

1991

Helen Jane Walters v. Louis Mark Walters : Petition for Writ of Certiorari

Utah Supreme Court

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BRIEF

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IN THE SUPREME COURT FOR THE STATE OF UTAH

HELEN JANE WALTERS,	:	
	:	
Petitioner,	:	Supreme Court No. 910316
	:	
vs.	:	
	:	
LOUIS MARK WALTERS,	:	
	:	
Respondent.	:	

CORRECTED PETITION FOR WRIT OF CERTIORARI

APPEAL FROM THE DECREE OF DIVORCE OF THE
FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
THE HONORABLE RAY M. HARDING, SR., PRESIDING

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APPENDIX

IN THE SUPREME COURT FOR THE STATE OF UTAH

HELEN JANE WALTERS,	:	
	:	
Petitioner,	:	Supreme Court No. 910316
	:	
vs.	:	
	:	
LOUIS MARK WALTERS,	:	
	:	
Respondent.	:	

QUESTIONS PRESENTED FOR REVIEW

1. Did the manner in which the Utah Court of Appeals considered the factual findings of the trial court conflict with established standards of review?

2. Should the Supreme Court of Utah settle the question of whether a married couple's period of cohabitation prior to the solemnization of their marriage can be considered a part of their marriage?

3. Should the Utah Supreme Court consider Appellee's challenge to Appellant's standing?

OPINION OF THE COURT OF APPEALS

The Utah Court of Appeals issued its opinion in this matter on the 14th day of May, 1991. The opinion was published in the Utah Advance Reports as Walters v. Walters, 160 Ut. Adv. Rep. 47. A copy of such opinion is attached to this Petition as Appendix "A".

JURISDICTION

As noted above, the opinion of the Utah Court of Appeals was issued on the 14th day of May, 1991. On the 13th day of June, 1991, Petitioner filed with the Supreme Court for the State of Utah an Ex Parte Motion for Enlargement of Time. A copy of such Ex

Parte Motion is included herein as Appendix "B". Such motion was granted although a written ruling on such motion was not provided to the parties. This Court has jurisdiction to consider this writ pursuant to §78-2-2(3)(a), §78-2a-4 of the Utah Code, and Rule 45 of the Utah Rules of Appellate Procedure.

CONTROLLING STATUTES

Utah Code Annotated

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

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

Utah Code Annotated

30-3-5. Disposition of Property - Maintenance and health care of the parties and children - Court to have continuing jurisdiction - Custody and visitation - Termination of alimony - Non-meritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, and parties....

Utah Rules of Civil Procedure, Rule 52. Findings by the court.

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A;...Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses....

STATEMENT OF THE CASE

A. Nature of the Case. This is an action for divorce, concerning distribution of property and an award of attorney's

fees.

B. Course of Proceedings and Disposition Below. This matter was originally commenced by the filing of Plaintiff's (HELEN's) Complaint for divorce on the 26th day of October, 1987. Trial was held on the 7th day of February, 1989. The trial court issued it Memorandum Decision on the 15th day of February, 1989, (attached hereto as Appendix "C"). Pursuant to a directive in such Memorandum Decision, HELEN filed an Affidavit in Support of Attorney's Fees (attached hereto as Appendix "D"). On the 31st day of July, 1989, the trial court issued a subsequent Memorandum Decision awarding HELEN One Thousand Dollars (\$1,000.00) of attorney's fees (attached hereto as Appendix "E"). Thereafter, on the 5th day of October, 1989, the trial court entered its written Findings of Fact and Conclusions of Law (attached hereto as Appendix "F"). On the 30th of October, 1989, the court entered its written Amended Decree of Divorce (attached hereto as Appendix "G"). On the 9th day of November, 1989, Defendant (LEWIS) filed his Notice of Appeal (attached hereto as Appendix "H").

After briefing and argument by the parties to the Utah Court of Appeals, that court issued its opinion on the 14th day of May, 1991, (see again Appendix "A"). Thereafter, HELEN filed her Ex Parte Motion for Enlargement of Time (see again Appendix "B") followed by her Petition for Writ of Certiorari on the 15th day of July, 1991. The parties stipulated to the filing of this Corrected Petition for Writ of Certiorari which was then filed on the dated indicated by the clerk's stamp.

STATEMENT OF FACTS

(All references in this section are to pages and lines of the Reporter's Transcript of Proceedings, Trial, i.e. 6:1307:22 is a reference to page 6, line 13 through page 7, line 22 of the transcript.)

HELEN, and LEWIS, were married on the 5th day of October, 1984 [3:10-15]. They separated when HELEN filed this action in October of 1987 [11:10-11].

The parties originally met in late 1978, slightly less than six (6) years prior to their marriage [29:10-32:8; Plaintiff's Exhibit #4]. At the time they met, HELEN lived in a mobile home situated in Orem [14:1-15:9]. Shortly after they met, the parties began living together in HELEN's mobile home in Orem [17:9-19:2; 32:22-33:6; 34:4-35:9; Plaintiff's Exhibit #4]. For a brief time LEWIS' son lived with them in Orem [32:22-33:6]. LEWIS and HELEN lived in the trailer until 1980 when they moved it to a pad LEWIS purchased in a trailer park in Pleasant Grove, situated at 625 South 50 West [35:10-36:5].

HELEN was employed at Geneva Steel from before the time the parties met through the time of the trial, except for a time when the plant temporarily ceased operations in 1981 and 1982 [35:14-37:7]. LEWIS was employed at Hill Air Force Base from 1967 through the date of the trial [84:19-85:2]. His work sometimes took him out of state on temporary duty assignments. LEWIS earned a retirement benefit as a result of his employment [85:3-86:2].

Between his temporary assignments LEWIS' base of employment was at Hill and his home was HELEN's trailer [52:25-53:18]. For

the years 1979 through 1983, the years the parties cohabited but prior to the parties' marriage, LEWIS listed his permanent address on his federal income tax returns as 625 South 50 West, Pleasant Grove, the site of the trailer he occupied with HELEN [75:4-8; 76:10-14].

HELEN had a minor daughter, Shantel, who was 12 years old at the time of trial and who had lived with LEWIS in the parties' trailer home from the time the parties first met when she was not quite three [39:23-40:18; 59:18-20]. Prior to their marriage the parties agreed that Shantel would use the surname of Walters at school and church rather than HELEN's surname [40:22-43:25]. LEWIS shared responsibility for the financial support of Shantel [59:18-60:16]. LEWIS listed Shantel as a dependent living with him on his 1982, 1983, and 1984 federal income tax returns [77:2-78:17]. Before they were married, LEWIS also helped HELEN pay for certain debts she had accumulated, testifying that he "[d]idn't expect nothing [in return]" [86:3-88:10].

Shortly before the parties met, LEWIS began purchasing a parcel of realty in Highland, Utah, [94:15-24]. LEWIS kept a second mobile home on this property from before the time the parties met through October, 1985, when he moved the trailer to a second trailer pad he purchased at 640 South 50 West, Pleasant Grove, near the site of the parties' home [100:20-101:5]. This second trailer, while situated in Highland, was variously described by witnesses as either 'unlivable' [24:22-25:25], occupied by a renter [27:12-28:4], or used for storage [53:19-54:17], but never

as LEWIS' residence [63:5-12].

From the time that HELEN's trailer was moved to the pad in Pleasant Grove in 1980 through and after the time LEWIS' trailer was moved from Highland to the neighboring pad in Pleasant Grove, the parties pooled their monies and efforts to improve the three (3) properties with an eye toward eventually using the value of the two (2) trailer properties to invest in building a home in Highland [56:4-23; 64:9-65:7; 114:14-115:25]. When HELEN was laid off from Geneva, LEWIS felt it would be better if she didn't seek substitute work because her efforts were needed to maintain and improve their properties [45:4-23].

They made numerous improvements to the property on which HELEN's trailer was placed, including concrete driveways and out-buildings [96:20-97:7]. LEWIS financed most of these improvements while HELEN arranged for, supervised, and participated in the work [37:15-39:3; Plaintiff's Exhibit #4]. HELEN's earnings were spent on utilities, groceries, and "keeping things in the home front going" [39:4-19]. They built a large utility building on the Highland property [83:9-16]. Again, HELEN arranged for and participated in the work of laying the pad and water line, erecting the building, and installing solar heating [45:24-46:13; 55:14-21].

All of the real property was purchased in LEWIS' name only, even the trailer pad bought after the marriage [60:17-61:13].

SUMMARY OF THE ARGUMENT

(1) In reversing the trial court's award to HELEN of certain property interests in real property and retirement benefits

acquired by LEWIS prior to the solemnization of their marriage and in reversing the trial court's award to HELEN of attorney's fees in the amount of One Thousand Dollars (\$1,000.00), the Utah Court of Appeals failed to apply several important and well established standards of review for challenges to a trial court's findings of fact. Those standards include the requirements that appellant establish clear error, marshal the evidence, and preserve issues for appeal. Had the Court of Appeals properly applied such standards, it would have determined that LEWIS did not carry his burden on appeal and would not have reversed the trial court's two (2) awards.

(2) This Court should settle the question of whether a period of pre-marital cohabitation can be considered a part of the marriage.

(3) Finally, this Court should allow HELEN to raise her objection to LEWIS' standing to challenge the trial court's award of interests in his real property.

ARGUMENT

POINT I

THE UTAH COURT OF APPEALS CONSIDERED THE FACTUAL FINDINGS OF THE TRIAL COURT IN CONFLICT WITH ESTABLISHED STANDARDS OF REVIEW

A. The Standards of Review

1. Findings of Fact:

As noted, Rule 52(a) of the Utah Rules of Civil Procedure

provides that "findings of fact...shall not be set aside unless clearly erroneous,...." In several cases the Utah Court of Appeals has defined its responsibility under Rule 52(a). "We will not set aside a trial court's findings of fact unless they are against the clear weight of the evidence or we otherwise reach a definite and firm conviction that a mistake had been made,..." Smith v. Linmar Energy Corp, 790 P.2d 1222 (Ut. Ct. App. 1990). In its detailed and instructional opinion issued in State v. Vigil, 164 Ut. Adv. Rep. 28 (Ut. Ct. App. June 1991), the Utah Court of Appeals explained why appellate courts give deference to trial court's findings of fact. In Vigil, the Utah Court of Appeals stated "Uniquely within the province of the trial court is the establishment of the predicate facts which emerge after consideration of all testimony and the weighing of credibility. Thus, we will not intrude upon the trial court's distillation of the facts from contradictory evidence unless such findings are clearly erroneous."

2. Marshalling of the Evidence:

The appellate courts have also described the burden that must be met by a party who challenges the sufficiency of a trial court's findings.

To mount a successful attack on the trial court's factual findings, an appellant must marshall all of the evidence in support of the trial court's findings and demonstrate that, even in viewing the evidence in the light most favorable to the findings, the evidence is insufficient to support the findings, Scharf v. BMG Corporation, 700 P.2d 1068 (Utah 1985), or that its findings are otherwise clearly erroneous." Schindler v. Schindler, 776 P.2d 84 (Ut. App. Ct. 1989).

Recently in State v. Quas, 163 Ut. Adv. Rep. 46 (Ut. Ct. App. June 1991), an appeal from a criminal conviction, the court refused to even consider the appellant's challenge to the sufficiency of the evidence because appellant failed to marshall the evidence and demonstrate how that evidence, including all reasonable inferences drawn therefrom, was insufficient to support the findings. In Vigil, supra, the Court of Appeals defined the marshalling burden as a "rigid requirement." Similarly, in Walton v. Walton, 164 Ut. Adv. Rep. 56 (Ut. Ct. App. June 1991), in an appeal from a divorce action, the Court of Appeals again refused to consider the appellant's challenge to the trial court's findings of fact reasoning:

If the appellants fails to marshall the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law to the case.

From well before the decision issued in this case through the Court of Appeals' most recently reported opinions, appellant's burden of marshalling the evidence in support of the trial court's findings when challenging those findings, has been a prerequisite to a review of the sufficiency of the evidence.

3. Preservation of Issues for Appeal:

"As the Utah appellate courts have reiterated many times, [they] generally will not consider an issue, even a constitutional one, which appellant raises on appeal for the first time." State v. Webb, 790 P.2d 65 (Ut. App. Ct. 1990). See also State v. Carter, 707 P.2d 656 (Utah 1985) and State v. Johnson, 771 P.2d 326

(Utah 1989). In two of its most recently published opinions, the Utah Court of Appeals has strictly enforced this need to preserve issues for appeal in refusing to consider issues that were not properly preserved. See State v. Cayer, 164 Ut. Adv. Rep. 35 (Ut. Ct. App. June 1991) and State v. Curry, 164 Ut. Adv. Rep. 63 (Ut. Ct. App. June 1991).

B. The Trial Court's Property Awards

In reversing portions of the trial court's property awards, the Court of Appeals took a two-step approach. First, it ruled that all property acquired prior to solemnization of the parties' marriage must be considered separate property. Then it ruled that the trial court had not found sufficient exceptional circumstances that would warrant awarding any of LEWIS' separate property to HELEN. In discussing the second step of its analysis, the court did not address LEWIS' failure to marshal the evidence in support of the trial court's findings nor his failure to show that despite such supporting the evidence, the trial court's findings were clearly erroneous. Rather, the appellate court, on its own, indicated that the weight of the evidence did not seem to support an award to HELEN of a portion of LEWIS' separate property. In effect, the appellate court simply reweighed the evidence notwithstanding that LEWIS did not shoulder the burden necessary for appellate review and notwithstanding that the appellate court did not find the trial court's view of the evidence was clearly erroneous.

In so doing, the Court of Appeals committed two (2) errors.

First, it assumed that the trial court could not determine from the facts that the parties' marital relationship began at a time prior to the actual solemnization of their relationship. This Court should review whether the trial court's determination of the actual beginning of the parties' relationship is properly a factual determination. Second, the Utah Court of Appeals violated its own long standing requirement that in reviewing challenges to the sufficiency of a trial court's findings of facts, appellant, not the appellate court, must marshall all evidence in support of those findings and then demonstrate how those findings are nevertheless insufficient. In this case, the Court of Appeals was itself apparently confused by the "vexing nature of the distinction between questions of fact and questions of law." Pullman-Standard, 456 U.S. at 288, which distinction it so carefully described later in Vigil.

This Court should grant certiorari on this issue because the Utah Court of Appeals reversed the trial court's findings of fact without requiring a marshalling of the evidence or a showing of clear error in the findings.

C. The Trial Court's Award of Attorney's Fees

As with the trial court's property award, the Utah Court of Appeals reversed an award to HELEN of her partial attorney's fees. Similarly, it did so without requiring that Appellant marshall the evidence in support of the trial court's findings and without determining that the trial court was clearly erroneous. Again the appellate court simply disagreed with the trial court's weighing of

the evidence and reversed on the strength of its own view of the weight of the evidence.

Moreover, the award of attorney's fees was reversed in spite of LEWIS' failure to object to the award at the trial level, and HELEN's argument on appeal that LEWIS had failed to preserve the issue (see Appendix "I").

This Court should grant certiorari to review this issue for the same reasons that it should grant certiorari to review the Utah Court of Appeals' reversal of the trial court's property award. An additional reason to review the reversal of attorney's fees is the Court of Appeals' failure to recognize that appellant had not preserved that issue for appeal. This Court should make a clear statement of whether challenges to the sufficiency of a trial court's findings of fact must meet these three (3) standards for review or whether Utah appellate courts may invade and redecide the facts of the case without requiring marshalling, preservation of issues, or a showing of clear error by the trial court.

POINT II

**THE SUPREME COURT OF UTAH, AS A MATTER OF FIRST IMPRESSION,
SHOULD SETTLE THE QUESTION OF WHETHER, IN APPROPRIATE
CIRCUMSTANCES, A MARRIED COUPLE'S PERIOD OF COHABITATION
PRIOR TO THE SOLEMNIZATION OF THEIR MARRIAGE CAN BE CONSIDERED
A PART OF THEIR MARRIAGE**

As noted, the Court of Appeals ruled "[u]nder Utah law the Walters' relationship could not be treated as a marriage prior to its solemnization on October 5, 1984....Therefore, we conclude as a matter of law that the Walters' marriage began on October 5, 1984, the date of its solemnization." The Court of Appeals

reasoned that §30-1-4.5, Utah's Common Law Marriage statute, could not be applied to that period of time during which the parties cohabited prior to solemnization of their marriage. In so ruling, it implied that §30-1-4.5 can be the only legal basis for legitimizing the period of cohabitation. This determination was reached even though HELEN argued that the trial court's record did not include any indication that either of the parties argued for or against the application of the section to the facts nor did the court cite to the section in either its Findings of Facts or Conclusions of Law, but that the argument against the application of this section was raised by LEWIS for the first time in his brief on appeal.

This Court should grant certiorari to settle the question of whether a married couple's period of pre-marital cohabitation can be, in appropriate circumstances, considered a part of their legal marriage. It should do so for the following reasons:

- (a) This is an issue which does not appear to have been squarely addressed by either the Utah Court of Appeals or the Utah Supreme Court prior to this decision and therefore this Court should settle the issue;
- (b) Contrary to the opinion of the Utah Court of Appeals, the determination of the date of the beginning of a marital relationship may be a factual finding most properly left to the discretion of the trial court;
- (c) This Court should determine if it is inequitable and an unequal protection of the laws to recognize a solemnized

relationship and a common law relationship but not a relationship based on substantially similar facts which does not fit squarely within either §30-1-4.5 or within the definition of a solemnized marriage;

- (d) If the determination of the date of the beginning of the marital relationship is in fact a legal question, this Court can affirm the trial court on any proper ground even though the trial court assigned another reason for its ruling [see State v. Bryan, 709 P.2d 257 (Utah 1985), In Re Estate of Hock, 655 P.2d 1111 (Utah 1982), Peterson v. Peterson, 645 P.2d 37 (Utah 1982), Buehner v. UWC Associates, 752 P.2d 892 (Utah 1988), State v. One 1979 Pontiac Trans Am, 771 P.2d 682 (Ut. Ct. App. 1989), Hagen v. Hagen, 810 P.2d 478 (Ut. Ct. App. 1991), State v. Belgard, 160 Ut. Adv. Rep. 42 (Ut. Ct. App. 1991)].

Partners to a valid marriage are presumed to share 50/50 in all property interests acquired by either of them during the term of the marriage. Dunn v. Dunn, 802 P.2d 1314 (Ut. Ct. App. 1990). Such proportionate share of property interests is not determined solely by the financial contributions of the two (2) parties. Dunn, supra, Huck v. Huck, 734 P.2d 417 (Utah 1986), and Martinez v. Martinez, 754 P.2d 69 (Ut. Ct. App. 1988). Presumably this benefit inures to all partners in all marriages, whether their marriage be solemnized or legitimized by way of §30-1-4.5. Yet in this case, the Utah Court of Appeals has told HELEN that although the trial court found she had maintained a marital relationship

with LEWIS both before and after solemnization, and although that relationship did not change significantly after solemnization (see Appendix "F"), all property acquired in LEWIS' name prior to the solemnization is LEWIS' alone and she must show exceptional circumstances in order to have some interest in the property. In contrast, according to the theory of Dunn, it would be LEWIS' burden to establish why HELEN should not share equally in property acquired after solemnization of their marriage. This shifting of burdens and presumptions seems reasonable to the Court of Appeals even though the trial court found that the parties' relationship was consistently the same from the time they first met, some four (4) years prior to their marriage, until the time that HELEN filed her Complaint for divorce.

Further, §30-1-4.5(2) provides that "the determination or establishment of a marriage under this section must occur during the relationship described in sub-section (1), or within one year following the termination of that relationship." The irony and the inequity of the Court of Appeals' ruling in this case is that if a party maintains a common law relationship that eventually blossoms into a solemnized marriage that is fortunate enough to endure for more than one (1) year, that party is prevented by the foregoing statutory limitation as well as the effects of this case from ever legitimizing his or her pre-marital relationship. As a result, that party would be prevented from sharing in any property interests acquired by the other party unless he or she were able to establish extraordinary circumstances.

The Court of Appeals viewed this case as simply a matter of marital property versus separate property, giving short shrift to, and finding no significance in the trial court's finding that the parties maintained a marital relationship during all periods when the property was acquired. It is respectfully argued that the Court of Appeals' approach to the issue was simplistic and unrealistic. This Court should review the ruling in this case to determine if there is sound public policy reasoning for discouraging common law partners from marrying as this case does, or for discriminating against a class of people such as HELEN's whose only distinguishing feature is that it sits between that class of persons who cohabit but never marry and that class of persons who participate in a solemnized marriage without prior cohabitation. This Court should accept this case to consider argument both for and against recognizing a married couple's pre-marital period of cohabitation as a logical and legal extension of their marriage.

POINT III

THE UTAH SUPREME COURT SHOULD CONSIDER APPELLEE'S CHALLENGE TO APPELLANT'S STANDING

In footnote #1 of its Decision, the Utah Court of Appeals stated that it refused to consider HELEN's argument that LEWIS lacked standing to challenge the trial court's real property award. The court stated that HELEN had not properly supplemented the record on appeal with evidence of alleged transactions related to the real property in question. HELEN had attached certified copies of a Quit Claim Deed and two (2) Warranty Deeds to her Brief of

Respondent. Copies of those three (3) certified deeds are attached hereto as Exhibits "J", "K" and "L".

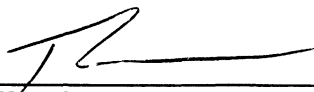
HELEN concedes that the record on appeal at the Utah Court of Appeals level was not properly supplemented. However, because "either party, or even the court on its own motion, may properly raise standing for the first time on appeal," Blodgett v. Zion's First National Bank, 752 P.2d 901 (Ut. Ct. App. 1988), Terracor v. Utah Board of State Lands, 716 P.2d 796 (Ut. 1986), Utah Restaurant Association v. Davis County Board of Health, 709 P.2d 1159 (Ut. 1985), Health Tecna Corp. v. Sound Systems International, Inc., 588 P.2d 169 (Ut. 1978), HELEN raises this issue in this Petition simply to preserve it should this Court grant certiorari to consider other issues raised hereinabove. Should this Court grant certiorari, HELEN seeks permission to properly supplement the record on appeal by proper motion under Rule 11(h) of the Utah Rules of Appellate Procedure in order that this Court might consider whether LEWIS has standing sufficient to challenge the trial court's award of certain property interests to HELEN.

CONCLUSION

This Court should grant certiorari to review the Utah Court of Appeals' decision regarding the trial court's factual findings pursuant to Utah Rules of Appellate Procedure, Rule 46(c), for the reason that this panel of the Court of Appeals failed to apply long recognized standards for appellate review of challenges to the sufficiency of a trial court's findings. Further this Court should accept this matter for review pursuant to Utah Rules of Appellate

Procedure, Rule 46(d) to settle the issue of whether a married couple's period of pre-marital cohabitation can be considered a part of their legal marriage. If accepted for review on any of these points, this Court should also allow HELEN to challenge LEWIS' standing.

DATED this 30 day of July, 1991.



THOMAS H. MEANS
Attorney for Petitioner

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, four copies of the foregoing Corrected Petition for Writ of Certiorari to Robert L. Moody, Attorney for Respondent, at 2525 North Canyon Road, Provo, UT 84604 this 30 day of July, 1991.



FILED

MAY 14 1991

IN THE UTAH COURT OF APPEALS

-----00000-----

Mary T. Norman
Mary T. Norman
Clerk of the Court
Utah Court of Appeals

Helen Jayne Walters,	)	OPINION
	)	(For Publication)
Plaintiff and Appellee,)	
)	
v.	)	Case No. 890671-CA
)	
Lewis Mark Walters,)	
	)	F I L E D
Defendant and Appellant.	)	(May 14, 1991)

Fourth District, Utah County
The Honorable Ray M. Harding

Attorneys: Robert L. Moody, Provo, for Appellant
Thomas H. Means, Provo, for Appellee

Before Judges Bench, Jackson, and Orme.

JACKSON, Judge:

Appellant, Lewis Mark Walters (Mark Walters), appeals from an amended decree of divorce awarding appellee, Helen Jane Walters (Helen Walters) a share of the parties' realty, a proportionate share of Mark Walters's retirement benefits, and attorney fees. Mark Walters challenges the decree on two grounds: (1) the trial court erred by establishing a marital relationship between the parties from January 1, 1980 until October 5, 1984, and (2) the trial court erred by awarding attorney fees where there was no evidence of financial need. Helen Walters raises the issue of Mark Walters's standing to bring this appeal.¹

1. Helen Walters argues that Mark Walters is without standing because, after trial and prior to this appeal, he transferred to third parties his interests in the real properties at issue. However, her challenge to Mark Walters's standing is premised upon alleged transactions which took place subsequent to the trial court's memorandum decision and which are not part of the trial record or the record on appeal. Hence, appellee's remedy, if any, regarding those transactions lies in the trial court.

FACTS

Helen Walters and Mark Walters met in late 1978. Helen Walters, was then, and at all relevant times, employed at Geneva Steel. Mark Walters was employed by the United States Air Force and was frequently assigned temporary duty assignments out of state. When he would return to Utah for visits, Mark Walters lived with Helen Walters in her trailer. Mark Walters also maintained a habitable trailer on property (Parcel 1) he owned prior to meeting Helen Walters, in Highland, Utah. Parcel 1 had been purchased by Mark Walters in 1977 and he made final payment on it in 1981.

In addition to Parcel 1, Mark Walters owned a trailer pad at 625 South 50 West, Pleasant Grove, Utah (Parcel 2). This had been purchased in his name in 1980. Helen Walters's mobile trailer was moved to Parcel 2 in 1980. Mark Walters paid all the expenses incurred as result of that move. Helen Walters arranged for and participated in improvements to this property and Mark Walters paid for those improvements.

From 1978 through 1983, Helen Walters filed her separate tax returns under the name of Hunter. Her daughter, Shantel, from a previous marriage, resided with Helen and Mark Walters, and was enrolled in school under the last name of Walters. In addition Mark Walters contributed to Shantel's financial support. Mark Walters's 1982 through 1984 federal income tax returns listed Shantel as a dependent living with him. In 1984, the parties were ceremoniously married and they filed a joint income tax return. Prior to 1984, the parties maintained separate checking accounts.

In July 1985, Mark Walters purchased a third trailer pad located at 640 South 50 West in Pleasant Grove, Utah (Parcel 3). This property was in the same trailer park as Parcel 2. In October 1985, he moved his trailer from Parcel 1 in Highland, Utah, to Parcel 3.

On October 26, 1987, Helen Walters filed for divorce, and on February 7, 1989, the parties appeared before the trial court to terminate their marriage and divide their real and personal property. Following the trial, the court issued a memorandum decision finding "that the parties began to carry on a marriage-like relationship on or about January 1, 1980, which was several years before the marriage was actually solemnized." The court determined that Helen Walters was to receive Parcel 2 in Pleasant Grove where her mobile home was located. Mark Walters was to keep Parcels 1 and 3. Helen Walters was also awarded a portion of Mark Walters's retirement

benefits to be calculated from January 1, 1980, using the formula set forth in Marchant v. Marchant, 743 P.2d 199, 205-06 (Utah Ct. App. 1987). On July 31, 1989, in a second memorandum decision, the trial court awarded Helen Walters \$1,000 for attorney fees "based on need and the relative ability of the parties to pay."

STANDARD OF REVIEW

In divorce proceedings, the trial court has considerable discretion concerning property distribution. This court will not disturb the trial court's decision unless it is clearly unjust or a clear abuse of discretion. Smith v. Smith, 751 P.2d 1149, 1151 (Utah Ct. App. 1988).

PROPERTY DISTRIBUTION

In distributing the parties' property, the trial court found that they began to carry on a marriage-like relationship on or about January 1, 1980. In making this finding, the court considered a number of factors: (1) Mark Walters stayed in Helen Walters's trailer with her when he was not working out of state, (2) Mark Walters had Helen Walters's trailer moved onto a lot for which he was paying, and did not charge rent, (3) Helen Walters made improvements on the property such as would be expected of a married couple, (4) Mark Walters paid debts for the plaintiff including debts to the I.R.S. and the tax commission, and (5) while working out of state, Mark Walters sent Helen Walters money on which to live.

Mark Walters challenges the trial court's property distribution on grounds that the trial court erred in ruling that their marriage relationship began January 1, 1980, and in distributing the property according to that ruling. Helen Walters argues that the trial court did not err, but rather used its broad discretion in distributing the parties' premarital and marital property.

"When a decree of divorce is entered, the court may include in it equitable orders relating to the children, property, and parties. . . ." Utah Code Ann. § 30-3-5 (1) (1989). The Utah Supreme Court has concluded that this statute confers "broad discretion upon trial courts in the division of property, regardless of its source or time of acquisition." Burke v. Burke, 733 P.2d 133, 134-35 (Utah 1987) (citations omitted). Further, "the purpose of property divisions is to allocate property in the manner which 'best serves the needs of the parties and best permits them to pursue their separate

lives.'" Noble v. Noble, 761 P.2d 1369, 1373 (Utah 1988)(quoting Burke 733 P.2d at 135)).

As a general rule, however, premarital property is viewed as separate property, and equity usually requires that "each party retain the separate property he or she brought into the marriage." Haumont v. Haumont, 793 P.2d 421, 424 (Utah Ct. App. 1990). However, this rule is not invariable. "In fashioning an equitable property division, trial courts need consider all of the pertinent circumstances." Burke, 733 P.2d at 135. Factors generally considered are:

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 time of 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. Of particular concern . . . is whether one spouse has made any contribution toward the growth of the separate assets of the other spouse and whether the assets were accumulated or enhanced by the joint efforts of the parties.

Id. (Citations omitted). Thus, where unique circumstances exist, a trial court may reallocate premarital property as part of a property division incident to divorce. Haumont, 793 P.2d at 424-25. See also Burt v. Burt, 145 Utah Adv. Rep. 29, 32 (Ct. App. 1990).

Implicit in this analysis is the requirement that the trial court, before exercising its discretionary power to distribute property, determine what property is premarital and what property is marital. To that end, the court must properly determine when the parties were lawfully married.

To permit appellate review of a trial court's property division, the lower court must have made adequate factual findings. Haumont, 793 P.2d at 425. The findings should be "'sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.'" Marchant v. Marchant, 743 P.2d 199, 202-03 (Utah Ct. App. 1987)(quoting Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987)).

In the instant case, the findings are not altogether clear as to how the trial court determined what was premarital property and what was marital property. The court's analysis focused on various factors leading the court to conclude that the parties' marriage-like relationship began January 1, 1980. We disagree. Under Utah law, the Walters' relationship could not be treated as a marriage prior to its solemnization on October 5, 1984. "Before adoption of section 30-1-4.5 in 1987, Utah did not recognize an unsolemnized relationship as a marriage, even though the parties to the relationship may have acted in other respects as spouses."² Layton v. Layton, 777 P.2d 504, 505 (Utah Ct. App. 1989)(citing Mattes v. Olearain, 759 P.2d 1177, 1181 (Utah Ct. App. 1988)). Further, section 30-1-4.5 may not be applied retroactively. Id. at 505.

Therefore, we conclude as a matter of law that the Walters' marriage began on October 5, 1984, the date of its solemnization. Property acquired before that date is premarital property and property acquired after is marital property. Specifically, Parcels 1 and 2 are premarital properties and Parcel 3 is marital property. Further, any apportionment of Mark Walters's retirement benefits should be calculated by using the formula in Marchant and October 5, 1984 used as the date of the parties' marriage.³

2. Section 30-1-4.5 recognizes a marriage relationship between cohabitants if the relationship satisfies certain specified requirements.

3. It is unclear why the court awarded Helen Walters any interest in Mark Walters's retirement benefits while awarding him no interest in her benefits. Ordinarily, the court should either award each spouse his or her own benefits, or award each a fifty percent interest in the benefits of the other, insofar as accumulated during the marriage. See, e.g., Burt, 145 Utah Adv. Rep. at 31. However, here Mark Walters's appeal of this issue is limited to arguing that the trial court used the wrong date in calculating Helen Walters's interest in his benefits. No argument was made that Helen Walters was entitled to no interest in Mark Walters's retirement benefits, nor that he was entitled to a corresponding interest in her benefits.

Before a trial court can include either of the parties premarital property in the marital estate, it must find unique circumstances that warrant disregarding the general rule that premarital property is separate property. See Burke, 733 P.2d at 135; Haumont, 793 P.2d at 424-25. Those findings must be sufficiently detailed to show how the court distributed the parties' property. Marchant, 743 P.2d at 202-03. In the case at bar, the only relevant unique circumstance discussed by the trial court was the fact that Helen Walters helped arrange for and make improvements to Parcels 1 and 2. The court did not consider any of the other factors generally considered by courts when equitably distributing property pursuant to a divorce. See Burke, 733 P.2d at 135; Haumont, 793 P.2d at 425. Further, the findings are insufficiently detailed to indicate how the trial court arrived at its decision.

Therefore, we remand to the trial court for further proceedings consistent with this decision, and to make sufficiently detailed findings to support that distribution. On remand, the trial court should "first properly categorize the parties' property as part of the marital estate or as separate property of one or the other." Burt, 145 Utah Adv. Rep. at 32. As a starting point then, Mark Walters is entitled to all of Parcels 1 and 2, and a fifty percent interest in Parcel 3. Helen Walters is entitled to a fifty percent interest in Parcel 3. Following the analysis in Burt, "the court should then consider the existence of exceptional circumstances and, if any be shown, proceed to effect an equitable distribution in light of those circumstances" Id.⁴

ATTORNEY FEES

Under Utah Code Ann. § 30-3-3 (1989), a court may award attorney fees in a divorce proceeding. "In order to award attorney fees, the trial court must find the requesting party is in need of financial assistance and that the fees requested are reasonable." Riche v. Riche, 784 P.2d 465, 470 (Utah Ct. App. 1989) (citations omitted).

The record contains evidence upon which to find that the attorney fees awarded were reasonable. Helen Walters's attorney testified regarding the amount and type of services

4. For example, since Helen Walters's trailer sits on Parcel 2, Mark Walters's separate property, the court may decide to treat that parcel as marital property, and Parcel 3, otherwise marital property, as Mark Walters's separate property, assuming the two properties are of comparable value.

rendered and submitted a supporting affidavit. However, the findings do not discuss the evidence upon which the trial court based Helen Walters's need for such fees. Moreover, upon reviewing the record, it is clear Helen Walters failed to demonstrate her need for an award of attorney fees. The trial court found that neither party was presently in need of financial support from the other. This finding suggests that Helen Walters is not in need of long-term financial assistance. Further, the record does not reveal that she has any need of short-term financial assistance. Therefore, we reverse the trial court's award of attorney fees.

Helen Walters also seeks an award of attorney fees on appeal. She first asks this court to award attorney fees pursuant to Utah R. App. P. 33(a) on the ground that this is a frivolous appeal. Obviously it is not, since appellant prevailed.

Helen Walters also seeks an award of her attorney fees incurred in this appeal pursuant to section 30-3-3. This court has previously awarded attorney fees on appeal under section 30-3-3. Maughan v. Maughan, 770 P.2d 156, 163 (Utah Ct. App. 1989). However, as we have already discussed, in awarding attorney fees under section 30-3-3, both the need for, and the reasonableness of, an award of attorney fees must first be determined. Riche, 784 P.2d at 470. Helen Walters has not demonstrated a need for an award of attorney fees below. Further, we see no new circumstances warranting an award of attorney fees in this appeal. Therefore, we decline to award attorney fees on appeal.

CONCLUSION

In summary, we reverse and remand the trial court's distribution of the parties' property, and reverse the trial court's award of attorney fees. We decline to award fees on appeal.

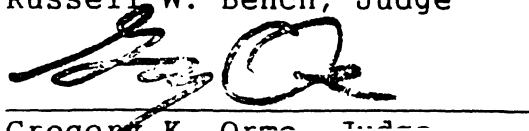


Norman H. Jackson, Judge

WE CONCUR:



Russell W. Bench, Judge



Gregory K. Ors, Judge

COPY

THOMAS H. MEANS (2222)
FLDRICH, NELSON, WEIGHT & ESPLIN
Attorneys for Petitioner
43 East 200 North
P.O. Box "L"
Provo, UT 84603-0200
Telephone: 373-4912

IN THE SUPREME COURT FOR THE STATE OF UTAH

HELEN JANE WALTERS,	:	
	:	EX PARTE MOTION FOR
Petitioner,	:	ENLARGEMENT OF TIME
	:	
vs.	:	
	:	Supreme Court No. _____
LOUIS MARK WALTERS,	:	Appellate Court No. 890671 CA
	:	
Respondent.	:	

COMES NOW Petitioner, HELEN JANE WALTERS, by and through her attorney of record, Thomas H. Means, Esq., pursuant to Rules 22(b), 22(c), 23, and 48(e) of the Utah Rules of Appellate Procedure, who hereby respectfully moves for this Court's order allowing for an extension of time for the filing of her Petition for Writ of Certiorari. For good cause, movant asserts as follows:

1. The extension is made necessary for the reason that Petitioner intends to ask this Court to review a question which may be a matter of first impression in this State. Petitioner felt it advisable to review decisions from sister states prior to filing the petition. Such research has taken longer than expected.

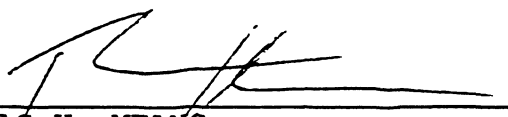
2. The movant has not sought nor been granted any prior enlargement of time to file her Petition for Writ of Certiorari.

3. The decision of the Appellate Court which the Petitioner will seek review from was issued on the 14th day of May, 1991. The original time to file the Petition for Writ of Certiorari will expire on the 13th day of June, 1991.

4. Petitioner seeks that the enlargement of time allow for either a 14-day extension for the filing of her petition pursuant to Rule 22(c) of the Utah Rules of Appellate Procedure or 30 days past the original time for filing or 10 days from the date of entry of the order granting the extension pursuant to Rule 48(e) of the Utah Rules of Appellate Procedure.

5. Because this motion is filed prior to the expiration of the original time for filing of the petition, no prior notice is required to be served upon opposing parties, pursuant to Rule 48(e).

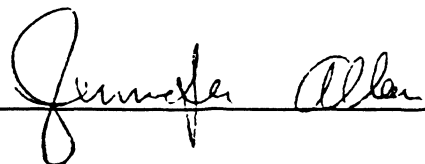
DATED this 13 day of June, 1991.



THOMAS H. MEANS
Attorney for Petitioner

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, a copy of the foregoing Ex Parte Motion for Enlargement of Time to Robert L. Moody, Attorney for Respondent, at 2525 North Canyon Road, P.O. Box 1466, Provo, UT 84603 this 13th day of June, 1991.



IN THE FOURTH JUDICIAL DISTRICT COURT
OF THE STATE OF UTAH, IN AND FOR UTAH COUNTY

1989 FEB 16 PM 4:00
SR

HELLEN JAYNE WALTERS,

Plaintiff,

CASE NUMBER CV 87 2408

-vs-

RAY M. HARDING, JUDGE

LEWIS MARK WALTERS,

Defendant.

MEMORANDUM DECISION

The Court, having conducted the trial of this matter on February 7th, 1989 and having taken all issues under advisement, will rule at this time.

The Court finds that the parties in this action are residents of Utah County, and the Court has jurisdiction. Each of the parties is granted a divorce against the other on grounds of irreconcilable differences. The Court finds that such grounds exist. The Court will not award alimony to either party.

There was an issue raised at trial as to exactly when the marital relationship between the parties began. The Court finds, based on the evidence presented at trial, that the parties began to carry on a marriage like relationship on or about January 1, 1980, which was several years before the marriage was actually solemnized.

The Court considered a number of factors in determining that the marital relationship began in 1980. Among these is the fact that the defendant stayed in the plaintiff's trailer with her when he was not working out of state. The defendant had the plaintiff's trailer moved onto a lot which he was paying for, and did not charge rent. The plaintiff made improvements on the

property such as would be expected of a married couple. The defendant paid debts and obligations for the plaintiff including substantial debts to the I.R.S. and the State Tax Commission. The plaintiff's child with the defendant's consent was enrolled in school under the name Walters. While working out of state, the defendant sent the plaintiff money to live on. Based on the foregoing circumstances, the Court finds that the parties established a marital relationship beginning on or about January 1st, 1980. This is an approximate date because the Court does not have sufficient evidence to fix an exact date.

Because the Court considers the parties to have begun their marital relationship on January 1, 1980, plaintiff is entitled to a share of defendant's retirement benefits accrued during the existence of the marriage. The formula which is to be used to apportion the plaintiff's share of the retirement benefit is found in Marchant v. Marchant, 743 P.2d 199 (Utah App. 1987). The plaintiff will not receive any retirement benefits until the defendant retires. If for any reason the defendant does not qualify for the benefit, neither will the plaintiff. In order to become eligible to receive retirement benefits when they become available, plaintiff's counsel must prepare an order which is to be filed with the defendant's employer which will give the instructions for payment of retirement benefits to the plaintiff. The formula which should be used in the order is "one half of his total monthly payment times the fraction in which the numerator consists of the number of years or months they were married during which the defendant was employed by the federal government and the denominator is the total number of years or months defendant was in such employment." Marchant, at 206. The fraction cannot be determined until the defendant retires. If the parties wish to avoid the need to enter such an order, they

The real property which is at issue was partially acquired before the marriage, and partially after. Considering when the properties were obtained, and how they were paid for, the Court finds the following to be an equitable division of the real property. The plaintiff is to receive the property in Pleasant Grove where her mobile home is located free and clear. The defendant may keep the Highland property which he acquired before the marriage, and the other Pleasant Grove property subject to the \$5,000.00 encumbrance which is still owing on that property. The Court finds that this is a fair division of the property which was either acquired or paid for during the marriage.

The Court, having no evidence as to the amount of money in the Deseret Bank, or the America First accounts during or before the marriage, will award plaintiff half of each of those. Plaintiff is to receive \$400.00 from the Deseret Bank Account, and \$2750.00 of the America First account.

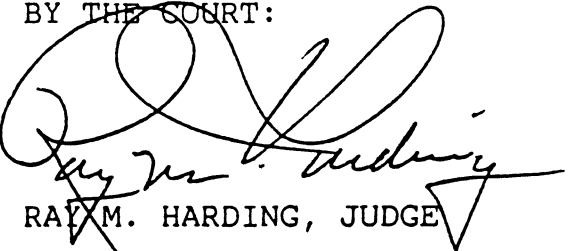
The Court has no evidence of values with which to divide the disputed personal property of the parties. The parties are therefore given the option of either agreeing on a division of property between themselves, or having one party prepare two lists of property and the other selecting a list. If the parties have not used one of these methods to divide the property within 10 days, the Court orders the property sold and the proceeds divided.

The Court will consider the issue of attorney's fees upon submission of affidavits by counsel.

Counsel for plaintiff to prepare findings of fact, conclusions of law, and a decree of divorce, and an order regarding retirement benefits, if necessary, and submit them to opposing counsel for approval as to form prior to filing with the Court for signature.

Dated this 15th day of February, 1989.

BY THE COURT:



RAY M. HARDING, JUDGE

cc: Robert L. Moody, Esq.
Thomas H. Means, Esq.

NOTARIAL PUBLIC

1989 MAR 22 PM 2:01

JS

THOMAS H. MEANS
Attorney for Plaintiff
81 East Center
P.O. Box 2283
Provo, Utah, 84603
[801] 377-7980

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

HELEN JAYNE WALTERS,)	
)	
Plaintiff,	)	AFFIDAVIT IN SUPPORT OF
	)	ATTORNEY'S FEES
v)	
)	
LEWIS MARK WALTERS,	)	No. CV 87 2408
)	
Defendant.)	

STATE OF UTAH)
 : ss
County of Utah)

Your affiant, upon his oath, swears and deposes as follows:

1. My name is Thomas H. Means; I am an attorney in good standing, licensed by the Utah State Bar and holding Utah State Bar card #2222. I am experienced in the litigation of the character presented by this action.

2. I am attorney of record for the party as indicated above.

"D"

3. In my capacity as attorney of record for such party I have reviewed the file and record of this matter, have consulted with my client and others, have advised my client by telephone and office visits, have prepared and filed pleadings, have discovered the facts attendant to the issues, and have appeared in a representative capacity for and with my client at each and all hearings as may be indicated by the file of this matter. Specifically, actions necessitated by the exigencies of this matter include the following:

Ex Parte Motions for Temporary Restraining Order,
Preliminary Injunction, and Order to Show Cause,
Affidavits and Temporary Restraining Order and Order to
Show Cause, meetings and consultation with Sheriff,
Hearing of Order To Show Cause, Stipulation, Preliminary
Injunction, Order, consultation with Pleasant Grove
detective and Pleasant Grove City Attorney regarding
Defendant's first violation of Temporary Restraining
Order, pre-trial hearing, Pre-Trial Order, Affidavits in
support of and second Motion for Order to Show Cause,
second Order to Show Cause, hearing on second Order to
Show Cause, Findings of Fact and Conclusions of Law, and
Judgment Upon Order to Show Cause, consultation with
Pleasant Grove Police and Utah County Attorney regarding

Defendant's second violation of Preliminary Injunction, three sets of Plaintiff's Interrogatories, and Certificates of Service, three sets of responses to Defendant's Interrogatories, review of records of Utah County Recorder, four Lis Pendens, telephone consultation with pay clerk at Hill Air Force Base, consultation with real estate appraiser, telephone consultation with banks and credit union regarding accounts, multiple meetings and consultations with investigator, research of case law, Subpoenas for records and appearances (8), telephone consultation with Alpine School District, research of federal right to privacy law [USCA, Section 552(a)] and Motion to Compel for response to Subpoena, consultation with parties' tax preparer, review of Defendant's tax returns, trial preparation, trial, Release of Lis Pendens, drafts of final Findings of Fact and Conclusions of Law, Decree of Divorce, Qualified Domestic Relations Order, Affidavit in Support of Attorney's Fees,

4. I have contracted with my client to provide such services, consultations, and representations at the rate of \$60.00 per hour.

5. I have dedicated 77.52 hours to date in representation of my client in this matter.

6. As per said fee agreement, and through 19 March, 1989, my client has incurred the following expenses in this action:

attorney fees	\$4651.00
advances-service costs	27.00
filing fees	87.00
recorders fees	40.00
witness fees	14.00
accounting costs	32.00
investigations	500.00
appraisals	450.00
total	\$5801.00

7. To date my client has expended \$1782.00 toward the above-noted expenses of this action.

8. The present unpaid balance of the expenses of this action is \$4019.00 all of which balance constitutes unpaid attorney's fees.

9. I believe such rate and such total fees at this stage of the proceedings to be reasonable, given the amount in controversy, the time necessarily expended by me in the matter, the relative complexity of the matter, and the comparable rates charged and time that would likely be dedicated to such representation by other

competent attorneys licensed to practice in this Court, and I further believe the various actions taken in Plaintiff's behalf in the prosecution of her claims have been reasonable, necessary, supported by good cause, and not frivolous nor brought in bad faith nor for delay nor harassment.

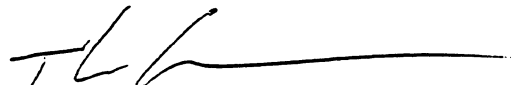
10. After-accruing fees will be as set forth in a Supplemental Affidavit of Attorney's Fees, if appropriate.

11. Your affiant proffers that Plaintiff is totally self-supported from income earned from her present employment at Geneva Steel, that in addition to supporting herself she is responsible for the total support of her daughter Shirley Schantell Hunter (Walters) whom she has custody of, and is partially supporting another adult daughter, Angela Cassingham, who lives with Plaintiff, who maintains part-time employment with a janitorial service, and who is afflicted with a disease which presently prevents her from maintaining full time employment and from living alone, to wit Guillain-Barre Syndrome.

12. At the trial of this matter Plaintiff gave testimony of her total gross income for 1988. It is your affiant's recollection that said total was \$26,182.40.

13. The legal basis for an award of attorney's fees is Section 30-3-3, Utah Code and the established law regarding awards of attorney's fees in actions for divorce as set forth in decisions such as Kerr v Kerr, 610 P2nd 1380, Beals v Beals, 682 P2nd 862, Cabrera v Cottrel, 694 P2nd 622, Talley v Talley, 739 P2nd 83, Newmeyer v Newmeyer, 745 P2nd 1276, Porco v Porco, 752 P2nd 365, Rasband v Rasband, 752 P2nd 1313, Aspar v Aspar 753 P2nd 978, Andersen v Andersen, 757 P2nd 476, Sorensen v Sorensen, 102 UAR 14, and Maughan v Maughan, 102 UAR 44. I believe Plaintiff justly deserves an award of attorney's fees and that such award to Plaintiff is supported by the facts and circumstances of this matter and the statute and decisions above cited.

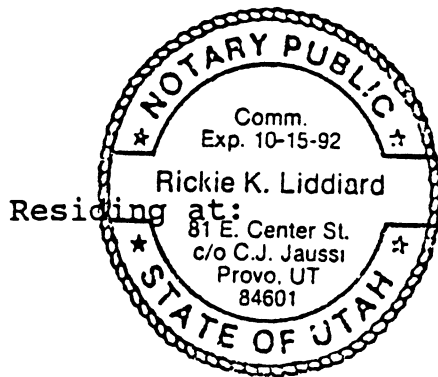
Dated this 20 day of MARCH, 1989.



Thomas H. Means
Affiant
Attorney for Plaintiff

ACKNOWLEDGMENT

On the 20 day of MARCH, 1989, personally appeared before me, **Thomas H. Means**, who duly acknowledged executing the foregoing Affidavit.



Rickie K. Liddiard
Notary Public
(seal)

My commission expires:

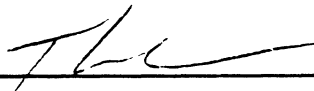
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date below-noted he/she served a true and correct copy of the foregoing BRIEF OF RESPONDENT on the following, in the manner prescribed by Utah Rules of Civil Procedure No. 5(b)(1), by either depositing the same in the U.S. Mails, addressed as below-noted, with all postage and other fees pre-paid, or by delivering the same to the following person[s] personally, or by delivering the same to a person of suitable age and discretion at the address[es] below-noted.

Dated this 19 day of July, 1990.

UTAH COURT OF APPEALS
230 South 500 East
Suite 400
Salt Lake City, Utah, 84102

ROBERT L. MOODY
Attorney for Appellant
2525 North Canyon Road
Provo, Utah, 84604



IN THE FOURTH JUDICIAL DISTRICT COURT
OF THE STATE OF UTAH, IN AND FOR UTAH COUNTY

HELEN JAYNE WALTERS,

Plaintiff,

CASE NUMBER CV 87-2408

-vs-

RAY M. HARDING, JUDGE

LEWIS MARK WALTERS,

Defendant.

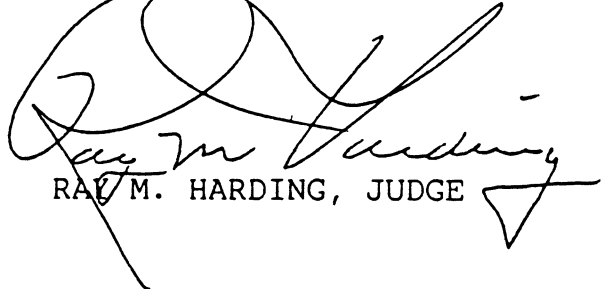
MEMORANDUM DECISION

The Court, having reserved the issue of attorney's fees in this matter will rule, and will award the plaintiff \$1,000.00 based on need and the relative ability of the parties to pay.

Counsel for plaintiff to prepare an order incorporating the terms of this decision and submit it to opposing counsel for approval as to form prior to filing with the Court for signature.

Dated this 31st day of July, 1989.

BY THE COURT:



RAY M. HARDING, JUDGE

cc: Thomas H. Means, Esq.
Robert L. Moody, Esq.

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
JAN 1 1989

OCT 5 4 25 PM '89



THOMAS H. MEANS, #2222
Attorney for Plaintiff
363 North University Avenue
Suite 103
P.O. Box 2283
Provo, Utah, 84603
[801] 377-7980

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

HELEN JAYNE WALTERS,)	
Plaintiff,	)	FINDINGS OF FACT and
	)	CONCLUSIONS OF LAW
v)	
LEWIS MARK WALTERS,	)	No. CV 87 2408
Defendant.)	

This matter came on regularly for trial on the 7th day of February, 1989. Plaintiff appeared personally and was represented by her attorney of record, Thomas H. Means. Defendant also appeared personally and was represented by his attorney of record, Robert L. Moody. Both parties gave testimony, as did Plaintiff's daughter, Sabrina Gunderson. The parties each introduced several exhibits and stated their stipulations into the record. Being thereby and otherwise fully apprised of the stipulations, facts, law, and filings regarding this matter, this Court, having taken the matter

under advisement and having issued its MEMORANDUM DECISION, now hereby enters the following.....

FINDINGS OF FACT

1. Plaintiff was a resident of Utah County at the time of the filing of her Complaint and for at least three months prior thereto. Defendant was a resident of Utah County at the time of the filing of his Counterclaim and for at least three months prior thereto.

2. The parties' marriage was solemnized on 5 October, 1984, in Winnipeg, Manitoba, Canada.

3. No children have been born of this marriage and Plaintiff is not pregnant. Plaintiff has a minor daughter, Shirley Schantell Hunter (Walters) from a prior marriage, born 15 May, 1976, who resided with the parties during the entire period when the parties resided together. Plaintiff has another daughter, Sabrina Gunderson, now married, who resided with the parties for a short period when Plaintiff's mobile home was situated at 155 South 1200 West, Orem, Utah.

4. During the marriage, differences have developed between the parties, which differences the parties have unsuccessfully attempted to resolve. Such differences persist.

5. The parties have lived separate and apart from and since on or about 10 November, 1987.

6. Plaintiff and her daughter, Shirley Schantell Hunter (Walters) have both resided in their present residence situated at 625 South 50 West, Pleasant Grove, Utah, continuously since in or about May, 1980. Plaintiff's daughter has attended the elementary and secondary schools servicing that address for her entire education and has been and is a member of the local ward of the church also servicing that address. Prior to May, 1980, Plaintiff and her minor daughter resided in the same mobile home which was then located at 155 South 1200 West, Orem, Utah. This mobile home has been the minor's only home.

7. Defendant has been employed as a civilian employee of the federal government from and since 1967 through the time of trial.

8. During the parties' marriage Plaintiff has been an employee of United States Steel Corporation except for a period when her employer ceased operations at the Geneva plant which was the location where she was employed. At the time of trial, Plaintiff had been re-employed by Geneva Steel for a period of approximately one year.

9. Neither party appears to be presently in need of or entitled to the continuing financial support of the other, either in the form alimony or child support.

10. The parties established a marriage-like relationship several years before their marriage was actually solemnized. While it is not possible to determine from the evidence the precise date when the parties began to cohabit, Plaintiff has established by a preponderance of the evidence, and it is reasonable from the evidence to find that such relationship commenced on or about 1 January, 1980, and continued from and since that time through the time the marriage was solemnized and until the parties separated. From and since 1 January, 1980, the parties cohabited and commingled their efforts and their earnings in a manner such as would be expected of a married couple. The evidence which supports such finding is as follows:

a. The parties met on the Defendant's birthday, 4 December, 1978.

b. At the time they met Plaintiff resided in her mobile home which was situated on a rental space at 155 South 1200 West, Orem, Utah. Although Defendant's employment sometimes required temporary duty (TDY) assignments out of state at guided missile sights, beginning shortly after the parties first met, when not on TDY assignments, Defendant stayed with Plaintiff in her mobile home.

c. In May of 1980, Defendant purchased, in his own name, a trailer pad at 625 South 50 West, Pleasant Grove, Utah. At that

same time the parties moved Plaintiff's mobile home onto that pad where they continued to co-habit. Defendant paid for the costs of moving the mobile home to the Pleasant Grove location as well as the costs incurred for culinary water and sewer connections.

d. Defendant did not charge Plaintiff rent for the placement of her mobile home on the pad or for her use of the realty as her residence.

e. At various times when Defendant was on TDY assignments, Plaintiff helped arranged for and make physical improvements to the Defendant's realty on which her mobile home was placed and to another parcel that Defendant was purchasing and situated at 6072 West 9600 North, Highland, Utah. Such improvements included the laying of concrete pads at each location, leveling, laying water lines, planting of a lawn, and construction of out-buildings and a metal building.

f. While employed, Plaintiff contributed her earnings toward the purchase of food, utilities, and other regular living expenses. Defendant's earnings were used to make payments on the realty.

g. When Plaintiff was not employed, and while Defendant was on TDY assignments, Defendant sent monies home to maintain Plaintiff and her daughter.

h. Defendant made contributions toward Plaintiff's separate debts owed to the I.R.S., the Utah State Tax Commission, an encumbrance on her mobile home, and debts owed for the purchase of her car, a T.V., and medical expenses incurred in an automobile accident.

i. Although not adopted by Defendant, Plaintiff's minor daughter from a prior marriage, with Defendant's knowledge and permission, and prior to solemnization of the marriage, attended school under Defendant's family name of Walters.

j. Defendant listed his address on his federal and state income tax returns as 625 South 50 West, Pleasant Grove, Utah - the same as Plaintiff's residence - for each of the years 1979, 1980, 1981, 1982, and 1983.

k. Defendant listed Plaintiff's daughter "Schanny" in his federal income tax returns under the category of "dependent children who lived with you" for each of the years 1982, 1983, and 1984.

l. The evidence does not indicate that the parties' relationship changed after the solemnization of their marriage.

11. At the time of trial Defendant maintained an account at Deseret Bank with a balance in an amount of \$800.00 and an account at America First Thrift with a balance in the amount of \$5500.00. This Court is without evidence sufficient to establish whether

these balances were accumulated prior to or after the parties established their marital relationship. However, the balance of the America First Thrift account appears to have been accumulated after 10 November, 1987, the date on or about which Defendant was served with a Temporary Restraining Order which is the same date when Defendant withdrew \$3000.00 from the account.

12. As of the date of trial Defendant was the record owner of four parcels of realty, to wit:

a. Parcel 1-

625 South 50 West, Pleasant Grove, Utah, on which is located Plaintiff's aforementioned mobile home, a 1974 72 foot Concord.

b. Parcel 2-

640 South 50 West, Pleasant Grove, Utah, on which is located a 1975 70 foot Brighton mobile home.

c. Parcel 3-

6072 West 9600 North, Highland, Utah.

d. Parcel 4-

746 West 600 North; Orem, Utah

13. Parcel 1 was deeded to Defendant on 27 May, 1980. Parcel 2 was deeded to Defendant on 18 July, 1985. Parcel 3 was deeded to Defendant on 4 August, 1978. Defendant entered into a Uniform Real Estate Contract for the purchase of parcel 3 in July, 1977,

reciting a down-payment of \$2,200.00 with annual payments toward the balance of \$5,800.00 in amounts of \$1,000.00 each scheduled to commence in June, 1978. Defendant made a final payment for parcel 3 in the amount of \$1,682.15 on 23 May, 1981. The parties have stipulated that Defendant has no equitable interest in the Orem parcel and that he is listed as legal owner of parcel 4 only as an accommodation to his son to enable his son to acquire equitable interests in the property. Parcels 1 and 3 are not encumbered by any debt. Parcel 2 is encumbered by a purchase money debt with a balance as of the date of trial in the amount of approximately \$5,000.00.

14. Defendant testified as to the purchase prices and costs of improvements dedicated to parcels 1, 2, and 3 respectively and to his opinion of their respective total values as of the date of trial. The parties have stipulated to this Court's acceptance into evidence of written appraisals of the parcels offered by Plaintiff and conducted by Thomas C. Lamoreaux, a Certified Review Appraiser. This Court considers Mr. Lamoreaux's assessment of the valuations of the parcels more credible than Defendant's own assessment for the following reasons:

a. Defendant's assessments are based almost exclusively on a compilation of purchase price and costs of improvements to each parcel.

Mr. Lamoreaux's assessments are based on several factors including location, access to main arterial roads and shopping, existence or non-existence of public improvements, adverse easements, and adequate drainage, room size and layout, insulation, adequacy of storage and closets, appeal and marketability, remaining economic life, availability for expansion, comparisons to recent sales of similar and proximate properties, income potential, highest and best use, and replacement cost.

b. Defendant testified to having no significant training or experience as an appraiser or builder of similar properties.

Mr. Lamoreaux's Qualifications Summary attached to his appraisal indicates that he has attended courses in real estate appraisal given by the American Institute of Appraisers, that he has appraised similar properties in the subject area from 1974 to the present, that he has experience as a supervisor and general contractor of residential construction from 1971 to 1974, that he is a designated appraiser for the Federal National Mortgage Association, a Certified Review Appraiser, and a licensed Realtor, and that he is a member of the National Association of Review Appraisers and the International Right of Way Association.

Upon the foregoing, this Court accepts and adopts the valuations placed on the properties by Mr. Lamoreaux, to wit:

Parcel 1, with improvements & mobile home: \$20,000.00

Parcel 2, with improvements & mobile home:	\$20,000.00
Parcel 3, with improvements:	\$10,000.00

15. The Court finds that because of the marriage-like relationship that began on 1 January, 1980, Plaintiff is entitled to a share of Defendant's retirement benefits accrued during the existence of the marriage-like relationship. The formula which is to be used to apportion the Plaintiff's share of the retirement benefit is found in Marchant v Marchant, 743 P2nd 199, (Utah App 1987). The Plaintiff shall not receive any retirement benefits until the Defendant retires. If for any reason the Defendant does not qualify for the benefit neither will the Plaintiff. In order to become eligible to receive retirement benefits when they become available, the Court finds that the Plaintiff's counsel must prepare an order which is to be filed with the Defendant's employer which will give the instructions for payment of retirement benefits to the Plaintiff. The formula which should be used in the Order is "one-half of his total monthly payment times the fraction in which the numerator consists of the number of years or months they maintained the marriage-like relationship during which the Defendant was employed by the federal government and the denominator is the total number of years or months the Defendant was in such employment."

16. With the exception of the aforementioned encumbrance affecting the property at 640 South 50 West, Pleasant Grove, and the parties' separate debts incurred since the date of their separation on 10 November, 1987, there exist no marital debts for which either party is liable either jointly or individually.

17. The parties have stipulated that Plaintiff should be awarded as her sole and separate property the parties' 1980 Chrysler automobile.

18. The parties have stipulated that Defendant should be awarded as his sole and separate property the parties' 1979 Chevrolet pick-up truck.

19. The parties have submitted their respective written lists of the other personalty of their marriage and have testified as to their respective claims to and needs for such personalty. The parties have each claimed entitlement to and need for many of the same items of personalty. From the evidence this Court is not able to ascertain or assign values to the various items of personalty listed or claimed by the parties nor does this Court have evidence from which it is able to determine, by a preponderance of the evidence which, if any, of such personalty is separate property as opposed to property accumulated during the parties' marital relationship.

20. Plaintiff has incurred an obligation in excess of \$4000.00 for attorney's fees reasonable to the prosecution of her Complaint. The hours expended as well as the hourly rate charged were reasonable in light of the complexity of the matter, the results obtained, and the hourly rate commonly charged for similar actions in this area. Plaintiff is in need of an award from Defendant to compensate her for a portion of said attorney's fees.

CONCLUSIONS OF LAW

1. Plaintiff is entitled to a Decree of Divorce dissolving her marriage to Defendant.

2. Defendant is entitled to a Decree of Divorce dissolving his marriage to Plaintiff.

3. Neither party is entitled to an award of alimony or other order of lump sum or periodic financial support from the other.

4. This Court need make no orders regarding liability for family or marital debts except that debt affecting the realty situated at 640 South 50 West, Pleasant Grove, Utah, and except those separate debts incurred by the parties respectively after the date of their separation, as are addressed hereinbelow.

5. Each party should be held solely and individually liable for any and all debt incurred in his or her individual name after the date of their separation on 10 November, 1987.

6. Plaintiff should be awarded as her equitable share of the parties' savings accounts the sum of \$3150.00 representing \$400.00 from Defendant's Deseret Bank Account and \$2750.00 from Defendant's America First Thrift account. Defendant should be awarded the remainder of each account.

7. Plaintiff should be awarded as her equitable share of the parties' equity in the realty acquired by their joint efforts during their marital relationship, all right title and interest in and to the realty and improvements - including the mobile home - situated at 625 South 50 West, Pleasant Grove, Utah. Defendant should be ordered to deed and deliver such realty to Plaintiff. Defendant should retain all right, title, and interests in and to the parties' realty and improvements - including the mobile home - situated at 640 South 50 West, Pleasant Grove, Utah, and the realty and improvements situated at 6072 West 9600 North, Highland, Utah. Such division is equitable owing to the time periods during which such equities were acquired in relation to the marital relationship that existed between the parties both prior to and after solemnization of their marriage, owing to the respective contributions made to acquisition and improvement of the properties by each party, owing to the fact that such division preserves the long established residence of Plaintiff and her minor daughter as well as the minor's school and religious associations, and owing to the fact that such division approximates a near equal division of the monetary values of the properties.

8. Defendant should be held solely and individually liable for all debt encumbering, associated with, or owing for the realty, improvements, and mobile home situated at 640 South 50 West,

Pleasant Grove, Utah. Defendant should hold Plaintiff harmless therefrom.

9. Plaintiff should be awarded as her sole and separate property the parties' 1980 Chrysler automobile.

10. Defendant should be awarded as his sole and separate property the parties' 1979 Chevrolet pick-up truck.

11. It is proper that the parties' personalty as noted in their respective lists of personalty heretofore submitted to and accepted as evidence by this Court, excluding the aforementioned automobiles and mobile homes, be marshalled, sold, and the proceeds therefrom divided equally between them.

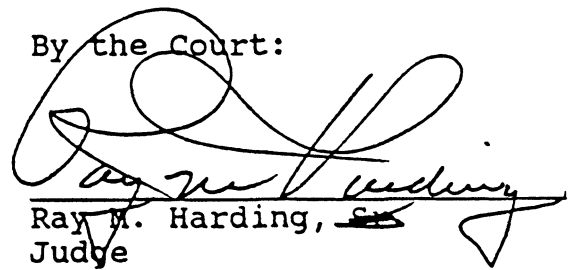
12. Plaintiff is entitled to a proportionate share of Defendant's civil service retirement benefits earned through his employment during the marital relationship. Such share should be determined according to the formula set forth in Marchant v Marchant, 743 P2nd 199 (Utah App. 1987). Accordingly, Plaintiff should not receive her share of such benefits until Defendant retires. If for any reason, Defendant does not qualify for such benefits, neither will Plaintiff. Plaintiff's proportionate share should be one half (50%) of the total amount of all of Defendant's monthly benefit payments multiplied by the fraction in which the numerator is the number of months comprising the period beginning on 1 January, 1980, and ending on the date of trial of this matter,

(109 months) and the denominator is the total number of months Defendant is employed by the federal government. The fraction cannot be determined until such time as Defendant shall retire. If Defendant separates from civil service in advance of retirement, and withdraws his contributions, Plaintiff should receive a portion of Defendant's refund based upon the above-noted fraction. Plaintiff is entitled to an award of such portion of Defendant's civil service retirement benefits as well as a Qualified Domestic Relations Order setting forth her rights in Defendant's civil service retirement benefits and authorizing and instructing the United States Office of Personnel Management to pay to her all sums to which she is entitled pursuant to the formula set forth hereinabove.

13. It is reasonable that Plaintiff be awarded as and for her reasonable attorney's fees the sum of \$1000.00.

Dated this 5 day of ^{Oct.}~~August~~, 1989.

By the Court:


Ray M. Harding, ~~Sr.~~
Judge
Fourth Judicial District
Utah County

Approved as to form:

OCT 26 1989

DA

THOMAS H. MEANS, #2222
Attorney for Plaintiff
363 North University
Suite 103
P.O. Box 2283
Provo, Utah, 84603
[801] 377-7980

**IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH**

HELEN JAYNE WALTERS,)	
	)	AMENDED
Plaintiff,	)	DECREE OF DIVORCE
)	
v)	
)	
LEWIS MARK WALTERS,	)	No. CV 87 2408
)	
Defendant.)	

This matter, having come on regularly for trial on the 7th day of February, 1989, and this Court, having taken the matter under advisement and having issued its MEMORANDUM DECISION, and having entered its written FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED, and DECREED as follows:

1. Plaintiff is hereby granted a Decree of Divorce dissolving her marriage to Defendant.

2. Defendant is hereby granted a Decree of Divorce dissolving his marriage to Plaintiff.

3. Each party is hereby held solely and individually liable for any and all debt incurred in his or her individual name after

the date of their separation on 10 November, 1987. Each party shall hold the other harmless for any and all such debts incurred in his/her individual name after 10 November, 1987.

4. Plaintiff is hereby awarded as her equitable share of the parties' savings accounts the sum of \$3150.00 representing a \$400.00 share of Defendant's Deseret Bank Account and a \$2750.00 share of Defendant's America First Thrift account. Defendant is hereby awarded the remainder of each account.

5. Plaintiff is hereby awarded as her equitable share of the parties' equity in the realty acquired by their joint efforts during their marital relationship, all right title and interest in and to the realty and improvements - including the mobile home - situated at 625 South 50 West, Pleasant Grove, Utah. More particularly described as:

Lot 9, Plat D, Pleasant Grove Mobile Home Estates
Defendant is hereby ordered to deed and deliver such realty to Plaintiff.

6. It is hereby ordered that Defendant retain all right, title, and interests in and to the parties' realty and improvements - including the mobile home - situated at 640 South 50 West, Pleasant Grove, Utah, and the realty and improvements situated at 6072 West 9600 North, Highland, Utah.

7. Defendant shall be and is hereby held solely and individually liable for all debt encumbering, associated with, or owing for the realty, improvements, and mobile home situated at 640 South 50 West, Pleasant Grove, Utah. Defendant shall hold Plaintiff harmless therefrom.

8. Plaintiff is hereby awarded as her sole and separate property the parties' 1980 Chrysler automobile.

9. Defendant is hereby awarded as his sole and separate property, the parties' 1979 Chevrolet pick-up truck.

10. It is hereby ordered that the parties' personalty as noted in their respective lists of personalty heretofore submitted to and accepted as evidence by this Court - but excepting the aforementioned automobiles and mobile homes - be marshalled, sold, and the proceeds therefrom divided equally between the parties.

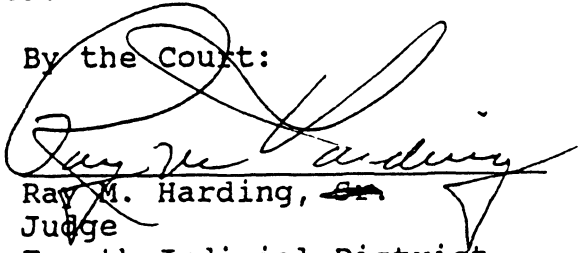
11. Plaintiff is hereby awarded a proportionate share of Defendant's civil service retirement benefits earned through his employment with the federal government during the marital relationship, which is and shall consist of one half (50%) of the total amount of all of Defendant's monthly benefit payments multiplied by the fraction in which the numerator is 109 and the denominator is the total number of months Defendant is employed by the federal government. The fraction shall be determined at such time as Defendant shall retire. Plaintiff shall not receive her

share of such benefits until Defendant retires. If Defendant separates from civil service in advance of retirement and withdraws his contributions, Plaintiff shall receive a portion of such refund based on the above-noted fraction. If for any reason, Defendant does not qualify for such benefits, neither will Plaintiff. Plaintiff is hereby granted and awarded such proportionate share of Defendant's civil service retirement benefits as well as a Qualified Domestic Relations Order setting forth her rights in Defendant's retirement benefits and authorizing and instructing the United States Office of Personnel Management to pay to her all sums to which she is entitled pursuant to the formula set forth hereinabove and hereby granted and awarded to her.

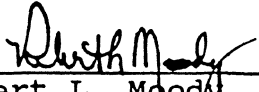
12. Plaintiff is hereby granted and Defendant is hereby ordered to pay as and for Plaintiff's reasonable attorney's fees the sum of \$1000.00.

Dated this 30th day of August, 1989.

By the Court:


Ray M. Harding, ~~SA~~
Judge
Fourth Judicial District
Utah County

Approved as to form:


Robert L. Moody
Attorney for Defendant

Robert L. Moody, #2302
TAYLOR, MOODY & THORNE
Attorneys for Defendant
2525 North Canyon Road
P.O. Box 1466
Provo, Utah 84603
Telephone 801-373-2721

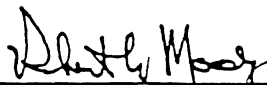
IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

HELEN JAYNE WALTERS,	:	
Plaintiff,	:	<u>NOTICE OF APPEAL</u>
vs.	:	
LEWIS MARK WALTERS,	:	Case No. <u>CV 87 2408</u>
Defendant.	:	Judge:

COMES NOW the Defendant, Mark Walters, by and through his attorney, Robert L. Moody of TAYLOR, MOODY & THORNE, and hereby gives notice of his appeal to the Court of Appeals of the State of Utah from the Decree of Divorce, signed by Judge Ray M. Harding in the Fourth Judicial District Court, Utah County, State of Utah, case No. CV 87 2408. Said Decree was signed and entered on the 13th day of October, 1989, by Judge Ray M. Harding and was filed in the Office of the Clerk thereof the same day. An Amended Decree was signed by Judge Ray M. Harding on the 30th day of October, 1989, and filed in the Office of the Clerk thereof

the same day. Defendant does hereby appeal from the whole of said decision.

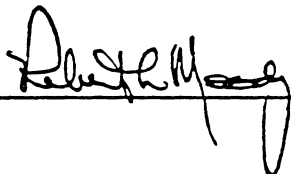
DATED this 9th day of November, 1989.



ROBERT L. MOODY
TAYLOR, MOODY & THORNE
Attorneys for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 9th day of November, 1989, I mailed a true and correct copy of the foregoing to Thomas Means, Attorney for Plaintiff, 363 North University Ave., Suite 103, Provo, Utah 84601; postage prepaid.



POINT III
RESPONDENT WAS ENTITLED TO THE TRIAL COURT'S AWARD TO HER OF
\$1000.00 AS AND FOR HER REASONABLE ATTORNEY FEES

Appellant contests the trial court's award of \$1,000.00 to Helen for attorney fees claiming she did not establish her need for the award. However, Appellant's challenge to the trial court's award of attorney fees to Respondent fails for two reasons.

First, Appellant has waived his right to challenge the award by his failure to lodge his objection below. He cannot raise the issue anew in this appeal. This court has recently cited with authority the general rule that "'[i]t would be manifestly unjust to permit a party to sit silently by, believing that prejudicial error has been committed' and then 'if he loses, come forward' claiming error." Onyeabor v Pro Roofing, Inc., 787 P2nd 525 (Utah App. 1990), citing Hill v Cloward, 377 P2nd 186 (Utah 1962). See also, Cunningham v Cunningham, 690 P2nd 549 (Utah 1984); Edgar v Wagner, 572 P2nd 405 (Utah 1977); In Re Ekker, 432 P2nd 45 (Utah 1967).⁵

⁵ Several recent cases involving appeals from criminal convictions have also applied this rule requiring preservation of issues for appeal. See, State v Carter, 707 P2nd 656 (Utah 1985); State v Arroyo, 770 P2nd 153 (Utah App. 1989); State v Johnson, 774 P2nd 1141 (Utah 1989); State v Schlosser, 774 P2nd 1132 (Utah 1989); State v Pacheco, 778 P2nd 26 (Utah App. 1989); State v Webb, 790 P2nd 65 (Utah App. 1990); State v Marshall, 132 Utah Ad. Rep. 45 (Utah App. 1990).

In this matter, at the direction of the trial court as indicated in its first MEMORANDUM DECISION, Respondent's counsel submitted an affidavit setting forth the basis, amount, and justification for attorney's fees. Appellant made no objection to the affidavit and claimed no error at the trial level as regards the claim or the award of attorney's fees. As Appellant has failed to preserve this claim of error now raised for the first time in this appeal, this court should refuse to address the claim.

Second, should this court decide Appellant has properly preserved this claim, it must determine if Respondent established a need for the award. Appellant has argued that because Respondent admitted in the affidavit that she was totally self supportive from her earnings at Geneva Steel and because the trial court found that neither party was in need of the continuing financial support of the other "either in the form of alimony or child support," she was not in need of the award. In so arguing, Appellant is equating the need required for an award of alimony with need required for the award of attorney's fees. Appellant cites no cases in support of that proposition. And, while this court has issued many cases addressing attorney's fees in domestic cases, none seems to have specifically stated what quantum of need is necessary to support such an award. It therefore appears that Appellant's burden in this regard is to establish that the trial court's finding that

Respondent needed the award was "clearly erroneous" in the manner set forth in Point I hereinabove. Appellant has failed to do so and the trial court's finding should be sustained.

Recorded at Request of _____

ENT 8094 BK 2586 PG 713
NINA S REID UTAH CO RECORDER BY ME
1989 MAR 31 10:23 AM FEE 7.00
RECORDED FOR LEWIS M. WALTERS

at _____ M. For Paid \$ _____

by _____ Doc. Book _____ Page _____ Ref.: _____

Mail tax notice to _____ Address _____

QUIT-CLAIM DEED

Lewis M. Walters
of American Fork, County of Utah
QUIT-CLAIM to

grantor
, State of Utah, hereby

Vera L. Walters

of 117 West Pacific Drive American Fork Utah grantee
---Ten Dollars and other valuable consideration----- DOLLARS,

the following described tract of land in Utah County,
State of Utah:

All of Lot 9. Plat "D" Pleasant grove mobile home estates,
Pleasant Grove, Utah, according to the official plat thereof
on file in the office of the Recorder of Utah County, Utah.

Subject to Restrictive Covenants recorded December 9, 1971,
as Entry No. 16656, in Book 1251, at Page 395 of the
Official Records of Utah County, Utah.

Witness the hand of said grantor, this 31st day of
March, A. D. one thousand nine hundred and 89

Signed in the presence of

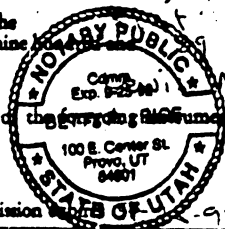
Sybil B. [unclear]
Peggy P. Smith

Lewis M. Walters
Lewis M. Walters

STATE OF UTAH,
County of Utah

On the 31st day of March, A. D. one
thousand nine hundred and 89, personally appeared before me

the signer of the foregoing instrument, who duly acknowledge to me that he executed the
same.



My commission expires 1-25-92

Address: Utah County

STATE OF UTAH
COUNTY OF UTAH

I, THE UNDERSIGNED RECORDER OF UTAH COUNTY, UTAH
DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A
TRUE COPY OF THE ORIGINAL RECORDED DOCUMENT IN THE
OFFICIAL RECORD IN MY OFFICE AS THE SAME APPEARS IN

BOOK 2586 AT PAGE 713

WITNESS MY HAND AND SEAL OF SAID OFFICE THIS 8

DAY OF May 19 90

NINA B. REID, RECORDER

Lillian M. Cleaveland DEPUTY

8160

RECORDED AT THE REGISTRY OF

WHEN RECORDED, MAIL TO:

BOOK 2586

PAGE 842

Lewis M. Walters

1989 MAR 31 PM 12:37

MINA B. REID

UTAH COUNTY RECORDER

Space Above for Recorder's Use

WARRANTY DEED

Lewis M. Walters

, grantor

of Pleasant Grove, Utah, County of

Utah

, State of Utah,

hereby CONVEY and WARRANT to

Vera L. Walters

, grantee

of American Fork, Utah, County of

Utah

, State of Utah

for the sum of Ten Dollars and other good and valuable considerations---DOLLARS,

the following described tract of land in Utah

County, State of Utah, to-wit:

Lot 11, Plat "D", Pleasant Grove Mobile Home Estates

WITNESS the hand of said grantor, this 31 day of March, 19 89

Signed in the presence of

Lewis M. Walters
Lewis M. Walters

STATE OF UTAH,

County of UTAH

ss.

On the 31 day of March, 19 89
personally appeared before me

Lewis M. Walters

the signer of the above instrument, who duly acknowledged to me that he executed the same.

Jane Williamson
Notary Public.

My commission expires 12-30-91 Residing in Pleasant Grove, Utah

APPROVED FORM — UTAH SECURITIES COMMISSION

FORM 101 - WARRANTY DEED - MAY 68, 20 U.S. 1100

STATE OF UTAH
COUNTY OF UTAH

I, THE UNDERSIGNED RECORDER OF UTAH COUNTY, UTAH
DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A
TRUE COPY OF THE ORIGINAL RECORDED DOCUMENT IN THE
OFFICIAL RECORD IN MY OFFICE AS THE SAME APPEARS IN

BOOK 2586 AT PAGE 842

WITNESS MY HAND AND SEAL OF SAID OFFICE THIS 5th

DAY OF July 19 90

NINA B. REID, RECORDER

Dale L. Martin DEPUTY

Recorded at Request of _____ ENT 5008 BK 2579 PG 825
at _____ M. Fee Paid \$ _____ NINA B REID UTAH CO RECORDER BY HM
1989 FEB 28 12:28 PM FEE 7.00
by _____ Dep. Book _____ Page _____ Ref. _____
Mail tax notice to _____ Address _____
RECORDED FOR LEWIS MARK WALTERS

WARRANTY DEED

LEWIS MARK WALTERS grantor
of American Fork, County of Utah, State of Utah, hereby
CONVEY and WARRANT to
STAN SAPP

of 775 North 300 East, Pleasant Grove, Utah grantee
-Ten Dollars and other valuable consideration - - - - DOLLARS,
for the sum of
the following described tract of land in Utah County,
State of Utah:

Commencing 10 Chains west and 583 feet north from the southeast
corner of the southwest quarter of Section 2, Township 5 South,
Range 1 East, Salt Lake Base and Meridian; thence west 132 feet;
thence north 110 feet; thence east 132 feet; thence south
110 feet to point of beginning.

WITNESS, the hand of said grantor, this 28th day of
February, A. D. 19 89

Signed in the Presence of

Lewis Mark Walters
Lewis Mark Walters

STATE OF UTAH,

County of UTAH

ss.

On the 28th day of February, A. D. 1989
personally appeared before me Lewis Mark Walters

the signer of the within instrument, who duly acknowledged to me that he executed the
same.

Thomas H. Olson
Notary Public.

My commission expires 10-1-90 Residing in Panguitch, Utah

STATE OF UTAH
COUNTY OF UTAH

I, THE UNDERSIGNED RECORDER OF UTAH COUNTY, UTAH
DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A
TRUE COPY OF THE ORIGINAL RECORDED DOCUMENT IN THE
OFFICIAL RECORD IN MY OFFICE AS THE SAME APPEARS IN

BOOK 2579 AT PAGE 825

WITNESS MY HAND AND SEAL OF SAID OFFICE THIS 5th

DAY OF July 19 20

NINA B. REID, RECORDER

Dale L. Morton DEPUTY