2d 558 (1981). In the context of joint custody, the inquiry under the statute is in part whether there has been a change in circumstance of the "joint custodians as established by the decree". *In re Marriage of Murphy*, 48 Wash.App. 196, 198-99, 737 P.2d 1319 (1987).

The primary concern of the courts in custody matters is always the welfare of the child. *In re Rankin*, 76 Wash.2d 533, 537, 458 P.2d 176 (1969). Custodial changes are viewed as highly disruptive for the children. *In re Marriage of Roorda*, 25 Wash.App. 849, 851, 611 P.2d 794 (1980). Both statute and case law demonstrate a strong presumption in favor of custodial continuity and against modification. RCW 26.09.200 et seq.; *In re Marriage of Thompson*, 32 Wash.App. 418, 421, 647

P.2d 1049 (1982); *Roorda*, at 851, 611 P.2d 794; *Anderson*, at 368, 541 P.2d 996.

[6] In the instant case, whether or not the trial court set forth findings which sufficiently reflect the mandate of RCW 26.09.260 turns largely upon the meaning of finding of fact 1.12 which provides:

The Court finds that the custodial arrangement established by the Decree of Dissolution is not harmful to the physical, mental or emotional health of the children.

Singleton argues that this finding is at odds with the trial court's decision to award custody to Stern. He asserts that finding 1.12 must be read to negate the requirement that the court find a detriment as set forth in RCW 26.09.260. This interpretation fails, however, to consider the context within which the finding was made and fails to consider the findings in their entirety. Although finding of fact 1.12 when examined by itself could be read as an assessment of the joint custodial relationship in the present tense, when the finding is read in context, it is clear that the trial court was not endorsing the present state of the joint custodial environment.

It is well established that the interpretation or construction of findings of fact and conclusions of law presents a question of law for the court. *Callan v. Callan*, 2 Wash.App. 446, 448, 468 P.2d 456 (1970). In *Callan* an action was brought to determine obligations under a divorce decree. The question presented involved the interpretation of language found in two paragraphs of the decree. This court stated:

The general rules of construction applicable to statutes, contracts and other writings are used with respect to findings, conclusions and judgment. These rules include the rule that the intention of the court is to be determined from all parts of the instrument, and that the judgment must be read in its entirety and must be construed as a whole so as to give effect to every word and part, if possible. The authorities ... refer to two canons of construction, here particularly pertinent (1) that the court is not confined to ascer-

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taining the meaning of a single word or phrase without regard to the entire judgment, and, if necessary, the judgment roll, and (2) that provisions in a judgment that are seemingly inconsistent will be harmonized if possible.

(Citations omitted.) *Callan*, at 448-49, 468 P.2d 456. We added "[i]t is not to be assumed that a court intended to enter a judgment with contradictory provisions and thus impair the legal operation and effect of so formal a document." *Callan*, at 449, 468 P.2d 456.

The trial court's findings of fact are sequential. They chronicle the significant events and circumstances that led to the petition and to the court's disposition. The meaning of finding of fact 1.12 is made clear by the next finding. Finding of fact 1.13, which qualifies finding of fact 1.12, provides:

Although joint parenting between the parents was successful at the beginning of their divorce, joint custody has not operated since the spanking incident.

The unequivocal inference is that after the spanking incident occurred, the joint custodial arrangement had not been successful. In our opinion, this finding confines the "not harmful" language in the finding above to the period between entry of the original decree and the March incident. It is a statement of past rather than present condition.

Additionally, references are made throughout the findings and conclusions concerning the decline of the custodial arrangement established by the decree of dissolution. Finding of fact 1.11 provides in relevant part:

[T]hat while both parents are committed, active and competent parents for their daughters, the historical and present level of conflict between the parents makes continuation of the joint custody arrangement unworkable.

At conclusion of law 1.1, the court stated in relevant part:

The Court is also mindful of RCW 26.09.260 and finds that changes have occurred in the circumstances of the children and the Respondent (joint custodian) and that

modification of the prior Decree is necessary to serve the best interests of the children.

Additionally, the court concluded at 1.2:

The conflict between the parents, arising primarily from the clearly excessive and inappropriate discipline the father administered to the child, Robin, warrants a change in the custodial relationship between the parents. The harm that is likely to be caused by perpetuating a clearly unworkable joint custody arrangement is outweighed by the advantage to both children to live in a less conflictual environment. The only manner in which that can be accomplished is by awarding the mother sole custody, both physical and legal.

When finding of fact 1.12 is read in combination with the other findings of fact and conclusions of law, Singleton's interpretation does not logically follow. We think a more reasonable interpretation of the finding is that the trial court determined the joint custodial arrangement was not harmful only as it existed prior to the spanking incident.

Singleton further argues that because the trial court found both parties to be fit and able parents, and that there existed little likelihood of a repeat of the incidents which gave rise to the petition for modification, no detriment to the children's well-being could be found in the original custodial arrangement. Singleton cites conclusion of law 1.7 in support:

The court also finds, however, that both parents would be fit and proper persons to have custody of their daughters and each would serve their daughters' interests well. Both parents desire custody and both would provide visitation to the other. The children's views are not able to be considered because they are so young. However, they are bonded to both parents and have expressed to others a desire to be with both parents. They have developed significant and important relationships with both parents and have, apparently, adjusted well with both parents, notwithstanding the conflict between them. The



Court finds there is little likelihood of a repeat of the incidents giving rise to this Petition.

[17] Singleton's argument, however, steers wide of the real issue. Certainly, parental fitness is a primary concern of the court when considering modification of residential and legal custody. See *Anderson*, at 366, 541 P.2d 996. In a joint custody situation, however, the court must be equally mindful of the "joint custodial environment" and whether changed circumstances have rendered joint custody unworkable and detrimental.

[8] In *In re Marriage of Murphy*, 48 Wash.App. 196, 737 P.2d 1319 (1987), a substantial change in circumstances was occasioned by the move of one joint custodial parent to another state. Although the trial court specifically found both parents were fit and maintained a good relationship with their child, it also found that alternating physical custody under the changed conditions, particularly where the child was approaching school age, was not feasible. The court therefore determined that the "present environment" was detrimental to the child. *Murphy*, at 199, 737 P.2d 1319.

[9] *Murphy* establishes that a finding of detriment to the child in his or her present environment need not be based upon the parenting of either party, but may arise from a change in the joint custodial environment. Such is the situation in the instant case. The relationship between the parties decayed so that the children's well-being was at risk. Substantial evidence in the record supports the trial court's determination that the joint custodial arrangement was no longer workable. The trial court had before it the reports of Alice Probert, a family court services social worker, and Dr. Dunne, a court-appointed child psychiatrist. Ms. Probert reported "[b]ecause of the high level of conflict and strong difference, [of opinion about management and care of the children] the children's care has been impacted negatively." [12] Dr. Dunne concluded "... thus the thought [of] joint parenting would be an optimal recommendation. However, given the historical and present level of conflict

between the parents, this recommendation would be unworkable at the present time." Parental fitness is but one part of the analysis when considering modification in a joint custody situation. In this case, it is not determinative.

Singleton maintains, however, that even if we were to affirm the trial court's finding that the conflict and lack of cooperation between the parents made the joint custodial arrangement unworkable, such a finding is not a sufficient ground upon which to modify the decree. We would not readily countenance a situation where one party undermined a joint custodial arrangement simply by refusing to cooperate, or by claiming an inability to get along with or trust the other party. But that is not the situation here. Ample testimony detailed the parties' history of conflict and the damaging change in the joint custodial environment as a result of the March incident. In our opinion, unworkability in this case directly relates to the welfare of the children involved. Changes in the conditions or circumstances between Singleton and Stern would have been of little moment had they not affected the welfare of the children. The record contains substantial evidence to support the court's finding that the best interests of the children required a change in custody. Fairly read, the court's findings reflect the application of the factors set forth in RCW 26.09.260. The order modifying custody is affirmed.

#### IV. MODIFICATION OF SUPPORT

As a part of its decree modifying custody, the trial court modified support. In addition to monthly child support, the order requires appellant to contribute a percent of the private educational expenses of the children. Conclusion of law 3.3 provides as follows:

The parents should contribute to the child care and private education expenses of their children in the same proportion and in the same ratio as indicated by their respective incomes [13] presently 59% (Respondent) and 41% (Petitioner). There appears to be little difference in this incremental expense whether the

children are in day care or attending private Catholic school and, indeed, the schooling expense may be less than maintaining the children in public school and then having to pay for before and after school child care.

Singleton assigns error to this finding<sup>2</sup> and argues it lacks evidentiary support in the record. We agree.

"In Washington, findings of fact supported by substantial evidence will not be disturbed on appeal." *Bering v. Sharr*, 106 Wash.2d 212, 220, 721 P.2d 918, (1986) cert. denied, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987); *Thorndike v. Hesperian Orchards, Inc.*, 54 Wash.2d 570, 575, 343 P.2d 183 (1959). If the record contains evidence of "sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise", substantial evidence exists. *In re Snyder*, 85 Wash.2d 182, 185-86, 532 P.2d 278 (1975).

[10] The amount of child support rests in the sound discretion of the trial court. This court will not substitute its own judgment for that of the trial court where the record shows that the trial court considered all relevant factors and the award is not unreasonable under the circumstances. *In re Marriage of Nicholson*, 17 Wash.App. 110, 119, 561 P.2d 1116 (1977).

[11] In the instant case, the trial court made its award on the basis that no measurable difference existed between the costs of day care and private school. The only testimony regarding comparative educational costs was that at the time the eldest child was in kindergarten and attending school half days, it was economically practical to place her in a full-day private school program because the costs were roughly equaled by the reduced cost of day care. There was no testimony regarding, and it appears that the trial court did not consider, the tuition and day care cost differential when both children were in school full time. Nor does it appear that the trial court considered the need, if any, that the children be placed in a private rather than public school.

2. Although labelled a conclusion of law, the

We have found no cases in Washington specifically addressing the minor child/private school tuition issue. The case of *Smith v. Pontius*, 119 Wash. 211, 205 P. 381 (1922), is, however, factually analogous. In *Pontius*, the court held that a divorced husband was not liable to the wife for expenses in maintaining an insane child in a private asylum. There, an ex-spouse brought an action seeking reimbursement for sums expended by her in support and maintenance of the parties' mentally ill child. The child was adjudged insane shortly after reaching the age of majority. At that time he was committed to the state-run institution in Steilacoom. Several years later the mother petitioned for the child's parole. Against the wishes of the father, the petition was granted. Thereafter, the mother kept the child in private sanitariums until she was financially no longer able to do so. The court ruled that where a child had been regularly committed to a state institution and there was no showing that the child was not properly treated while in the state's care, nor that in a private sanitarium the child would receive better care, it was not necessary to the child's welfare that he reside in a private institution. Thus, the money expended for the child's maintenance was itself not reasonably necessary and the father was under no legal obligation to pay. *Pontius*, at 213-14, 205 P. 381.

A similar rationale was offered by a California court with regard to the noncustodial parent's obligation to provide for the private education of his or her minor children. In *In re Marriage of Aylesworth*, 165 Cal.Rptr. 389, 394, 106 Cal.App.3d 869 (1980), the court identified two primary conditions which must exist prior to an award for private education expenses: demonstrated need of the child, and the parent's ability to pay. See *Straub v. Straub*, 29 Cal.Rptr. 183, 213 Cal.App.2d 792 (1963). Need may be assessed by determining whether the child has equal access to a public school education, and, if so, whether due to the peculiar circum-

conclusion is primarily a finding of fact.

stances of the child it is in his or her "best interests" to instead attend private school.

In *Aylesworth*, one of the parties' children was epileptic, a condition which prior to receiving regular medication caused him to miss significant time from school, and when in attendance, to be the subject of ridicule from his classmates. The child was placed by the mother in a private school. In upholding the trial court's grant of tuition costs in favor of the mother, the appellate court ruled:

[I]t is a legitimate and reasonable inference from respondent's testimony that the closer personal attention afforded Duke at Crossroads School is of personal benefit to him in helping to alleviate his past anxieties related to school, and in helping him to cope with and adjust to his need for medication and all the attendant psychological problems accompanying such an illness in a young man. Moreover, this finding is not inconsistent with the court's refusal of [the mother's] request for private tuition for Duke's sister, Cynthia, who has never attended private school and shows no need or evidence that such attendance would be of a more personal benefit to her than it would be to any child in general.

*Aylesworth*, 165 Cal.Rptr. at 394.

In the case at bench, there are no findings regarding the need for a private education. Nor are there findings that any benefit shall inure to these children from attending a private school that will not inure to them from attending a public one. The trial court did find that there was "little difference" between the costs of attending private school full-days and attending public school half-days with the remainder spent in day care. However, no finding was made comparing the costs of tuition and day care with both children enrolled in school full time.

Conspicuously absent from Stern's brief is any mention of the comparative costs between public and private schooling with or without day care. Stern concedes, however, that with both children in school full time, day care costs will diminish to a frac-

tion of that required at the time of the modification.

[12] Assuming it to be true that day care costs with both children in school full time are nominal, what remains is the cost differential between public and private schools. Singleton, in his motion for reconsideration before the trial court, set forth a tuition and day care cost schedule that plainly evidenced an appreciable difference in private school expenses over that of public schools. In the absence of a showing of need or want of availability of public schooling, no substantial evidence can be found to support the trial court's award. As a result, the court exceeded the limits of its discretion.

[12, 13] There is no per se prohibition against the award of private school tuition for a minor child. Factors such as family tradition, religion, and past attendance at a private school, among others, may present legitimate reasons to award private school tuition expenses in favor of the custodial parent. However, the court's findings do not address such circumstances. Where acceptable public schools are available, and there is no showing of special circumstances justifying the need for private school education, the noncustodial parent should not be obligated to pay for the private education of his or her minor children.

The grant of an income-proportionate contribution to the children's private education expenses was error. As to that portion of the court's decree, we reverse.

#### V. ATTORNEY FEES

[14] Stern requests her costs and attorney fees on appeal. This court may award attorney fees under RCW 26.09.140 after specifically considering the financial resources of both parties. In *re Marriage of Belsby*, 51 Wash.App. 711, 719, 754 P.2d 1269 (1988). We must then balance the needs of one party against the other party's ability to pay. In *re Marriage of Young*, 18 Wash.App. 462, 466, 569 P.2d 70 (1977). Additionally, we may also consider the merits of the appeal itself. *Chapman v. Perera*, 41 Wash.App. 444, 455-56, 704

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Cite as 789 P.2d 815 (Wash.App. 1990)

P.2d 1224, *review denied*, 104 Wash.2d 1020 (1985).

[1] Contrary to Stern's claim, the appeal was neither frivolous nor devoid of merit. However, the record before this court is lacking sufficient evidence as to the relative needs and abilities of the parties. We therefore remand this issue to the trial court to determine whether costs and fees are appropriate and, if so, in what amount.

WINSOR and WEBSTER, JJ., concur.



57 Wash.App. 697

STATE of Washington, Respondent,

v.

Jeaneane WOOLBRIGHT, Petitioner.

No. 23955-1-I.

Court of Appeals of Washington,  
Division 1.

April 30, 1990.

Driver, charged with driving while intoxicated, filed motion to dismiss. The District Court granted motion, and State appealed. The Superior Court, King County, Patricia Aitken, J., reversed Seattle District Court's dismissal, and appeal was taken. The Court of Appeals, Scholfield, J., held that: (1) implied consent law did not require that State perform breathalyzer test, and (2) failure of trooper to administer breathalyzer test to driver was not arbitrary action or governmental misconduct authorizing dismissal of driving while intoxicated charges.

Judgment affirmed.

#### 1. Automobiles ⇨122

Statutory scheme relative to breath test contains no language which gives suspect right to breath test to be administered

by arresting officer or under his supervision.

#### 2. Automobiles ⇨355(6)

Chemical tests are neither necessary nor required to prove intoxication for driving while intoxicated purposes.

#### 3. Criminal Law ⇨700(9)

State's duty to preserve material evidence for defendant does not require investigating officers to seek out exculpatory evidence or conduct test to exonerate defendant.

#### 4. Automobiles ⇨115

Implied consent statute does not require that defendant arrested for driving while intoxicated be given breathalyzer test, but merely provides that defendant is deemed to have given her consent and establishes certain guidelines for testing in event that test was used or sought to be used.

#### 5. Automobiles ⇨115

Defendant charged with driving while intoxicated had right to additional tests administered by qualified person of her own choosing, where defendant had in fact agreed to submit to breath test administered by arresting officer, although officer later determined that working machine was not available.

#### 6. Automobiles ⇨115

Failure of trooper to administer breathalyzer test to driver charged with driving while intoxicated was not arbitrary action or governmental misconduct authorizing dismissal of driving while intoxicated charges; driver did not have right to such tests, and no test was given because officer was unable to find functioning machine after two attempts and driver had been in custody for lengthy amount of time.

Albert A. Rinaldi, Seattle, for Jeaneane Woolbright.

Pamela Mohr, David Bruce, Deputy King County Prosecutors, Seattle, for State.

## **ADDENDUM "I"**

MARCUS P. RANDOLPH vs. MARY E. RANDOLPH  
Civil No. 914902308DA

DEFENDANT'S MONTHLY EXPENSES

Rent	\$ 750.00
Food and Household Supplies	450.00
Utilities (pays gas only)	75.00
Telephone	40.00
Laundry and Cleaning	20.00
Clothing	150.00
Medical Expenses	98.00 *
Dental Expenses (deductible)	8.00
Medical Insurance (COBRA)	139.00
Child Care (\$60/mo, 8 mos/yr)	40.00
Cosgriff	168.00 *
Entertainment	200.00 *
Auto Expense	80.00
Incidentals	161.00
School Expenses	<u>177.00</u> *
<b>TOTAL</b>	<b>\$2,556.00</b>

\* calculations set forth on next page



Medical Expenses:

Psychological:

Ben Dobbin (2 @ \$60)	\$ 120.00	
Less Insurance Coverage	<u>50%</u>	
Paid by Defendant		\$ 60.00

Miscellaneous:

	\$ 40.00	
Less Insurance Coverage	<u>80%</u>	
Paid by Defendant		\$ 8.00

Amortization of Deductible:

\$350 : 12		\$ <u>30.00</u>
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<b>TOTAL MONTHLY MEDICAL EXPENSES</b>		<b>\$ 98.00</b>
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Cosgriff (as received 10/8 from Rosie):

Kira: Tuition	\$ 965.00	
Books and Fees	<u>125.00</u>	
		\$1,090.00

Erika: Tuition	\$ 850.00	
Books and Fees	<u>75.00</u>	
		\$ <u>925.00</u>

<b>Total Cosgriff per year</b>		<b>\$2,015.00</b>
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<b>TOTAL COSGRIFF PER MONTH</b>		<b>\$ 168.00</b>
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Incidentals:

Haircuts (1/mo each)	\$ 50.00
Relatives Gifts (1/mo)	20.00
Christmas (\$100/girl)	17.00
Birthdays (\$100/girl)	17.00
Family Christmas (\$200/year)	17.00
Church	20.00
Alcohol	<u>20.00</u>

<b>TOTAL INCIDENTALS PER MONTH</b>	<b>\$ 161.00</b>
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School (University of Utah):

(Based on 12 credit hours per quarter)

In-state full-time tuition	\$ 557.00/quarter
Books	\$ 150.00/quarter

<b>Total Quarterly Expenses</b>	<b>\$ 707.00</b>
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<b>TOTAL MONTHLY EXPENSES</b>	<b>\$ 177.00</b>
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