

1991

Mary N. Thronson v. Charles A. Thronson : Brief in Opposition to Certiorari

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

~~890547-CA~~

IN THE SUPREME COURT OF THE STATE OF UTAH

MARY M. THRONSON,

Plaintiff-Appellant,

vs.

CHARLES A. THRONSON,

Defendant-Appellee.

Case No. 890547-CA

District Court No. 87-4904318

Category No.

910287

**APPELLANT MARY M. THRONSON'S BRIEF IN OPPOSITION
TO THE PETITION FOR WRIT OF CERTIORARI
OF APPELLEE CHARLES H. THRONSON**

**APPEAL FROM DECREE OF DIVORCE ENTERED ON
JUNE 26, 1989, IN THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, HONORABLE DAVID S. YOUNG**

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UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARY M. THRONSON,

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APPELLANT MARY M. THRONSON'S
BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF
CERTIORARI OF APPELLEE CHARLES
H. THRONSON

CHARLES A. THRONSON,

Defendant-Appellee.

Case No. 890547-CA

District Court No. 87-4904318

Category No. 7

QUESTIONS FOR REVIEW

The Petition for Writ of Certiorari requests this Court to review the following questions:

1. Did the Court of Appeals have the authority to modify the temporary alimony award of the trial court and award permanent alimony instead?
2. Was the Court of Appeals' decision in awarding permanent alimony supported by the facts, and the law in the State of Utah.

REPORT OF THE OPINION OF THE COURT OF APPEALS

The opinion of the Court of Appeals is reported at Thronson v. Thronson, 157 Utah Adv. Rep. 51 (Utah Ct. App. March 25, 1991) [hereinafter Thronson], and is appended hereto as Exhibit 1.

**STATEMENT OF GROUNDS UPON WHICH THE
PETITION FOR WRIT OF CERTIORARI IS BASED**

The Petition of the Defendant/Appellee is based upon the provisions of § 78-2-2, Utah Code Ann. (1953 as amended) and Rule 45 of the Utah Rules of Appellate Procedure. Rule 46 of the Utah Rules of Appellate Procedure sets forth the considerations governing the review of certiorari. The Petition has failed to specifically identify the consideration(s) which require this Court to grant the Petition.

DETERMINATIVE AUTHORITY

1. Rule 46 of the Utah Rules of Appellate Procedure.
2. Olsen v. Olsen, 704 P.2d 564 (Utah 1985).
3. Martinez v. Martinez, 754 P.2d 69 (Utah Ct. App. 1988), cert. granted, Sept. 7, 1988.
4. English v. English, 565 P.2d 409 (Utah 1977).

In addition, the other case law set forth hereafter is determinative in the issues raised in the Petition.

STATEMENT OF THE CASE

1. The parties were married for ten years and nine months.
2. The parties have one son of this marriage, Patrick, age nine.
3. Ms. Thronson, while a pharmacist, interrupted her career and its development to become the primary care-taker of the child and worked part-time for that reason during the marriage. (T.R. 172 - 174)

4. That during the pendency of the divorce, Ms. Thronson was required to utilize her savings and inheritance to meet her monthly living expenses. (T.R. 257, 295) Furthermore, Ms. Thronson was required to incur debts in order to finance her minimal living expenses during this period of time. (T.R. 333)

5. At the time of the trial Ms. Thronson was employed part-time at 16 hours a week earning \$15.50 per hour. (T.R. 173, 217-218) During the pendency of the action and prior to trial Ms. Thronson received temporary child support of \$1,000 per month and temporary alimony of \$1,000 per month plus one of the annuities. (T.R. 139 and Defendant's Exhibit 38 admitted at T.R. 553)

6. The annuity which was awarded to Ms. Thronson in the amount of \$989.45 per month will expire and terminate on December 15, 1991. Additionally, the Defendant was awarded the other annuity of the parties paying \$1,004.50 per month which expired in March of 1991. (Defendant's Exhibit 38 admitted at T.R. 553)

7. At the time of the trial Mr. Thronson was a practicing attorney earning income of \$94,476 per year with expenses of \$4,003 per month. (Opinion of the Court of Appeals, p. 13).

9. Ms. Thronson had monthly expenses at the time of the trial of \$3,700 per month. (Opinion of the Court of Appeals, p. 13).

10. Ms. Thronson has the ability to earn \$35,000 per year when working full-time thus leaving an annual deficit between her

ability to produce income for herself, and the needs as found by the trial court of \$9,400 annually. (Opinion of the Court of Appeals, p. 13).

11. Throughout these proceedings Ms. Thronson has stated a claim for permanent alimony and equitable restitution (Appellant's Reply Brief at p. 12, T.R. 350, 352).

12. In the Complaint for divorce Ms. Thronson requested permanent alimony of \$2,000 per month, together with "such other and further relief as to the Court may seem just and proper." (See Complaint for Divorce, Exhibit 2)

13. Mr. Thronson petitioned the Court of Appeals for rehearing alleging, principally, that the Court of Appeals had misunderstood the trial court's ruling and finding of gross monthly income on the part of Ms. Thronson. The Court of Appeals denied the Petition for Rehearing on May 21, 1991.

ARGUMENT

POINT I

MR. THRONSON HAS NOT MET THE REQUIREMENTS OF RULE 46 FOR THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI.

Rule 46 of the Utah Rules of Appellate Procedure provides in part:

Review by a Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. (emphasis added)

Rule 46, Rules of Appellate Procedure.

The Rule goes on to spell out the four important reasons that the Supreme Court may consider in passing on a Petition for Writ of Certiorari:

(a) When a panel of the Court of Appeals has rendered a decision in conflict with the decision of another panel of the Court of Appeals on the same issue of law;

(b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with the decision of the Supreme Court;

(c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision; or,

(d) When the Court of Appeals has decided an important question of municipal, state or federal law which has not, but should be, settled by the Supreme Court.

Rule 46, Utah Rules of Appellate Procedure.

It is important to note that the Petition for Writ of Certiorari has failed to specify what consideration it claims should be relied upon by this Court in granting the Petition. However, the Petition would appear to qualify or to state grounds only under Rule 46(c) claiming, apparently, that the decision of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings so as to call for review.

As will be demonstrated, the Court of Appeals' decision is consistent with established Utah law both as to its authority to award permanent alimony, and as to the equity of that decision.

For these reasons, the requirements of Rule 46 are not met and this Court must deny the Petition for Writ of Certiorari.

POINT II

THE COURT OF APPEALS HAS AUTHORITY TO MODIFY A LOWER COURT DECISION AND GRANT PERMANENT ALIMONY IN THIS CASE.

The Petition for Writ of Certiorari seems to claim that not only is permanent alimony unjustified given the facts of this case, but that the Court of Appeals could not have awarded permanent alimony for:

- (1) Want of authority; and,
- (2) Failure to raise the issue below.

This court modified the trial court's award of temporary alimony and awarded permanent alimony instead in Olsen v. Olsen, 704 P.2d 564 (Utah 1985):

Therefore, under our discretionary power to modify the final Decree in a divorce action, we hereby modify the Decree of Divorce in this case to provide for permanent alimony from defendant to plaintiff. Again, should the circumstance change in the future, the defendant may petition the court to modify the Decree under its continuing jurisdiction.

Id. at 566-567, citing Higley v. Higley, 676 P.2d 379 (Utah 1983) and Read v. Read, 594 P.2d 871 (Utah 1979).

In Olsen not only did the court acknowledge the discretionary power of appellate courts to modify a Decree of Divorce, but also set forth the wisdom and justification for permanent alimony awards in cases such as this. Given, the continuing jurisdiction of the courts over alimony awards, an alimony award should be permanent and not anticipate changes in

circumstances which are not presently ascertainable with a high degree of certainty. Otherwise, an alimony award which is made temporary may be based upon circumstances which may never occur and are purely speculative.

In this case, there were no findings and no evidence to support any findings that the disparity in income between Mr. and Mrs. Thronson would ever diminish. Likewise, there were no facts and could be no finding that Ms. Thronson's needs or ability to meet those needs would ever change.

However, if those circumstances were to substantially change in the future, either party would have the right to seek a modification of the Decree.

In Rudman v. Rudman, 16 Utah Adv. Rep. 37 (Utah Ct. App. May 28, 1991), the court noted:

The second error of law is that any future social security award is too speculative, absent a specific finding as to the date and the amount of the future award.

Id. at 38.

In Rudman, the lower court awarded alimony until the wife reached the age of 65 and would receive social security benefits. There, as in this case, any reason for terminating alimony would be too speculative. In this case, unlike Rudman, no finding was made at all with regard to any future circumstances which would alleviate the need for alimony on the part of Ms. Thronson. Mr. Thronson is protected, in any case, by his opportunity to seek a modification if that did occur.

In addition to permanent alimony, Ms. Thronson requested equitable restitution, or alimony in an increased amount paid presently and for a shorter period of time. There are many reasons that would justify such a request for the present use of alimony in an increased amount rather than waiting for lower installments paid over a longer period of time.

Secondly, the Petition suggests that the Court should not have granted a permanent alimony award because it was not requested below. The Complaint of the Plaintiff specifically asks for permanent alimony in the amount of \$2,000 (See Exhibit 2). At various times thereafter, Ms. Thronson sought various forms of relief including alimony, alimony limited by years and amount but increased from that awarded by the lower court or the Court of Appeals, and equitable restitution. The different relief claimed at various times by Ms. Thronson was likely dictated by tactical considerations and Ms. Thronson's own perception of her future circumstances at any given time. In addition, Ms. Thronson, prayed for just and reasonable relief in the discretion of the Court after being advised of all the facts. It was in the exercise of that request, as well as the authority cited above, that the Court of Appeals modified the lower court decision and granted a permanent alimony award.

In Martinez v. Martinez, 754 P.2d 69 (Utah Ct. App. 1988), cert. granted, Sept. 7, 1988, Plaintiff raised the issue of the adequacy of child support and alimony on appeal. There, as here, the trial court had awarded temporary alimony. Relying upon

Olsen, the Court of Appeals found that the lower court had abused its discretion in limiting the award of alimony to a period of five years, and, instead awarded permanent alimony. There is no indication in Martinez that the Plaintiff sought permanent alimony, but rather, raised only the general question of the sufficiency of the alimony award on appeal.

POINT III

THE COURT OF APPEALS' RULING IS CONSISTENT WITH UTAH CASE LAW.

At the heart of Mr. Thronson's Petition is his belief that, "Alimony is now designed primarily to assist the formerly dependent or semi-dependent spouse to achieve or re-achieve financial self-sufficiency so as to vitiate further need for alimony.". (Appellee's Petition for Rehearing, page 13, Appellee's Petition for Writ of Certiorari, page 14) Except for a Maryland case, Mr. Thronson suggests no authority for that notion.

Furthermore, Mr. Thronson proposes, "Most people, when they are faced with a differential between their income and expenses, either raise their income, through working more hours or selecting other employment, or reduce their expenses to a level which they are capable of paying.". (Appellee's Brief, page 14) Mr. Thronson suggests that that principal be applied only to Ms. Thronson and not himself.

Mr. Thronson goes on to suggest that alimony should not be a "lifetime pension" nor should it encourage substantial underemployment or discourage self sufficiency.¹

Nowhere in the Petition for Rehearing or Petition for Writ of Certiorari is the real standard for the award of alimony, in Utah, mentioned or discussed. However, the findings of the lower court do address the basis for determining alimony, and the Court of Appeals decision is based upon those findings.

In Utah an alimony award should, "to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to that standard of living enjoyed during the marriage." Howell v. Howell, 155 Utah Adv. Rep. 18, p. 20, (quoting Gardner v. Gardner, 748 P.2d 1076) (Utah 1988)). See also, Paffell v. Paffell, 732 P.2d 96, 100-101 (Utah 1986) and Olsen v. Olsen, 704 P.2d 564 (Utah 1985). Furthermore, "An alimony award should, to the extent possible, equalize the parties' respective post-divorce living standards. . .", Rasband v. Rasband, 752 P.2d 1331, 1333 (Utah Ct. App. 1988).

The process for analyzing an alimony award is straightforward and long established by case law in this state.

¹ It should be remembered that the Court of Appeals arrived at its decision to award permanent alimony after ratifying the lower court regarding Ms. Thronson's full-time income and inability to meet her present needs nonetheless. Therefore, it cannot be argued that the alimony in this case will discourage Ms. Thronson's full-time employment when it is one of the assumptions accounted for in the award of alimony.

This Court correctly set forth the three considerations in making an alimony award as follows:

(1) The financial condition and needs of the party seeking alimony;

(2) The party's ability to produce sufficient income for him or herself; and

(3) The ability of the other party to provide support. Naranjo v. Naranjo, 751 P.2d 1144 (Utah Ct. App. 1988), (citing English v. English, 565 P.2d 409 (Utah 1977))

After determining the financial needs and resources of the parties, "the court should set alimony as permitted by those parameters, to approximate the parties' standard of living during the marriage as closely as possible. It follows that if the payor/spouses resources are adequate alimony need not be limited to provide for only basic needs, but should also consider the recipient's spouse's station in life." Howell v. Howell, 155 Utah Adv. Rep. 18, at p. 20. (quoting Gramme v. Gramme, 587 P.2d 144, 147 (Utah 1978)).

The Petition for Writ of Certiorari suggests that the Court of Appeals' decision is not consistent with any Utah case law. In Davis v. Davis, 749 P.2d 647 (Utah 1988) the Supreme Court upheld a permanent alimony award of \$750 per month where the husband had yearly income approaching \$100,000 per year and the wife was in her early 30s, in good health, well educated and working as a full-time teacher, earning over \$27,000 annually. The permanent alimony award was sustained even though the wife

received a large cash settlement at the time of the divorce in the amount of \$164,000, as well as substantial amounts of personal property. The parties had been married less than 13 years.

The Petition for Writ of Certiorari attempts to minimize the impact of the Davis case suggesting that it is an isolated case. However, the facts of Davis, as well as the facts in this case, meet the established criteria for the award of alimony rather than a mythical "profile" that the Petition has created as the basis for an alimony award.

The Petition places an extraordinary amount of weight on the fact that these parties were married almost 11 years. Not only is that a sufficient time given the alimony considerations and the process for awarding alimony described above, it is also an inappropriate consideration. "The standard utilized by the trial court, viz. the length of the marriage and the contributions of each to their joint financial success, is not an appropriate measure to determine alimony." English v. English, 565 P.2d 409 (Utah 1977).

POINT IV

THE AWARD OF PERMANENT ALIMONY IS FAIR AND EQUITABLE.

The Petition suggests that the award of permanent alimony is unfair because Ms. Thronson was awarded "substantial financial support", a "substantial cash payment" and a "substantial inheritance". The Petition does not set forth how these items

affect Ms. Thronson's ability to produce income for herself and meet her needs.

Ms. Thronson was awarded one of the parties annuities paying \$989 per month. That annuity will terminate in December, 1991. Mr. Thronson received the other annuity paying over \$1,000 per month which likewise terminates in 1991.

Ms. Thronson received an inheritance from the estate of her deceased brother prior to the divorce trial. However, because her support during that period of time was insufficient the entire inheritance amount was depleted. (T.R. 177, 179 and 256-257).

The limited partnership interest awarded to Ms. Thronson and valued at \$11,000 provides no monthly cash flow. Obviously, the pension and IRA interests provide no present income or cash flow. In fact, Ms. Thronson's IRA has been "cashed-in" to pay for her monthly living expenses resulting from the deficiency which occurred after alimony terminated more than a year ago. Ms. Thronson has been forced to sell her home because she could no longer maintain it without alimony. The cash award to Ms. Thronson was in the amount of \$2,002 which was the cash payment at the end of the trial from defendant's stock in his law firm, which amount has likewise been consumed to meet her monthly living expenses after the termination of alimony per the Decree of Divorce.

Additionally, and perhaps most importantly, is the fact that the Petition for Writ of Certiorari entirely ignores the Court of

Appeals' observation that Mr. Thronson had earned income at the time of the divorce in the amount of \$94,476 annually. Presumably, Mr. Thronson accepts that finding as accurate. That being the case, the Petition for Rehearing absolutely ignores the remarkable disparity in income between these parties. Ms. Thronson's experience over the past years has borne out this Court's observation that, "She will face a substantial income shortfall compared with her needs". (Court of Appeals' decision pp. 55 - 56) This is in spite of the fact that even when paying alimony, Mr. Thronson still had discretionary income above and beyond that necessary to meet his monthly expenses.

In contrast to Mr. Thronson's "profile" standard for determining alimony, which it arbitrarily ignores the cases which do not fit the supposed "profile", the law in the state of Utah is based upon fairness, equity and ascertainable standards which are set forth above. If the "profile" standard were adopted by this court, not only would it absolutely ignore the standard which has governed the award of alimony for many years, but it would perpetuate the hardship of Ms. Thronson which has existed since the termination of alimony under the divorce Decree.

CONCLUSION

The Petition fails to set forth any basis sufficient to satisfy the requirements of Rule 46 of the Utah Rules of Appellate Procedure. In fact, no basis is identified in the body of the Petition which could be relied upon to grant a Writ of Certiorari in this case. The Court of Appeals has properly

Certiorari in this case. The Court of Appeals has properly exercised its discretionary authority to modify a final Decree of Divorce and award permanent alimony. The decision of the Court of Appeals is consistent with the request made various times by Ms. Thronson for permanent alimony commencing with her Complaint for Divorce.

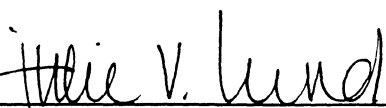
The decision of the Court of Appeals, based upon the findings of the trial court, meets the three-pronged test for alimony which has long governed that issue in Utah. The "profile" standard asserted in the Petition, if it ever was viable, has not been relied upon in Utah for decades and should not be a basis for re-examining the decision of the Court of Appeals.

The circumstances of these parties in particular Ms. Thronson's inability to produce income to meet her needs acquired during the marriage, and Mr. Thronson's ability to do so, justify a permanent alimony award. Alimony was reasonable and warranted on a temporary basis and there is no basis upon which to find that those circumstances will change, therefore, a permanent alimony award was in order.

DATED THIS 22 day of July, 1991.

Respectfully Submitted,


GREEN & BERRY


FREDERICK N. GREEN
Attorney for Plaintiff/Appellant

CERTIFICATE OF MAILING

I, Frederick N. Green, certify that on July 22, 1991, I served four copies of the attached Appellant Mary M. Thronson's Brief in Opposition to the Petition for Writ of Certiorari of Appellee Charles H. Thronson upon Clark W. Sessions and Dean C. Andreason, the counsel for the Appellee in this matter by causing it to be mailed to them by first class mail with sufficient postage prepaid to the following address:

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FREDERICK N. GREEN
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Tab 1

FILED

MAR 25 1991

IN THE UTAH COURT OF APPEALS

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Mary M. Thronson,)	OPINION	<i>Mary Thronson</i> Mary I. Noonan Clerk of the Court Utah Court of Appeals
Plaintiff and Appellant,)	(For Publication)	
v.)	Case No. 890547-CA	
Charles H. Thronson,)	F I L E D	
Defendant and Appellee.)	(March 25, 1991)	

Third District, Salt Lake County
The Honorable David S. Young

Attorneys: Paul H. Liapis, Helen E. Christian, and Kim M.
Luhn, Salt Lake City, for Appellant
Clark W. Sessions and Dean C. Andreasen, Salt Lake
City, for Appellee

Before Judges Bench, Garff and Jackson.

JACKSON, Judge:

Mary Thronson appeals provisions of a divorce decree and separate order awarding joint legal custody of a child, child support, alimony, and property. We remand for further proceedings regarding child custody and support. We modify the alimony award and affirm the remainder of the decree.

FACTS

The parties were married on September 30, 1978. Their marriage was the first for both. She was a full-time pharmacist and he a full-time attorney. A son was born to them on September 11, 1981. She became the child's primary caretaker and a part-time pharmacist. He became a shareholder in his law firm. She filed a complaint for divorce. He filed a counterclaim for divorce. They were divorced by a decree entered June 23, 1989. A separate order of joint legal custody was also entered. Further relevant facts will be set forth below in our treatment of the respective issues.

CHILD CUSTODY AWARD

Ms. Thronson challenges the joint legal custody decree and order on two grounds: (1) She did not agree to the order of joint legal custody and Utah Code Ann. § 30-3-10.2 (1989) required the agreement of both parents at the time of this decree and order. (2) The provision for an automatic award of sole custody to one parent when the other moves from the state was error.

CHILD CUSTODY IN UTAH

Prior to 1988, Utah did not have a statute expressly authorizing an award of "joint legal custody"¹ of a child. Our

1. Custody terminology: Many legislators, judges and writers have been loose with their "joint" custody language. Early articles identified this vexing problem as follows:

Both the forms of custody [sole, divided, split, joint] following divorce and the terms which describe them are vague and overlapping. The lack of standard definitions and the courts' tendency to use certain terms interchangeably have created confusion.

Folberg & Graham, Joint Custody of Children Following Divorce, 12 U.C. Davis L. Rev. 523, 525 (1979).

Often, when referring to one of these custody arrangements, courts use vague language or inadequately defined terms.

Bratt, Joint Custody, 67 Ky. L.J. 271, 283 (1978-79).

One author points out that considerable semantic confusion has resulted possibly because the "term" joint custody predates the "concept" of joint custody as it is known today. He states: "I have encountered at least fifteen terms used to refer to various alternatives to sole custody: joint legal custody, joint physical custody, divided custody, separate custody, alternating custody, split custody, managing conservatorship, possessory conservatorship, equal custody, shared custody, partial custody, custody 'given to neither party to the exclusion of the other,' temporary custody, shifting custody, and concurrent custody." Miller, Joint Custody, 13(3) Fam. L.Q. 345, 360 n. 79 (1979).

divorce statutes have contained various child custody provisions since 1903. For many years Utah Code Ann. § 30-3-5 (1989) has authorized district courts to include in divorce decrees "equitable orders relating to the children, property and parties." Further, Utah Code Ann. § 30-3-10 has contained various specific provisions regarding factors to be considered in awarding sole custody of a child. See Lembach v. Cox, 639 P.2d 197 (Utah 1981); 1 Utah L.Rev. 363 (1989) (historical development of child custody factors and preferences in Utah).

"Joint Legal Custody" was specifically added to the sole custody statute in 1988, and designated as § 30-3-10.1 to -10.4. We emphasize that this is a joint "legal" custody statute and not a joint "physical" custody statute. In the 1988 Utah legislative session, Senator Hillyard stated: "This is not joint physical custody. The child obviously can't live in two homes. But it's joint legal custody which would give the non-custodial parent more involvement in the decisions of child raising." Floor Debate, (Feb. 3, 1988) Sen. Recording No. 42, side 2. In section 10.1 the legislature provided its definition of joint legal custody:

In this chapter, "joint legal custody"

(1) means the sharing of the rights, privileges, duties, and powers of a parent by both parents, where specified;

(2) may include an award of exclusive authority by the court to one parent to make specific decisions;

(3) does not affect the physical custody of the child except as specified in the order of joint legal custody;

(4) is not based on awarding equal or nearly equal periods of physical custody of and access to the child to each of the parents, as the best interest of the child often requires that a primary physical residence for the child be designated; and

(5) does not prohibit the court from specifying one parent as the primary caretaker and one home as the primary residence of the child.

Utah Code Ann. § 30-3-10.1 (1989). Subsections (1) and (2) define joint legal custody: both parents share the authority and responsibility to make basic decisions regarding their

child's welfare. Subsections (3), (4) and (5) tell us what joint legal custody is not -- it is not joint physical custody. We note that this statute does not contain a definition of nor a provision for "joint physical custody."

Subsection 10.2(1) created a "rebuttable presumption" that joint legal custody is in the best interest of a child. But, that presumption was made subject to subsection (2) which provided:

The court may order joint legal custody if it determines that:

- (a) both parents agree to an order of joint legal custody;
- (b) joint legal custody is in the best interest of the child; and
- (c) both parents appear capable of implementing joint legal custody.

Utah Code Ann. § 30-3-10.2 (1989).

The order remains discretionary with the court, not mandatory, even when all three conditions are satisfied, i.e., (1) parental agreement, (2) best interests, and (3) parents capable of implementation. Further sections of the statute emphasize its "parental agreement" posture. We note that section 10.3 -- terms of joint legal custody order -- contains two further subsections dealing with parental agreement:

- (2) The court shall, where possible, include in the order the terms agreed to between the parties; . . .
- (5) The agreement may contain a dispute resolution procedure the parties agree to use

Utah Code Ann. § 30-3-10.3 (1989). Moreover, the termination provisions, section 10.4, confer upon one parent the right to unilaterally terminate the order of joint legal custody. The order can be terminated simply by filing and serving a motion. Once the motion is filed, the court is required to replace the order "with an order of sole legal custody under Section 30-3-10." Utah Code Ann. § 30-3-10.4 (1989). This provision emphasizes the parental agreement stance of the statute as initially adopted and in force at the time of this divorce.

We return to section 10.2(3) to point out that the legislature created a list of factors the court shall consider in determining the best interest of a child in the context of joint legal custody (not joint physical custody). Those factors are:

- (a) whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal custody;
- (b) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;
- (c) whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent;
- (d) whether both parents participated in raising the child before the filing of the suit;
- (e) the geographical proximity of the homes of the parents;
- (f) if the child is 12 years of age or older, any preference of the child for or against joint legal custody; and
- (g) any other factors the court finds relevant.

Utah Code Ann. § 30-3-10.2(3) (1989). On the other hand, the legislature did not offer any guidance to trial courts to assist in determining the "capability" of the parents. The term is not defined. Section 10.4 contains provisions for (1) modification of a joint legal custody order, (2) termination of the order discussed above, and (3) attorneys fees based on frivolous pleadings and harassment. Utah Code Ann. § 30-3-10.4 (1989). The modification provisions appear to be a codification of the Hogge v. Hogge, 649 P.2d 51 (Utah 1982) bifurcated procedure used in sole custody modifications. Prior to adoption of this statute in 1988, the only reported Utah case dealing directly with an initial award of "joint custody" was Lembach v. Cox, *supra*. There, the court stated "a custody arrangement, joint or otherwise, is within the broad equitable powers of the court." Further, the court said "[t]he fact that the father and the mother could not negotiate a joint custody arrangement demonstrates the inappropriateness of ordering joint custody." 639 P.2d at 200.²

2. Other Utah reported cases involving joint custody are: Moody v. Moody, 715 P.2d 507 (Utah 1985) (modification hearing of an initial award of joint custody); Becker v. Becker, 694 P.2d 608 (Utah 1984) (on modification hearing, it was noted that trial court considered joint custody but did not order it in initial decree).

Prior to 1980, a handful of states including California had adopted various forms of "joint custody" statutes. During the 1980's "joint custody" was in vogue and a second wave of states adopted "joint custody" statutes. Utah became the thirty-second state (and apparently the last) caught up in this wave. 2 Family Law and Practice, § 32.04 (A. Rutkin ed. 1990 & Supp.) (hereinafter "Fam. Law").³

California, the acknowledged pioneer of no-fault divorce and joint custody, retrenched in 1988 regarding joint custody. California's 1979 statute contained a "presumption . . . that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody." Cal. Civ. Code § 4600.5(a) (West 1979). In 1983, California amended its joint custody statute to include a specific definition of both "physical" custody and "legal" custody. The California Legislature recognized the need to be more specific when in 1983 it defined joint legal custody to mean "both parents shall share the right and responsibility to make decisions relating to the health, education and welfare of the child," Cal. Civ. Code § 4600.5(d), and defined joint physical custody as "each of the parents . . . [have] significant periods of physical custody." Cal. Civ. Code § 4600.5(d)(5) (West 1988). A team

3. The child custody reform of the eighties gained impetus from ongoing no-fault divorce legislative reform. Utah added "irreconcilable differences" to its list of nine fault-based grounds in 1987. Utah Code Ann. § 30-3-1(3)(a) (1987). "Both reforms took place with no public commitment or private initiative for the systematic assessment of the legal changes on patterns of custody or on child welfare. As fashions change and new interest groups emerge, family law is at risk of becoming a series of experiments that never report results in ways that can help inform the legislative process." Zimring, Foreword to Sugarman & Kay, Divorce Reform at the Crossroads, at viii (1990). As no-fault made divorce virtually automatic, fathers' groups began to protest a pro-mother bias in child custody decisions. At the same time, feminist groups began attacking legal standards which were gender-specific as inherently discriminatory. Then, fathers' groups turned the idea of gender-neutrality to their advantage in the child custody arena. These opposing forces set the stage for "joint custody" statutes based on the rationale of "equality" rather than "equity" and children end up taking a back seat to the drivers, i.e., their divorcing parents. One writer succinctly summed up the result: "This modern trend illustrates a move backward toward the more explicit treatment of children as property -- only this time the property is to be divided equally." Fineman, Dominant Discourse, Professional Language, and Legal Change In Child Custody Decisionmaking, 101 Harv. L. Rev. 727, 739-40 (1988).

of Stanford professionals proposed the need to consider "joint custody" as having a third form -- the actual residential arrangement for the child.⁴ Later, a California Task Force recommended that existing joint custody provisions be clarified to indicate that no statutory presumption exists in favor of joint custody. In response, subsection (d) was added:

This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the courts and the family the widest discretion to choose a parenting plan which is in the best interests of the child or children.

Cal. Civ. Code § 4600(d) (West Supp. 1989).

Coincidentally, while this appeal was pending, the 1990 Utah Legislature substantially amended its two year-old joint legal custody statute deleting the "rebuttable presumption" favoring joint legal custody. See Utah Code Ann. § 30-3-10.2 (1989 & Supp. 1990). However, the legislature retained its initial definition of "joint legal custody," section 30-3-10.1, and the list of seven factors courts are required to consider in determining the best interests of the child in the context of joint legal custody. Section 30-3-10.2(3)(a-g). Also retained in the statute is some language regarding parental agreement: "The court shall, where possible, include in the order [joint legal custody order] the terms agreed to between the parties [parents]," § 30-3-10.3(2) (emphasis added), and, "The agreement may contain a dispute resolution procedure the parties agree to use" § 30-3-10.3(5) (emphasis added). Utah Code Ann. § 30-3-10.3 (1989). Our legislature's change of position on the "rebuttable presumption" in favor of joint legal custody and the

4. "There are actually three aspects of joint custody: the legal custody agreement, the physical custody agreement and the actual residential arrangement for the child. It is important to investigate the three forms of joint custody separately to understand the implications of each for the functioning of the post-divorce family." Albiston, Maccoby, & Mnookin, Does Joint Legal Custody Matter?, Stan. L. & Pol'y Rev. 167, 168 (1990).

necessity of parental agreement creates confusion concerning the public policy basis for the joint legal custody statute. Utah and California appear to be the first and only states to retrench from a presumption in favor of joint (legal) custody after having adopted the presumption. Due to the paucity of pre-statute and absence of post-statute joint custody reported decisions in Utah, plus the fact that Utah's statute is not like that of any other state, we are left to decide an issue of first impression with little useful precedent. Ms. Thronson argues that we should apply the 1990 version of the joint legal custody statute, i.e., apply the amendments retroactively. We decline to do so. The 1990 amendments did not make a mere procedural change or simply clarify how the 1988 statute should have been understood originally. The amendments were substantial and substantive, thus retroactive application is not appropriate. See In re J.P., 648 P.2d 1364, 1369 n. 4 (Utah 1982).

ANALYSIS OF JOINT LEGAL CUSTODY AWARD UNDER § 30-3-10.1 to -10.4

As noted above, the majority of states have adopted statutes expressly authorizing some form of "joint custody" award. Those statutes come in four basic forms:

1. joint custody as an option only where the parties petition or agree;
2. joint custody as an option;
3. joint custody as a presumption or preference;
4. joint custody split into joint legal custody and joint physical custody.

Fam. Law, § 32.06[2]. Initially, Utah combined forms 1 and 3. Now, Utah is form 2, but only as to joint "legal" custody. Here, the trial court faced Utah's initial statute with a favorable presumption on one hand and the requirement of parents' agreement on the other. Ms. Thronson opposed a joint custody order. The trial court failed to meet the parental agreement requirement head-on. Instead, the court found "there exists substantial difficulty between the parties" and "it is in the best interests of the child for the parties to be

awarded joint legal custody." The court failed to find whether the parents agreed or disagreed as to an order of joint legal custody. At the time the court ruled, the statute stated:

The court may order joint legal custody if it determines that:

(a) both parents agree to an order of joint legal custody . . .

§ 30-3-10.2(2)(a) (1989).

The form of the statute required a threshold finding of parental "agreement." The trial court implicitly found "disagreement" but proceeded with the order. Moreover, the record reveals opposition to the order, i.e., no agreement. Several states have adopted the "parental agreement" form of joint custody statute, including Colorado, Texas and Kansas.⁵ The Colorado statute, for example, requires that any motion for joint custody be filed by both parties, Colo. Rev. Stat. § 14-10-124(5) (1973), and that any plan for joint custody must be jointly agreed to by the parties, Colo. Rev. Stat. § 14-10-124.5(5) (1973). In Colorado, a trial court ordered joint custody over the objection of the mother. The appellate court ruled that the award in the absence of agreement of the parties was an abuse of discretion. In re Marriage of Posinoff, 683 P.2d 377, 378 (Colo. Ct. App. 1984). See also Gonzalez v. Gonzalez, 672 S.W.2d 887 (Tex. Ct. App. 1984) (court has no authority to award joint custody without agreement); Larsen v. Larsen, 5 Kan. App. 2d 284, 615 P.2d 806 (1980) (without agreement, joint custody award unauthorized).

We hold that the trial court abused its discretion by imposing the order of joint legal custody on the parents and child. The statute required parental agreement. Here, there was parental opposition. See Lembach v. Cox, 639 P.2d 197, 200 (Utah 1981) (inappropriate to order joint custody where parents not in agreement). Thus, we vacate the order of joint legal custody. Due to our ruling and remand, we need not reach Ms. Thronson's challenge to the provision for automatic change of custody when one parent moves from the state.

5. Illinois, Massachusetts, Ohio, and Wisconsin have also adopted similar statutes. Fam. Law § 32.06[2] at n. 45.

**ANALYSIS OF CHILD CUSTODY
UNDER § 30-3-10**

Our vacating of the order of joint legal custody is not necessarily dispositive of the issues of child custody, including legal custody, i.e., decision-making, and physical custody, i.e., caregiving and visitation rights. The trial court's findings might support a "best interests" custody award under § 30-3-10, although an award of joint legal custody was improper. However, both the court's memorandum decision and formal findings specify the court's reliance on the legislature's list of best interest factors in the joint legal custody statute § 30-3-10.2(3) enumerated above. On the other hand, § 30-3-10 provides:

In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties.

Utah Code Ann. § 30-3-10 (1989) (emphasis added).

Our Supreme Court has developed the best interest factors to be considered under this provision.

We believe that the choice in competing child custody claims should instead be based on function-related factors. Prominent among these, though not exclusive, is the identity of the primary caretaker during the marriage. Other factors should include the identity of the parent with greater flexibility to provide personal care for the child and the identity of the parent with whom the child has spent most of his or her time pending custody determination if that period has been lengthy. Another important factor should be the stability of the environment provided by each parent.

Pusey v. Pusey, 728 P.2d 117, 120 (Utah 1986) (emphasis added). See also Hutchison v. Hutchison, 649 P.2d 38, 41 (Utah 1982); Rule 4-903(3) Utah Code of Jud. Admin. (1989) (requiring custody evaluators to consider and respond to a list of factors).

Our comparison of the two lists of factors reveals that they are not identical, although some similarities appear. Moreover, the context of the respective factors point the thrust of the trial court's inquiry in two different directions. As a result, the findings herein will not support an ultimate finding under § 30-3-10 that child custody should be placed with one parent or the other. Further, the findings contain internal disagreement. The memorandum decision states "the court desires the parties to arrange between themselves for reasonable and liberal visitation which they determine." To the same effect is formal finding number 61: "[i]t is in the best interests of the parties and their minor child to attempt to arrange between themselves reasonable and liberal visitation If the parties are unable to do so, the court will set a specific schedule." But, the court in formal finding number 65 took that promised privilege away from the parties stating -- "[i]n light of an appropriate reasonable and liberal visitation schedule, it is reasonable that the parties' minor child will spend 57% of his time with plaintiff, who has primary physical custody, and 43% of his time with the defendant." The 57% visitation award to the mother provides the basis for the "primary physical custody" statement. This was the only time the trial court mentioned physical custody. This specification of visitation time surreptitiously imposed an award of joint physical custody upon the parties without proper consideration of the best interest factors under § 30-3-10. We hold the findings to be inadequate to support any award of child custody because:

- (1) The trial court utilized best interest factors related to joint legal custody § 30-3-10.2(3) and not the factors related to child custody § 30-3-10;
- (2) The findings are in conflict as to the determination of visitation rights, i.e., by the court or the parents; _
- (3) The findings do not support any award of physical custody; and
- (4) Custody was awarded on the basis of a court imposed visitation time allocation.

Our task is to act in the best interests of the child. We must vacate and remand the custody and visitation award. We do not remand simply for revision of the findings or with directions to modify the decree regarding these matters. During the interim, the facts regarding the parents and their

child and their relationships might have been dramatically changed. Further, the joint legal custody statute has been substantially amended. The current factual and legal circumstances should be examined before this matter is finalized. Thus, we remand for further fact finding and a new legal determination, utilizing whatever procedures and hearings the trial court deems necessary -- consistent with this opinion.

CHILD SUPPORT AWARD

Child support will have to be reconsidered in connection with the above remand. Utah Code Ann. § 78-45-7.4 (Supp. 1990) reveals that the support obligation is intended to be a shared obligation of both parents. This obligation must be allocated in proportion to the parties' adjusted gross income pursuant to Utah Code Ann. § 78-45-7.5 to -7.7. Subsection 7.5 lists the items of income to be included in gross income. It also lists two items to be subtracted from gross income to calculate adjusted gross income: alimony previously ordered and paid and child support previously ordered. Neither of those items is applicable here. Thus, gross income is the same as adjusted gross income in this case. But, the trial court failed to include income from nonearned sources as required by § 78-45-7.5(1)(a). Moreover, the trial court averaged Mr. Thronson's earned income for several years rather than using "current earnings." Section 78-45-7.5(5)(b) indicates that current earnings are to be used. On remand, child support calculations should properly account for these items pursuant to the statutory requirements.

ALIMONY AWARD

The trial court awarded Ms. Thronson alimony of \$800 per month for one year. Three factors must be considered by the trial court in making an alimony award:

1. the financial condition and needs of the party seeking alimony;
2. that party's ability to produce sufficient income for him or herself; and
3. the ability of the other party to provide support.

Naranjo v. Naranjo, 751 P.2d 1144, 1147 (Utah Ct. App. 1988) (citing English v. English, 565 P.2d 409, 410 (Utah 1977)).

"Failure to analyze the parties' circumstances in light of these three factors constitutes an abuse of discretion." Id. (citing Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986)). As long as the trial court exercises its discretion within the bounds and under the standards we have set and has supported its decision with adequate findings and conclusions, we will not disturb its rulings. Davis v. Davis, 749 P.2d 647, 649 (Utah 1988).

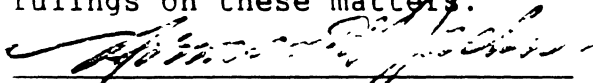
Here, the trial court considered each of the alimony factors and entered findings. Ms. Thronson's actual and necessary monthly living expenses were found to be \$3,700. She presented a higher figure, but the court heard evidence challenging certain items and found them to be overstated. Ms. Thronson's current earning capacity, as a full-time pharmacist, was found to be \$35,000 a year gross. This finding was based on competent evidence and represents the midpoint of an annual gross salary range of \$31,000 to \$39,000. The final factor, Mr. Thronson's ability to provide support, i.e., his earning capacity, was considered by the trial court. He submitted a thirteen year summary of his income. The trial court used an average of the last eight years, after excluding some contingent fee income in three of those years. Thus, the court found Mr. Thronson's average gross income to be \$71,376 annually. This calculation and finding was in error. Mr. Thronson's schedule showed his current gross earning capacity to be \$94,476 annually. Nevertheless, we cannot say that an award of \$800 per month in alimony is an abuse of discretion given the above factors and other financial circumstances of the parties. But, we do hold that the trial court abused its discretion in making the alimony non-permanent, i.e., for one year.

The trial court found that "an annual income of \$35,000 should be imputed" to Ms. Thronson, i.e., she could earn that amount, assuming she was employed on a full-time basis. But, the court found her needs to be \$3,700 per month, i.e., \$44,400 annually. Accordingly, she is not capable of meeting her needs, she requires \$9,400 annually to meet her needs, even when employed on a full-time basis. Thus, she will require the \$800 per month (\$9,600 annually) alimony for the foreseeable future. Otherwise, she will face a substantial income shortfall compared to her needs. Further, the trial court found Mr. Thronson's actual and necessary monthly living expenses to be \$4,300 per month, i.e., \$51,600 annually. This leaves him with some discretionary income. These findings warrant an award of permanent alimony. The trial court abused its discretion in limiting the alimony award to one year. Rasband v. Rasband, 752 P.2d 1331, 1335 (Utah Ct. App. 1988).

We remand for modification of the alimony award to be permanent alimony of \$800 per month.

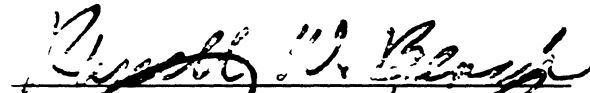
**OTHER FINANCIAL AND
PROPERTY AWARDS**

There is no fixed formula upon which to determine a division of property in a divorce action. The trial court has considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity. See Naranjo, 751 P.2d at 1146. Ms. Thronson claims the trial court erred by failing to restore to her inheritance monies expended by her while the parties were separated prior to divorce; by failing to replace certain furniture removed by Mr. Thronson; and by failing to restore certain funds spent by Mr. Thronson after they separated. We have examined these items and find no abuse of trial court discretion. This court will not disturb a determination of financial and property interests unless it is clearly unjust or a clear abuse of discretion. Rasband, 752 P.2d at 1335. Thus, we affirm the rulings on these matters.

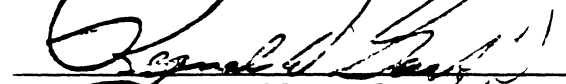


Norman H. Jackson, Judge

WE CONCUR:



Russell W. Bench, Judge



Reginal W. Garff, Judge

Tab 2

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

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

MARY THRONSON,

Plaintiff,

-vs-

CHARLES THRONSON,

Defendant.

COMPLAINT FOR DIVORCE

Civil No. D87-

Judge

COMES NOW THE PLAINTIFF to the above-entitled action, by and through counsel, and complains and alleges against the defendant as follows:

1. Plaintiff is and has been a resident of Salt Lake County, State of Utah for a period of three months or more immediately prior to the filing of the Complaint in this action.

2. The parties to this action are husband and wife, having been married on September 30, 1978 in Omaha, Nebraska.

3. Irreconcilable differences have arisen between the parties which make continuation of the marriage impossible.

4. The parties maintained their marital domicile in Salt Lake County, State of Utah and the acts complained of herein occurred in Salt Lake County, State of Utah.

5. There has been one child born as issue of this marriage, namely,

Patrick, born September 11, 1981. Plaintiff is a fit and proper person to be awarded the temporary and permanent care, custody and control of said minor child, subject to defendant's reasonable rights of visitation.

6. Defendant should be ordered to pay to plaintiff the sum of Six Thousand Dollars (\$6,000.00) per month, as and for child support, for the support and maintenance of the minor child children of the parties, until said child attains the age of 18 years or graduates from high school, whichever last occurs.

7. If the defendant falls 30 or more days in arrears in his child support obligation, the plaintiff should be entitled to mandatory income withholding relief, pursuant to Utah Code Annotated, Section 78-45(d)-1, et. seq. (1984, as amended).

8. Defendant should be ordered to maintain in force health and accident and dental insurance for the benefit of the minor child of the parties, until said minor child attains the age of 18 years or graduates from high school, whichever last occurs. Each party should be ordered to pay one-half of all medical, dental, orthodontic, optometric and psychotherapeutic expenses not covered by said insurance.

9. Defendant should be ordered to maintain in force a policy of insurance on his own life, naming the minor child as the sole and absolute beneficiary of said life insurance policy, in the minimum face value of One Hundred Thousand Dollars (\$100,000.00), until said child reaches the age of 18 years or graduates from high school, whichever last occurs.

10. Defendant should be ordered to pay to plaintiff the sum of Two Thousand Dollars (\$2,000.00) per month, as and for alimony, until the death of the plaintiff, the death of the defendant, or the remarriage or cohabitation of the plaintiff, whichever first occurs.

11. Defendant should be required to maintain plaintiff as a beneficiary on his health insurance policy for the maximum time allowable by law after the entry of the Decree of Divorce herein, with defendant to be responsible for payment of the premiums for said health insurance, in lieu of an award of additional alimony to the plaintiff.

12. Defendant should be awarded the right to claim the minor child of the parties as a dependent for the purpose of the calculation of his state and federal income taxes, so long as he is current in his child support obligation for any tax year in which the minor child is so claimed. Plaintiff should be required to sign all documents necessary to enable defendant to claim the minor child in such a manner.

13. During the course of their marriage, the parties have acquired an interest in real property commonly known as 2063 Hubbard Avenue, Salt Lake City, Utah 84108. Plaintiff should be awarded the temporary and permanent use and possession of said real property, subject to the indebtedness thereon, which plaintiff should be ordered to pay and assume, and subject to a lien in behalf of the defendant for one-half the equity value in the property as of the date of filing of the Complaint for Divorce, which should become payable to defendant upon the first to occur of the following events:

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

14. During the course of their marriage, the parties have acquired certain automobiles, including a 1986 Mercedes 190, a 1986 Toyota Landcruiser, three motorcycles and a utility trailer. Plaintiff should be awarded the Mercedes automobile, free and clear of any interest of the defendant. Defendant should be awarded the Toyota Landcruiser, the motorcycles and the utility trailer, free and clear of any interest of the plaintiff.

15. During the course of their marriage, the defendant has acquired an interest in a gun collection which should be awarded to the defendant, free and clear of any interest of the plaintiff.

16. During the course of their marriage, the parties have acquired certain items of personal effects, jewelry, clothing and belongings. Each party should be awarded his or her own personal items.

17. During the course of their marriage, the parties have acquired certain items of household furnishings, fixtures and appliances, which items should be awarded to the plaintiff, free and clear of any interest of the defendant.

18. During the course of their marriage, the defendant has acquired an interest in a retirement plan through his employer which should be divided equally between the parties according to the "Woodward" formula.

19. During the course of their marriage, the parties have acquired an interest in certain banking accounts, which accounts should be divided equally between the parties according to monetary value.

20. During the course of their marriage, each party has acquired an interest in an inheritance or insurance proceeds by reason of the death of a member of his or her family. Specifically, plaintiff has acquired an inheritance by reason of the death of her brother. Defendant has acquired an inheritance by reason of the death of his grandmother. Each party should

receive his or her own separate inheritance, free and clear of any interest of the other party, since these inheritances are not marital assets.

21. During the course of their marriage, the defendant has acquired further interest in assets, the exact nature and extent of which are unknown to plaintiff, which include, but which are not limited to, interest in a limited partnership. These remaining assets of the parties should be divided equally between the parties according to monetary value, one-half to each.

22. Plaintiff is unaware of any debts or obligations incurred by the parties which are presently outstanding, other than the mortgage indebtedness on the real property. In the event that any such debts or obligations exist, defendant should be ordered to pay and assume these debts and obligations and should be ordered to hold the plaintiff harmless thereon. Each party should be ordered to pay and assume all debts and obligations incurred in his or her own name since the date of filing of the Complaint for Divorce in this action, and each should be ordered to hold the other harmless thereon.

23. Each party should be ordered to execute and deliver all necessary documents to transfer the title and ownership of the property of the parties pursuant to the Decree entered in this action.

24. Each party should be ordered to pay and assume his or her own court costs and attorney's fees incurred herein in the event this matter is uncontested. In the event this matter is contested, defendant should be ordered to pay plaintiff's reasonable court costs and attorney's fees in an amount to be determined by the court.

WHEREFORE, plaintiff prays for the following relief:

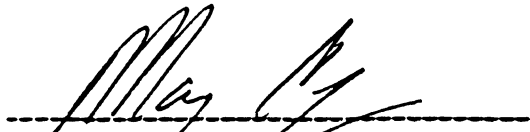
1. For a Decree of Divorce dissolving the bonds of matrimony existing between the parties, the same to become final and effective immediately upon the signing and entry thereof by the court.

2. For said Decree to be granted in accordance with the Complaint of the plaintiff, as set forth above.

3. For such other and further relief as to the court may seem just and proper.

DATED THIS 2 day of November, 1987.

CORPORON & WILLIAMS

A handwritten signature in dark ink, appearing to read 'Mary C. Corporon', is written over a horizontal dashed line.

MARY C. CORPORON
Attorney for Plaintiff

Plaintiff's address:

2063 Hubbard Avenue
Salt Lake City, Utah 84108