

2002

Judy Cox, Plaintiff/Appellee v. Larry Cox, Defendant/Appellan : Brief of Appellee

Utah Court of Appeals

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Larry V. Cox; Pro Se.

Robert H. Wilde; Attorney for Plaintiff.

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FILED
Utah Court of Appeals
DEC 13 2002
Paulette Stagg
Clerk of the Court

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STATEMENT OF JURISDICTION

Jurisdiction for this appeal of a decree of divorce is found at Utah Code Anno. 78-2a-3(h).

DETERMINATIVE LAW

The only law Appellee believes to be determinative of any issue in this matter is Utah Code Anno. 78-45-7.5 which is included in the Appellee's addendum.

STATEMENT OF THE CASE

This omnibus divorce was tried to the court for three and one half days. Record at 1552-54. At the conclusion of the trial the court issued findings, conclusions and a decree. Record at 1136-73. The appellant (Mr. Cox) disagreed with the outcome and appealed. Record at 1216-17.

Mrs. Cox believes all findings were supported by the record. The decree was supported by the findings. Mr. Cox believes that he should not pay alimony and that the property division should be modified. Mrs. Cox believes trial court was very thorough and its actions were proper.

SUMMARY OF ARGUMENT

An appellant appealing from a bench trial faces a significant uphill challenge. He must obtain the entire record and glean all facts which support the position he opposes in order to marshal the facts. He must then show that those facts are insufficient to support the trial court's findings and judgment. Here, Mr. Cox has not done that. He failed to

have the most critical portion of the record transcribed. He completely failed to marshal the evidence. His brief fails to comply with the rules of this court. His appeal must be dismissed and plaintiff (Mrs. Cox) should be awarded her attorney fees.

Before the matter was briefed the Mr. Cox waived his appeal by accepting the benefit of the decree which was appealing.

ARGUMENT

APPELLANT HAS NOT CONSIDERED THE STANDARD ON APPEAL FROM A BENCH TRIAL

When reviewing a bench trial Utah appellate courts consider the facts from the record most favorable to the findings of the trial court. *State v. Layman*, 953 P.2d 782, 784 n.1 (Utah Ct. App. 1998). A trial court's findings of fact should not be set aside unless clearly erroneous, and due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses. *Tanner v. Carter*, 2001 UT 18, ¶ 2, 20 P.3d 332. Appellate courts grant due deference to the trial court's resolution of factual disputes. *Id* at ¶ 2, 20 P.3d 332. This rule of appellate analysis is particularly important in a case like this where the trial court, sua sponte, specifically called the Mr. Cox a liar and found in open court that the Mr. Cox would not be believed and, unless there was other independent supporting evidence the court would take "... a jaundice eye at it." [sic] Record at 1554, pages 743/13-744/8. The trial court entered specific findings on points where it was evident Mr. Cox had lied. Record at 1159-60.

APPELLANT DID NOT PROVIDE THE NECESSARY RECORD

When the entire record of the case is not before an appellate court, it must presume the trial court's findings are supported by competent and sufficient evidence. *Sampson v. Richins*, 770 P.2d 998, 1002 (Utah Ct. App. 1989).

In this matter the Mr. Cox obtained the transcript of the three days of trial during which testimony was taken and exhibits offered and admitted. Following the trial the Mrs. Cox submitted her proposed findings of fact, conclusions of law and decree of divorce. Mr. Cox objected to many of the proposed findings and to provisions of the decree. Record at 1032 & 1061. On January 10, 2002 the trial court heard these objection for about three hours. The trial court considered each of Mr. Cox's objections, overruled some and sustained others. The minute entry for that hearing is contained in the record at 1089. During that hearing the trial court discussed the objections and explained the reasons for its rulings; the reasons some findings were rejected or altered while others were not. Mr. Cox failed to obtain the transcript of that portion of the trial. That portion of the trial record is the more important than all others. That is where the court provided its explanation for the points Mr. Cox now challenges. Without that portion of the transcript this court must presume that the trial court's findings are supported by competent and sufficient evidence. *Sampson v. Richins*, 770 P.2d 998, 1002 (Utah Ct. App. 1989).

APPELLANT HAS FAILED TO MARSHAL THE EVIDENCE

When reviewing a bench trial, appellate courts may not set aside a trial court's findings of fact unless they are clearly erroneous. Utah R. Civ. P. 52(a). To successfully demonstrate that a factual finding is clearly erroneous, the appellant must marshal all the evidence in favor of the factual finding and show that, even when viewed in the light most favorable to the trial court's factual finding, the favorable evidence is insufficient to support that finding. *Tanner v. Carter*, 2001 UT 18, ¶ 17, 20 P.3d 332; *State v. Robertson*, 932 P.2d 1219, 1223-24 (Utah 1997). In assessing whether a finding is clearly erroneous, reviewing courts must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. Utah R. Civ. P. 52(a).

To marshal the evidence the appellant must glean from the record all the favorable evidence and argue it at the points in his brief where he challenges each specific factual finding. See *Tanner*, 2001 UT 18 at ¶¶ 18-19; *Fitzgerald v. Critchfield*, 744 P.2d 301, 304 (Utah Ct. App. 1987) (concluding appellant's listing of favorable facts in his facts section did not meet marshaling requirement).

In challenging the trial court's findings here, Mr. Cox has not marshaled any of the favorable evidence or even attempted to demonstrate its insufficiency. In light of Mr. Cox's failure to marshal the evidence, this court must assume that all the trial court's findings are supported by the evidence. See, e.g., *Utah Med. Prods., Inc. v. Searcy*, 958 P.2d 228, 233 (Utah 1998)

Mr. Cox identified various points on appeal on which he claims the trial court's

findings were deficient. Notwithstanding the fact that Mr. Cox's failure to marshal the evidence is fatal to his appeal Mrs. Cox will show that significant evidence supports each point.

EVIDENCE SHOWS THE PARTIES' STANDARD OF LIVING DURING MARRIAGE

Mr. Cox suggests that the record lacked evidence on the parties' standard of living during their marriage. He is wrong. At page 240/22 of the transcript, record at 1552, Mrs. Cox offered an appraisal of the Sego Lily home which showed the fair market value and included photographs of the home in which the parties lived after they were transferred back to Utah by the Army. At page 242/14, record at 1552, Mrs. Cox offered an appraisal of the Riverton home which showed the fair market value and included photographs of the home in which the parties lived until their separation. At page 248/21 of the transcript, record at 1552, Mrs. Cox testified of new furniture and a wave runner Mr. Cox had purchased. At page 264/18, record at 1553, Mrs. Cox introduced a list of personal property the parties had acquired during the marriage. At page 239/11 of the transcript, record at 1552, Mrs. Cox testified she should be receiving medical benefits as a result of her status as the soon to be former spouse of a military retiree. All of this evidence helped the court understand the standard of living the parties had during their marriage.

The court's findings also show the standard of living. Finding 19 discusses the amount of Mr. Cox's retirement. Record at 1139. Findings 23-27 discuss the residences.

Record at 1139-40. Findings 46 & 47 are entitled "Standard of Living" and discuss family income and assets. Record at 1142-43.

There was evidence which helped the court understand the parties standard of living. From that evidence the court entered appropriate and adequate findings of fact.

EVIDENCE SHOWING APPELLEE'S CURRENT LIFESTYLE

Mr. Cox complains the trial court did not require that Mrs. Cox show she was unable to provide for her own needs and that she can provide for her own needs. That evidence was introduced and he misperceives the law.

At trial Mrs. Cox introduced her financial statement as exhibit 43. That document showed her income, assets and expenses. Record at 1552 at transcript 244/1. The court made findings on Mrs. Cox's financial condition as well. Finding 73 discusses Mrs. Cox's income and need for child support. Record at 1147. Mrs. Cox's monthly needs, from exhibit 43, are found at finding 75. Record at 1147. That Mrs. Cox's needs were not being met with in that budget were found at finding 77. Record at 1147.

Mr. Cox apparently believes that he is the person who is responsible for determining Mrs. Cox's needs and that she should be able to live on what he wishes to give her. Utah courts have held that "an alimony award should, after a marriage . . . and to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to that standard of living enjoyed during the marriage." *Gardner v. Gardner*, 748 P.2d 1076, 1081 (Utah 1988); see also *Jones v.*

Jones, 700 P.2d 1072, 1075 (Utah 1985); *Roberts v. Roberts*, 835 P.2d 193, 198 (Utah Ct. App. 1992); *Bell v. Bell*, 810 P.2d 489, 491 (Utah Ct. App. 1991). In light of this goal, the trial court must consider: "(1) the financial conditions and needs of the receiving spouse; (2) the ability of the receiving spouse to produce a sufficient income; and (3) the ability of the supporting spouse to provide support." *Roberts*, 835 P.2d at 198.

Findings 78-83 show that the trial court very carefully did this. Record at 1147-48.

EVIDENCE SHOWS THE APPELLANT'S ABILITY TO PAY

Mr. Cox suggests the court received no evidence as to his ability to pay alimony. The second witness Mrs. Cox called was Dr. Kristy Farnsworth. Dr. Farnsworth was qualified as an expert witness in vocational rehabilitation, record at 1552, transcript at 88/15-90/5. Based on the Mr. Cox's work history, education and experience she testified that the Mr. Cox was capable of earning between \$50,000 and \$85,000 or \$90,000. Record at 1552, transcript at 96/8-14. It is significant that the trial court did not adopt Dr. Farnsworth's view completely. Instead he found that Mr. Cox could earn \$42,000.00. Dr. Farnsworth further testified that Mr. Cox has been underemployed in his last job, record at 1552, transcript 98/9. Mr. Cox's counsel introduced evidence of his military retirement and the unemployment benefits he was then receiving. Record at 1554, transcript at 555/7-20. All of this evidence established Mr. Cox's ability to pay alimony.

The court's findings show Mr. Cox's ability to pay alimony. Findings 29-45 discuss Mr. Cox's education, training and experience and the ability to generate income

which flows from them. Record at 1140-42. Findings 48-74 show that the parties' Laundromat is a revenue producing asset and awarded to Mr. Cox. Record at 1143-47.

EVIDENCE SUPPORTING THE IMPUTATION OF INCOME

Mr. Cox complains that the trial court improperly imputed income. At trial Mrs. Cox stipulated that income of \$7.50 per hour could be imputed to her for 40 hours per week though she was not working that many hours at the time. Record at 1153, transcript at 339/4-14. Mr. Cox's counsel accepted the stipulation and did not offer other evidence to suggest Mrs. Cox's ability to produce income was different than that stipulated.

This imputation is within the guidelines set by the statute. Utah Code Anno. 78-45-7.5(2) limits the number of imputed hours to 40. Mrs. Cox testified she was earning \$7.50 per hour at the time. Record at 1552, transcript at 259/3. The code provides that historic income will be used unless there is a finding of voluntary unemployment or underemployment. Id at §7.5(a). There was no such evidence or finding for Mrs. Cox. The imputation of \$7.50 for 40 hours per week was completely within the guidelines.

Mr. Cox believes his income should have been based on his historic income. The trial court rejected that argument as it was allowed to do under the statute. The statute requires the use of historic income unless "... a hearing is held and a finding is made that the parent is voluntarily unemployed or underemployed." Id. That is exactly what happened here. At finding 35 the court found that, though unemployed, Mrs. Cox had not made serious attempts to seek employment since the beginning of the summer of 2001,

four and one half months earlier. Record at 1141. That finding was supported by Mr. Cox's own testimony that he had made only one job application per week all summer, the one required to receive unemployment. Record at 1552, transcript at 59/21-60/3.

Based on Dr. Farnsworth's testimony, *supra*, and Mr. Cox' own testimony, the court found Mr. Cox had been voluntarily underemployed and unemployed. See finding 39. Record at 1142. Because there was evidence to show Mrs. Cox was voluntarily unemployed, had been voluntarily under employed and to show the income he was capable of earning the court was justified in departing from the statute and in not using his historic income.

EVIDENCE SUPPORTING THE VALUATION OF PROPERTY

Mrs. Cox suggests the trial court erred when in "... apparently deciding to give Judy virtually all the equity in the Sego Lily home and all the equity in the Riverton home." Applt brief at 27. Mrs. Cox fails to describe how this happened. The findings, on the other hand, show a conscious attempt by the court to equally divide the parties assets. After 15 pages of findings dealing with the parties assets and debt, record at 1139-54, the findings include a comprehensive spreadsheet showing the allocation of equity and debt between the parties with Mr. Cox's account containing approximately \$107,000.00 more than Mr. Cox's account. That difference is resolved by awarding Mrs. Cox a judgment for \$53,415.50. Record at 1155.

Mr. Cox's brief attempts to discuss some aspect of refinancing but, again, he has

failed to marshal the evidence on that point. Because he has failed to marshal that evidence and because the record does not contain the trial court's description of why it did what it did Mr. Cox cannot prevail on this point.

EVIDENCE SUPPORTED THE DIVISION OF MILITARY RETIREMENT

Though he does not phrase it this way Mr. Cox's claim is that military retirement should have been divided differently by using an earlier date to create the numerator for the Woodward formula and that the evidence does not support the date shown. In actuality, the official retirement document supports the date used. A collateral document suggests another date. The court used the official retirement document.

At trial exhibit 34 was offered and admitted into evidence. Mr. Cox testified that it was his DD Form 214. Record at 1552, transcript at 158/17. As a retired military officer he described the DD Form 214 as a document prepared by the military in the normal course of its business which is given to departing service people which "... explains all the things you did in the military." Record at 1552, transcript at 158/1-15.

As Mr. Cox was examined by his counsel about his DD Form 214 there was considerable discussion about what it showed. Record at 1553, transcript at 386-400. At the conclusion of that discussion the court described its understanding of the document and its concern that the dates on the DD Form 214 did not coincide with those on another military document admitted into evidence as exhibit 63, the Record of Assignments. Record at 394/17.

Mr. Cox's counsel acknowledged that he had failed to provide any other evidence which would substantiate Mr. Cox's position that the Record of Assignments rather than the DD Form 214 was correct. Record at 1553, transcript at 394/24-25. Mrs. Cox's counsel noted, and the court acknowledged, that Mr. Cox was the person who had access to military personnel experts who could have explained the discrepancy but failed to produce such a witness. Record at 1553, transcript at 398. Mr. Cox was asked how he could tell from the documents that the date shown on exhibit 63 was the beginning date for computation of his retirement. He responded "by this document, you can't tell ...". Record at 1553, transcript at 396/21. When the court admitted the other documents they were not received as being authoritative because they were discrepant and the court cautioned they may not be given much weight. Record at 1553, transcript at 400/8-21.

Exhibits 34 and 63 are attached as part of Mrs. Cox's addendum. The relative importance of the two documents may be determined from the face of the documents themselves. The Record of Assignments is apparently part of a larger document which Mr. Cox did not introduce, as seen by the fact that the number "18," apparently a paragraph number, appears in the upper left hand corner and the number two, apparently a page number appears in the lower right hand corner. Nothing on the face of the document authenticates it or shows its use. Mr. Cox did not describe its use at trial other than to say it showed where he had been and what he had done while in the Army. Record at 1553 transcript at 391. There was no substantiated testimony that exhibit 63 had anything to do

with Mr. Cox's retirement.

Exhibit 34 is different. It provides, at the top, "this is an important record. Safeguard it" and "any alterations in shaded areas render form void." It further provides, at paragraph 18, "Data herein subject to computer matching within DOD or with other agencies for verification purposes and determining eligibility or compliance with federal benefits." I.e. it shows on its face it pertains to retirement. Paragraph 23 also shows it pertains to Mr. Cox's retirement. It is a personnel document. See paragraph 22.

The DD Form 214 shows, at ¶12(a), that Mr. Cox entered the military "this period" on December 10, 1968. It shows, at ¶12(c), net active service which matches the entering date shown in ¶12(a). The trial court used these two matching dates in making findings 13, 14 and 17. Record at 1138. The trial court did not use the date in exhibit 63, the Record of Assignments, presumably because the DD Form 214 was an official retirement record and the other was not.

Though the year since the hearing has dimmed his memory, it is the undersigned's recollection that this issue was discussed in detail in the hearing of Mr. Cox's objections on January 10, 2002. Unfortunately, since that hearing's transcript is not part of the record we do not have the benefit of the trial court's reasoning.

APPELLANT WAIVED HIS RIGHT TO APPEAL

This matter appeals the Decree of Divorce entered by the trial court on January 22, 2002, Record at 1164. The Decree, at paragraph 15, awarded the Mr. Cox certain real

property in Riverton, Utah. On May 26, 2002, pursuant to paragraph 27 of the Decree, Mrs. Cox executed a quit claim deed to the Riverton Property, a copy is attached. That deed was provided to Mr. Cox' counsel. On June 20, 2002 Mr. Cox recorded that quit claim deed. The quit claim deed shows on its face that it was issued "pursuant to a decree of divorce."

The Decree of Divorce also provided, at paragraph 14 that Mrs. Cox was awarded certain property located in Sandy, Utah. On April 25, 2002, Mr. Cox executed a quit claim deed to the Sandy property for Mrs. Cox, copy attached. That quit claim deed also shows on its face that it was issued pursuant to a decree of divorce.

Utah law is both old and continuing that when one accepts the benefit of a judgment he may not thereafter continue an appeal from that judgment. *Ottenheimer v. Mountain States Supply Co.*, 56 Utah 190, 193, 188 P. 1117, 1118 (1920); *Hollingsworth v. Farmers Insurance Co.*, 655 P.2d 637 (Utah 1982); *Trees v. Lewis*, 738 P.2d 612, (Utah 1987); *Cingolani v. Utah Power & Light Co.*, 790 P.2d 1219, 1222 (Utah Ct. App. 1990); *Estate of Husband v. Husband*, 888 P.2d 137 (Utah Ct. App. 1994) .

The cases explain the breadth of the rule. In *Ottenheimer* the appealing party was awarded a money judgment and possession of real property. After the appeal was filed the appellant vacated the property but, apparently, did not collect the money judgment. *Trees*, at 613, states the rule "... one who accepts benefit under a judgment is estopped from later attacking the judgment on appeal, and one who acquiesces in a judgment cannot later

attack it." The waiver arises from the acceptance of **A benefit, not THE benefit**. The rule is that an appellant need not accept the entire benefit of the judgment. Accepting a partial benefit is sufficient to invoke the rule.

There is a minor exception to the acceptance of the benefit rule which is given lip service in some cases but is not generally applied. In *Jensen v. Eddy*, 30 Utah 2d 154, 514 P.2d 1142 (1973) the court described an exception where there are independent claims within the judgment. This exception does not apply here. Paragraph 15 of the Decree of Divorce notes that the Mr. Cox' interest in the property is subject to a judgment lien of \$53,415.50. Record at 1169. Paragraphs 126 and 127 of the Findings of Fact shows that this figure is the net result of calculating the parties relative equity in all of the marital assets. Record at 1154-55. These paragraphs also show that the parties equity in their respective residences is factored into the \$53,415.50 lump sum. Finding 128 shows that this sum, associated with the residence, is in the nature of alimony and support. Record at 1155. The award of the residences and the allocation of their equity is inextricably intertwined with all of the other aspects of the judgment. It is not an independent claim and not subject to the rule of *Jensen*.

APPELLANT'S BRIEF IGNORES THE RULES OF APPELLATE PROCEDURE PRESERVATION FOR APPEAL.

Rule 24(a)(5) Utah R. App. P., requires that an appellant cite to the record his attempts to preserve issues before trial court. This rule flows from the principle that it is

necessary to give the trial court an opportunity to correct any errors before the matter is taken on appeal. *R.T. Nielson v. Cook*, 2002 UT 11 ¶12, 40 P.3d 1119. Mr. Cox has not cited any place in the record where any of his issues were preserved.

REFERENCES TO THE RECORD.

Rule 24(a)(7) Utah R. App. P., requires that an appellant refer to the record when citing “facts” in his brief. Though there are a handful of citations to the transcript there are literally no citations to the record in Mr. Cox’s brief. The citations to the transcript deal almost exclusively with the DD Form 214 issue which deals with the interpretation of a document and not with some factual contention. This deficiency is in the face of the fact that the appeal is from a bench trial and Mr. Cox is required to cite to the record as he marshals his evidence and the fact that he failed to provide the complete record.

REQUEST FOR ATTORNEY FEES

Though Mr. Cox is pro se it is apparent that this matter falls within the purview of Rule 24(j) Utah R. App. P. and that an award of attorney fees is appropriate. Mr. Cox’s brief is like that described by this court in *Demetropoulos v. Vreeken*, 754 P.2d 960 (Utah Ct. App. 1988). “While numerous issues are raised on appeal, appellant’s brief has not been of much help to the court in disposing of the case before it.” at 960.

The result of Mr. Cox’s failure to comply with Rule 24, his failure to marshal the evidence and his failure to obtain the entire record is that his appeal was doomed from before the time his brief was filed. Still, Mrs. Cox has been required to go through the

exercise of preparing her own brief to rebut Mr. Cox's undocumented assertions. This has been a significant financial burden which she should not be required to bear.

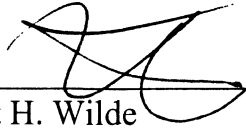
The record below shows that Mr. Cox's attempts at pro se representation have had the effect of shifting the financial burden to the Mrs. Cox in the past as well. The record, at 361-393, shows that the parties agreed to mediate. Mr. Cox appeared without counsel at the mediation which then took three sessions totaling 15 hours. At the conclusion of the mediation a mediation agreement was signed which Mr. Cox then refused to honor. The result was that Mrs. Cox incurred attorney fees for 15 hours of her attorney's time in addition to fees for the mediator. Had Mrs. Cox had counsel the mediation would have either broken down in the first session or it would have resolved. Mrs. Cox bore the financial brunt of Mr. Cox's pro se representation there as well.

Now Mr. Cox is again pro se. His brief is legally insufficient but Mrs. Cox must respond. She should not be required to bear that cost. The court should award Mrs. Cox her attorney fees incurred because of the deficiencies in Mr. Cox's lawyering.

CONCLUSION

The appeal should be dismissed and the Mrs. Cox awarded her attorney fees.

Dated this 13 day of December 2002.



Robert H. Wilde
Attorney for Appellee

ADDENDUM

Utah Code Anno. 78-45-7.5

Exhibit 34

Exhibit 63

Quit Claim Deed to Riverton Property

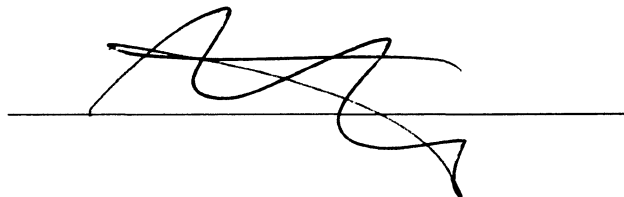
Quit Claim Deed to Sego Lily Property

Trial Transcript pages 88-96, 157, 386-400

Delivery Certificate

I hereby certify that a two true and correct copies of the foregoing BRIEF OF APPELLEE was mailed to the following via first class mail, postage prepaid thereon, this 13 day of December 2002.

Larry Cox
2195 West 13250 South
Riverton, UT 84065



ADDENDUM

Document 1 of 1

Source:

Utah Primary Law/Utah Code Annotated 1953/TITLE 78 JUDICIAL CODE/PART 4 PARTICULAR PROCEEDINGS/CHAPTER 45 UNIFORM CIVIL LIABILITY FOR SUPPORT ACT/78-45-7.5. Determination of gross income - Imputed income.

78-45-7.5. Determination of gross income - Imputed income.

(1) As used in the guidelines, "gross income" includes:

(a) prospective income from any source, including nonearned sources, except under Subsection (3); and

(b) income from salaries, wages, commissions, royalties, bonuses, rents, gifts from anyone, prizes, dividends, severance pay, pensions, interest, trust income, alimony from previous marriages, annuities, capital gains, social security benefits, workers' compensation benefits, unemployment compensation, income replacement disability insurance benefits, and payments from "nonmeans-tested" government programs.

(2) Income from earned income sources is limited to the equivalent of one full-time 40-hour job. However, if and only if during the time prior to the original support order, the parent normally and consistently worked more than 40 hours at his job, the court may consider this extra time as a pattern in calculating the parent's ability to provide child support.

(3) Specifically excluded from gross income are:

(a) cash assistance provided under Title 35A, Chapter 3, Part 3, Family Employment Program;

(b) benefits received under a housing subsidy program, the Job Training Partnership Act, Supplemental Security Income, Social Security Disability Insurance, Medicaid, Food Stamps, or General Assistance; and

(c) other similar means-tested welfare benefits received by a parent.

(4) (a) Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. The income and expenses from self-employment or operation of a business shall be reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support award. Only those expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts.

(b) Gross income determined under this subsection may differ from the amount of business income determined for tax purposes.

(5) (a) When possible, gross income should first be computed on an annual basis and then recalculated to determine the average gross monthly income.

(b) Each parent shall provide verification of current income. Each parent shall provide year-to-date pay stubs or employer statements and complete copies of tax returns from at least the most recent year unless the court finds the verification is not reasonably available. Verification of income from records

maintained by the Department of Workforce Services may be substituted for pay stubs, employer statements, and income tax returns.

(c) Historical and current earnings shall be used to determine whether an underemployment or overemployment situation exists.

(6) Gross income includes income imputed to the parent under Subsection (7).

(7) (a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed, the party defaults, or, in contested cases, a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.

(b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community, or the median earning for persons in the same occupation in the same geographical area as found in the statistics maintained by the Bureau of Labor Statistics.

(c) If a parent has no recent work history or their occupation is unknown, income shall be imputed at least at the federal minimum wage for a 40-hour work week. To impute a greater income, the judge in a judicial proceeding or the presiding officer in an administrative proceeding shall enter specific findings of fact as to the evidentiary basis for the imputation.

(d) Income may not be imputed if any of the following conditions exist:

(i) the reasonable costs of child care for the parents' minor children approach or equal the amount of income the custodial parent can earn;

(ii) a parent is physically or mentally disabled to the extent he cannot earn minimum wage;

(iii) a parent is engaged in career or occupational training to establish basic job skills; or

(iv) unusual emotional or physical needs of a child require the custodial parent's presence in the home.

(8) (a) Gross income may not include the earnings of a minor child who is the subject of a child support award nor benefits to a minor child in the child's own right such as Supplemental Security Income.

(b) Social Security benefits received by a child due to the earnings of a parent shall be credited as child support to the parent upon whose earning record it is based, by crediting the amount against the potential obligation of that parent. Other unearned income of a child may be considered as income to a parent depending upon the circumstances of each case.

History: C. 1953, 78-45-7.5, enacted by L. 1989, ch. 214, § 7; 1990, ch. 100, § 5; 1994, ch. 118, § 7; 1996, ch. 171, § 1; 1997, ch. 29, § 1; 1997, ch. 174, § 68; 1997, ch. 375, § 322; 1998, ch. 53, § 3; 2000, ch. 161, § 30; 2001, ch. 116, § 203.

Administrative Rules. - This section is implemented by, interpreted by, or cited as authority for the following administrative rule(s): R527-601.

Amendment Notes. - The 1994 amendment, effective July 1, 1994, rewrote Subsection (5)(b).

The 1996 amendment, effective April 29, 1996, added "40-hour" and the second sentence in Subsection (2).

The 1997 amendment by ch. 29, effective May 5, 1997, substituted "shall" for "may" in Subsection (8)(b).

The 1997 amendment by ch. 174, effective July 1, 1997, rewrote Subsection (3)(a) which read "Aid to Families with Dependent Children (AFDC)" and substituted "Supplemental Security Income, Social Security Disability Insurance" for "S.S.I." in Subsection (3)(b).

The 1997 amendment by ch. 375, effective July 1, 1997, substituted "Department of Workforce Service" for "Office of Employment Security" in Subsection (5)(b).

The 1998 amendment, effective May 4, 1998, inserted "minor" before "child" twice in Subsection (8)(a).

The 2000 amendment, effective May 1, 2000, substituted "the party defaults, or, in contested cases" for "c" in Subsection (7)(a); added the language beginning with "or the median earning" in Subsection (7)(b); and added "or their occupation is unknown" in Subsection (7)(c).

The 2001 amendment, effective April 30, 2001, added "income replacement" before "disability insurance benefits" in Subsection (1)(b).

NOTES TO DECISIONS

Analysis

Deductible expenses.

Findings by court.

Imputed income.

Modification of award.

Second job.

Self-employment.

Social Security benefits.

Cited.

Deductible expenses.

The allocation of expenses cannot be dealt with as a matter of law under this section; the deductibility of particular expenses poses a question of fact, turning on whether such expenses are necessary, and, if so, whether they exceed those required for the business's operation at a reasonable level. *Bingham v. Bingham*, 872 P.2d 1065 (Utah Ct. App. 1994).

The trial court acted within its discretion in not deducting as "necessary expenses required for self-employment of business operation" the father's small business taxes and his student loan obligations in calculating his gross income. *Jensen v. Bowcut*, 892 P.2d 1053 (Utah Ct. App. 1995), cert. denied, 899 P.2d 1231 (Utah 1995).

Court properly allowed only half of father's claimed expenses for education, travel, and entertainment deductions because the claimed expenses significantly benefited the father and were double the amount reasonably necessary to allow his business to operate at a reasonable level. *Reinhart v. Reinhart*, 963 P.2d 757 (Utah Ct. App. 1998).

Findings by court.

Although a trial court entered findings required by Subsection (7)(b), since the trial court failed to enter any findings required under Subsection (7)(a), the findings on the whole were insufficient. *Hall v. Hall*, 858 P.2d 1018 (Utah Ct. App. 1993).

Imputed income.

Even though the court's findings of fact did not include a specific finding that ex-husband was underemployed, because he had acquiesced to the imputation of income at the trial level and because his job history and current employment options inarguably supported this imputation, the trial court did not abuse its discretion in imputing income in an amount greater than the ex-husband's current salary. *Hill v. Hill*, 869 P.2d 963 (Utah Ct. App. 1993).

Subsection (7)(c), by its terms, applies only when a parent has no recent work history. *Reese v. Reese*, 1999 UT 75, 984 P.2d 987.

Where the plaintiff did not assert that she was unqualified to receive at least the lower of two standard wages or that her work for the school district was so specialized that her qualifications could not transfer to other contexts, and where there was no indication that the trial court's imputed salary diverged from the prevailing wages for persons with the plaintiff's background and qualifications, there was no error in the court's finding that she was underemployed. *Reese v. Reese*, 1999 UT 75, 984 P.2d 987.

Where the only testimony that the plaintiff presented as to an unusual need for her to stay at home related to allegations that the defendant had abused one of her daughters from a former relationship, and where the parties were now divorced, with the defendant having only supervised visitation, there was no basis for reversing the trial court's imputation of the plaintiff's income. *Reese v. Reese*, 1999 UT 75, 984 P.2d 987.

It was proper to impute income to the father because the pursuit of a bachelor's degree is not "career or occupational training to establish basic job skills" under Subsection (7)(d)(iii). *Mancil v. Smith*, 2000 UT App 378, 313 P.2d 509.

Modification of award.

When the parties had agreed to the amount of child support before the effective date of the child support guidelines, the trial court erred in modifying child support when no petition to modify had been filed and in modifying the support amount without finding that a material change of circumstances had occurred since the previous order had been entered. *Bailey v. Adams*, 798 P.2d 1142 (Utah Ct. App. 1990) (applying § 78-45-7.2(1) prior to 1990 amendment regarding impact of guidelines on existing support orders).

Second job.

The trial court's decision to consider the father's second source of income as part of his primary job was supported by the fact that both sources involved the performance of his professional duties as a physician. *Jensen v. Bowcut*, 892 P.2d 1053 (Utah Ct. App. 1995), cert. denied, 899 P.2d 1231 (Utah 1995).

Self-employment.

Court properly calculated father's income under § 78-45-7.5(4)(a) rather than under the 40-hour work week requirements of § 78-45-7.5(2) because father was a self-employed anesthesiologist, a highly compensated profession whose members customarily work more than 40 hours a week. *Reinhart v. Reinhart*, 963 P.2d 757 (Utah Ct. App. 1998).

Social Security benefits.

A trial court may, in its discretion, consider a child's receipt of Social Security benefits against the parent's child support obligation. However, a trial court may not order that those Social Security benefits be subject to legal process. *Nunley v. Brooks*, 881 P.2d 955 (Utah Ct. App. 1994).

In a proceeding on a petition by the guardian and conservator for a child, appointed following the death of the custodial parent, the trial court acted within its discretion in refusing to offset Social Security benefits paid to the child on the basis of the child's deceased mother's earning record. *Jensen v. Bowcut*, 892 P.2d 1053 (Utah Ct. App. 1995), cert. denied, 899 P.2d 1231 (Utah 1995).

Social Security benefits made to minor children as a result of obligor parent's disability may be credited toward that parent's ongoing child support obligation. *Coulon v. Coulon*, 915 P.2d 1069 (Utah Ct. App. 1996).

Social Security benefit amounts paid to minor children, which exceed the court-ordered child support for the same period, may not be credited toward previously accrued child support arrearages. *Coulon v. Coulon*, 915 P.2d 1069 (Utah Ct. App. 1996).


Cited in *Thronson v. Thronson*, 810 P.2d 428 (Utah Ct. App. 1991); *Cummings v. Cummings*, 821 P.2d 472 (Utah Ct. App. 1991).

COLLATERAL REFERENCES

A.L.R. - Attributing undisclosed income to parent or spouse for purposes of making child or spousal support award, 70 A.L.R.4th 173.

Basis for imputing income for purpose of determining child support where obligor spouse is voluntarily unemployed or underemployed, 76 A.L.R.5th 191.

CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

1. NAME (Last, First, Middle) COX, LARRY VAN		2. DEPARTMENT, COMPONENT AND BRANCH ARMY RA OD		3. SOCIAL SECURITY NO. 520 58 3229	
4.a. GRADE, RATE OR RANK LTJG		4.b. PAY GRADE O-5		5. DATE OF BIRTH (YYMMDD) 440527	
6. RESERVE OBLIG TERM DATE Year 00 Month 00 Day 00		7.a. PLACE OF ENTRY INTO ACTIVE DUTY FT BENNING, GA			
7.b. HOME OF RECORD AT TIME OF ENTRY (City and state, or complete address if known) 1232 W PARKWAY AVE, SALT LAKE CITY, UT 84119		8.a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND US ARMY DEPOT TOOELE SEE #18 XW			
8.b. STATION WHERE SEPARATED FORT CARSON, CO 80913-5014		9. COMMAND TO WHICH TRANSFERRED NA			
10. SGLI COVERAGE <input type="checkbox"/> None Amount: \$ 100,000.00		11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.) 91B MAINTENANCE MANAGEMENT 19 YEARS 11 MONTHS//11A INFANTRYMAN 24 YEARS 2 MONTHS//12A ARMOR, GENERAL 24 YEARS 2 MONTHS//91A ORDNANCE, GENERAL 18 YEARS 10 MONTHS//92B SUPPLY & MATERIEL MANAGEMENT 16 YEARS 11 MONTHS//91D MUNITIONS MATERIEL MANAGEMENT 18 YEARS 10 MONTHS//NOTHING FOLLOWS			
12. RECORD OF SERVICE		Year(s) Month(s) Day(s)			
a. Date Entered AD This Period		68 12 10			
b. Separation Date This Period		93 01 31			
c. Net Active Service This Period		24 01 21			
d. Total Prior Active Service		00 10 14			
e. Total Prior Inactive Service		00 00 00			
f. Foreign Service		05 01 15			
g. Sea Service		00 00 00			
h. Effective Date of Pay Grade		85 11 01			
13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service) ARMY SERVICE RIBBON//NATIONAL DEFENSE SERVICE MEDAL w/1 BRONZE STAR//MERITORIOUS SERVICE MEDAL w/1ST OAK LEAF CLUSTER//ARMY COMMENDATION MEDAL//ARMED FORCES EXPEDITIONARY MEDAL//OVERSEAS SERVICE RIBBON-2//MARKSMANSHIP BADGE (RIFLE M16)//NOTHING FOLLOWS					
14. MILITARY EDUCATION (Course title, number of weeks, and month and year completed) INFANTRY OFFICER CANDIDATE SCHOOL 23 WEEKS (DEC 68)//CHEMICAL, BIOLOGICAL & RADIOLOGICAL OFFICER BASIC 1 WEEK (OCT 69)//ARMOR OFFICER ORIENTATION 8 WEEKS (MAR 69)//ARMOR OFFICER BASIC 9 WEEKS (MAR 69)//ORDNANCE OFFICER ADVANCED COURSE 36 WEEKS (MAR 74)//AMMUNITION OFFICER 7 WEEKS (JUN 74)//COMMAND & GENERAL STAFF COLLEGE SEE ITEM #18					
15.a. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM		Yes No <input type="checkbox"/> <input checked="" type="checkbox"/>		15.b. HIGH SCHOOL GRADUATE OR EQUIVALENT Yes No <input checked="" type="checkbox"/> <input type="checkbox"/>	
16. DAYS ACCRUED LEAVE PAID 60		17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>			
18. REMARKS DATA HEREIN SUBJECT TO COMPUTER MATCHING WITHIN DOD OR WITH OTHER AGENCIES FOR VERIFICATION PURPOSES AND DETERMINING ELIGIBILITY OR COMPLIANCE FOR FEDERAL BENEFITS//REF ITEM 8a: TOOELE, UT 80407//REF ITEM #14: 44 WEEKS (JUN 83)//NOTHING FOLLOWS					
19.a. MAILING ADDRESS AFTER SEPARATION (Include Zip Code) 2202 EAST SEGO LILY DR SANDY, UT 84092			19.b. NEAREST RELATIVE (Name and address - include Zip Code) JUDY M. COX, 2202 EAST SEGO LILY DR, SANDY, UT 84092		
20. MEMBER REQUESTS COPY 6 BE SENT TO: UT DIR. OF VET AFFAIRS <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No			22. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade, title and signature) R.A. BAYER, CHIEF PERSONNEL PROCESSING BR		
21. SIGNATURE OF MEMBER/BEING SEPARATED 					
DD Form 214, NOV 88		Previous editions are obsolete.		MEMBER - 1	
23. TYPE OF SEPARATION RETIREMENT		24. CHARACTER OF SERVICE (Include upgrades) HONORABLE			
25. SEPARATION AUTHORITY AR 635-100, PARA 4-14		26. SEPARATION CODE RBD		27. REENTRY CODE NA	
28. NARRATIVE REASON FOR SEPARATION FOR THE LENGTH OF SERVICE					
29. DATES OF TIME LOST DURING THIS PERIOD					



RECORD OF ASSIGNMENT

ACTIVE DATE	MOS	DUTIES PERFORMED	ORGANIZATION AND STATION OR THEATER	NON-DUTY DAYS	TYPE OF REPORT
1 Svc	(26Jan68)	9Dec68 DP-SP5 (E5) (INF)			
Dec68	Commissioned	ARM-USAR fr Inf OCS			
Dec68	0001	Casual	Enroute to USARPAC Lft Knox, Ky	2	None
Dec68	0001	DyUnasgd/DetB1stBnSchBdeUSAArms			
		FtKnoxKy	USARPAC (Korea)	7	None
Dec68	0006	StuO ACR#1C (TDY USAArms FtKnoxKy)	USARPAC (Korea)	15	Acad
Mar69	0001	Casual	Enr to USARPAC (Korea)	44	none
Apr69	1203	Plt Ldr	A Trp4thSgdn7thCav 2dInfDiv USARPAC-Korea	6	67-6
May69	1204	XO	B Trp4thSgdn7thCav2dInfDiv USARPAC-Korea	0	None
Jun69	0600	Sgdn Motor Off	HHT 4thSgdn7thCav, 2dInfDiv USARPAC-Korea	0	67-6
Jul70	0600	Sgdn Motor Off	HHT 4thSgdn7thCav, 2dInfDiv USARPAC-Korea	0	None
Aug70	0001	Casual	Enr to CONUS	25	None
Aug70	0600	Sgdn Motor Officer	HHT1stSgdn4thCav1stInfDivFtRileyKS	5	67-6
Aug70	0600	Sgdn Motor Officer	HHT1stSgdn4thCav1stInfDivFtRileyKS	10	67-6
Jan71	0600	Sgdn Motor Officer	HHT1stSgdn4thCav1stInfDivFtRileyKS	19	67-6
Jan72	4808	Maint Officer	HQ&ACo701stMaintBn1stInfDivFtRileyKS	0	67-6
May72	4815	Company CO	CoC701stMaintBn1stInfDivFtRileyKS	67-7	67-7
May72	4815	Company CO	CoC701stMaintBn1stInfDivFtRileyKS	0	67-7
May72	0001	DyUnasgd	CoC701stMaintBn1stInfDivFtRileyKS	7	None
May72	0001	Casual	Enr to Aberdeen Proving Ground, MD	1	None
May72	0001	DyUnasgd	SOC USAOC&S APG MD	24	None
May72	0006	Stu O (C22-3)	SOC USAOC&S APG MD	0	Acad
May72	0001	Casual (TDY Enr RSA AL)	Enr to Rock Island IL	8	None
May72	0001	DyUnasgd (TDY MMCS)	WingateArmyDepot, GallupNewMexico	16	None
May72	0006	StuOff (4514Crs) TDY MMCS	WingateArmyDepot, GallupNewMexico	00	Acad
May72	0001	Casual	Enroute to Gallup New Mexico	19	None
May72	4815	C, Mission Div	FtWingateDepotActivity, Gallup, NM		


2nd /

8271298

QUIT-CLAIM DEED

~~All of lot 16 Hamilton Acres No. 2,~~
subdivision according to the official plat
thereof on file in the office of the Salt
Lake County Recorder


WITNESS the hand of said Grantor, this 26th day of May, A.D. Two Thousand Two.



Judy Cox

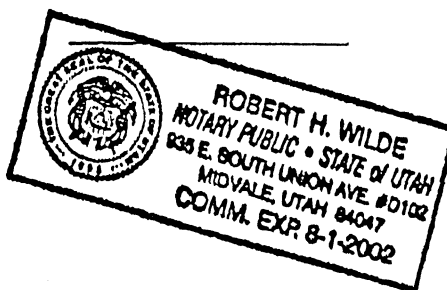
STATE OF UTAH)
County of Salt Lake) ss

On the 26 day of May, 2002 personally appeared before me Judy Cox, the signer of the foregoing instrument, who duly acknowledge to me that she executed the same.



NOTARY PUBLIC
Residing at:

My Commission Expires:



BK8611PG55

LARRY V &	PRINT	U	UPDATE	REAL ESTATE	00100
M; JT			LEGAL	BUILDINGS	179100
			TAX CLASS	MOTOR VEHIC	0
W: 13250 S	EDIT 1		FACTOR BYPASS	TOTAL VALUE	237200
HRTON UT	84065000095				
2195 W 13250 S	EDIT 1	BOOK 8218	PAGE 1338	DATE 01/06/1999	
				TYPE UNKN PLAT	

06/20/2002 PROPERTY DESCRIPTION FOR TAXATION PURPOSES ONLY
 THE S'LY 155 FT OF LOT 16, HAMILTON ACRES #2. 5734-2603
 6777-0612 7191-0751 8170-0958

EYS: 1=VTNH 2=VTOP 4=VTAU 6=NEXT 7=RTRN VTAS 8=RXMU 10=RXBK 11=RXPN 12=PREV

BK8611 PG556

8234451

WHEN RECORDED, RETURN TO:
Judy Cox
2202 East Sego Lily Drive
Sandy, Utah 84092

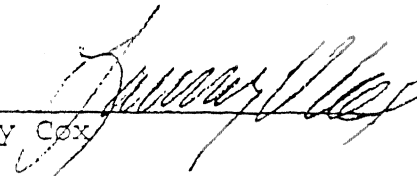
8234451
05/15/2002 02:59 PM 10.00
Book - 8598 Pg - 2601
GARY W. DTT
RECORDER, SALT LAKE COUNTY, UTAH
JUDY COX
2202 E SEGO LILY DR
SANDY UT 84092
BY: TAS, DEPUTY - W 1 P.

QUIT-CLAIM DEED

Larry Cox, Grantor, of Sandy City, County of Salt Lake, State of Utah, hereby QUIT-CLAIMS to Judy Cox 2202 East Sego Lily Drive, Sandy, Utah 84092 Grantee, of Sandy City, County of Salt Lake, State of Utah, pursuant to a decree of divorce, the following described tract of land in Salt Lake County, State of Utah:

All of lot 519 Park Crest No. 5 subdivision according to the official plat thereof on file in the office of the Salt Lake County Recorder 28-15-131-014

WITNESS the hand of said Grantor, this 25 day of APRIL, A.D. Two Thousand Two.

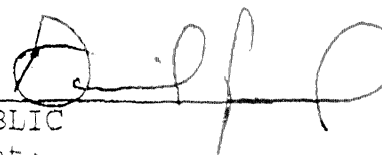

Larry Cox

STATE OF UTAH)
:SS
County of Salt Lake)

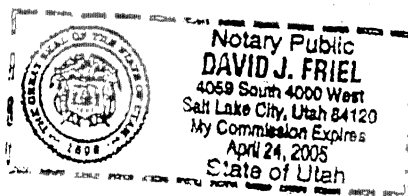
On the 25 day of APRIL, 2002 personally appeared before me Larry Cox, the signer of the foregoing instrument, who duly acknowledge to me that she executed the same.

My Commission Expires:

4/24/05


NOTARY PUBLIC
Residing at:

SALT LAKE COUNTY



FILED AS RECEIVED
CO. RECORDER

BK8598PG260

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

JUDY COX,

Plaintiff,

vs.

LARRY V. COX,

Defendant.

Case No. 974904537 DA

TRANSCRIPT OF TRIAL
Volume I

October 9, 2001

FILED DISTRICT COURT
Third Judicial District

MAY 03 2002
By K. Shupe
SALT LAKE COUNTY
Deputy Clerk

BEFORE THE HONORABLE GLENN K. IWASAKI
District Court Judge

Jeri Kearbey
Certified Court Transcriber

1230 Gaylene Circle
Sandy, Utah 84094

1 the same time.

2 Q. How many hours a week did you put in there?

3 A. Oh, two to three hours a day during the week.

4 Q. Now, you referenced your termination with Lewis
5 Brothers because of the INF treaty, correct?

6 A. That's correct.

7 Q. And you spoke about the STARK treaty, correct?

8 A. That's correct.

9 Q. Was there supposed to be any break in employment
10 if the STARK treaty would have been taken over by Lewis
11 Brothers?

12 A. No. That was supposed to just carry over to the
13 STARK treaty. And we thought it was going to and we were
14 all disappointed when it didn't.

15 Q. Were there other individuals besides yourself who
16 were laid off or terminated by Lewis Brothers?

17 A. Everybody was terminated.

18 Q. How many?

19 A. Thirty-five.

20 MR. FRIEL: No further questions on this issue,
21 Judge.

22 THE COURT: Appreciate that, Mr. Friel. Thank
23 you.

24 Do you want to call your next witness?

25 MR. WILDE: I do.

1 THE COURT: Thank you.

2 Thank you, Mr. Cox. You can take a seat at
3 counsel table.

4 Ms. Farnsworth, come forward and be sworn, please.

5 KRISTY FARNSWORTH,
6 called as a witness by the plaintiff,
7 having been duly sworn, was examined and
8 testified on her oath as follows:

9 DIRECT EXAMINATION

10 BY MR. WILDE:

11 Q. Would you tell us your name and address, please.

12 A. Kristy Farnsworth. My business address is 9557
13 South 700 East in Sandy.

14 Q. Would you tell us what you do for a living?

15 A. I'm a rehabilitation specialist.

16 Q. Would you tell us what a rehabilitation specialist
17 is?

18 A. A rehab specialist works with individuals to
19 develop return-to-work plans. I work with individuals that
20 may have some type of injury on the job to help them find a
21 job, do job placement with employers. I develop plans for
22 medical treatment and follow through to help the person
23 recover from an injury so that they can go back to work.
24 Those types of things.

25 Q. Would you describe for us your education, training

1 and experience that allows you to do that.

2 A. Yes. I have a bachelor's degree in independent
3 studies from BYU, a master's degree in educational
4 psychology with -- in rehabilitation counseling from the
5 University of Utah, and a Ph.D. in human development from
6 the Fielding Institute, and post-doctoral studies in neuro-
7 psychology. And I have several certifications in my field
8 of rehabilitation, including certified rehabilitation
9 counselor, certified disability management specialist, and a
10 certified vocational evaluator.

11 Q. Have you testified as an expert witness in court
12 before?

13 A. Yes.

14 Q. Describe for us the courts.

15 A. Well, I've testified in this district and also at
16 the federal level, and in administrative hearings.

17 Q. Describe the administrative hearings, the classes
18 of administrative hearings, if you will.

19 A. Administrative hearings at the office of Hearings
20 and Appeals with Social Security Administration, where
21 individuals are applying for social security disability, I'm
22 an impartial expert to answer questions from the judge.

23 And administrative hearings in the State Insurance
24 Fund and Worker's Compensation.

25 Q. As part of the work that you do, does it include

1 determining, based upon people's experience and education
2 and prior shown skills, the ranges in which they might be
3 employed, the income you might expect based upon their
4 history?

5 A. Yes. I do that routinely.

6 Q. What have you examined in preparation for coming
7 here to talk with us today?

8 A. I looked at the information that Mr. Cox
9 submitted, I think several days ago. Most of the exhibits
10 that were discussed earlier at this hearing.

11 Q. And did you also have the opportunity to review
12 his deposition?

13 A. I didn't look at his deposition.

14 Q. Oh, all right. Okay. And so that would include
15 the applications he's made, the information on his degree,
16 his work with the Army?

17 A. Correct. Yes. And the applications for
18 employment and the certificates regarding the commendations
19 he received while in the military.

20 Q. What is Exhibit 18?

21 A. This is just a summary of the types of jobs and
22 the salaries that I found for individuals with
23 qualifications, education and experience similar to
24 Mr. Cox's.

25 MR. FRIEL: Your Honor, the witness here has not

1 been qualified as an expert. If I may voir dire the
2 witness, please.

3 THE COURT: You may.

4 MR. FRIEL: Thank you.

5 VOIR DIRE EXAMINATION

6 BY MR. FRIEL:

7 Q. Dr. Farnsworth, are you associated with a group or
8 other individuals with your same expertise?

9 A. Yes.

10 Q. And who is that?

11 A. The International Association of Rehabilitation
12 Professionals, the Case Management Society of America,
13 National Academy of Neuropsychologists.

14 Q. You had mentioned that you've qualified as an
15 expert in the Third District Court before?

16 A. Yes.

17 Q. And in front of which judges?

18 A. Probably all of them.

19 Q. Has there ever been a time that you have not
20 qualified as a judge [sic]?

21 A. Never.

22 Q. How long ago did you -- when was the first time
23 you were qualified as an expert witness?

24 A. I'm not exactly sure, but I would estimate it
25 probably was around 1985 or 1986.

1 MR. FRIEL: No further questions, Judge.

2 THE COURT: Thank you.

3 MR. WILDE: We offer 17, which is Dr. Farnsworth's
4 resumé.

5 THE COURT: Any objections to 17?

6 MR. FRIEL: Which is offered as? I'm sorry I
7 didn't hear that.

8 THE COURT: It's a resumé.

9 MR. WILDE: It's her resumé offered as
10 illustrative of her testimony.

11 MR. FRIEL: No objections on that.

12 THE COURT: 17's in.

13 DIRECT EXAMINATION (resumed)

14 BY MR. WILDE:

15 Q. Based upon your examination of the documents we
16 provided, did you also listen to Mr. Cox's testimony in
17 court earlier this morning?

18 A. Yes, I did hear that.

19 Q. Based upon the things that you've considered and
20 examined, what's your expert opinion as to the range of
21 income which Mr. Cox could earn based upon his experience,
22 expertise, education and training?

23 A. I think that a conservative estimate of his
24 earning capacity right now would be about \$50,000, and then
25 it would go up from there, depending on how well he

1 performed and applied himself in the job.

2 Q. Now, you've heard him indicate that he's been
3 looking for a job during the summer and has not found
4 anything even in the range of nine or \$10 an hour. Based on
5 your review of the documents which he's provided, can you
6 enlighten us on why that might be, that he hasn't found a
7 job?

8 A. Well, I think there are a number of reasons. But,
9 primarily, I think that when an individual is looking for a
10 job, they have to have a certain goal in mind and really
11 direct their energies towards that goal. Complete and
12 accurate description of a person's skills and abilities on
13 an application is really important. And an application
14 needs to be very neatly and professionally completed.

15 And I think that a person whose really looking for
16 a job needs to focus their responses on applications to the
17 job that they're looking for.

18 Q. Would you tell us what Exhibit 18 is?

19 A. This is just a summary of the research that I did
20 related to employment opportunities for individuals who have
21 education and experience similar to Mr. Cox's.

22 Q. And in which of these categories do you think
23 Mr. Cox would fall with the ones that are listed on Exhibit
24 18?

25 A. I think that any of the job titles listed under

1 Occupational Reports would be -- could be considered job
2 goals for Mr. Cox. Any of the job titles under the Labor
3 Market By Demand section could also be job goals.

4 The National Salary Surveys section are really
5 more general, but any type of management position could also
6 be found under there and would also be appropriate for
7 Mr. Cox.

8 The College Placement Council Salary Survey, I
9 have on there the salaries offered for persons who graduated
10 with an MBA. I'm not sure that he has an MBA, but he does
11 have a master's degree in management that would qualify him
12 to apply for the jobs stated earlier in this summary. So I
13 would probably eliminate those that say MBA non-technical,
14 because I'm not positive that he has that.

15 But, clearly, financial manager is similar to the
16 type of training that he had. And even the University of
17 Utah graduates summary identifies persons that have a
18 bachelor of science in business administration ranges that
19 could easily include him. And then the sample of current
20 job listings were just a few that I pulled off of the
21 website. And I think that those also would be job goals for
22 him.

23 MR. WILDE: Offer 18 as illustrative of her
24 testimony.

25 MR. FRIEL: No objection.

1 THE COURT: So although there were no objections
2 and it's going to be received, can you help me out,
3 Dr. Farnsworth, as to where you got the occupational
4 reports, where you got the labor market --

5 THE WITNESS: Yes.

6 THE COURT: -- tell me the sources, please.

7 THE WITNESS: Yes. The attachments on the --
8 included on this Exhibit 18 are copies of the information.
9 And the information comes from the Bureau of Labor
10 Statistics, and I just accessed that through the America Job
11 Bank.

12 THE COURT: Okay. So the front page of P-18 is a
13 compilation of a summary of what is contained, and reference
14 to where you received that information are the rest of
15 these --

16 THE WITNESS: Exactly, yes.

17 THE COURT: Very well. Thank you. P-18 is in.
18 Thank you.

19 Q. (By Mr. Wilde) So would it be fair to say that
20 you're familiar with employment potential and probable
21 earnings as derived from work history, occupation
22 qualifications and prevailing earnings for persons of
23 similar backgrounds in this community and the median
24 earnings for persons in the same occupation and the same
25 geographic area as maintained by the Bureau of Labor

1 Statistics?

2 A. Right.

3 Q. And so if Mr. Cox were to put together an
4 appropriate resumé and submit appropriate -- appropriately
5 drafted applications, and your testimony is that his
6 starting salary could be about what?

7 A. Fifty. I think that's very conservative.
8 \$50,000.

9 Q. And from there go up to what?

10 A. Well, it would really depend on how he would apply
11 himself. But if an individual got in and did the job and,
12 you know, worked at it, could probably go up to even eighty-
13 five, ninety, depending on how much the individual is
14 willing to invest in the job.

15 MR. WILDE: No further questions.

16 THE COURT: Thank you.

17 Mr. Friel?

18 CROSS-EXAMINATION

19 BY MR. FRIEL:

20 Q. Dr. Farnsworth, looking at the, I believe, Exhibit
21 18, which talks about salaries.

22 A. Yes. Yes.

23 Q. Now, how have you broken this down as far as
24 geographical location? What does this tell us as far as a
25 geographical location of where these salaries could be

1 obtained?

2 A. They're all in the state of Utah except those that
3 are noted under the National Salaries Surveys.

4 Q. Okay. And tell me the age, how you project in
5 here the age of the person that you're looking at. Does age
6 have anything to do with these projected salaries?

7 A. The age is not reflected in the projected
8 salaries.

9 Q. So if we have a person who is retired military, 57
10 years old, do you think that has an impact on the figures
11 you're stating?

12 A. I think that an individual that is 57 years old
13 has at least ten years to be in the workforce. Employers
14 for the types of jobs that I have listed here are eager to
15 accept individuals who have the experience and the education
16 that Mr. Cox has and prefer those types of stable workers to
17 younger individuals, who may not be as committed to stay
18 with a company.

19 Q. Are you telling us that this eager -- quote,
20 "eager" -- attitude still persists with employers, even over
21 the last couple of months?

22 A. Well, I think that it still persists. And the
23 reason is, over the last six years, Utah has had a deficit
24 of skilled and qualified workers to fill the job openings
25 employers have had, and it has been difficult for employers

1 THE WITNESS: And I swear that this document was
2 given to me at the deposition, but maybe no.

3 THE COURT: So any objections to 31 being
4 received?

5 MR. FRIEL: No.

6 THE COURT: 31's in.

7 Q. (By Mr. Wilde) Mr. Cox, what's Exhibit 32?

8 A. That's the lease. I believe that's the lease.

9 Q. Well, actually, it says "Guarantee" doesn't it?

10 A. Yeah. Yes.

11 Q. And that's a personal guarantee of obligations in
12 connection with the lease.

13 A. Yes.

14 Q. Whose signatures are on there?

15 A. That's my signature, and I'd signed her name also.

16 MR. WILDE: Offer 32.

17 THE COURT: Is there a date on this guarantee?

18 MR. WILDE: I have it --

19 THE COURT: It's undated as to the document. Is
20 there a date?

21 MR. WILDE: No, I don't see a date on the
22 document.

23 THE COURT: Okay. And so on P-32, you admit that
24 you also have signed Mrs. Cox's name, right?

25 THE WITNESS: I'm not sure who this went to, but,

1 yes, I've signed her name to that document.

2 THE COURT: Okay. Thank you.

3 MR. FRIEL: And, Your Honor, I'm unsure, as well,
4 the purpose of this exhibit?

5 THE COURT: Well, I can see it as credibility,
6 indicating that on P-31 was the document that he said that
7 he used to sign the name of Ms. Cox. And on P-32, now it's
8 another document that he's saying that he used it. That's
9 how I'm viewing it. Is that --

10 MR. FRIEL: As long as I don't guess.

11 THE COURT: Very well. So 32 is in.

12 Q. (By Mr. Wilde) Mr. Cox, what's Exhibit 33?

13 A. This is addendum to the lease.

14 Q. Whose signatures are on Exhibit 33?

15 A. That's my signature.

16 Q. Both of them?

17 A. And --

18 Q. You signed Judy's name there?

19 A. I signed Judy's name too.

20 MR. WILDE: Offer 33.

21 THE COURT: This is P-33. Any objections?

22 MR. FRIEL: No.

23 THE COURT: P-33 is also received.

24 MR. WILDE: Excuse me for a second, Your Honor.

25 Q. (By Mr. Wilde) Mr. Cox, what's Exhibit 34?

1 A. That's the DD Form 214.

2 Q. What's a DD Form 214?

3 A. States at the top Certificate of Release of
4 Discharge from Active Duty.

5 Q. And, in fact, that's the document that you get at
6 the time you leave active duty in which the military
7 categorizes and explains all the things you did while you
8 were in the military, isn't it?

9 A. That's correct.

10 Q. And that's something that the military normally
11 does in the course of its business when it releases people,
12 isn't it?

13 A. That's correct.

14 Q. And this is the one that pertains to you, isn't
15 it?

16 A. That's correct.

17 MR. WILDE: Offer 34.

18 MR. FRIEL: No objection.

19 THE COURT: 34 is in.

20 Q. (By Mr. Wilde) And this, in fact -- well, strike
21 that.

22 Mr. Cox, what's Exhibit 35?

23 A. Defense Finance and Accounting Service of the
24 income that I made for 1999 for a retirement.

25 Q. That's a 1099R, isn't it?

1 MR. WILDE: And we object to the exhibit.

2 THE COURT: Why?

3 MR. WILDE: It's irrelevant. This shows 1979.

4 We're dealing with what's happened since he got back from
5 the Army and took up with Ms. Armstrong. And we think it's
6 irrelevant.

7 MR. FRIEL: Our position, Judge, is that it does
8 go to his service, his character. Character is at issue,
9 and at stake here is believability, integrity, and I think
10 it's important.

11 THE COURT: The motion to exclude based upon the
12 remoteness in time has -- has a lot of appeal to the Court.
13 However, much has been said about character and the door has
14 been opened by both sides as to the attack on character by
15 both sides as to -- as to Mr. Cox from Mr. Wilde, and to
16 some extent Ms. Cox and Mr. Friel.

17 While I agree that it is distant in time, that
18 will go to weight and not admissibility. The Court is going
19 to allow the bishop's certificate with that admonition, that
20 it goes to weight and not admissibility. So it will be
21 received.

22 So D-62 -- the four previously have been received,
23 as well as now the bishop's certificate. The Court, over
24 objection, will receive D-62.

25 MR. FRIEL: Thank you.

1 Q. Mr. Cox, will you turn to Exhibit No. B, please?

2 A. Yes.

3 Q. And, specifically, let's pass the first page and
4 let's go to the second page. Can you identify what this
5 document is?

6 A. This is my entry date into the military.

7 Q. And what does that date show?

8 A. 26 January 1968.

9 MR. WILDE: We're going to object to testifying
10 from it unless it's marked and offered as an exhibit.

11 THE COURT: All right. Do you want to mark the
12 whole document as 63, Mr. Friel?

13 MR. FRIEL: That's what I would propose to do,
14 Judge.

15 THE COURT: Okay.

16 MR. WILDE: And, excuse me, Your Honor. The whole
17 document refers to the military record or to Mr. Cox's
18 characterization of it on the front.

19 THE COURT: I'm suggesting that all of those --
20 all four documents be marked in the same and that his
21 examination as supporting and as -- as foundation to
22 eventually lead to whatever is on the military retirement
23 summary page will be then taken care of.

24 MR. WILDE: And we would object to that. We don't
25 have any problem with the final three documents, but the

1 first page, we think, is argument.

2 THE COURT: Okay.

3 MR. FRIEL: Well, Judge, you can't have it both
4 ways. Either you've got to argue from the first forward, or
5 we can argue back. And he's --

6 THE COURT: Well, we're going to have the military
7 retirement package of four pages will be D-63.

8 MR. FRIEL: Thank you.

9 Q. Again, Mr. Cox, second page Exhibit -- let's see--

10 A. Is a document showing that the date that I entered
11 the military is on 26 January 1968.

12 Q. That's right. What was actually the marriage
13 date?

14 A. 17 November 1971.

15 Q. 17 or 18th of November?

16 A. I think it was 18 November.

17 Q. Okay. Thank you. Let's turn to the second page,
18 please -- or pardon me. Actually, the third page of Exhibit
19 63. And identify that, please.

20 A. That's a DD Form 214.

21 Q. And what --

22 A. It shows my separation date of being January 31,
23 1993.

24 Q. Okay. And that's specifically under 12B; is that
25 right?

1 A. Yes.

2 Q. 12B, January 31, '93?

3 A. Yes.

4 Q. All right. And so, for purposes of your
5 enlistment and discharge in the Army, those are the two
6 dates from page 2 and 3 of those Exhibit 64 --

7 MR. WILDE: Objection. Foundation.

8 THE COURT: Overruled.

9 Q. (By Mr. Friel) Will you turn to the last page of
10 Exhibit 63?

11 A. That's the Defense Finance and Accounting Service
12 of year 2000.

13 Q. When did you specifically receive this?

14 A. Towards 2001. This is the last one I've got.

15 Q. Okay. And then did you use the figure \$39,516 as
16 part of your tax records?

17 A. I did.

18 Q. Okay. Now, if you will, turn back to the first
19 page of B, Mr. Cox. You've outlined for the Court the date
20 here. If you pass the first paragraph, you entered
21 military, correct?

22 A. I did.

23 Q. And then you've got an additional four breakdown--
24 lines of breakdown. Why did you break -- break it down into
25 those sequential days?

1 A. That was by the year and by the date.

2 Q. Uh-huh.

3 A. January 26th of 1968 to 31 January 1968 is by
4 dates.

5 Q. Right. And then you broke it down from February 1
6 of '68?

7 A. To 31 December '68, which is 334 days.

8 Q. Right. So you have totaled here service in the
9 military at 9,130 days, correct?

10 A. That's correct.

11 MR. WILDE: Objection. Leading.

12 THE COURT: And I understand that, but let's get
13 through this. So just be mindful of the reading, Mr. Cox.

14 MR. FRIEL: All right.

15 Q. Would you go ahead, Mr. Cox, and what is the next
16 set of numbers that you have here?

17 A. The next set of numbers is the date that we got
18 married.

19 Q. Uh-huh.

20 A. To the day that I retired. And then I compared
21 the two.

22 Q. Okay. And we have the total days married through
23 when?

24 A. 31 January 1993.

25 Q. Okay. Date you finished your service.

1 A. Retired.

2 Q. All right. And those days tallied how many?

3 A. 7,741 days.

4 Q. All right. And then did you make calculations
5 based on those two figures?

6 A. I did.

7 Q. And what did you come up with?

8 A. I came up with percentage of military days that
9 respondent and petitioner were married were 84 per cent,
10 84.78 per cent.

11 Q. Okay. And then did you use the dollar figure on
12 the last page 4 of the exhibit as the retirement amount?

13 A. I did.

14 Q. And that amount was what?

15 A. \$3,293.

16 Q. And that's per month that you receive from --

17 A. That's correct.

18 Q. -- the military.

19 A. That's correct.

20 Q. Okay. Now, that's a gross income figure, correct?

21 A. Yes, it is.

22 Q. You're taxed on that?

23 A. Yes, I am.

24 Q. And then you calculated the respective percentages
25 as what?

1 A. As 42.39 per cent for petitioner or \$1,395.90, and
2 \$1,897.10 for me.

3 Q. Okay. All right. And at this point in time, you
4 are receiving the full \$3,293 per month, correct?

5 A. Yes.

6 Q. But you are paying \$1,500 -- \$1,500 per month in a
7 child support/alimony combination.

8 A. That's correct.

9 Q. Okay. Let's see, did we offer and get in 63?

10 MR. FRIEL: All right. I'd like to offer 63,
11 Judge.

12 THE COURT: Other than the objections previously
13 indicated, Mr. Wilde?

14 MR. WILDE: Yes, Your Honor. We object in that
15 this merely shows -- the second page merely shows time in
16 these various assignments. The third page has absolutely
17 nothing on there that indicates it, in any fashion, is
18 associated with his retirement.

19 And, in fact, if you look at his net active
20 service, which is listed on there at 12C, of 24 years, 1
21 month and 21 days, you get that number if you subtract 12-
22 10-68 from 1-31-93. And there is nothing they've produced
23 which indicates that the Army is in fact basing his
24 retirement on the first date which he indicates, which is
25 December 10, '68.

1 MR. FRIEL: Your Honor, the issue is: Is this
2 exhibit illustrative of his testimony? If Mr. Wilde wants
3 to cross-examine, that's what that argument is and he can go
4 after it.

5 MR. WILDE: Your Honor, I disagree. The issue is
6 not is this illustrative of his testimony, because these are
7 documents that were prepared by the Army, these are business
8 records from the Army. And if we're going to be talking
9 about his retirement, we ought to be looking at a business
10 record from the Army in which the Army says, "We're
11 calculating Larry Cox's retirement on some particular set of
12 numbers or some particular set of dates." And this document
13 does not do that.

14 And, in fact, it shows on his DB Form 214 that his
15 net active service is not the beginning date on the first
16 line, which says Enlisted Service; it in fact is the
17 beginning date on the second line, which is the beginning of
18 his commissioned service.

19 And there's nothing before this Court which would
20 indicate that his retirement includes that enlisted service.
21 And, in fact, the document would indicate that it starts
22 with his commissioned service.

23 THE COURT: A certificate of release or discharge
24 from active duty, someone who has absolutely no experience
25 with military documents, doesn't that indicate to me that

1 that's the date that he was discharged from duty?

2 MR. FRIEL: Certainly. And he's no longer part of
3 the Army.

4 MR. WILDE: Right.

5 THE COURT: All right. And so if he's no longer
6 part of the Army and he's got actual time in, why doesn't
7 that begin the -- why isn't that the beginning/ending date
8 for his retirement then?

9 MR. WILDE: Okay. That's the ending date of his
10 service and the beginning date of his retirement. But
11 that's not the issue. The issue is whether the additional
12 year they're trying to get off the first line of the second
13 page is something that's included for his retirement. And
14 in fact, the DB Form 214 shows that the beginning of his
15 term is December 12th -- or pardon me -- December 10, 1968
16 and not January 26th, 1968, as they're arguing.

17 THE COURT: Well, they -- no, no, no. The date
18 entered is 12-10 of '68.

19 MR. WILDE: That's correct. And that's the figure
20 we ought to be using.

21 THE COURT: And so --

22 MR. WILDE: We ought to be subtracting 12-10 of
23 '68 --

24 THE COURT: Oh, instead of 26 January '68?

25 MR. WILDE: That's right.

1 THE COURT: All right. Okay. So wait a minute
2 now.

3 So do you have any -- do you have any objections
4 to Certificate of Release or Discharge from Active Duty,
5 that document?

6 MR. WILDE: No, we don't.

7 THE COURT: Okay. What you have is, on the
8 military retirement part of it, when he's indicated 26
9 January '68 he entered military service, that is not the
10 same as date entered of 12-68 -- of 12-10-68.

11 MR. WILDE: That's exactly right.

12 THE COURT: Is that what you're saying? All
13 right.

14 MR. WILDE: And that gets to, Your Honor, our more
15 basic and underlying objection as to having these argument
16 documents admitted as exhibits.

17 THE COURT: Well, before we get into that, let me
18 hear that response then, that your military retirement
19 summary on the front page of D-63 did not coincide with the
20 records that are there. Mr. Friel.

21 MR. FRIEL: We're going off of it, Judge. The
22 first -- first enclosure there, and the second, I -- I see
23 the argument. Mr. Wilde has had these documents in this
24 possession for a long period of time. We don't have further
25 documentation whether --

1 MR. COX: Can I -- can I say something? Since I
2 know, probably, more about this --

3 THE COURT: Well, and that very well may be the
4 answer to it all, to ask him. But, then, right now I'm
5 looking at the documents. You've got a -- you've got a 12-
6 10-68 date on the Certificate of Release or Discharge From
7 Active Duty. As to the record of assignments, you've got a
8 26 January '68 date. And so we have that discrepancy.

9 MR. WILDE: We do. And in fact, Mr. Wilde has not
10 had these documents in his possession for a long time;
11 Mr. Wilde has had the DD Form 214. But when Mr. Cox
12 delivered this book last week or the end of the week before,
13 that was the first time I'd seen the record of assignments.

14 THE COURT: Okay.

15 MR. WILDE: And, in fact, Mr. Cox is the person
16 who has access to the military records people and to the
17 defense accounting service who could get the underlying
18 information which show that, and he has not done that.

19 THE COURT: All right.

20 MR. FRIEL: Let me follow up with Mr. Cox.

21 THE COURT: Please do.

22 Q. (By Mr. Friel) Mr. Cox, you see the different
23 dates on the --

24 A. I do.

25 Q. -- third page of the exhibit.

1 A. I do.

2 Q. And what is the difference, then, between the
3 record of service date entered and the enlisted service
4 start date?

5 A. Mr. Wilde knows it is the date that I was
6 commissioned.

7 Q. Which date were you commissioned?

8 A. 12-10 of 1968.

9 Q. Okay.

10 A. The active -- the enlisted time of 26 January 1968
11 is computed into my retirement.

12 MR. WILDE: Objection. Foundation.

13 THE COURT: And while it's an objection as to
14 foundation -- and that's sustained. How does he know that,
15 Mr. Friel?

16 MR. FRIEL: Okay.

17 Q. Looking at that first page, it says Enlisted
18 Service, January '68, how do you know, Mr. Cox, that that
19 is the -- the date of the beginning of the computation for
20 the retirement purposes?

21 A. By this document, you can't tell. But they do --

22 MR. WILDE: We're going to object under what "this
23 document" is.

24 Q. (By Mr. Friel) Page No. 2 or are you at page 3?

25 A. Page No. 2 -- or page No. 3.

1 Q. Okay. The Certificate of Release or Discharge
2 From Active Duty. Correct?

3 A. Yes.

4 Q. 12A is the date you were commissioned.

5 A. Yes.

6 Q. And do you know whether the retirement started on
7 this date or the date of enlisted service?

8 MR. WILDE: Objection, leading.

9 THE COURT: Well, no. He said "Do you know," and
10 that could be answered yes or no.

11 THE WITNESS: They're going to be --

12 THE COURT: It can be answered yes or no.

13 Q. (By Mr. Friel) Do you know?

14 A. Yes, I do.

15 Q. Okay. How do you know?

16 MR. WILDE: Objection. Foundation.

17 THE COURT: Well, that's what I'm after. How do
18 you know?

19 THE WITNESS: They pay retirement on -- on active
20 duty --

21 MR. WILDE: Objection. Foundation.

22 THE WITNESS: -- service, not -- it's not
23 separated by whether you're commissioned --

24 THE COURT: That's not responsive. How do you
25 know that is the calculation from January 26th of nineteen

1 ninety -- of January 26th of '68?

2 THE WITNESS: I don't have a document that says
3 that.

4 THE COURT: Who has the document?

5 THE WITNESS: I imagine the military does.

6 THE COURT: Who has control of that document?

7 THE WITNESS: Military personnel.

8 THE COURT: Who has access to that document?

9 THE WITNESS: Military personnel. I -- I don't
10 know if I can get it or not.

11 THE COURT: You can't get your own document, you
12 can't get your own records out of the military?

13 THE WITNESS: It takes time, sir.

14 THE COURT: Can anyone else access that other than
15 you?

16 THE WITNESS: They can. They can.

17 THE COURT: And I'm accepting Mr. Wilde's
18 objections. Do you wish to voir dire, Mr. Wilde?

19 VOIR DIRE EXAMINATION

20 BY MR. WILDE:

21 Q. Mr. Cox, you've seen your DD Form 214 before,
22 haven't you?

23 A. I have.

24 Q. When was that issued to you?

25 A. The day that I retired.

1 Q. Which was?

2 A. 1 -- or January 31, 1993.

3 Q. Did you read it then?

4 A. I did.

5 Q. Did you have access to your record of assignment
6 at the time?

7 A. I did.

8 Q. Did you compare the two documents?

9 A. I really didn't. I would think they knew what
10 they were doing as far as retirement, and I never really
11 looked at it that --

12 Q. You were in the Army for how long, Mr. Cox?

13 A. Twenty-six years.

14 Q. Did you ever run across an occasion when they
15 didn't know what they were doing?

16 A. Yes.

17 Q. Okay. And did you go back at any time and say to
18 anybody in the Army, "You've got me as entering active duty
19 12-10-68 and, in fact, I entered January of '68?

20 A. No, I did not.

21 Q. Did you ever ask to have your DD Form 214
22 corrected?

23 A. No, I did not.

24 Q. Have you ever done anything to obtain the
25 underlying documents which would show whether or not they

1 actually are computing your retirement on the beginning of
2 1968 versus the end?

3 A. No, I did not.

4 MR. WILDE: I don't think he's got any basis for
5 him to testify as to this, and the documents are certainly
6 things that he has within his control and should have
7 provided it if he wanted to rely on it.

8 THE COURT: All right. The Court is going to
9 sustain the objection in part and overrule the objection in
10 part.

11 The military retirement first page summarization
12 will not be received as to D-63. The second, third and
13 fourth pages will be received, and it will be received as to
14 admissibility and not as -- and it will be -- it'll be
15 viewed as to -- as to be competently admissible at this
16 time. Whatever weight the Court will put to it will be
17 subject to arguments and underlying documents.

18 Because of the discrepancy in the dates that are
19 on the internal documents, the Court will not allow the
20 calculations from 26 January '68 as part of the military
21 retirement, but that can be argued to the Court.

22 MR. FRIEL: Thank you.

23 THE COURT: So 63 is admitted in part and denied
24 in part.

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DIRECT EXAMINATION (resumed)

BY MR. FRIEL:

Q. Mr. Cox, we will skip Exhibit C. It's already been entered. If you'll go with me to Exhibit No. D. Turn specifically to the second page of -- second page of D. Now, actually, this financial declaration was admitted already as well --

THE COURT: That's right.

MR. FRIEL: And the follow-up to that, the Verified Petition for Order to Show Cause, that has been admitted already.

THE COURT: Right. Subject to revisions during testimony.

MR. FRIEL: The revisions were on the first financial declaration.

THE COURT: Okay.

Q. (By Mr. Friel) Mr. Cox, turn with me to the last page of what you have as Exhibit No. D. Can you identify what is written here?

A. That's my total monthly expenses.

Q. Did you prepare this personally?

A. I did.

Q. When did you prepare this?

A. About a week, two weeks ago.

Q. Okay. And did you sign this?