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Melissa Shaw v. Scott Shaw : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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**APPEAL FROM DECREE OF DIVORCE AND AMENDED DECREE OF DIVORCE
GRANTED BY THE THIRD JUDICIAL DISTRICT COURT, THE HONORABLE
STEPHEN L. HENRIOD PRESIDING**

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II. STATEMENT OF JURISDICTION

A. The Third Judicial District Court, Salt Lake County, State of Utah, had subject matter jurisdiction over this case because the Petitioner- Appellant resided in that judicial district for three months prior to the commencement of the action, and the action involved dissolution of the marriage contract between the parties and the disposition of property and the maintenance of the parties. *Utah Code Ann.*, §§ 30-3-1(2) and 30-3-5(1).

B. The Utah Court of Appeals has appellate jurisdiction over divorce matters pursuant to U.C.A. § 78-2a-3(2)(h).

C. A Decree of Divorce was entered on January 15, 2002. An Amended Decree of Divorce was entered February 14, 2002. Appellant filed his Notice of Appeal February 13, 2002.

D. The Amended Decree of Divorce was a final judgment.

III. STATEMENT OF ISSUES

Whether certain of the trial court's factual findings should be set aside. The standard of review is whether the trial court's findings are clearly erroneous. *D'Aston v. D'Aston*, 844 P.2d 345, 355 (Utah Ct. App. 1992).

Whether the trial court erred in valuing and dividing marital property. The standard of review is abuse of discretion. *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991).

Whether the trial court's valuation and division of marital property was supported by adequate factual findings. The standard of review is abuse of discretion. *Hall v. Hall*, 858 P.2d 1018 (Utah Ct. App. 1994)

Whether the trial court erred in awarding permanent alimony to Appellee. The standard of review is abuse of discretion. *Stevens v. Stevens*, 754 P.2d 952, 958 (Ut. Ct. App. 1988).

Whether the trial court erred in admitting the testimony of Appellee's rebuttal witness, Barbra Underhill. Counsel for Appellant made a timely objection to the admission of Ms. Underhill's testimony, which preserved the issue on appeal. Record on Appeal, at 257, lines 12 -16; Utah Rules of Evidence, Rule 103(a)(1). The standard of review is abuse of discretion. *State of Utah v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993).

IV. CONSTITUTIONAL OR STATUTORY PROVISIONS

Utah Code Ann. §30-3-5

Utah Code Ann. §78-45-7(2)

Utah Rules of Civil Procedure, Rules 26(a)(3)(A), (B) and (C)

Utah Rules of Evidence, Rules 401, 402, 702, 703 and 705

V. STATEMENT OF THE CASE

A. Nature of the Case

This action is to dissolve a second marriage between two professionally established individuals. The action presented issues regarding valuation of marital property, and permanent alimony award to Appellee. This appeal also presents issues regarding the trial court's admission of testimony by Appellee's surprise expert witness.

B. Course of Proceedings

A bench trial was held on October 29 and 30, 2001, in the present matter before the Honorable Stephen L. Henriod, Third Judicial District Court, Salt Lake County, Utah. *Record on Appeal*, 318, pages 1 and 215. At the conclusion of trial, Judge Henriod took the matter under advisement. *Record on Appeal*, 318, page 283, ln 10. On November 20, 2001, the trial court issued its Findings of Fact and Conclusions of Law. *Record on Appeal*, 182. A Decree of Divorce was entered on January 15, 2002. *Record on Appeal*, 237. An Amended Decree of

Divorce was entered February 14, 2002. *Record on Appeal*, 260. Appellant filed a Notice of Appeal on February 13, 2002. *Record on Appeal*, 246. Pursuant to the stipulated motion extending time, the Brief of Appellant is due in this matter on September 5, 2002. *Record on Appeal*, 319.

C. Disposition

The trial court entered a Decree of Divorce and Amended Decree of Divorce.

VI. STATEMENT OF FACTS

Appellant and Appellee were married on August 9, 1993. *Record on Appeal*, 213, ¶3. The parties had no children of their own. *Id.*, 214, ¶6. The parties separated January 11, 2001. *Id.*, 214, ¶4. Appellee has a 17 year old son from a previous marriage, for whom she receives child support. *Record on Appeal*, 318, page 52, lns 2 - 11, page 64, lines 14 - 15.

A. Facts Relating to Marital Property Division and Valuation

Appellant owned a Harley-Davidson motorcycle that he brought into the marriage. *Record on Appeal*, 20, ¶6. During the parties' marriage, or on November 7, 1998, Appellant ordered a new 2000 Harley-Davidson motorcycle. *Record on Appeal*, 318, page 37, lns 10 - 11. When the motorcycle arrived in September, 1999, Appellant traded in his 1986 Harley-Davidson motorcycle and received a credit of \$9400, against the purchase price of \$18,875.42. *Record on Appeal*, page 37, lns 16 - 25; Petitioner's Exhibit 11.

The trial court awarded the motorcycle to Appellant, along with the indebtedness thereon. *Record on Appeal*, 239 ¶13, 240, ¶27, 261, ¶4. The trial court found the value of the motorcycle to be \$19,000. *Record on Appeal*, 196, ¶66, Petitioner's Exhibit 12. The trial court found the payoff on the motorcycle to be \$5,452 and ordered the parties to share equally the \$13,547.81 in equity. *Id.*, ¶¶ 67, 68 and 69. The trial court made no specific findings as to why the \$19,000 value was appropriate, or why it gave Appellant no credit for his premarital contribution regarding the motorcycle.

During the course of the marriage, Appellee purchased a 1995 Harley-Davidson motorcycle. *Record on Appeal*, 318, page 35, lns 20 - 25. Appellee sold the motorcycle to a motorcycle dealer after the parties separated, for \$9400. *Record on Appeal*, 318, page 36, lns 1 - 6, 195, ¶62. The trial court found that \$9,400 was fair and reasonable compensation for Appellee's motorcycle. *Record on Appeal*, 195, ¶ 63. The trial court ordered the parties to divide the sales proceeds from the motorcycle equally. *Record on Appeal*, 196, ¶¶ 64 and 69. The trial court made no specific findings as to why the \$9,400 value for Appellee's motorcycle was appropriate.

During the course of the marriage, Appellant purchased a 1992 Ford F250 pick up truck. *Record on Appeal*, 318, page 36, lines 23 -25. The trial court found the value of the truck to be \$7,500. *Record on Appeal*, 196, ¶ 70. The trial court awarded the truck to Appellant. *Id.* The trial court made no specific findings as to how it arrived at the \$7,500 value for the truck.

Prior to the date of the parties' marriage, Appellant accumulated construction tools worth thousands of dollars. *Record on Appeal*, 318, page 201, lines 9 - 14. During the marriage, Appellant bought a table saw for between \$400 and \$500. *Record on Appeal*, 318, page 108, lines 10 - 15. During the marriage, Appellee bought a diamond ring for \$5000, *Id.* page 77, lines 18 - 23. The diamond ring was valued at \$4500 for insurance purposes. *Record on Appeal*, 318, page 77, ln 25, page 78, lines 1 - 9, Petitioner's Exhibit 1. Appellee sold the diamond ring to her mother for \$500. *Record on Appeal*, 318, page 77, lines 18 - 21. Appellee referred to the

diamond ring as the “table saw ring” because she bought it in retaliation for Appellant’s purchase of the table saw. *Record on Appeal*, 318, page 108, lines 4 - 12. The trial court found that there had not been enough detailed testimony regarding the value of the tools, which it noted that Appellee had alleged were equal to the value of the diamond ring. *Record on Appeal*, 198, ¶ 79. The trial court found that Appellee had paid \$2,400 for the ring and that the \$500 sales price was less than its actual value. *Record on Appeal*, 198, ¶¶ 77 and 78.. The trial court made no specific findings as to the value of the diamond ring or the table saw and did not credit Appellant with the value of any premarital tools.

B. Facts Relating to Permanent Alimony

Appellee is employed as the office manager for Red Rock Brewing Company. *Record on Appeal*, 318, page 42, lines 4 - 9. The trial court found that Appellee had fair and reasonable living expenses of \$3,519.30. *Record on Appeal*, 198, ¶ 81, Petitioner’s Exhibit 21. The trial court found that Appellee had a net monthly income of \$2,218.66. *Record on Appeal*, 200, ¶ 91, Petitioner’s Exhibit 21. The trial court found that Appellee had a shortfall of \$1,300.64, between her net income and her needs. *Record on Appeal*, 202, ¶ 107. The trial court found that Appellee had therefore established a need for alimony. *Record on Appeal*, 202, ¶ 108.

Included in Appellee’s monthly living expenses was significant credit card debt incurred after the date of separation. *Record on Appeal*, 204, ¶ 120. Petitioner’s Exhibit 21. The trial court ordered Appellee to be solely responsible for those debts. *Id.* Also included in Appellee’s

monthly living expenses was a debt to Linda Tobin for her half of the replacement cost of the marital home's carpet. *Record on Appeal*, 220, ¶ 37, Petitioner's Exhibit 21. The trial court ordered Appellee to be solely responsible for that debt. *Record on Appeal*, 191, ¶ 37. Also included in her monthly living expenses was a \$200 lease payment for the new truck driven by her son, Jason, along with the costs of his food, gas, car insurance, housing, entertainment and private school. Petitioner's Exhibit 21.

Appellant is employed as a firefighter. *Record on Appeal*, 318, page 130, lines 21 - 22. The trial court found that Appellant had living expenses of \$2,576, after the sale of the marital home. *Record on Appeal*, 229, ¶ 115, Respondent's Exhibit P. The trial court found that Appellee had a net monthly income of \$3,170. *Record on Appeal*, 227, ¶ 100. The trial court found that Appellee Appellant had an ability to pay Appellee alimony. *Record on Appeal*, 229, ¶ 117.

The trial court excluded from Appellant's monthly living expenses the \$250 monthly payment for the parties' Marriott timeshare and the \$150 monthly payment for the parties' WorldMart timeshare, which the trial court awarded to Appellant, subject to the indebtedness thereon. *Record on Appeal*, 221, ¶ 44. The trial court found that the timeshares had no market value. *Id.* The trial court made no specific findings as to why it was appropriate to eliminate the timeshare payments when they were not yet sold or transferred and had no market value.

C. Facts Relating to Rebuttal Witness Testimony

Appellee was awarded the right to reside in the marital home with her son after the parties separated in January 2001. *Record on Appeal*, 218, ¶30. Appellant paid both mortgages on the marital home until time of trial. *Id.*, ¶32. Appellee resided in the marital home for six months and then vacated the residence on July 7, 2001. *Id.*, ¶33. Appellant resumed residency on July 11, 2001. *Id.* Appellant claimed the mortgage interest deduction and real property taxes on his 2000 income tax return. Respondent's Exhibit 18.

The trial court allowed the testimony of a surprise rebuttal witness, Ms. Barbara Underhill, a certified public accountant, over Appellant's objections. *Record on Appeal*, 318, page 257, lines 12 - 25, page 258, lines 1 - 5, page 259, ln 25, page 260, lines 1 - 14. Appellant did not testify regarding the allocation of the mortgage interest deduction or real property taxes and his claim for business mileage during direct examination or cross. Appellee did not identify Ms. Underhill as a witness until the day before trial, did not identify her as an expert witness, did not provide a report regarding her expected testimony and did not qualify her as an expert. Nevertheless, the trial court allowed Ms. Underhill to opine on the mortgage interest deduction and property tax allocations, the consequences of Appellant not filing an amended tax return and Internal Revenue Service regulations regarding business mileage expenses. *Record on Appeal*, page 261, lines 4 - 25, page 262, lines 1 - 10. The trial court found that the parties were at an increased risk of audit and financial loss unless Appellant filed an amended return. *Record on*

Appeal, 222, ¶ 57. The trial court awarded Appellee the right to claim one-half the mortgage interest deduction and real property taxes on the marital home for the 2000 income tax year and ordered Appellant to file an amended tax return. *Record on Appeal*, 239, ¶ 12, 261, ¶4.

VII. SUMMARY OF ARGUMENT

The trial court was inequitable in valuing the parties' vehicles -- using a price in excess of the purchase price and Appellee's estimate for Appellant's motorcycle and the high blue book price for Appellant's truck, while accepting the dealer purchase price for Appellee's motorcycle. The trial court failed to give Appellant credit for his premarital contribution to his motorcycle. The trial court failed to give Appellant credit for his premarital construction tools and refused to find a value for the one marital tool, a table saw, despite testimony as to its value. The trial court netted Appellant's tools it did not value, against Appellee's diamond ring, which it did not value and for which it used a clearly erroneous purchase price. The trial court failed to make adequate findings supporting the inequitable division and valuation of the personal property.

The trial court's ruling regarding Appellee's post separation debt and her right to alimony are a poignant example of the trial court's ruling's plain error and internal inconsistency. As the facts marshaled below revealed, Appellee could have provided more for her own support by not running up her credit cards after the date of separation, after she sold everything at a garage sale. The trial court's order that Appellee pay her separate property debts incurred after the date of separation is antithetical to the trial court's other ruling that Appellant fund that expense. It is at least error and at most inequitable to order Appellant to underwrite Appellee's post separation extravagant purchases that the court awarded to her. Similarly, although the trial court ordered Appellee to be solely responsible for half the replacement cost of

the marital home's carpet, the trial court inexplicably includes that amount in calculating Appellant's alimony obligation. Appellee leased a new Ford Ranger truck for her 17 year old son. Appellee had the ability to provide a greater share of her own support by not leasing such an expensive vehicle or any vehicle at all for her son. Regardless, Appellant should not be obligated to support a child that is not his own, by paying for his transportation, private schooling, insurance, food, lodging and entertainment.. Finally, the trial court eliminated \$400 from Appellant's monthly living expenses because it assumed Appellant would dispose of the parties' two timeshares. Appellant was ordered to pay the monthly obligations thereon and it was error not to have included them in his monthly living expenses.

The trial court allowed Appellee's surprise expert rebuttal witness to testify, over Appellant's objection. The trial court allowed testimony regarding the allocation of the mortgage interest deduction and property taxes on the marital home for the 2000 income tax year and Appellant's claim for business mileage expense - all issue that Appellant had not testified to on direct and Appellee had not raised in her case-in-chief or in cross examination. To the extent Ms. Underhill testified as a lay witness, Ms. Underhill's rebuttal testimony was outside the scope because Appellant did not testify regarding the allocation of the mortgage interest deduction or property taxes on direct examination. To the extent Ms. Underhill testified as an expert witness, her testimony was improperly admitted because Appellee did not disclose Ms. Underhill until the day of trial, did not designate her as an expert witness and the disclosure was not

accompanied by a written report. Had Appellant known that Ms. Underhill would be testifying regarding the issue of the mortgage interest deduction, he would have called the parties' former accountant to testify on his behalf and to present evidence that the accountant had advised Appellant that he could claim the entire deduction for the 2000 income tax year and justifying Appellant's right to claim it.

VIII. ARGUMENT

A. The Evidence Does Not Support the Trial Court's Findings Regarding Marital Property.

1. The Valuation of the 2000 Harley-Davidson Motorcycle

The trial court was asked to value the parties' 2000 Harley-Davidson motorcycle, acquired during the marriage. The evidence apparently in support of the trial court's conclusion, included Petitioner's Exhibit 11, the Vehicle Buyer's Order and Purchase Agreement, which indicated a purchase price of \$18,875.42. The Purchase Agreement also indicated that a 1986 Harley-Davidson motorcycle (Vin No. 1HD1DJL18GY500291) had been accepted as a trade-in, for which Appellant received a \$9,400 credit. *Id.*

Appellee testified that in her opinion, the actual value of Appellant's motorcycle was \$18,000. *Record on Appeal*, 318, page 39, lines 22 - 25. Based apparently on the \$18,875.42 retail price listed in the Purchase Agreement, the trial court valued the 2000 Harley-Davidson

motorcycle at \$19,000. *Record on Appeal*, 224, ¶69, 263, ¶2. The trial court found the payoff to be \$5,452. *Id.* Accordingly, the trial court ordered the parties to divide the equity of \$13,548 equally. *Id.*

In his Amended Financial Declaration, Appellant estimated that his motorcycle was worth \$18,000. *Record on Appeal*, 124. Appellant testified that the motorcycle was brand new when he purchased it and he had put a “lot more miles” on it since. *Record on Appeal*, 318, page 199, lines 9 - 18. Appellant conceded that \$18,000 was a reasonable value for the motorcycle. *Record on Appeal*, 318, page 208, lines 20 - 25.

The trial court apparently rounded up from the motorcycle’s retail price of \$18,875.42, as listed in the Purchase Agreement, to arrive at the \$19,000 value. The trial court may have believed that was an appropriate value since there was a waiting time for new Harley-Davidson motorcycles. *Record on Appeal*, 318, page 152, lines 2 - 13. The trial court may not have believed Appellant’s testimony regarding the additional miles, since Appellant initially gave an estimate of \$16,000 for the motorcycle, which he conceded under cross-examination, was an understatement of its value. *Record on Appeal*, 318, page 209, lines 2 - 4, Respondent’s Exhibit Q, 196, ¶67.

Nevertheless, is far more reasonable that a new motorcycle that has been driven some distance has diminished at least somewhat in value. Moreover, even if the trial court rejected Appellant’s value, there was no reason to reject Appellee’s value, since she presumably had

incentive to value the motorcycle at its greatest value, since she knew it was going to be awarded to Appellant. The evidence did not support that finding and the trial court abused once again abused its discretion. The trial court failed to make adequate findings as to why it valued the motorcycle at \$19,000. It simply recited the retail purchase price of \$19,000, observed that Appellant had valued it at \$16,000 in testimony and \$18,000 in other documents, and then valued it at \$19,000. *Record on Appeal*, 224, p¶¶67 and 69, 239 ¶13, 261 ¶4.

Absent unusual circumstances, the law presumes that the marital estate should be divided equally. *Hall v. Hall*, 858 P.2d 1018 (Utah Ct. App. 1994). The trial court's property and debt allocations must be based on adequate findings and the failure to do so is an abuse of discretion. *Id.*, at 1021. The trial court's failure to make adequate findings on this issue is an abuse of discretion. (*Id.*)

Although the trade-in motorcycle was mentioned on the Purchase Agreement, there was no testimony from either party as to the date Appellant purchased it, or as to whether it was premarital. Appellant did not request at trial that he be given credit for the premarital motorcycle. In the absence of any specific testimony on this issue, the trial court ordered the parties to divide equally the "marital equity" in the motorcycle, which included the credit for the trade-in. *Record on Appeal*, 224, ¶69.

In his Answer to the Petition for Divorce, filed on or about December 28, 2000, Appellant alleged that he had purchased the 1986 Harley-Davidson motorcycle prior to the marriage and

had traded it in on the 2000 Harley-Davidson motorcycle. *Record on Appeal*, 20, ¶6. He further requested a credit of approximately \$10,000 of equity from the premarital motorcycle against the equity in the 2000 Harley- Davidson motorcycle. *Id.* This allegation was not controverted in the trial testimony.

In general, each party should receive the real and personal property he or she brought into the marriage. *Mortenson v. Mortenson*, 760 P.2d 304, 306 (Utah 1988), *Burt v. Burt*, 799 P.2d 1166, 1172 (Ut. Ct. App. 1990). Exceptions include when the premarital property has become commingled with a marital asset. *Burt, supra*, at 1168. Under those circumstances, a trial court should properly consider the premarital contribution when dividing the marital asset. *Rappleye v. Rappleye*, 855 P.2d 260, 263 (Ut. Ct. App. 1993). That may be why the trial court decided as it did, but without adequate findings, it is impossible to know. Apparently, the trial court did not consider whether the trade-in was premarital and therefore Appellant was entitled to a credit for his contribution. The trial court's failure was an abuse of discretion. The trial court made no findings as to why it did not give Appellant credit for his pre-marital contribution to a marital asset. The failure to make adequate factual findings on this issue is an abuse of discretion. (*Id.*)

The trial court abused its discretion in valuing the marital property. Its valuation of Appellant's motorcycle should be set aside. *Howell, supra*, 806 P.2d, at 211.

2. The Valuation of the 1995 Harley-Davidson Motorcycle

The trial court was asked to value the parties' 1995 Harley-Davidson motorcycle, acquired during the marriage.

Appellee testified that the motorcycle was in good condition at the time of sale but had an oil leak. *Record on Appeal*, 318, page 36, lines 7 - 11. She further testified that the fact that the motorcycle had an oil leak was reflected in the lower sales price *Id.*, lines 12 - 14. She testified that she had researched the NADA blue book value of her motorcycle before selling it and had learned that it was \$9500. *Id.*, page 77, lines 6 - 12. She also testified that she looked at advertisements for similar motorcycles in the newspaper and attempted to sell the motorcycle through the newspaper, before finally taking it to the dealership to be sold. *Id.*, lines 15 - 17.

The trial court found, apparently based on Appellee's testimony, that the \$9,400 she received from the sale of the 1995 motorcycle was fair and reasonable compensation for a motorcycle of the same year and in like condition and repair. *Record on Appeal*, 223, ¶63. The trial court apparently believed that because Appellee stood to be equally disadvantaged by a low sales price, she had obtained the best price she could have, under the circumstances. *Record on Appeal*, 318, page 277, lines 3 - 12. The trial court also believed that if she had really had wanted to dump the motorcycle, as Appellant argued, she could have easily gotten less. *Id.*, lines 13 - 17.

Appellant testified that he had researched the NADA blue book evaluation on 1995 Harley Davidson motorcycles and it gave her motorcycle a value of \$12,800. *Record on Appeal*, 318, page 146, lines 1 - 4, Respondent's Exhibit HH and II. He testified that he had also researched the value of Appellee's motorcycle through newspaper ads for comparable bikes. and found the asking prices to be between \$13,000 and \$15,000. *Record on Appeal*, 318, page 145, lines 16 - 25, page 146, lines 1 - 7, Respondent's Exhibit HH and II. He testified that the NADA blue book rate did not include accessories. *Record on Appeal*, 318, lines 22 - 23. He testified that Appellee's motorcycle had accessories which would increase the value by "\$1500 plus," such as chrome controls, brake clutch, foot pads, extra exhaust, custom seats, air cleaners, timing covers, and primary covers. *Record on Appeal*, 318, page 147, lines 3 - 10. He testified that in one ad in the newspaper for a motorcycle exactly like hers, the asking price was \$14,000. *Record on Appeal*, 318, page 148, lines 11 - 13. He testified that in another ad for a motorcycle one year older than hers, the asking price was \$14,900. *Id.*, lines 13 - 15. Appellant further testified that the motorcycle's oil leak was insignificant and would have only cost \$500 to fix. (*Record on Appeal*, 318, page 235, lines 3 - 9 . He claimed the leak was merely cosmetic and did not effect the motorcycle's performance *Id.*, lines 15 -17.

In closing, the Appellant argued that Appellee's bitter and calculated purpose to punish Appellant should be viewed as a whole. *Record on Appeal*, 318, page 277, lines 3 - 15. Appellant cited to Appellee's comments to her friend at the garage sale that she was not going to

leave anything for Appellant (*Record on Appeal*, 318, page 107, lines 1 - 7), her concealment of a bank account from Appellant (*Record on Appeal*, 226, ¶92) her sale of the diamond ring to her mother for below the appraised value (*Record on Appeal*, 198, ¶78 and her sale of the motorcycle at a price far below its value are consistent with her goal to punish Appellant. *Record on Appeal*, 318, page 277, lines 3 - 19.

There was ample evidence presented that the value of Appellee's motorcycle, based on the NADA blue book and newspaper advertisements for comparable motorcycles, exceeded the sales price by as much as \$5,000. It is unfair and inequitable to value Appellant's almost two year old motorcycle at its purchase price, on the one hand, and on the other hand to accept the sales price Appellee obtained for the motorcycle through the dealer. Especially when there was ample evidence presented that she was trying to minimize the amount of money Appellant was to receive from the division of the marital property. It was an abuse of discretion to value the motorcycle at the sales price of \$9,400. Additionally, the trial court failed to make adequate findings as to why it valued the motorcycle at that price.

Absent unusual circumstances, the law presumes that the marital estate should be divided equally. *Hall v. Hall*, 858 P.2d 1018 (Utah Ct. App. 1994). The trial court's property and debt allocations must be based on adequate findings and the failure to do so is an abuse of discretion. *Id.*, at 1021. The trial court's failure to make adequate findings on this issue is an abuse of discretion. (*Id.*)

The trial court abused its discretion in valuing the marital property. Its valuation of Appellee's motorcycle should be set aside. *Howell, supra*, 806 P.2d, at 211.

3. The Valuation of the Ford Truck

The trial court was asked to value the parties' 1992 Ford F250 pick-up truck, acquired during the marriage.

Appellee presented the testimony of Jeff King, who was in charge of salesmen at Larry Miller Ford in West Valley City. *Record on Appeal*, 318, page 94, ln 20. Mr. King testified that although he had not actually inspected the vehicle to determine what options it had and its condition, he estimated its value as being "somewhere close to the \$10,000 range retail." *Record on Appeal*, 318, page 96, lines 16 -24. He gave that value as the price he expected Appellant to receive if he sold it on his own. *Id.*, ln 25, page 97, lines 1 - 5. He indicated that was the price for a "standard pickup" and indicated that the truck could be worth even more, with options. *Id.* . He testified that he used the standard mileage figure of 90,000, and that mileage up to 110,000 would not substantially affect the truck's value. *Record on Appeal*, 318, page 97, 10 - 15.

On cross-examination, Appellant presented Mr. King with the NADA blue book value for a 1992 Ford pick-up truck *Record on Appeal*, 318, page 98, lines 1 - 25, page 99, ln 1, Respondent Exhibit EE. Mr. King admitted that if the truck were two wheel drive and had no extra cab, the value would change substantially. *Record on Appeal*, 318, page 98, lines 21 - 22. Also on cross examination, Mr. King admitted his estimated value was for a supercab, and not a

4 x 4. *Record on Appeal*, 318, page 99, lines 3 - 8. Also on cross, Appellee's witness regarding the truck's value reduced his estimate of that truck's value to \$7,000. *Record on Appeal*, 318, page 100, lines 17 - 19.

Appellant testified that he had researched the NADA blue book evaluation on 1992 Ford F250 pick up trucks and it gave the truck a high value of \$6,375. *Record on Appeal*, 318, page 150, lines 2 - 7. Respondent Exhibit EE. He testified that the vehicle had been used as a work truck for seven years and had 110,000 miles. *Id.*, lines 6 -7. He testified that the vehicle had a lot of dents, and that "the bumper was bent, the tail gate has got some damage to it, the bed of the truck is all banged up." *Id.*, lines 14 - 19. He also testified that the paint was chipped. *Id.*, lines 18 -19. He also testified that he had researched trucks in the newspaper and that a truck with a five speed, his being an automatic, was advertised for \$3500. *Id.*, lines 23 - 25, Respondent Exhibit. FF. He estimated that his truck was worth in the range of \$3,500 to \$4,000. *Record on Appeal*, 318, page 151, lines 9 - 13. He testified that even though the truck in the paper was not a diesel as his is, it would not increase the value. *Record on Appeal*, 318, page 237, lines 14 - 18. Appellant later testified that the truck had a shell and he agreed with Mr. King's testimony that it would increase the value of the truck by \$150 to \$200. *Record on Appeal*, 318, page 250, lines 2 -11. Appellant introduced photographs of the truck reflecting its damaged condition. *Record on Appeal*, 318, page 239, lines 12 -25, page 240, lines 1 - 2, Respondent Exhibit JJ.

The trial court, apparently based on Mr. King's testimony, valued the truck at \$7,500. *Record on Appeal*, 224, ¶70. The trial court awarded the truck to Appellant and ordered the parties to share equally the equity in the truck. *Id.* The trial court apparently did not believe Appellant's testimony regarding the lower value.

There was ample evidence presented that Appellant's truck was in poor condition, with high miles, and should not have been valued at above the high blue book provided by Appellee's own expert, Mr. King, for a truck with superior options. Mr. King estimated its value at \$7,000, or between \$7,150 and \$7,200 with the addition of a shell. *Record on Appeal*, 318, page 250, lines 2 -11. It is unfair and inequitable to, on the one hand, value Appellant's truck at above high blue book value, value Appellant's almost two year old motorcycle at its purchase price, and on the other hand, simply accept the sales price Appellee obtained for her motorcycle. The evidence does not support a value of \$7,500 for the truck. *Record on Appeal*, 318, page 100, lines 17 - 19, page 250, lines 2 -11. It was abuse of the trial court's discretion to value the truck at \$7,500.

Absent unusual circumstances, the law presumes that the marital estate should be divided equally. *Hall v. Hall*, 858 P.2d 1018 (Utah Ct. App. 1994). The trial court's property and debt allocations must be based on adequate findings and the failure to do so is an abuse of discretion. *Id.*, at 1021. The trial court's failure to make adequate findings on this issue is an abuse of

discretion. (*Id.*) The trial court did not make specific findings as to why it valued the truck at \$7,500. The trial court's failure to do so is an abuse of discretion. *Id.*

The trial court abused its discretion in valuing the marital property. Its valuation of Appellant's truck should be set aside. *Howell, supra*, 806 P.2d, at 211.

4. The Valuation of the Premarital Construction Tools and Diamond Ring

The trial court was asked to value the parties' tools and a diamond ring that Appellee purchased for herself during the marriage.

Appellant offered the insurance appraisal on the diamond ring, which valued it at \$4,500. *Record on Appeal*, 318, page 78, lines 1 - 9, Respondent Exhibit I. Appellant presented testimony of the parties' mutual friend, Claudia Bennion, who testified that the Appellee told her that she paid \$5000 for the diamond ring. *Record on Appeal*, 318, page 108, lines 16 - 18. Ms. Bennion further testified that Appellee told her that Appellant paid between \$400 and \$500 for the table saw. *Id.*, lines 13 - 15. Appellant testified that he had construction tools worth thousands of dollars and that he had acquired most of it prior to the marriage. *Record on Appeal*, 318, page 201, lines 9 - 14.

Appellee presented no testimony regarding the type or value of Appellant's tools, either marital or premarital. She produced no evidence controverting Appellant's testimony that he had construction tools, the majority of which were acquired prior to the marriage.

The trial court found that Appellee paid \$2,400 for the diamond ring. *Record on Appeal*, 225, ¶77, Respondent Exhibit I. The trial court found that the diamond ring had been appraised for insurance purposes at \$4,500 *Id.* The trial court found that the sale of the ring for \$500 was less than the ring's actual value. *Id.*, ¶78. The trial court found that "detailed testimony was not elicited regarding the actual value of hand tools, compressors, table saws, and other items of property which remained in the [Appellant's] possession, which the Petitioner alleged was equal to the value of the ring." *Id.* It cited the testimony of Appellant's witness, Claudia Bennion, in support of this finding. *Record on Appeal*, 198, ¶77. The trial court therefore apparently netted the value of Appellee's diamond ring against the value of Appellant's tools, because it did not award either party an equalizing payment.

Appellee did not testify regarding the purchase price of the diamond ring, did not claim she purchased it for \$2,400, and did not even list the ring as an asset on her financial declarations. *Record on Appeal*, 15, 33, Petitioner's Exhibit 21). The trial court's factual findings should be set aside, where they are found to be clearly erroneous. *D'Aston v. D'Aston*, 844 P.2d 345, 355 (Utah Ct. App. 1992). The trial court's factual finding is directly contrary to the only testimony on the subject of the ring's purchase price, that of Claudia Bennion, who testified that Appellee admitted to paying \$5000 for the ring. *Record on Appeal*, 318, lines 15 - 18. The trial court's finding that the purchase price of the ring was \$2,400 (, *Record on Appeal*, 198, ¶77), should be set aside as clearly erroneous.

The trial court did not value the diamond ring, nor did it value Appellant's tools. Since the trial court netted one against the other, based on the erroneous value of \$2,400 for the ring, that finding should also be set aside. *Id.*, ¶79. The trial court also accepted without foundation Appellee's allegation that the value of the marital tools was equal to the value of the ring; however, the actual testimony was that Appellee bought the diamond ring and justified it on the grounds that Appellant had gone out and bought the \$400 - \$500 table saw. *Record on Appeal*, 318, page 108, lines 10 - 12. In fact, Ms. Bennion testified that Appellee referred to it as the "table saw ring." *Id.* The finding that Appellee claimed the value of the ring to be equal to Appellant's tools should be set aside as clearly erroneous.

The trial court's finding that "detailed testimony was not elicited regarding the actual value oftable saws," also is clearly erroneous. *Record on Appeal*, 225, ¶79. Ms. Bennion testified that Appellee told her that Appellant paid between \$400 and \$500 for the table saw. *Record on Appeal*, 318, page 108, lines 10 - 12.

It is clearly erroneous, unfair and inequitable to net a diamond ring that cost \$5000, and which was appraised at \$4,500 against a table saw worth between \$400 and \$500. There was substantial evidence to support a finding that most of Appellant's tools were acquired before the marriage, that the diamond ring was valued at \$4,500 or \$5,000 and that the table saw should be valued at \$400 or \$500 -- with Appellant awarded an appropriate equalizing payment.

The trial court made no specific findings as to the value of the ring or the table saw and claimed it could not make factual findings regarding the tools, despite the evidence that the table saw cost between \$400 and \$500 and the majority of the tools were premarital. *Record on Appeal*, 225, ¶79, 318, page 108, lines 13 - 15, page 201, lines 9-14.

Absent unusual circumstances, the law presumes that the marital estate should be divided equally. *Hall v. Hall*, 858 P.2d 1018 (Utah Ct. App. 1994). The trial court's property and debt allocations must be based on adequate findings and the failure to do so is an abuse of discretion. *Id.*, at 1021. The failure to make adequate factual findings on the value of the ring and the table saw is an abuse of discretion. (*Id.*)

The trial court abused its discretion in valuing the marital property. Its valuation of Appellant's tools and Appellee's diamond ring should be set aside. *Howell, supra*, 806 P.2d, at 211.

B. The Evidence Does Not Support The Trial Court's Award of Permanent Alimony to Appellee

The trial court was asked to determine whether Appellant should be ordered to pay permanent alimony to Appellee.

The trial court had before it three financial statements filed by Appellee in support of her request for alimony: a financial declaration dated November 16, 2000, (*Record on Appeal*, 15), a financial declaration dated January 8, 2001, (*Record on Appeal*, 33), and a financial

declaration list , dated October 26, 2001, (Petitioner's Exhibit 21). The financial declaration list reflected Appellee's net monthly income of \$2,334.66 and average monthly living expenses for her and her 17 year old son of \$3,519.30. *Id.* Appellee's expenses included revolving credit installments payments of \$882.12, private school expenses of \$100, automobile gas, insurance and installment payments of \$672.18 for her new Hyundai automobile (valued at \$15,726.49) and her son's new Ford Ranger truck (valued at \$19,446.25), both purchased after the date of separation.

The trial court had before it two financial statements filed by Appellant in opposition to Appellee's request for alimony: a financial declaration dated January 25, 2001 (*Record on Appeal*, 51), and a financial declaration dated October 10, 2001. (*Record on Appeal*, 124). The trial court found that Appellant's current reasonable and fair living expenses upon the sale of the marital home to be \$2,576 and his net monthly was \$3,170. *Record on Appeal*, 227, and 229, ¶¶ 100 and 115.

Based on these findings, the trial court found that Appellee had established a need for alimony (based on a shortfall of \$1,300.64) and that Appellant had the financial ability to support her. *Record on Appeal* 228, and 229, ¶¶ 107, 108, 117. The trial court awarded Appellee \$250 per month until the marital home sold and \$500 per month thereafter, for the length of the marriage. *Record on Appeal*, 239 and 240 , ¶¶ 15 and 16, 261, ¶4. Based solely on the numbers the trial court used, its decision was reasonable.

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Based on these findings, the trial court found that Appellee had established a need for alimony (based on a shortfall of \$1,300.64) and that Appellant had the financial ability to support her. *Record on Appeal* 228, and 229, ¶¶ 107, 108, 117. The trial court awarded Appellee \$250 per month until the marital home sold and \$500 per month thereafter, for the length of the marriage. *Record on Appeal*, 239 and 240 , ¶¶ 15 and 16, 261, ¶4. Based solely on the numbers the trial court used, its decision was reasonable.

The trial court determines alimony awards between divorcing parties under Utah Code Ann. §30-3-5. In making that determination, the court must consider the following factors:

- (i) the financial condition and needs of the recipient spouse;
- (ii) the recipient's earning capacity or ability to produce income;
- (iii) the ability of the payor spouse to provide support;
- (iv) the length of the marriage;
- (v) whether the recipient spouse has custody of minor children requiring support;
- (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and
- (vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

In determining a reasonable alimony award, the trial court must consider the financial conditions and needs of the wife, her ability to produce sufficient income for herself and her husband's ability to provide support. *Jones v. Jones*, 700 P.2d 1072 (Utah 1985), *Schaumberg v. Schaumberg*, 875 P.2d 598, 602 (Ut. Ct. App. 1994). If the trial court has not considered these factors or has not supported its ruling with adequate findings based on sufficient evidence, or has abused its discretion, the decision must be reversed. *Cox v. Cox*, 877 P.2d 1262, 1267 (Ut. Ct. App. 1994).

Utah Code Ann., §30-3-5 (ii) requires the trial court to consider the alimony recipient 's ability to support herself as one factor in determining whether alimony should be awarded. Appellee had temporary possession of the marital home for six months, from January ,2001 - July, 2001. *Record on Appeal*, 218, ¶¶ 30,31,33. Appellant's witness, Ms. Bennion, testified that Appellee held a garage sale of household goods in June, 2001. *Record on Appeal*, 318, page 106, lines 7 - 11. Ms. Bennion testified that Appellee sold clothes, dressers, a cedar chest, sewing machine, knick knacks and jewelry. *Id.*, lines 18 - 21. Ms. Bennion testified that Appellee told her that she "was selling everything," including a teak wood fish that Ms. Bennion had given Appellant. *Id.*, lines, 5 - 14. Ms. Bennion testified that Appellee said she was not going to leave anything for [Appellant.] *Id.*, ln 7.

After the date of separation, Appellee ran up significant credit cards to such retailers and credit card companies as R.C. Willey, (3,347.15) Granite Furniture, (\$1,505.52) Mt. America, (\$1,907.04) Discover, (2,346.00) Lowe's, (\$700) and Dell Computers (\$1,454.10). Petitioner's Exhibit 21. She also had a credit card debt with Citibank(\$8,054.71). *Id.* The trial court ordered Appellee to be solely responsible for these debts since they were incurred after the date of separation. *Record on Appeal*, 240, ¶¶ 18 - 23. With respect to the Citibank debt, Appellee failed to meet her burden of proving that it was a marital obligation since she did not disclose it until the day of trial. *Record on Appeal* , 229, ¶120. The monthly payments for these debts and obligations alone total \$532.12. (*Id.*) Appellee testified that she incurred many of these debts to

replace items she left in the marital residence. *Record on Appeal*, 318, page 56, lines 9 - 17, page 57, lines 17 - 22.

By ordering Appellant to pay Appellee permanent alimony of \$500, contravenes the trial court's finding that Appellee should be solely responsible for these debts incurred after the date of separation. *Id.* It encourages the party with less income to "run up the bills," after separation so they can conveniently demonstrate a "need" for alimony. It rewards Appellee for selling the household goods at a garage sale so she has an excuse for purchasing new to furnish her condominium, all courtesy of Appellant. It is unfair and inequitable to require Appellant to underwrite Appellee's extravagant purchases. Deducting the installments payments associated only with these debts, (\$1300.64 - \$532.12), reduces Appellee's need for permanent alimony to \$768.52.

Similarly, Appellee claims a debt to Linda Tobin of \$3,034.00, with a monthly payment of \$150. Petitioner's Exhibit 21. The trial court found that this debt was incurred so Appellant could pay her share of the replacement cost of the carpeting in the marital home. *Record on Appeal*, 220, ¶¶ 36 and 37. The trial court found that Appellee was solely obligated to repay the Tobin loan. *Id.* By ordering Appellant to pay Appellee permanent alimony, contravenes the trial court's finding that Appellee should be solely responsible for the Tobin debt. *Id.* It is unfair and equitable to purport to make an equal debt division, when, by awarding permanent alimony, one party ends up assuming the entire debt. Deducting the installments payment

associated with this debt, (\$768.52 - \$150), further reduces Appellee's need for permanent alimony to \$618.52.

Finally, Appellee acquired a new 2001 Hyundai Tiburon automobile and a new Ford Ranger truck for her 18 year old son, Jason, after the date of separation, worth \$15,726.49 and \$19,446.25, respectively. *Record on Appeal*, 318, page 59, lines 4 - 8., Petitioner's Exhibit 21. The gas, insurance and installment payments on these vehicles cost \$672.18 per month, of which \$200 is the truck lease payment. *Id.* Appellee clearly had the ability to acquire a less expensive vehicle for Jason and/or to purchase no vehicle for him at all. The insurance expense for a male teenage driver in a new vehicle surely represents the lion's share of Appellee's \$348.18 per month gas and insurance expense. Jason is not Appellant's child and Appellant should not have to pay for his expensive transportation. Appellee already sends the child to private school and has included his food, gas, clothing and entertainment expenses in her financial declaration. It is unfair and inequitable to tack an expensive car payment on top of all this and demand that Appellant contribute each month. Deducting Jason's lease payment (\$200) and half the gas/insurance monthly payment (\$174.09) and his private school (\$100), further reduces Appellee's need for alimony to \$144.43.

The trial court found that Appellant's current reasonable and fair living expenses upon the sale of the marital home to be \$2,576 and his net monthly was \$3,170. *Record on Appeal*, 227,

and 229, ¶¶ 100 and 115. Accordingly, the trial court inferred that Appellant had \$594 extra each month to satisfy an alimony obligation to Appellee.

The trial court excluded from Appellant's monthly living expenses a \$250 monthly payment for the parties' Marriott timeshare and the \$150 monthly payment for the parties' Worldmart timeshare, which the trial court awarded to Appellant. *Record on Appeal*, 221, 228-229 ¶ 44, ¶112. The trial court found that the timeshares had no market value. *Id.*, 221, ¶44.

Appellee testified that she had found a purchaser for the WorldMart timeshare. *Record on Appeal*, 318, page 34, lines 4 - 20. Appellant testified he was unwilling to sell it. *Id.*, page 207, lines 18 - 21. Appellant testified that he was willing to sell the Marriott timeshare. *Id.*, page 207, lines 22 - 23. The trial court may have decided it was appropriate to deduct the timeshare payment from Appellant's monthly expenses based on Appellee's testimony that the WorldMart timeshare could be sold. The trial court may have decided to deduct both timeshares from Appellant's monthly expenses because Appellee testified that the timeshares were a "luxury" and Appellant testified he wanted to keep the WorldMart timeshare. *Id.*, page 33, lines 11 - 15, page

The trial court asked Appellant if he could sell the timeshares. *Record on Appeal*, 318, page 207, ln 25. Appellant responded that he "checked with several real estate firms that deal in timeshares and they say the best you could do is to get somebody to assume your payments." *Record on Appeal*, 318, page 208, ln 3 - 5.

The trial court made no specific findings as to why it was appropriate to eliminate the timeshare payments when the timeshares had no value and there was no testimony that they were actually sold. Appellant was still responsible for making the monthly payments of \$250 and \$150 as of the date the trial court ordered him to pay monthly alimony of \$500. The parties purchased the timeshares during the marriage and therefore decided that they were a “luxury” they could afford. It is unfair to penalize Appellant by awarding him the worthless timeshares and the monthly obligations thereon, and then eliminating the payments from his monthly living expenses when calculating alimony. Appellee should share in the lingering responsibilities for assets acquired during the marriage.

Although Appellee testified she had a purchaser for the WorldMart timeshare, there was no signed contract and Appellant testified that he wanted to keep it. *Id.* There was no testimony that there was a purchaser for the Marriott timeshare. It is unfair on the one hand to eliminate the timeshare payment from Appellant’s monthly living expenses and on the other, require him to defray the monthly costs for Appellee’s son’s new truck, insurance and private school. A timeshare is no more a luxury than a brand new truck for a 17 year old boy.

The trial court’s finding that Appellant’s living expenses were \$2,576 was clearly erroneous and should be set aside. Appellant’s living expenses should have been \$2,976. Considering then his net income of \$3,170, Appellant only had the ability to pay Appellee \$194 in permanent alimony.

The evidence does not support an award of permanent alimony to Petitioner. To award permanent alimony of \$500 was an abuse of discretion. The permanent alimony award to Appellee should be set aside. *Stevens, supra*, 754 P.2d , at 958.

C. The Testimony of Appellee's Rebuttal Witness Was Improperly Admitted

Appellee called Barbara Underhill, a certified public accountant, as a surprise expert rebuttal witness. *Record on Appeal*, 318, page 255, lines 11 - 17. Appellant objected that Ms. Underhill was not properly a rebuttal witness because her testimony should have been part of Appellee's case in chief and Appellant had not addressed how Appellee had allocated her expenses. *Record on Appeal*, 318, page 257, lines 12 - 16. In response, Appellee argued that Ms. Underhill's testimony was going to the issue of allocation of those expenses, and the deductibility of certain claimed exemptions by Mr. Shaw under the IRS regulations. *Id.*, lines 18 - 22. Appellant argued that if that were the case, Appellant gave no notice that there was going to be expert witness testimony and Appellee provided no report or opinion. *Id.*, lines 23 - 25. Appellant complained that he had only learned Ms. Underhill's name the day before and that there was no designation as to her expected testimony. *Id.*, ln 25, page 258, lines 1 - 3. The trial court nevertheless allowed Ms. Underhill to testify as a rebuttal witness. *Id.*, lines 4 - 5.

Ms. Underhill testified that she prepared Appellee's income tax return for the 2000 income tax year. *Record on Appeal*, 318, page 257, lines 3 - 7. She testified that Appellee claimed one-half the mortgage interest deduction and real property taxes on her 2000 income tax

return. *Record on Appeal*, 318, page 258, lines 9 - 23. She was asked to review Appellant's 2000 income tax return and testify as to how he had allocated the mortgage interest deduction. *Record on Appeal*, 318, page 259, lines 19 - 23, 260, lines 15 - 19. Appellant once again objected to this question as being outside the scope of the direct examination because he did not ask Appellant about the percentage he had allocated. *Record on Appeal*, 318, page 259, line 25, page 260, lines 1 - 2. Appellee argued in response that she had asked Appellant if he had assisted in the preparation of the 2000 income tax return and he had claimed he did. *Record on Appeal*, 318, page 226, lines 5 - 10, page 260, lines 3 - 6. The trial court allowed Ms. Underwood continue. *Record on Appeal*, page 260, line 14.

Ms. Underhill testified that Appellant had claimed the entire mortgage interest deduction and property taxes and half the income tax refund. *Id.*, lines 15 - 19. She opined that the inconsistencies in the returns subjected both parties to a potential audit or "increased IRS action." *Record on Appeal*, 318, page 261, lines 4 - 9. She opined that the best way to resolve the matter would be for one of the parties' income tax returns to be amended. *Id.*, lines 10 - 13. She also opined regarding the IRS regulations regarding mileage claimed in performance of job duties. *Id.*, lines 14 - 25, page 262, lines 1 - 11. She opined that if an employee were reimbursed for mileage, the employee would not be entitled to claim the mileage as a business expense. *Id.*

The trial court found that Appellee has claimed only half the mortgage interest deductions and property taxes on her 2000 income return and that Appellant had claimed 100% of the same deductions on his 2000 income tax return. *Record on Appeal*, 222, ¶¶54 and 55. The trial court found that Appellant should file an amended tax return for 2000, claiming only one-half the interest deductions. *Id.*, at ¶ 58. The trial court also found that Appellant's claim for an employee business mileage expense was "unreasonable, unsupported and may constitute tax fraud." *Id.*, ¶ 56.

Only relevant evidence is admissible at trial. Utah Rules of Evidence, Rules 401 and 402. If Ms. Underwood's testimony was properly admitted, the trial court had the right to make determinations regarding the relative credibility of witnesses. Utah Rules of Civil Procedure, Rule 52(a); *D'Aston v. D'Aston*, 844 P.2d 345,355 (Utah Ct. App. 1992).

Appellee called Ms. Underhill as surprise rebuttal witness. To the extent Ms. Underhill testified at trial as a lay witness in rebuttal, under Utah Rules of Evidence, Rules 701, she was only permitted to testify regarding evidence required because of the evidence presented on direct examination. *Adams v. Lang*, 275 P.2d 881, 882 (1954). The only possibly related question, asked by Appellee on cross-examination, was whether Appellant had assisted in the preparation of the 2000 income tax return and he had claimed he did. *Record on Appeal*, 318, page 226, lines 5 - 10, page 260, lines 3 - 6. Appellee asked nothing about allocating the mortgage income deduction and property taxes. Because Appellant did not testify regarding the mortgage interest

deductions on direct examination, Ms. Underhill's testimony was not properly admitted. Utah Rules of Evidence, Rules 701, *Adams*, 275 P.2d at 882.

The trial court may have found that asking if Appellant assisted in the preparation of the 2000 income tax return opened the door to Ms. Underhill's rebuttal testimony on the mortgage interest deduction allocation; however the trial court made no findings regarding the basis for overruling Appellant's objection. Failure to make adequate findings is an abuse of discretion. *State v. Larsen*, *supra*, 856 P2d, at 1361.

Ms. Underhill, a certified public accountant, could have testified as an expert witness in rebuttal, under Utah Rule of Evidence, Rule 702, if she qualified as an expert by knowledge, skill, experience, training or education. The matter of determining the qualifications of an expert witness is within the discretion of the trial court. *State v. Locke*, 688 P.2d 464 (Utah 1984). Appellant did not qualify Ms. Underhill as an expert witness.

If she was being offered as an expert, Utah Rules of Civil Procedure, Rules 26(a)(3)(A) and Rules 702, 703 or 705 of the Utah Rules of Evidence, required Appellee to disclose the identity of her expert witness in advance of trial. The disclosure required by subsection (a)(3)(A) must be accompanied by a written report, unless otherwise stipulated by the parties or ordered by the Court. Rule 26(a)(3)(B). The written report which is required with the disclosure of the expert witness's identity under (a)(3)(B), must contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is

expected to testify and a summary of the grounds for each opinion. Finally, under Rule 26(a)(3)(C), unless otherwise stipulated by the parties or ordered by the court, the disclosures required by Subdivision (a)(3)(A) must be made within 30 days after the expiration of fact discovery or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party. Appellee did not disclose Ms. Underhill's identity until the day before trial and provided no written report regarding her expected testimony. *Record on Appeal*, 318, page 257, lines 23 -25, page 258, lines 1 - 3.

The trial court made no findings as to the basis for overruling Appellant's objections. It may have been that the trial court did not believe that Ms. Underhill was testifying as an expert witness, and therefore, the requirements of Utah Rules of Civil Procedure, Rules 26(a)(3)(A) and Rules 702, 703 or 705 of the Utah Rules of Evidence, did not have to be met. Despite not being qualified as an expert, Ms. Underhill opined on such issues as whether the filing of conflicting reports would create a problem for the parties and how the IRS Regulations addressed the issue of business mileage. *Record on Appeal*, 318, page 261, lines 4 - 8 , 14 - 25, page 262, lines 1 - 11. She should not have been permitted to give this "expert testimony," without being qualified as an expert witness. Utah Rule of Evidence, Rule 702.

It was error to have allowed Ms. Underhill to testify as a rebuttal witness, under Utah Rules of Evidence, Rule 103(a)(1). It was an abuse of discretion to allow her to testify as an

expert witness. *Larsen, supra*. This Court must still decide if it was harmless error. *State of Utah v. Jacques*, 924 P.2d 898, 902 (Ut. Ct. App. 1996).

Since the parties resided together as husband and wife for all of 2000, it may well be that it was appropriate for them to share the mortgage income deduction equally. Also, the trial court may not have believed Appellant that he had sought advice from his accountant and the accountant had advised him to claim the entire deduction and the business expense mileage. If so, then it was harmless error to allow Ms. Underhill to testify.

Had Appellant known that Ms. Underhill would be testifying regarding the issue of the mortgage interest deduction and business mileage deduction, he would have called the parties' former accountant to testify on his behalf and to present evidence that the accountant had advised Appellant that he was entitled to claim the entire deduction for the 2000 income tax year and the business mileage and justifying Appellant's right to claim them. Even Ms. Underhill conceded on cross-examination that if Appellant had given his CPA all the relevant information, allowed the CPA to make his analysis, and to advise him how to proceed, it would have been reasonable for Appellant to have followed his accountant's advice. *Record on Appeal*, 318, page 265, lines 10 -25, page 266, ln 1. Appellant was deprived of the opportunity to present the testimony of his own certified public accountant as to the advice he received. Ms. Underhill's testimony went un rebutted and Appellant was ordered to amend his return, costing thousands of

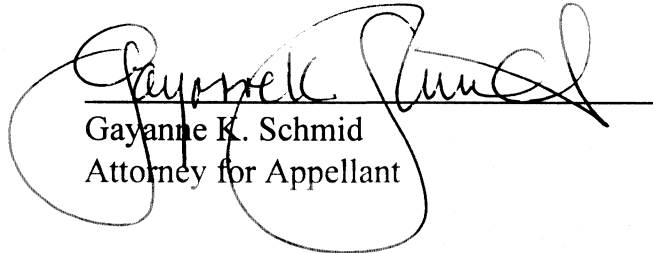
dollars. Thus, it was not harmless error to allow Ms. Underhill to testify, as either a fact or expert witness.

IX. CONCLUSION

For all the foregoing reasons, Appellant respectfully requests this Court to

- (1) remand this matter to the trial court for more detailed and further findings regarding the issues of property division and valuation;
- (2) reverse the award of permanent alimony to Appellee;
- (3) reverse the order that Appellant amend his 2000 income tax return and/or remand the issue to the trial court to permit testimony from the parties' accountant.

Dated: September 12, 2002

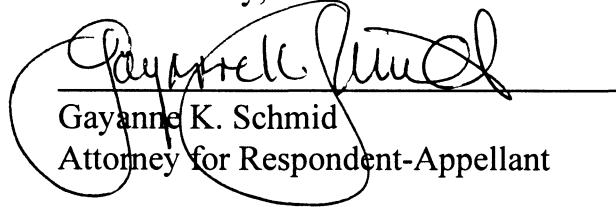


Gayanne K. Schmid
Attorney for Appellant

PROOF OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Respondent-Appellant was served by mail, first class postage prepaid, this September 12, 2002,, to the following counsel of record:

James I. Watts, Esq.
39 Exchange Place
Suite 100
Salt Lake City, UT 84111



Gayanne K. Schmid
Attorney for Respondent-Appellant

ADDENDUM A

1. Memorandum Findings of Fact and Conclusions of Law
2. Findings of Fact and Conclusions Law
3. Decree of Divorce
4. Amended Findings of Fact and Conclusions of Law
5. Amended Decree of Divorce
6. Utah Rules of Civil Procedure, Rules 26(a)(3)(A), (B) and (C)
7. Utah Rules of Civil Procedure, Rules 52
8. Utah Code Ann. §30-3-1
9. Utah Code Ann. §30-3-5
10. Utah Code Ann. §78-2a-3(2)
11. Utah Rules of Evidence, Rule 103
12. Utah Rules of Evidence, Rule 401
13. Utah Rules of Evidence, Rule 701
14. Utah Rules of Evidence, Rule 702
15. Utah Rules of Evidence, Rule 703
15. Utah Rules of Evidence, Rule 705

FILED DISTRICT COURT
Third Judicial District

NOV 20 2001

SALT LAKE COUNTY

By _____ Deputy Clerk

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

MELISSA SHAW,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
Petitioner,	:	
	:	CASE NO. 004907136
vs.	:	
SCOTT SHAW,	:	
	:	
Respondent.	:	

This matter having come on regularly for trial pursuant to Notice before the Honorable Stephen L. Henriod on October 29 and 30, 2001, Melissa J. Shaw appearing in person and represented by James I. Watts, and the respondent Scott Shaw appearing in person and represented by Richard G. Hackwell, the Court having received exhibits, taken testimony of the parties and their respective witnesses, received and heard the arguments of counsel, and otherwise being fully advised, hereby enters its

FINDINGS OF FACT

1. The Court finds that it has jurisdiction over the parties and the subject matter pursuant to Utah Code Ann., Section 78-3-4(1), and that venue is proper.
2. The parties have been actual and bona fide residents of Salt Lake County for at least three months immediately prior to the filing of the Complaint for divorce in this action.

3. The Court finds that the petitioner and respondent were married on August 9, 1993, in Sturgis, South Dakota.

4. The Court finds that the parties separated on or about January 11, 2001, following the filing of the Complaint.

5. The Court finds that irreconcilable differences have arisen in the marriage, which makes continuation of a viable marriage an impossibility.

6. The Court finds that there have been no children born of this marriage and none are expected.

7. The Court finds that the parties have entered into a partial stipulation, resolving certain matters raised by way of petitioner's Petition, the Court finds said stipulation to be fair and reasonable and does adopt the same.

8. The Court finds the parties' stipulation to be as follows:

(a) That all retirement accounts and pensions owned by the parties shall be divided between them pursuant to the Qualified Domestic Relations Order, in accordance with the Woodward formula.

(b) That the Order pertains to each and every retirement account or pension owned by the parties as of this date, which should include the petitioner's and the respondent's retirements from Redrock Brewing Company and the respondent's retirement

account 401k and 457 account with the State Retirement Systems, Firefighters Department.

(c) That the parties' marital residence located at 5349 S. Appian Way, Salt Lake County, State of Utah, has been listed for sale at the appraised price of \$160,000 and should be sold.

(d) That the respondent is awarded the use and possession of the residence during the pendency of the sale.

(e) That the respondent shall not make any alterations, modifications or improvements to the home that would cost more than \$100 without the specific authorization or approval of the petitioner.

(f) That any modifications or repairs made by him will be the respondent's sole financial responsibility, unless such written approval is obtained in advance of making said improvements.

(g) That the petitioner and respondent will cooperate in all respects in order to market the residence, to include if necessary, the placing of a lockbox on the residence to allow access at times when he is not otherwise able to be at the residence or would render the listing agent unable to show the residence

9. The Court finds that during the course of the marriage the parties have acquired an interest in two parcels of real

property and an interest in two timeshares. [Testimony of petitioner, testimony of respondent]

10. The Court finds that the parties acquired a home at 5524 South 3535 West, Taylorsville, Utah, on or about April 28, 1993. [Testimony of petitioner, testimony of respondent, respondent's Exhibit "AA"]

11. The Court finds that the purchase price for the 3535 West home was \$72,500. [Respondent's Exhibit "AA"]

12. The Court finds that there was no down payment made by the parties, which reduced the purchase price or created any immediate equity in the property.

13. The Court finds that the sum of \$4,290.20 in settlement charges representing loan origination fees, appraisal fees, credit report, mortgage insurance, and other costs typically borne by a purchaser were paid by the respondent. [Respondent's Exhibit "AA"]

14. The Court finds that the respondent immediately moved into the home and that the petitioner moved into the residence some two weeks later. [Testimony of petitioner]

15. The Court finds that from May 1993, the petitioner was employed on a full-time basis, and that her earnings and respondent's earnings were utilized to pay common household expenses, including mortgage, taxes, food, insurance, utilities,

entertainment, and all other living expenses. [Testimony of petitioner, testimony of respondent]

16. The Court finds that the real property located at 5524 South 3535 West was sold in or about 1996. [Testimony of petitioner, testimony of respondent]

17. The Court finds that the proceeds derived from the sale of the 5524 South 3535 West property represented equity that had been created as a result of improvements made to the residence which were paid for by both parties, as well as general property value appreciation. [Testimony of petitioner, testimony of respondent]

18. The Court finds the net equity from the sale of the residence to be the sum of \$15,000. [Testimony of petitioner, testimony of respondent]

19. The Court finds that the respondent utilized \$7,500 of the \$15,000 amount to pay off a loan secured by his Jeep Cherokee automobile. [Testimony of respondent]

20. The Court finds that the remaining \$7,500 was used as a down payment on the real property located at 5349 S. Appian Way, which the parties thereafter occupied as their marital residence. [Testimony of petitioner, testimony of respondent]

21. Respondent should be allowed \$4,290 as a credit for his separate property contribution to the parties' prior residence at

5525 South 3535 West, Salt Lake City, Utah, because the parties used a portion of the sale proceeds of the 3535 West residence to acquire the marital residence and used the balance of the sale proceeds of the 3535 West residence to satisfy other marital obligations.

22. The Court finds that during the entire period of ownership of the Appian Way home, the petitioner was employed on a full-time basis outside of the home, that the respondent was employed on a full-time basis by Salt Lake City Fire Department, and that during the entire period of the marriage (August 1993-December 2001), that the respondent had secondary employment as a licensed general contractor, maintenance/handyman or as an employee of Redrock Brewing Company doing maintenance work. [Testimony of petitioner, testimony of respondent, petitioner's Exhibit Nos. 14, 15, 16, 17, 19, and 20]

23. The Court finds that the parties used all income earned from all sources for common living expenses, including mortgage, taxes, food, utilities, travel, and all other needs of the family. [Testimony of petitioner, testimony of respondent]

24. The Court finds that during the period that the parties resided at the Appian Way property, the home was occupied by the petitioner, the petitioner's son from a prior marriage, Jason, now

age 17, the respondent, and two large dogs. [Testimony of petitioner, testimony of respondent]

25. The Court finds that during the period of occupancy of the Appian Way property, that certain improvements were made to the property, including partial re-carpeting of the bedrooms in 1996, and the installation of a small in-ground pool. [Testimony of petitioner, testimony of respondent, respondent's Exhibit "X"]

26. The Court finds that the respondent, in or about the years 1999-2000, removed the stairs from the deck of the house and started to install a used hot tub in the rear yard, and in the process of said work removed the cement patio in the rear of the home. [Testimony of petitioner, testimony of respondent, petitioner's Exhibit Nos. 2 and 3]

27. The Court finds that as of this date, the work to restore or repair the rear of the home has not been completed. [Testimony of respondent]

28. The Court finds that the petitioner, following the filing of the Complaint, did file a Motion for Order to Show Cause seeking temporary Orders, which was to be heard on or about January 10, 2001. [Court's file]

29. The Court finds that at the hearing of petitioner's Motion, the parties entered into a stipulation resolving the issues raised by petitioner's Motion, which stipulation was memorialized

in the Minutes of the law and motion hearing and an Order of the Court.

30. The Court finds that the respondent was ordered to vacate the residence by January 14, 2001; the Court awarded exclusive use of the real property to the petitioner and her minor son, Jason, during the pendency of these proceedings; and, the respondent was to have use of the shed during the day in order to obtain tools. [Court's file; recommendation and Order on hearing dated January 10, 2001]

31. The Court finds that from and after January 4 until July 7, 2001, the petitioner did occupy the residence with her son, Jason. [Testimony of petitioner, testimony of respondent]

32. The Court finds that from February 2001-June 2001, the respondent made the first and second mortgage payments pursuant to the parties' stipulation and Orders of the Court. [Testimony of respondent]

33. The Court finds that the petitioner vacated the residence on July 7, 2001, and that the respondent took possession on July 11, 2001. [Testimony of petitioner, testimony of respondent, petitioner's Exhibit 25]

34. The Court finds that the carpet in the living room, dining room, hallways and stairs is between 10-12 years in age. [Testimony of petitioner, testimony of respondent]

35. Petitioner moved from the marital residence on or about Saturday, July 7, 2001. Petitioner did not inform respondent she had moved from the home. Over the next few days, respondent heard through friends petitioner had moved. On Tuesday, July 10, 2001, respondent became concerned for the two dogs apparently alone at the marital residence and inquired through counsel whether petitioner had moved. Respondent received his clearance to enter the marital residence on Wednesday, July 11, 2001. Respondent entered the home that afternoon with Claudia Bennion. Respondent and Bennion found the dogs unsupervised in the marital residence with an automatic feeder and water dish. Respondent and Bennion found the marital residence filthy and in disrepair. The carpets were badly soiled and rank with dog urine and feces. The back yard was deep in dog feces. The back yard had overgrown and then died out. On October 1, 2001, on respondent's Order to Show Cause, the Court ordered the petitioner to pay \$3,345 toward the carpet. Respondent paid an additional \$1,201.33 for the carpet. Respondent paid an additional \$202.50 for sod. Respondent contributed labor to lay the sod at a value of \$200. Respondent contributed an additional 40 hours of labor to clean the marital residence after he regained occupancy on July 11, 2001, for an additional credit of \$600 which represents 40 hours at \$15 per hour. Respondent's total

advances to repair and clean the marital residence after he retook possession on July 11, 2001, is \$2,203.83.

36. The Court finds that the petitioner has paid the sum of \$3,331 to Carpet One for the replacement of the carpet in the home. [Testimony of petitioner]

37. The Court finds that the petitioner, in order to make said payment, was required to borrow such funds from Linda Tobin, and that the petitioner is obligated to Ms. Tobin for said loan. [Testimony of petitioner, petitioner's Exhibit 21]

38. The Court finds that prior to vacating the residence on January 14, 2000, the respondent, in an effort to deprive the petitioner of access to tools, rakes, shovels and other items necessary to maintain the residence, yard and sprinkling system, did construct an artificial wall in the garage, behind which the tools were secured. [Testimony of petitioner, testimony of respondent, petitioner's Exhibit Nos. 5, 6, 7, and 8]

39. The Court finds that the respondent did further screw shut a closet within the home, behind which other tools commonly used to maintain and keep up the residence were stored. [Testimony of petitioner, testimony of respondent, petitioner's Exhibit Nos. 5, 6, 7 and 8]

40. The Court finds that the respondent also padlocked the pool house door, where pumps, filters, chlorine and chemicals,

necessary to properly maintain the in-ground pool were housed. [Testimony of petitioner, testimony of respondent, petitioner's Exhibit Nos. 8 and 9]

41. Petitioner did not take care of the house during her period of occupancy as well as contemplated in the Court's Order, but did not trash the residence to the extent claimed by respondent. Likewise, the respondent, except for paragraphs 38, 39 and 40 above, did not reduce the value of the home during his occupancy.

42. The Court finds that the equity within the home is marital property, and that any equity derived from the sale of the residence shall be equally divided between the parties.

43. The Court finds that in addition to the marital residence, the parties have an interest in two timeshares, to wit: Trendwest, and the Marriott Mountainside Project in Park City, Utah. [Testimony of petitioner, testimony of respondent, petitioner's Exhibit No. 10, respondent's Exhibit "B"]

44. During the marriage the parties acquired two timeshare accounts, an interest in Marriott Mountainside in Park City with a monthly payment of \$250, and a WorldMart timeshare with a monthly payment of \$150. Neither has any market value. Respondent shall be awarded the timeshare accounts subject to all indebtedness thereon.

45. Any sums the parties once held jointly already have been divided as they desire and the parties presently have no joint bank accounts.

46. Each party should be awarded any life insurance policy which the party presently maintains and may change the beneficiary as the party desires.

47. The Court finds that for the year 1998, the petitioner and respondent filed joint income tax returns and had income from wages, salaries and tips of \$83,842. [Petitioner's Exhibit 14]

48. The Court finds that for the year 1999, the petitioner and respondent filed joint income tax returns and had income from wages, salaries and tips of \$98,587.

49. The Court finds that for the year 2000, the petitioner filed an individual tax return and had income from wages, salaries and tips of \$33,401.

50. The Court finds that for the year 2000, the respondent filed an individual income tax return and had income from wages, salaries and tips of \$79,684.

51. The Court finds that the petitioner's median income for the years 1998, 1999 and 2000 is the sum of \$29,549.

52. The Court finds that the respondent's median income for the years 1998, 1999, and 2000 is the sum of \$67,351.

53. The Court finds that the respondent's median income is 2.27 times greater than the petitioner's median income. [Petitioner's Exhibit Nos. 15, 17, 18 and 20]

54. The Court finds that the petitioner, in filing her individual 2000 tax return, allocated the deduction for mortgage interest and property taxes equally between herself and the respondent. [Testimony of Barbara Underhill, CPA]

55. The Court finds that the respondent, in filing his individual 2000 income tax returns claimed 100% of all mortgage interest deductions, deductions for the Marriott and Trendwest timeshares, and real property taxes. [Testimony of Barbara Underhill, CPA, and petitioner's Exhibit 18]

56. The Court finds that the respondent likewise claimed an employee business expense for miles driven, claiming 7,488 miles, which the Court finds to be unreasonable, unsupported, and may constitute tax fraud.

57. The Court finds that the parties are at an increased risk of audit and financial loss unless an amended 2000 tax return is prepared and filed by the respondent. [Testimony of Barbara Underhill, CPA]

58. The Court finds that an amended tax return should be filed forthwith by the respondent, claiming only one-half of the

mortgage interest deductions, property taxes and other deductions, which should properly be allocated between the parties.

59. The Court finds that during the course of the marriage the parties have acquired interests in certain vehicles, including a 1995 Harley Davidson Low Rider, a 2000 Harley Davidson, and a 1992 Ford F250 truck. [Testimony of petitioner, testimony of respondent]

60. The Court finds that in 1998, the parties borrowed against a line of credit, the sum of \$19,683.47 from Mountain America Credit Union, securing the loan by the parties' Appian Way real property. [Testimony of petitioner, testimony of respondent, petitioner's Exhibit Nos. 26, 1]

61. The Court finds that the proceeds were used to pay and satisfy Mountain America Credit Union's loans, which had been obtained to acquire the 1992 Ford truck, and the 1995 Harley Davidson.

62. The Court finds that the petitioner, in or about July 2001, sold the 1995 Harley Davidson to Harley Davidson of Salt Lake for the sum of \$9,400. [Testimony of petitioner]

63. The Court finds that the \$9,400 received by the petitioner represents fair and reasonable compensation for a 1995 Harley Davidson motorcycle in like condition and repair.

64. The Court finds that the respondent is entitled to receive from the proceeds of the sale of the 1995 Harley Davidson, the sum of \$4,700.

65. The Court finds that the 2000 Harley Davidson motorcycle is presently in the possession of respondent. [Testimony of petitioner, testimony of respondent]

66. The Court finds that the 2000 Harley Davidson has the average retail price of \$19,000. [Petitioner's Exhibit 12]

67. The Court finds that the respondent testified that the 2000 Harley Davidson's value is \$16,000 and in other documents submitted to the Court conceded that the motorcycle's value is \$18,000. [Testimony of respondent, respondent's Exhibit "Q"]

68. Said motorcycle payoff is \$5,452.

69. Petitioner should be awarded a sum equal to one-half the equity in said Harley Davidson, less \$4,700.

70. Respondent should be awarded the 1992 Ford truck and petitioner should be awarded one-half the equity of \$7,500, or \$3,750.

71. The Court finds that the line of credit secured by a trust deed has not been substantially reduced from its original balance of \$19,693.47 as of the date of trial; and, the balance stands at \$18,187.97. [Petitioner's Exhibit Nos. 26, 1]

72. The Court finds that respondent has controlled the line of credit, and on occasion has drawn against it, as he deemed necessary. [Testimony of respondent, petitioner's Exhibit 1]

73. The Court finds that the petitioner did not know of the additional advances against the line of credit, or approve these draws. [Testimony of petitioner]

74. The Court finds that the parties have substantially divided all personal property between them and that said division is fair and reasonable. [Testimony of petitioner, testimony of respondent]

75. The Court finds that each party has requested a few remaining items of property from the other of a sentimental nature, including the petitioner's request for the skating rink Christmas decoration, the skinny Christmas tree, all ornaments with Jason or petitioner's name on them, one of the old-time Santas, the mirror over the stairway, and the rug in the basement TV room which was given to her as a gift. The respondent has requested the return of a Taylor Made driver, having a value of \$250, which he alleged was missing when he returned to the residence, and a children's carousel belonging to his daughter. [Testimony of respondent]

76. The Court finds that the petitioner denies having those items of property or that she has disposed of the same. [Testimony of petitioner]

77. The Court finds that the petitioner, in order to subsist, has been required to borrow funds from her parents and to sell items of her personal property, including a diamond ring. The petitioner testified that she sold the ring and received the sum of \$500. The petitioner purchased the ring for \$2,400, and was appraised for insurance purposes at \$4,500. [Testimony of petitioner, respondent's Exhibit 1]

78. The Court finds that the sale of the ring for \$500 was less than the ring's actual value.

79. The Court finds that detailed testimony was not elicited regarding the actual value of hand tools, compressors, table saws, and other items of property which remained in the respondent's possession, which the petitioner alleged was equal to the value of the ring. [Testimony of Claudia Benson]

80. The Court finds that each party has submitted a Financial Declaration setting forth what they believe to be their reasonable living expenses and incomes. [Petitioner's Exhibit 21, respondent's Exhibit "Q"]

81. The Court finds that the petitioner's Financial Declaration has living expenses of \$3,519.30, which the Court finds to be very fair and reasonable. [Petitioner's Exhibit 21]

82. The Court finds that the petitioner purchased a Hyundai Tiberon from Westland Ford on November 4, 2000, doing so at the

request and demand of the respondent in order to remove him from the obligation of the 2000 Hyundai Elantra which had been acquired by the parties approximately one year earlier. [Testimony of petitioner]

83. The Court finds that the trade-in allowance of \$12,000 was equal to the debt owing on the car. [Petitioner's Exhibit 22]

84. The Court finds that there is no marital equity in the present Hyundai automobile. [Testimony of petitioner, petitioner's Exhibit 22]

85. The Court finds that the monthly payment on the Hyundai Tiberon is equal to the Hyundai Elantra, and that the exchange did not increase the petitioner's reasonable and necessary living expenses. [Testimony of petitioner, petitioner's Exhibit 22]

86. The Court finds that the petitioner's current monthly gross income is the sum of \$2,680.78. [Testimony of petitioner, petitioner's Exhibit Nos. 13, 21]

87. The Court finds that the petitioner in claiming child support of \$235.54 overstated the amount of child support that she is receiving. [Petitioner's Exhibit 21]

88. The Court finds that the actual amount of income the petitioner has received for the reporting period of January 1-June 2001, was the sum of \$416.20, at \$69.36 per month. [Respondent's Exhibit "S"]

89. The Court finds that the actual amount of child support amortized over the period of 1995-present is the sum of \$116 per month.

90. The Court finds that the petitioner has overstated her monthly net and gross income by \$116.

91. The Court finds that the petitioner's actual monthly gross income from all sources is \$2,697.32, that petitioner has standard deductions of \$578.66, and a net monthly income of \$2,218.66, rather than \$2,334.66 as set forth on petitioner's Exhibit 21.

92. The Court finds that the petitioner failed to disclose a bank account with Goldenwest Credit Union in Ogden, Utah, which as of November 1, 2001, had a balance of \$862.70. [Respondent's Exhibit "M"]

93. The Court finds that the failure to disclose said account may affect the petitioner's credibility before the Court.

94. The Court finds that respondent submitted an amended Financial Declaration. [Respondent's Exhibit "Q"]

95. The Court finds that the respondent asserts a gross monthly income of \$4,804 from his employment as a firefighter.

96. The Court finds that the respondent claims no exemptions and has an actual filing status of two exemptions. [Testimony of respondent]

97. The Court finds that the respondent claims no income from secondary employment. [Respondent's Exhibit "Q"]

98. The Court finds that in addition to standard deductions, respondent pays child support for two children from a prior marriage of \$525 per month. [Respondent's Exhibit "Q"]

99. The Court finds that respondent claimed a net monthly income from his primary employment of \$2,734.96 in his Financial Declaration. [Testimony of respondent, respondent's Exhibit "Q"]

100. The Court finds that the respondent has misrepresented and misstated his actual net monthly income from his primary employment, which the Court finds to be \$3,170 per month. [Respondent's Exhibit "P"]

101. The Court finds that at the present time, respondent is paying the first and second mortgage obligations on the Appian Way home, which he occupies and which is listed for sale.

102. The Court finds the mortgage obligations total \$1,676. [Respondent's Exhibit "Q"]

103. The Court finds that the \$1,676 does not represent a reasonable and necessary future living expense for the respondent, a single man, and his children when they visit for two weeks per year, and that a reasonable amount for a living expense for respondent would be an amount similar to the petitioner's claimed expense of \$925 per month.

104. The Court finds that upon the sale of the home, the respondent will have additional disposable income of \$751.

105. The Court finds that respondent has further overstated his living expenses and the amount set forth for food and household supplies of \$350 per month is unreasonable given the respondent's employment as a firefighter and his work schedule of 24 hours on, 24 hours off.

106. The Court finds that the respondent eats a percentage of his meals at the fire station, and his meals are subsidized by income tax deductions. [Testimony of Barbara Underhill, CPA, petitioner's Exhibit Nos. 15, 17 and 18]

107. The Court finds that the petitioner has a monthly shortfall of \$1,300.64, between her net income and her needs.

108. The Court finds that petitioner has established a need for alimony.

109. The Court finds that respondent has consistently maintained secondary employment throughout the marriage and that said secondary employment was used by the parties for living expenses, travel, vacations and to otherwise maintain their lifestyle. [Testimony of petitioner, testimony of respondent]

110. The Court finds that the respondent ceased secondary employment in December 2000, has not sought secondary employment,

and has testified that he is not intending to, nor does he believe that he should be obligated to seek or accept secondary employment.

111. The Court finds that only respondent's income from his principal employment should be imputed to him.

112. The Court finds that the adjustments made to the respondent's living expenses for food and household supplies, reducing said sum to \$150 from \$350 claimed, reducing entertainment by \$100, and eliminating the timeshare payments will result in an immediate savings to respondent of \$656 per month.

113. The Court finds that upon sale of the house, an additional \$751 in savings will be realized.

114. The Court finds that the respondent will have increased net earnings of \$1,351 per month when the home sells

115. The Court finds that the actual and necessary living expenses of respondent upon sale of the house should be the sum of \$2,576.

116. The Court finds that the respondent's present net income of \$3,171.88, without secondary employment, is in excess of that needed for his actual living expense when the home sells.

117. The Court finds that the respondent has the financial ability to pay spousal support from current and imputed earnings.

118. The Court finds that a reasonable sum for alimony is the sum of \$250 per month.

119. After sale of the home, the alimony should increase to \$500 per month, and be paid for a period equal to the duration of the marriage.

120. Petitioner claimed the \$8,054.52 balance on the Citibank credit card existed prior to the parties' separation and is a marital expense which the parties should share. Petitioner failed to disclose the account on earlier Financial Declarations and in discovery. Respondent testified he was unaware of the account until the morning of trial. Because petitioner offered no credible evidence the account balance pre-existed the parties' separation and as a sanction for petitioner's failure to disclose the account in discovery, petitioner shall be solely responsible for the Citibank credit card.

Petitioner obtained the Discover Card and incurred its present balance after the parties' separation. Petitioner shall be solely responsible for the Discover Card balance.

Petitioner obtained the R.C. Willey account and incurred its present balance after the parties' separation. Petitioner shall be solely responsible for its balance.

Petitioner obtained the Granite Furniture account and incurred its present balance after the parties' separation. Petitioner shall be solely responsible for its balance.

Petitioner obtained the Lowe's account and incurred its present balance after the parties' separation. Petitioner shall be solely responsible for its balance.

Petitioner obtained the Dell Computers account and incurred its present balance after the parties' separation. Petitioner shall be solely responsible for its balance.

Petitioner shall be solely responsible for all financial obligations regarding the 2001 Hyundai and 2001 Ford truck.

Petitioner shall be solely responsible for all financial obligations regarding the West Jordan condominium.

121. Respondent shall be solely liable for the Discover Card in his name.

Respondent shall be solely responsible for all financial obligations regarding the 2000 Harley Davidson motorcycle and 1992 Ford truck.

122. Both parties' testimony and exhibits showed a significant lack of credibility.

123. Each party shall pay their own attorney's fees which each party incurs to effect dissolution of the parties' marriage.


From the foregoing Findings of Fact, the Court now makes and enters the following:

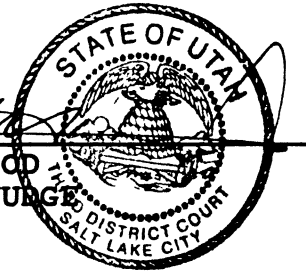
CONCLUSIONS OF LAW

1. The parties are subject to this Court's jurisdiction.
2. In lieu of alimony and to remedy the petitioner's contempt, the Court may adjust distribution of real and personal property at the time the marriage is dissolved.
3. The parties are entitled to a Decree of Divorce on grounds of irreconcilable differences.
4. The parties shall sell the house and divide the proceeds equally, after the following offsets:
 - (a) Respondent is awarded \$4,290 (down payment on first house);
 - (b) Respondent is awarded \$2,200 (house sale repairs);
 - (c) Petitioner is awarded equity from respondent's Harley (Findings para. 69);
 - (d) Petitioner is awarded the equity from the truck (\$3,750) if the proceeds from the sale of the house are inadequate to cover the foregoing awards then consequences shall be divided equally.
5. Personal property, including bank accounts as divided, except as set forth in Findings para. 75.

Counsel for petitioner is to prepare the appropriate Findings and Decree.

Dated this 28 day of November, 2001.


STEPHEN L. HENRICH
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed^{and Faxed} a true and correct copy of the foregoing Findings of Fact and Conclusions of Law, to the following, this 20 day of November, 2001:

James I. Watts
Attorney for Petitioner
39 Exchange Place, Suite 100
Salt Lake City, Utah 84111

Gayanne K. Schmid
Richard G. Hackwell
Attorneys for Respondent
68 S. Main Street, 8th Floor
Salt Lake City, Utah 84101-1534

A handwritten signature in black ink, appearing to read "J. Watts", is written over a horizontal line.

JAMES I. WATTS (4768)
39 Exchange Place, Suite 100
OLD SALT LAKE STOCK & MINING BLDG.
Salt Lake City, Utah 84111
Tel (801) 994-0838
Fax (801) 994-0833

Attorney for Petitioner

FILED
JAN 14 2002
Mad. Henroid

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

MELISSA SHAW,

Petitioner,

v.

SCOTT SHAW,

Respondent.

FINDINGS OF FACTS AND
CONCLUSIONS OF LAW

Civil No. 004907136

Judge Stephen L. Henroid

This matter having come on regularly for trial pursuant to Notice before the Honorable Stephen L. Henroid on October 29 and 30, 2001, Melissa J. Shaw appearing in person and represented by James I. Watts, and the respondent Scott Shaw appearing in person and represented by Richard G. Hackwell, the Court having received exhibits, taken testimony of the parties and their respective witnesses, received and heard the arguments of counsel, and otherwise being fully advised, hereby enters its FINDINGS OF FACT :

1. The Court finds that it has jurisdiction over the parties and the subject matter pursuant to Utah Code Annotated, § 78-3-4(1), and that venue is proper.
2. The parties have been actual and bona fide residents of Salt Lake County for at least three months immediately prior to the filing of the Complaint for divorce in this action.
3. The Court finds that the petitioner and respondent were married on August 9, 1993, in Sturgis, South Dakota.

4. The Court finds that the parties separated on or about January 11, 2001 following the filing of the Complaint.

5. The Court finds that irreconcilable differences have arisen in the marriage, which makes continuation of a viable marriage an impossibility.

6. The Court finds that there have been no children born of this marriage and none are expected.

7. The Court finds that the parties have entered into a partial stipulation, resolving certain matters raised by way of petitioner's Petition, the Court finds said stipulation to be fair and reasonable and does adopt the same.

8. The Court finds the parties' stipulation to be as follows:

(a) That all retirement accounts and pensions owned by the parties shall be divided between them pursuant to the Qualified Domestic Relations Order, in accordance with the Woodward formula.

(b) That the Order pertains to each and every retirement account or pension owned by the parties as of this date, which should include the petitioner's and the respondent's retirements from Redrock Brewing Company and the respondent's retirement account 401k and 457 account with the State Retirement Systems, Firefighters' Department.

(c) That the parties' marital residence located at 5349 S. Appian Way, Salt Lake County, State of Utah, has been listed for sale at the appraised price of \$160,000 and should be sold.

(d) That the respondent is awarded the use and possession of the residence during the pendency of the sale.

(e) That the respondent shall not make any alterations, modifications or improvements to the home that would cost more than \$100 without the specific authorization or approval of the petitioner.

(f) That any modifications or repairs made by him will be the respondent's sole financial responsibility, unless such written approval is obtained in advance of making said improvements

(g) That the petitioner and respondent will cooperate in all respects in order to market the residence, to include if necessary, the placing of a lockbox on the residence to allow access at times when he is not otherwise able to be at the residence or would render the listing agent unable to show the residence.

9. The Court finds that during the course of the marriage the parties have acquired an interest in two parcels of real property and an interest in two timeshares

10. The Court finds that the parties acquired a home at 5524 South 3535 West, Taylorsville Utah, on or about April 28, 1993.

11. The Court finds that the purchase price for the 3535 West home was \$72,500.

12 The Court finds that there was no down payment made by the parties, which reduced the purchase price or created any immediate equity in the property.

13. The Court finds that the sum of \$4,290.20 in settlement charges representing loan origination fees, appraisal fees, credit report, mortgage insurance, and other costs typically borne by a purchaser were paid by the respondent.

14. The Court finds that the respondent immediately moved into the home and that the petitioner moved into the residence some two weeks later.

15. The Court finds that from May 1993, the petitioner was employed on a full-time basis, and that her earnings and respondent's earnings were utilized to pay common household expenses, including mortgage, taxes, food, insurance, utilities, entertainment, and all other living expenses.

16. The Court finds that the real property located at 5524 South 3535 West was sold in or about 1996.

17. The Court finds that the proceeds derived from the sale of the 5524 South 3535 West property represented equity that had been created as a result of improvements made to the residence which were paid for by both parties, as well as general property value appreciation.

18. The Court finds the net equity from the sale of the residence to be the sum of \$15,000.

19. The Court finds that the respondent utilized \$7,500 of the \$15,000 amount to pay off a loan secured by his Jeep Cherokee automobile.

20. The Court finds that the remaining \$7,500 was used as a down payment on the real property located at 5349 S. Appian Way, which the parties thereafter occupied as their marital residence.

21. The Court finds that the respondent should be allowed \$4,290 as a credit for his separate property contribution to the parties' prior residence at 5525 South 3535 West, Salt Lake City, Utah, because the parties used a portion of the sale proceeds of the 3535 West residence to acquire the marital residence and used the balance of the sale proceeds of the 3535 West residence to satisfy other marital obligations.

22. The Court finds that during the entire period of ownership of the Appian Way home, the petitioner was employed on a full-time basis outside of the home, that the respondent was employed on a full-time basis by Salt Lake City Fire Department, and that during the entire period of the marriage (August 1993-December 2001) that the respondent had secondary employment as a licensed general contractor, maintenance/handyman or as an employee of Redrock Brewing Company doing maintenance work.

23. The Court finds that the parties used all income earned from all sources for common living expenses, including mortgage, taxes, food, utilities, travel, and all other needs of the family.

24. The Court finds that during the period that the parties resided at the Appian Way property, the home was occupied by the petitioner, the petitioner's son from a prior marriage Jason, now age 17, the Respondent, and two large dogs.

25. The Court finds that during the period of occupancy of the Appian Way property that certain improvements were made to the property, including partial re-carpeting of the bedrooms in 1996, and the installation of a small in-ground pool.

26. The Court finds that the respondent, in or about the years 1999-2000, removed the stairs from the deck of the house and started to install a used hot tub in the rear yard, and in the process of said work removed the cement patio in the rear of the home.

27. The Court finds that as of this date, the work to restore or repair the rear of the home has not been completed.

28. The Court finds that the petitioner, following the filing of the Complaint, did file a Motion for Order to Show Cause seeking temporary Orders, which was to be heard on or about January 10, 2001.

29. The Court finds that at the hearing of petitioner's Motion, the parties entered into a stipulation resolving the issues raised by petitioner's Motion, which stipulation was memorialized in the Minutes of the Law and Motion hearing and in an Order of the Court

30. The Court finds that the respondent was ordered to vacate the residence by January 14, 2001; the Court awarded exclusive use of the real property to the petitioner and her minor son, Jason, during the pendency of these proceedings; and, the respondent was to have use of the shed during the day in order to obtain tools.

31. The Court finds that from and after January 4 until July 7, 2001, the petitioner did occupy the residence with her son, Jason.

32. The Court finds that from February 2001-June 2001, the respondent made the first and second mortgage payments pursuant to the parties' stipulation and the Orders of the Court.

33. The Court finds that the petitioner vacated the residence on July 7, 2001, and that the respondent took possession on July 11, 2001.

34. The Court finds that the carpet in the living room, dining room, hallways and stairs is between 10-12 years in age.

35. The Court finds that the petitioner moved from the marital residence on or about Saturday, July 1, 2001, but that the petitioner did not inform respondent she had moved from the home. Over the next few days, respondent heard through friends petitioner had moved. On Tuesday, July 10, 2001, respondent became concerned for the two dogs apparently alone at the marital residence and inquired through counsel whether petitioner had moved. Respondent received his clearance to enter the marital residence on Wednesday, July 11, 2001. Respondent entered the home that afternoon with Claudia Bennion. Respondent and Bennion found the dogs unsupervised in the marital residence with an automatic feeder and water dish. Respondent and Bennion found the marital residence filthy and in disrepair. The carpets were badly soiled and rank with dog urine and feces. The back yard was deep in dog feces. The back yard had overgrown and then died out. On October 1, 2001, on respondent's Order to Show Cause, the Court ordered the petitioner to pay \$3,345 toward the carpet. Respondent paid \$1,201.33 toward the replacement of the carpet. Respondent paid an additional \$202.50 for sod. Respondent contributed labor to lay the sod at a value of \$200. Respondent contributed an additional 40 hours of labor to clean the marital residence after he regained occupancy on July 11, 2001, for an additional credit of \$600, which represents 40 hours at \$15 per hour. Respondent's total advances to repair and clean the marital residence after he re-took possession on July 11, 2001 is the sum of \$2,203.83.

36. The Court finds that the petitioner has paid the sum of \$3,331 to Carpet One for the replacement of the carpet in the home.

37. The Court finds that the petitioner, in order to make said payment, was required to borrow such funds from Linda Tobin, and that the petitioner is obligated to Ms. Tobin for said loan.

38. The Court finds that prior to vacating the residence on January 14, 2000, the respondent, in an effort to deprive the petitioner of access to tools, rakes, shovels and other items necessary to maintain the residence, yard and sprinkling system, did construct an artificial wall in the garage, behind which the tools were secured.

39. The Court finds that the respondent did further screw shut a closet within the home, behind which other tools commonly used to maintain and keep up the residence were stored.

40. The Court finds that the respondent also padlocked the pool house door where pumps, filters, chlorine and chemicals necessary to properly maintain the in ground pool were stored.

41. The Court finds that Petitioner did not take care of the house during her period of occupancy as well as contemplated in the Court's Order, but did not trash the residence to the extent claimed by the Respondent, likewise, the Respondent, except for the acts set forth in paragraphs 38, 39, and 40 above, did not reduce the value of the home during his occupancy.

42. The Court finds that the equity within the home is marital property, and that any equity derived from the sale of the residence shall be equally divided between the parties.

43. The Court finds that in addition to the marital residence, the parties have an interest in two timeshares, to wit: Trendwest and the Marriott Mountainside Project in Park City, Utah.

44. The Court finds that during the marriage the parties acquired two timeshare accounts, an interest in Marriott Mountainside in Park City, Utah, with a monthly payment of \$250, and a WorldMart timeshare with a monthly payment of \$150. Neither has any market value. Respondent shall be awarded the timeshare accounts subject to all indebtedness thereon.

45. The Court finds that any sums the parties once held jointly already have been divided as they desire and the parties presently have no joint bank accounts

46. The Court finds that each party should be awarded any life insurance policy which the party presently maintains and may change the beneficiary as the party desires.

47. The Court finds that for the year 1998, the petitioner and respondent filed joint income tax returns and had income from wages, salaries and tips of \$83,842.

48. The Court finds that for the year 1999, the petitioner and respondent filed joint income tax returns and had income from wages, salaries and tips of \$98,587.

49. The Court finds that for the year 2000, the petitioner filed an individual tax return and had income from wages, salaries and tips of \$33,401.

50. The Court finds that for the year 2000, the respondent filed an individual income tax return and had income from wages, salaries and tips of \$79,684.

51. The Court finds that the petitioner's median income for the years 1998, 1999 and 2000, is the sum of \$29,549.

52. The Court finds that the respondent's median income for the years 1998, 1999, and 2000 is the sum of \$67,351.

53. The Court finds that the respondent's median income is 2.27 times greater than the petitioner's median income.

54. The Court finds that the petitioner, in filing her individual 2000 tax return, allocated the deduction for mortgage interest and property taxes equally between herself and the respondent.

55. The Court finds that the respondent, in filing his individual 2000 income tax returns claimed 100% of all mortgage interest deductions, deductions for the Marriott and Trendwest timeshares, and real property taxes.

56. The Court finds that the respondent likewise claimed an employee business expense for miles driven, claiming 7,488 miles, which the Court finds to be unreasonable, unsupported, and may constitute tax fraud.

57. The Court finds that the parties are at an increased risk of audit and financial loss unless an amended 2000 tax return is prepared and filed by the respondent.

58. The Court finds that an amended tax return should be filed forthwith by the respondent, claiming only one-half of the mortgage interest deductions, property taxes and other deductions which should properly be allocated between the parties.

59. The Court finds that during the course of the marriage the parties have acquired interests in certain vehicles, including a 1995 Harley Davidson, a 2000 Harley Davidson and a 1992 Ford F250 truck.

60. The Court finds that in 1998, the parties borrowed the sum of \$19,683.47 from Mountain America Credit Union, securing the loan by the parties' Appian Way real property.

61. The Court finds that the proceeds were used to pay and satisfy Mountain America Credit Union's loans, which had been obtained to acquire the 1992 Ford truck, and the 1995 Harley Davidson.

62. The Court finds that the petitioner, in or about July 2001, sold the 1995 Harley Davidson to Harley Davidson of Salt Lake for the sum of \$9,400.

63. The Court finds that the \$9,400 received by the petitioner represents fair and reasonable compensation for a 1995 Harley Davidson motorcycle in like condition and repair.

64. The Court finds that the respondent is entitled to receive from the proceeds of the sale of the 1995 Harley Davidson the sum of \$4,700.

65. The Court finds that the 2000 Harley Davidson motorcycle is presently in the possession of respondent.

66. The Court finds that the 2000 Harley Davidson has the average retail price of \$19,000.

67. The Court finds that the respondent testified that the 2000 Harley Davidson Motorcycle's value is \$16,000 and in other documents submitted to the Court the respondent conceded that the motorcycle's value is \$18,000.

68. The Court finds the loan payoff for the 2000 Harley Davidson Motorcycle to be \$5,452.

69. The Court finds the Petitioner should be awarded a sum equal to one-half the equity in said Harley Davidson, less \$4,700. ($\$19,000 - \$5,542 \text{ payoff} = \$13,548 - \$4,700 [\text{sale of 1995 Harley}] = \$8,848 \div 2 = \$4,424$).

70. The Court finds the Respondent should be awarded the 1992 Ford truck. and that the respondent should receive $\frac{1}{2}$ equity in said truck, or \$3,750, the Court finding the vehicle value to be \$7,500.

71. The Court finds that the line of credit secured by a trust deed has not been substantially reduced from its original balance of \$19,693.47 as of the date of trial; and, the balance stands at \$18,187.97.

72. The Court finds that respondent has controlled the line of credit, and on occasion has drawn against it as he deemed necessary.

73. The Court finds that the petitioner did not know of the additional advances against the line of credit or approved these draws.

74. The Court finds that the parties have substantially divided all personal property between them and that said division is fair and reasonable.

75. The Court finds that each party has requested a few remaining items of property from the other of a sentimental nature, including the petitioner's request for the skating rink Christmas decoration, the skinny Christmas tree, all ornaments with Jason or petitioner's name on them, one of the old-time Santas, the mirror over the stairway, and the rug in the basement TV room which was given to her as a gift. The respondent has requested the return of a Taylor Made driver,

having a value of \$250, which he alleged was missing when he returned to the residence and a children's carousel belonging to his daughter.

76. The Court finds that the petitioner denies having those items of property or that she has disposed of the same.

77. The Court finds that the petitioner, in order to subsist, has been required to borrow funds from her parents and to sell items of her personal property, including a diamond ring. The petitioner testified that she sold the ring and received the sum of \$500. The petitioner purchased the ring for \$2,400, and was appraised for insurance purposes at \$4,500.

78. The Court finds that the sale of the ring for \$500 was less than the ring's actual value.

79. The Court finds that detailed testimony was not elicited regarding the actual value of hand tools, compressors, table saws, and other items of property which remained in the respondent's possession, which the petitioner alleged was equal to the value of the ring.

80. The Court finds that each party has submitted a Financial Declaration setting forth what they believe to be their reasonable living expenses and incomes.

81. The Court finds that the petitioner's Financial Declaration has living expenses of \$3,519.30, which the Court finds to be very fair and reasonable.

82. The Court finds that the petitioner purchased a Hyundai Tiburon from Westland Ford on November 4, 2000, doing so at the request and demand of the Respondent in order to remove him from the financial obligation secured by the 2000 Hyundai Elantra, which had been acquired by the parties approximately one year earlier.

83. The Court finds that the trade-in allowance of \$12,000 was equal to the debt owing on the car.

84. The Court finds that there is no marital equity in the present Hyundai automobile.

85. The Court finds that the monthly payment on the Hyundai Tiberon is equal to the Hyundai Elantra, and that the exchange did not increase the petitioner's reasonable and necessary living expenses.

86. The Court finds that the petitioner's current monthly gross income is the sum of \$2,680.78.

87. The Court finds that the petitioner, in claiming child support of \$235.54 overstated the amount of child support that she is receiving.

88. The Court finds that the actual amount of income the petitioner has received for the reporting period of January 1 – June 2001, was the sum of \$416.20, at \$69.36 per month.

89. The Court finds that the actual amount of child support amortized over the period of 1995-present, is the sum of \$116 per month.

90. The Court finds that the petitioner, on the trial exhibits, overstated her monthly net and gross income by \$116.

91. The Court finds that the petitioner's actual monthly gross income from all sources is \$2,697.32, that petitioner has standard deductions of \$578.66, and a net monthly income of \$2,218.66, rather than \$2,334.66.

92. The Court finds that the petitioner failed to disclose a bank account with Goldenwest Credit Union in Ogden, Utah, which as of November 1, 2001, had a balance of \$862.70.

93. The Court finds that the failure to disclose said account may affect the petitioner's credibility before the Court.

94. The Court finds that respondent submitted and the Court received, as an exhibit, an amended Financial Declaration.

95. The Court finds that the respondent asserts a gross monthly income of \$4,804 from his employment as a Firefighter.

96. The Court finds that the respondent claims no exemptions and has an actual filing status of two exemptions.

97. The Court finds that the respondent claims no income from secondary employment.

98. The Court finds that in addition to standard deductions, respondent pays child support for two children from a prior marriage of \$525 per month.

99 The Court finds that respondent claimed on his amended financial declaration a net monthly income from his primary employment of \$2,734.96.

100. The Court finds that the respondent has misrepresented and misstated his actual monthly income from his primary employment, which the Court finds to be \$3,171.88 per month.

101. The Court finds that at the present time, respondent is paying the first and second mortgage obligations on the Appian Way home, which he occupies and which is listed for sale.

102. The Court finds the mortgage obligations total \$1,676 per month.

103. Court finds that the \$1,676 does not represent a reasonable and necessary future living expense for the respondent, a single man who's children visit for two weeks per year, and that a reasonable amount for a living expense for respondent would be an amount similar to the petitioner's claimed expense of \$925 per month.

104. The Court finds that upon the sale of the home the respondent will have additional disposable income of \$751.

105. The Court finds that respondent has further overstated his living expenses and the amount set forth for food and household supplies of \$350 per month is unreasonable given the respondent's employment as a firefighter and his work schedule of 24 hours on 24 hours off.

106. The Court finds that the respondent eats a percentage of his meals at the fire station, and his meals are subsidized by income tax deductions.

107. The Court finds that the petitioner has a monthly shortfall of \$1,300.64, between her net income and her needs.

108. The Court finds that petitioner has established a need for alimony.

109. The Court finds that respondent has consistently maintained secondary employment throughout the marriage and that said secondary employment was used by the parties for living expenses, travel, vacations, and to otherwise maintain their lifestyle

110. The Court finds that the respondent ceased secondary employment in December 2000, has not sought secondary employment, and has testified that he is not intending to, nor does he believe that he should be obligated to seek or accept secondary employment.

111. The Court finds that only respondent's income from his principal employment should be imputed to him for purposes of alimony

112. The Court finds that the adjustments made to the respondent's living expenses for food and household supplies, reducing said sum to \$150 from \$350 claimed, reducing

entertainment by \$100, and eliminating the timeshare payment will result in an immediate savings to respondent of \$656 per month.

113. The Court finds that upon sale of the house, an additional \$751 in savings will be realized.

114. The Court finds that the respondent will have increased net earnings of \$1,351 per month when the home sells.

115. The Court finds that the actual and necessary living expenses of respondent upon sale of the house should be the sum of \$2,576.

116. The Court finds that the respondent's present net income of \$3,171.88, without secondary employment, is in excess of that needed for his actual living expense when the home sells.

117. The Court finds that the respondent has the financial ability to pay spousal support from current and imputed earnings.

118. The Court finds that a reasonable sum for alimony is the sum of \$250 per month.

119. The Court finds that upon the sale of the residence, alimony should increase to \$500 per month, and be paid for a period equal to the duration of the marriage.

120. The Court finds that the petitioner claimed the \$8,054.52 balance on the Citibank Credit Card existed prior to the parties' separation and is a marital expense that the parties should share. Petitioner failed to disclose the account on earlier Financial Declarations in discovery. Respondent testified he was unaware of the account until the morning of trial.

121. The Court finds that because petitioner offered no credible evidence the account balance pre-existed the parties' separation and as a sanction for petitioner's failure to disclose the account in discovery, petitioner shall be solely responsible for the Citibank Credit Card.

122. The Court finds that the petitioner obtained the Discover Card and incurred its present balance after the parties' separation. Petitioner shall be solely responsible for the Discover Card balance.

123. The Court finds that the petitioner obtained the R.C. Willey account and incurred its present balance after the parties' separation. Petitioner shall be solely responsible for its balance.

124. The Court finds that the petitioner obtained the Granite Furniture account and incurred its present balance after the parties' separation. Petitioner shall be solely responsible for its balance.

125. The Court finds that the petitioner obtained the Lowe's account and incurred its present balance after the parties' separation. Petitioner shall be solely responsible for its balance.

126. The Court finds that the petitioner obtained the Dell Computers account and incurred its present balance after the parties' separation. Petitioner shall be solely responsible for its balance.

127. The Court finds that the petitioner shall be solely responsible for all financial obligations regarding the 2001 Hyundai.

128. The Court finds that the petitioner shall be solely responsible for all financial obligations regarding the West Jordan condominium.

129. The Court finds that the respondent shall be solely liable for the Discover Card in his name.

130. The Court finds that the respondent shall be solely responsible for all financial obligations regarding the 2000 Harley Davidson motorcycle and the 1992 Ford F250 truck.

131. The Court finds that both parties' testimony and exhibits showed a significant lack of credibility.

132. The Court finds that the Petitioner should be awarded the right to take her maiden name of Frank, if she so desires.

133. The Court finds that each party shall pay their own attorney's fees, which each party incurs, to effect dissolution of the parties' marriage.

From the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The Court concludes that it has jurisdiction over the parties, subject matter, and that venue is proper.

2. The Court concludes that the petitioner, Melissa Shaw should be granted a Decree of Divorce from the respondent and the same to become final upon entry.

3. The Court concludes that irreconcilable differences have arisen making a continuation of the marriage an impossibility.

4. The Court concludes that there have been no children born of this marriage and that none are expected.

5. The Court concludes that the parties have acquired interest in real, personal, tangible, intangible and other properties, the sum of which were divided by Stipulation of the parties, and other items ordered divided in accordance with the Findings of Fact and Conclusions of Law as entered by the Court following trial in this matter.

RETIREMENT BENEFITS

6. The Court concludes that the parties' various retirement benefits of all kinds 401k or 457 with Redrock Brewing Company and or the State of Utah Retirement Systems, Firefighters Retirement should be divided pursuant to a Qualified Domestic Relations Order in accordance with the Woodward Formula.

REAL PROPERTY

7. The Court concludes that the real property presently owned by the parties located at 5349 S. Appian Way, Salt Lake County, State of Utah, should be immediately listed for sale and sold and that the initial listing price shall be the appraised value of \$160,000.

8. The Court concludes that during the pendency of the sale and pursuant to the parties' Stipulation, the respondent shall be entitled to the exclusive use and possession of the property, that no alterations, modifications or improvements to the home costing more than \$100 shall be made by the respondent without authorization or approval by the petitioner, that any modification or repair made by the respondent shall be his sole financial responsibility unless written approval is obtained in advance from the petitioner.

9. The Court concludes that the parties shall cooperate with one another in the marketing and sale of the residence.

10. The Court concludes that the respondent paid the sum of \$4,290.20 in settlement charges, loan origination fees, appraisal fees, and other costs typically born by a purchaser in the acquisition of the parties' first home located at 5524 South 3535 West, Taylorsville, Utah, which was acquired on or about April 28, 1993.

11. The Court concludes that the respondent should be entitled to a return of the \$4,290.20 from the proceeds derived from the sale of the Appian Way property.

12. The Court concludes that all of the equity which existed in the 5524 South 3535 West property, sold in 1996, was the result of improvements made to the residence and paid for by both parties as well as general property value appreciation.

13. The Court concludes that \$7,500 of the proceeds from the sale of the 5524 South 3535 West property was used as a down payment on the Appian Way property.

14. The Court concludes that there have been numerous improvements made to the Appian Way property, which were paid for by both the parties.

15. The Court concludes that the parties' earnings, from all sources, were likewise used to pay common living expenses to include: taxes, mortgage, food, utilities, travel and other family needs.

16. The Court concludes that from January 14, 2001 until July 7, 2001 the petitioner occupied the Appian Way residence with her son Jason, and that the respondent has had possession of the residence from July 11, 2001, to the time of the trial.

17. The Court concludes that the petitioner has paid the sum of \$3,331 to Carpet One, Salt Lake City, Utah, for carpet replacement in the Appian Way home and that the respondent has paid or been credited with paying the sum of \$2,203.83 in improving or repairing the home.

18. The Court concludes that the parties have equally shared in the cost of maintaining and improving the residence, that neither party has caused substantial waste to the property and that the proceeds from the sale of the Appian Way home shall be divided evenly between the parties after offsets and credits as set forth within the Findings of Fact and Conclusion of Law.

19. The Court concludes that the petitioner is entitled to be paid from respondent's portion of the sale proceeds of the marital residence, the sum of \$4,424 representing $\frac{1}{2}$ of the equity in the 2000 Harley Davidson which the Court has awarded to the respondent.

20. The Court concludes that the respondent should be paid from the gross sales proceeds the sum of \$4,290 representing costs paid by respondent on the parties first home.

22. The Court concludes that the petitioner is to be awarded, from the sale of the marital residence, the sum of \$3,750 representing $\frac{1}{2}$ of the equity in the 1992 Ford Truck, which the respondent retains.

23. The Court concludes that each party should be entitled to retain, as his or her separate property, all items of personal property in his or her possession, free and clear of claim of the other.

24. The Court concludes that the petitioner is entitled to retain as her separate property, the Hyundai Tiburon acquired by her on November 4, 2000, and that there does not exist in the vehicle any marital equity.

25. The Court concludes that during the marriage the parties acquired interest in two timeshares, to wit: Trendwest Timeshare and a Marriott Mountainside Timeshare in Park City, Utah.

26. The Court concludes that the respondent is entitled to those timeshares, that there is no equity therein, and that the respondent shall pay, assume, and discharge the obligations secured thereby and holding the petitioner harmless there from.

27. The Court concludes that the petitioner's necessary living expenses are the sum of \$3,519.30.

28. The Court concludes that the petitioner's actual monthly gross income, from all sources, is \$2,697.32, and that the petitioner's net monthly income from all sources including child support, is the sum of \$2,218.66.

29. The Court concludes that the respondent has a gross income of \$4,804 and a net monthly income of \$3,170.

30. The Court concludes that the respondent overstated his reasonable and necessary living expenses.

34. The Court concludes that upon the sale of the Appian Way residence and after corrections for over-stated expenses as detailed in the Court's Findings of Fact, that the respondent will have an additional \$1,351 in disposable income.

32. The Court concludes that the petitioner will have a monthly shortfall of \$1,364 between her net income and her necessary living expenses.

33. The Court concludes that the respondent's median income is 2.27 times greater than the petitioner's median income as demonstrated through tax returns for the years 1998, 1999 and 2000.

34. The Court concludes that there is a gross disparity in the earnings and the earning capabilities of the parties that the petitioner has demonstrated a need for spousal support and alimony, that the respondent has the ability to pay and therefore concludes that the respondent shall pay alimony to the petitioner.

35. The Court concludes that the petitioner is entitled and that the respondent is obligated to pay the sum of \$250 per month in alimony commencing December 2001 and continuing until such time as the marital residence is sold, upon the sale of the marital residence the alimony obligation shall increase (without necessity for any further hearings) to the sum of \$500 per month and shall be paid for a period equal to the duration of the marriage.

36. The Court concludes that the respondent should pay the Court ordered alimony on the 1st day of each month and is to continue said payment until April 30, 2007, at which time it shall cease unless earlier termination occurs by order of the Court or operation of law.

37. The Court concludes that alimony shall terminate upon cohabitation, remarriage, or death of the petitioner.

38. The Court concludes that during the course of the marriage the parties incurred certain debts and obligations, which should be divided pursuant to provisions in the Findings of Fact and Conclusions of Law.

39. The Court concludes that the petitioner did purchase, in July of 2001, a condominium in West Jordan, Utah, that there is no equity of a monetary nature, and that petitioner is awarded the same free and clear of claim by respondent.


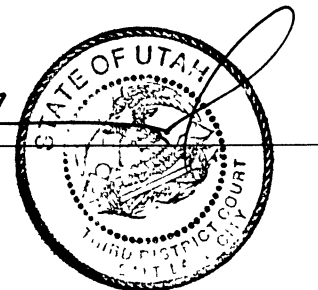
40. The Court concludes that for the reasons set forth in its Findings of Fact, the respondent should immediately file an amended 2000 tax return and shall allocate all interest income deductions for mortgages and all refunds from state returns equally between the parties.

41. The Court concludes that the petitioner is awarded the right to take her maiden name of Frank, if she so desires

42. The Court concludes that each party should be responsible for and shall pay his or hers own attorney fees and costs incurred in this matter.

DATED this 17 day of January 2002.

By the Court:

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Attorney for Petitioner

IMAGED

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 01/15/02

FILED DISTRICT COURT
Third Judicial District

Mad Winn
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

MELISSA SHAW,

Petitioner,

v.

SCOTT SHAW,

Respondent.

DECREE OF DIVORCE

Civil No. 004907136

Judge Stephen L. Henroid

This matter having come on regularly for trial pursuant to Notice before the Honorable Stephen L. Henroid on October 29 and 30, 2001, Melissa J. Shaw appearing in person and represented by James I. Watts, and the respondent Scott Shaw appearing in person and represented by Richard G. Hackwell, the Court having received exhibits, taken testimony of the parties and their respective witnesses, received and heard the arguments of counsel, and otherwise being fully advised, does hereby **ORDER, ADJUDGE AND DECREE AS FOLLOWS:**

The Petitioner, Melissa Shaw, is awarded a Decree of Divorce from the Respondent on the grounds of irreconcilable differences and the marriage is hereby dissolved and the parties are hereby free and absolutely released from the bonds of matrimony.

The Court approves the parties' partial stipulation and orders as follows:

Divorce Decree @J



1. That all retirement accounts and pensions owned by the parties will be divided between them pursuant to the Qualified Domestic Relations Order, in accordance with the Woodward Formula.

2. That this will include the Petitioner's and the Respondent's retirement accounts from Redrock Brewing Company and the Respondent's 401k, 457 or any other retirement account maintained through the State Retirement Systems Firefighter's Department.

3. That the parties' marital residence located at 5349 S. Appian Way, Salt Lake County, State of Utah, is ordered be listed for sale at \$160,000 and is to be sold.

4. That the Respondent is awarded the use and possession of the residence during the pendency of the sale.

5. That the Respondent is ordered not to make any alterations, modifications, or improvements to the home that would cost more than \$100 without the specific authorization or approval of the Petitioner

6. That any modifications or repairs made by him will be the Respondent's sole financial responsibility, unless such written approval is obtained in advance of making said improvements.

7. The Petitioner and Respondent are ordered to cooperate in all respects in order to market the residence, to include if necessary, the placing a lock box on the residence to allow access at times when the Respondent is not otherwise able to be at the residence or would render the listing agent unable to show the residence.

8. The Court orders that upon the sale of the residence, the respondent is to receive from the gross proceeds, the sum of \$4,290 representing the down payment on the parties' first home, with the balance of the sale proceeds divided evenly with the following offsets and deductions:

a) The Petitioner to receive from the Respondent's portion of the sales proceeds the following amounts:

- i. \$3,750 (½ equity in the 1992 Ford Truck),
- ii. \$4,424 (½ equity in the 2000 Harley Davidson Motorcycle).

9. The Court awards to the Respondent the Marriott and the WorldMart timeshares subject to all indebtedness thereon.

10. The Respondent is ordered to pay the debt secured by the timeshares holding the Petitioner harmless there from.

11. The Court orders that each party is awarded any life insurance policy which the party presently maintains and may change the beneficiary as the party desires.

12. The Court orders that an amended 2000 tax return be filed by the Respondent, and that the Respondent claim only one-half of the mortgage interest deductions, property taxes, and other deductions which should properly be allocated between the parties.

13. The Court awards the Petitioner ½ of the equity in the 1992 Ford Truck, equal to the sum of \$3,750; and, ½ of the equity in the 2000 Harley Davidson Motorcycle, equal to the sum of \$4,424, and is to be paid to her as ordered above.

14. The Court orders that the personal property be awarded to the party in possession of the same with the exception of the following items which the Court orders be returned to the Petitioner: the skating rink Christmas decoration, the skinny Christmas tree, all ornaments with Jason's or her name on them, one of the Old-Time Santas, the mirror over the stairway, and the rug in the basement TV room.

15. The Court orders alimony to be paid to the Petitioner by the Respondent in the sum of \$250 per month commencing with the month of December 2001, and that said obligation should be paid to the Petitioner on the 1st day of each month.

16. The Court orders that upon the sale of the Appian Way residence, that alimony will be increased to \$500 per month, without further court proceedings.

17. The Court orders that alimony shall be paid by the respondent to the petitioner for a period equal to the duration of the parties' marriage, and shall terminate on April 30, 2007.

18. The Court orders that the alimony award shall terminate at an earlier date upon the cohabitation, remarriage, or death of the Petitioner.

19. The Court orders that the Petitioner is solely responsible for the Discover Card balance.

20. The Court orders that the Petitioner is solely responsible for the Granite Furniture account.

21. The Court orders that the Petitioner is solely responsible for the R.C. Willey account.

22. The Court orders that the Petitioner is solely responsible for the Lowe's account.

23. The Court orders that the Petitioner is solely responsible for the Dell Computer account.

24. The Court orders that the Petitioner is solely responsible for the obligation regarding the West Jordan condominium.

25. The Court orders that the Respondent is solely responsible for the Discover Card in his name.

26. The Court awards to the Petitioner her condominium in West Jordan Utah, free and clear of claim by Respondent.

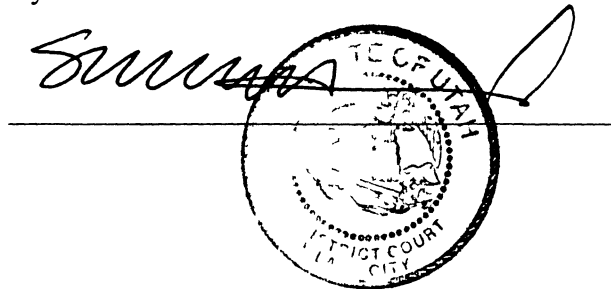
27. The Court orders that the Respondent is solely responsible for all financial obligations regarding the 2000 Harley Davidson Motorcycle and the 1992 Ford Truck..

28. The Court orders that the Petitioner is awarded the right to take her maiden name of Frank, if she so desires.

29. The Court orders that each party is responsible for paying their own attorney fees and costs incurred in this matter.

DATED this 14 day of January 2002.

By the Court:

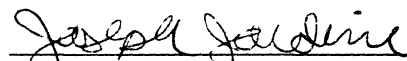


NOTICE TO RESPONDENT

TO: SCOTT SHAW

Please take notice that the undersigned Attorney for Petitioner will submit the above and foregoing Findings of Fact and Conclusions of Law and Decree of Divorce to Judge Stephen L. Henroid for his signature, upon the expiration of five (5) days, plus three (3) days mailing, from the date this notice is mailed to you unless written objection is filed prior to that time, pursuant to Rule 4-504(2) of the Code of Judicial Administration in the District Courts of the State of Utah. Kindly govern yourself accordingly.

DATED this _____ day of January 2002.



Attorney for Petitioner

JAMES I. WATTS (4768)
39 Exchange Place, Suite 100
OLD SALT LAKE STOCK & MINING BLDG.
Salt Lake City, Utah 84111
Tel (801) 994-0838
Fax (801) 994-0833

Attorney for Petitioner

Mad Winn

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

MELISSA SHAW,

Petitioner,

v.

SCOTT SHAW,

Respondent.

AMENDED FINDINGS OF FACTS AND
CONCLUSIONS OF LAW

Civil No. 004907136

Judge Stephen L. Henroid

RESPONDENT'S Objection to the form of the previously entered *Decree of Divorce* and *Findings of Fact and Conclusions of Law*, having come before the Court; the Court having agreed to hear the matter via teleconference on January 29, 2002, at 2:00 p.m., the petitioner appearing by and through her attorney of record James I. Watts, the respondent appearing by and through his attorney of record, Gayanne Schmid, the Honorable Judge Stephen Henroid presided. The Court having heard the argument of counsel having received the objections and replies thereto and having made an oral ruling and attorney for petitioner being directed to prepare *Amended Findings of Facts and Conclusions of Law and Decree of Divorce* memorializing the Court's ruling. Those *Amended Findings of Facts and Conclusions of Law*, having been submitted to counsel for the respondent and the Court having reviewed the same, does now enter its **Amended Findings of Fact and Conclusions of Law**.

1. The Court finds that paragraph 69 of the *Findings of Facts and Conclusions of Law* as previously entered, should be amended as follows:

2. The Court finds that the formula for calculating the petitioner's equity in the 2000 Harley Davidson Motorcycle, awarded to the respondent, is as follows: \$19,000 (value of motorcycle) - \$5,542; payoff = \$13,548 divided by 2 = \$6,774 (parties' equity). From petitioner's equity, the sum of \$4,700 is to be deducted, petitioner's net equity in respondent's motorcycle is the sum of \$2,074 and the petitioner is awarded a judgment in said amount.

3. Paragraph 36 of the *Findings of Facts and Conclusions of Law* are amended to reflect that the Court finds the petitioner has paid the sum of \$3,331 to Carpet One for the replacement of carpet in the home, and that the respondent has paid the sum of \$2,203.83 for repairs to the residence and that each party is entitled to a return of those funds from the sale proceeds.

AMENDED CONCLUSIONS OF LAW

The Court having adopted the *Amended Findings of Fact* does now adopt its *Amended Conclusions of Law* as follows:

1. Paragraph 17 of the *Conclusions of Law* is amended as follows: The Court concludes that the petitioner has paid the sum of \$3,331 to Carpet One of Salt Lake City, Utah for carpet replacement in the Appian Way home and that the respondent has paid, or been credited with, paying the sum of \$2,203.83 in improving and repairing the home.


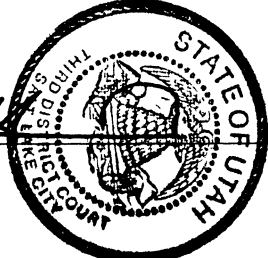
2. The Court concludes that the parties are entitled to be repaid those funds from the sale proceeds of the home which amounts were advanced by her or him for repairs in order to make the home more salable

3. Paragraph 19 is amended to reflect that: The Court concludes that the petitioner is entitled to be paid from the respondent's portion of the sale proceeds of the marital residence, the sum of \$2,074 representing $\frac{1}{2}$ of the equity in the 2000 Harley Davidson, which the Court has awarded to the respondent.

4. The Court concludes that all other remaining provisions of the previously entered *Findings of Facts and Conclusions of Law* are and remain the findings of facts and conclusions of the Court.

DATED this 14 day of February 2002.

By the Court:

JAMES I. WATTS (4768)
39 Exchange Place, Suite 100
OLD SALT LAKE STOCK & MINING BLDG.
Salt Lake City, Utah 84111
Tel (801) 994-0838
Fax (801) 994-0833

IMAGED

Mad Winn

Attorney for Petitioner

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

MELISSA SHAW,

Petitioner,

v.

SCOTT SHAW,

Respondent.

AMENDED DECREE OF DIVORCE

Civil No. 004907136

Judge Stephen L. Henroid

This matter having come on regularly for trial pursuant to Notice before the Honorable Stephen L. Henroid on October 29 and 30, 2001, Melissa J. Shaw appearing in person and represented by James I. Watts, and the respondent Scott Shaw appearing in person and represented by Richard G. Hackwell. The Court having entered a *Decree of Divorce* and *Findings of Fact and Conclusions of Law*, the form of which was objected to by the respondent and the Court having agreed to hear the matter via teleconference on January 29, 2002, the petitioner appearing by and through her attorney of record James I. Watts, the respondent appearing by and through his attorney of record Gayanne Schmid, the Honorable Judge Stephen Henroid presiding, did hear the argument of counsel, did receive objections and replies thereto, and having made an oral ruling and the attorney for petitioner being directed to prepare *Amended Findings of Facts and Conclusions of Law* memorializing the Court's ruling and amending the *Findings of Facts and Conclusions of Law*, the Court does now **ORDER, ADJUDGE AND AMEND DECREE AS FOLLOWS:**

Amended Decree of Divorce @J



1. Paragraph 8(a) of the *Decree of Divorce* is amended to reflect the amount of the petitioner's equity in the 2000 Harley Davidson Motorcycle is the sum of \$2,074.

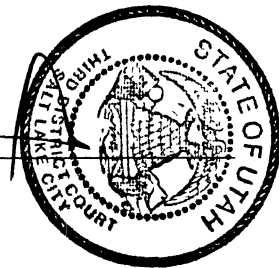
2. Paragraph 13 of the *Decree of Divorce* is amended as follows: The Court awards the petitioner ½ of the equity in the 1992 Ford Truck, equal to the sum of \$3,750; and, ½ of the equity in the 2000 Harley Davidson Motorcycle, equal to the sum of \$2,074, and is to be paid to her as ordered above.

3. The Court orders that each of the parties is entitled to be prepaid from the sales proceeds, the funds advanced by him or her to make repairs or improvements to the home in anticipation of sale. That the petitioner is to receive the sum of \$3,331 and respondent is to receive the sum of \$2,203.83.

4. The Court orders that all other remaining provisions of the previously entered *Decree of Divorce* are and remain the orders of the Court.

DATED this 14 day of February 2002.

By the Court:

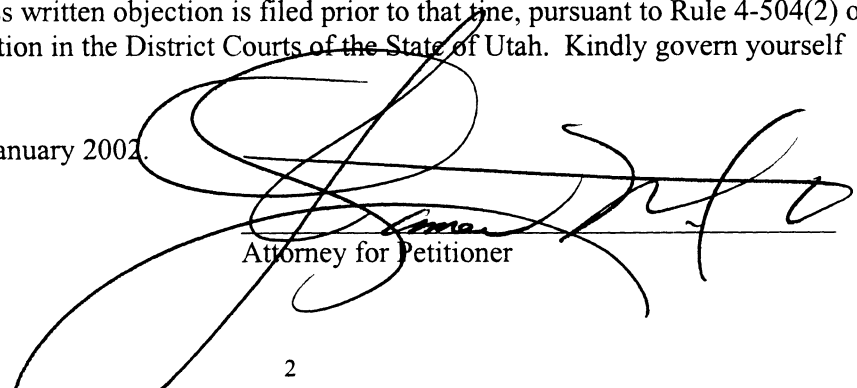


NOTICE TO RESPONDENT

TO: SCOTT SHAW

Please take notice that the undersigned Attorney for Petitioner will submit the above and foregoing Findings of Fact and Conclusions of Law and Decree of Divorce to Judge Stephen L. Henroid for his signature, upon the expiration of five (5) days, plus three (3) days mailing, from the date this notice is mailed to you unless written objection is filed prior to that time, pursuant to Rule 4-504(2) of the Code of Judicial Administration in the District Courts of the State of Utah. Kindly govern yourself accordingly.

DATED this 5 day of January 2002.



Attorney for Petitioner

UTAH RULES CIVIL PROCEDURE RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Required disclosures; Discovery methods.

(3) Disclosure of expert testimony.

(A) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or

705 of the Utah Rules of Evidence.

(B) Unless otherwise stipulated by the parties or ordered by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness or party.

The report shall contain the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(3) shall be made within 30 days after the expiration of fact discovery as provided by subdivision (d) or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (3)(B), within 60 days after the disclosure made by the other party.

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; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. 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. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

UTAH CODE ANN SECTION 30-3-1 PROCEDURE --RESIDENCE --GROUNDS.

(1) Proceedings in divorce are commenced and conducted as provided by law for proceedings in civil causes, except as provided in this chapter.

(2) The court may decree a dissolution of the marriage contract between the petitioner and respondent on the grounds specified in Subsection

(3) in all cases where the petitioner or respondent has been an actual and bona fide resident of this state and of the county where the action is brought, or if members of the armed forces of the United States who are not legal residents of this state, where the petitioner has been stationed in this state under military orders, for three months next prior to the commencement of the action.

(3) Grounds for divorce:

(a) impotency of the respondent at the time of marriage;

(b) adultery committed by the respondent subsequent to marriage;

(c) willful desertion of the petitioner by the respondent for more than one year;

(d) willful neglect of the respondent to provide for the petitioner the common necessities of life;

(e) habitual drunkenness of the respondent;

(f) conviction of the respondent for a felony;

(g) cruel treatment of the petitioner by the respondent to the extent of causing bodily injury or great mental distress to the petitioner;

(h) irreconcilable differences of the marriage;

(i) incurable insanity; or

(j) when the husband and wife have lived separately under a decree of separate maintenance of any state for three consecutive years without cohabitation.

UTAH CODE ANN. SECTION 30-3-5 DISPOSITION OF PROPERTY --
MAINTENANCE AND HEALTH CARE OF PARTIES AND
CHILDREN --DIVISION OF DEBTS --COURT TO HAVE CONTINUING
JURISDICTION – CUSTODY AND PARENT-TIME --DETERMINATION OF
ALIMONY --NONMERITORIOUS PETITION FOR MODIFICATION.

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

- (a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;
- (b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children;
- (c) pursuant to Section 15-4-6.5:
 - (i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(7) (a) The court shall consider at least the following factors in determining alimony:

- (i) the financial condition and needs of the recipient spouse;
- (ii) the recipient's earning capacity or ability to produce income;
- (iii) the ability of the payor spouse to provide support;
- (iv) the length of the marriage;
- (v) whether the recipient spouse has custody of minor children requiring support;
- (vi) whether the recipient spouse worked in a business owned or operated

by the payor spouse; and

(vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (7)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

UTAH CODE ANN. SECTION 78-2a-3 COURT OF APPEALS JURISDICTION.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies.

UTAH EVIDENCE RULE 103. RULINGS ON EVIDENCE

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain Error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

UTAH RULES EVIDENCE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

UTAH RULES EVIDENCE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

UTAH EVIDENCE RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

UTAH EVIDENCE RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

UTAH EVIDENCE RULE 705. DISCLOSURE OF FACTS OR DATA
UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.