

1992

Janet R. (Cox) Rex v. K. Norman Cox : Brief of Appellee

Utah Court of Appeals

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**COURT OF APPEALS
BRIEF**

UTAH
DOCKET NO.
KFU
50

A10
DOCKET NO. 920818

IN THE UTAH COURT OF APPEALS

JANET R. (COX) REX,

Plaintiff/Appellant,

-vs-

Case No. 92-0818

K. NORMAN COX,

Trial Court No. 904402060

Defendant/Appellee.

Priority Classification 15

BRIEF OF APPELLEE

AN APPEAL FROM THE JUDGMENT AND DECREE OF DIVORCE ENTERED
BY THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
STATE OF UTAH, ON OR ABOUT OCTOBER 28, 1992, THE
HONORABLE LYNN W. DAVIS PRESIDING.

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BRIEF OF APPELLEE

Appellee, K. Norman Cox, Defendant, submits the following brief of Appellee in this matter.

I. STANDARD OF REVIEW.

In divorce proceedings, this Court may not disturb the trial court's determinations, absent a showing of clear abuse of discretion. Dunn v. Dunn, 802 P.2d 1314, 1317 (Ut. App. 1990). Additionally, this Court must place a presumption of validity upon the trial court's actions. Berger v. Berger, 713 P.2d 695, 697 (Ut. 1985). Cummings v. Cummings, 821 P.2d 472 (Utah App. 1991).

The burden of proof is on Plaintiff to show error or absence of discretion, and this Court may only overturn the trial court's Findings of Fact if they are clearly erroneous—that is, the evidence clearly preponderates to the contrary and is against the clear weight of evidence, or unless the Court reaches a definite and firm conviction that a mistake has been made. Dunn v. Dunn, 802 P.2d at 1317.

Moreover, even where the trial court has failed to enter findings on all material issues, if the facts in the record are clear, uncontroverted, and capable of supporting a finding in favor of the trial court's judgment, the trial court's judgment will not be disturbed on appeal. Hardy v. Hardy, 776 P.2d 917, 924 (Ut. App. 1989).

II. STATEMENT OF FACTS.

The facts set forth below were established by the testimony and evidence presented at trial on August 31, 1992, and the Decision and Findings of Fact of the Honorable Lynn W. Davis,

District Court Judge for the Fourth Judicial District Court for Utah County, State of Utah.

1. Plaintiff and Defendant were married for fewer than three years. The parties were married for 29 months, from July 1, 1988, to their separation on December 1, 1990. (Findings of Fact, p. 2, par. 3; Judge Davis' Decision, pp. 4, 14; Trial Transcript, p. 60, ll. 4-11, p. 145, ll. 2-5).

2. Plaintiff and Defendant were older in years, both parties had been married before, and no children were born as issue of the marriage. At the time of their marriage, Appellant was 47 years of age and Respondent was 56. This was Plaintiff's third marriage and Defendant's second marriage. (Findings of Fact, p. 2, par. 4; Judge Davis' Decision, pp. 4-14; Trial Transcript, p. 59, ll. 17-25, p. 60, ll. 15-17, p. 144, ll. 13-19, p. 145, ll. 6-8).

3. Defendant brought his unencumbered premarital home into the marriage. In 1966, Defendant and his deceased former wife built a house in Orem, Utah. Defendant paid off a 20-year VA mortgage on the home sometime in 1987. As of the date of the parties' marriage on July 1, 1988, the home and property were unencumbered by mortgage or lien. (Findings of Fact, p. 2, par. 5; Judge Davis' Decision, pp. 7, 14; Trial Transcript, pp. 142-143, ll. 1-25, 1-8).

4. Plaintiff's remodeling expenditures did not increase the value of Defendant's premarital home. The parties stipulated before trial that the value of Respondent's home prior to marriage and prior to remodeling was \$77,000.00. The Court determined that at the date of separation the fair market value of Defendant's premarital home was \$105,000.00. Plaintiff contributed \$12,562.65.

The court determined that award as follows: \$18,062.65 contributed by Plaintiff minus \$5,500.00 reimbursed to Plaintiff by Defendant. Defendant contributed \$11,931.00 towards remodeling Defendant's home. The value of Respondent's premarital home in 1988 plus the amount the parties paid toward the remodeling, or a total of \$106,993.65, exceeds the \$105,000.00 fair market value of the home. (Findings of Fact, p. 3, par. 7, pp. 4-5, par. 12-13; Judge Davis' Decision, pp. 4, 7, 16-17).

5. **Prior to the parties' marriage, Plaintiff sold her premarital residence against the advice of Defendant and her brother-in-law, an accountant.** In June 1988, against the advice of Defendant and Plaintiff's accountant, Plaintiff sold her personal residence to her parents, Smith and Lee Jacobs. From the \$21,000.00 proceeds received from that sale, Plaintiff repaid her parents the \$18,000.00 she had borrowed from them to purchase the home. (Findings of Fact, p. 3, par. 6; Judge Davis' Decision, p. 7; Trial Transcript, pp. 145-146, ll. 9-25, 1-14).

6. **Defendant intended to protect his separate premarital home under the provisions of an Antenuptial Agreement, and Plaintiff had knowledge of and acquiesced to Defendant's intent.** At Plaintiff's behest, the parties met with Plaintiff's attorney on or about June 23, 1988. At this time, Plaintiff's attorney had knowledge that Defendant was represented by counsel. (Trial Transcript, p. 107, ll. 6-21, p. 113, ll. 23-25, p. 114, ll. 4-8, p. 148, ll. 4-6.) Plaintiff's attorney drafted an Antinuptial Agreement so that it required the signatures of Plaintiff and Plaintiff's attorney and the signatures of Defendant and his attorney. (Trial Transcript, p. 98, ll. 21-25, p. 99, ll. 1-5, p.

114, ll. 11-16). Plaintiff executed the Antenuptial Agreement on June 28, 1988, and Defendant executed the Antenuptial Agreement on June 30, 1988. Defendant intended for his premarital assets, including his premarital home, to be protected under the provisions of the Antenuptial Agreement, and Plaintiff admitted at trial that she had knowledge of Defendant's intent to protect his premarital home. This fact was substantiated by the testimony of Plaintiff's attorney at trial. (Findings of Fact, p. 3, par. 8; Judge Davis' Decision, p. 6; Transcript, p. 70, ll. 6-11, p. 72, ll. 12-15, p. 126, ll. 20-22, p. 130, ll. 3-7, p. 130-131, ll. 23-24, 1-6, p. 151-152, ll. 15-25, 1-4, p. 157, ll. 8-13).

7. Defendant intended the Warranty Deed to secure only the amount of Plaintiff's remodeling expenditures. Nearly contemporaneous with the parties' signing of the Antenuptial Agreement, Defendant executed a joint deed to his premarital home and placed Plaintiff's name on the title to the home intending to secure monies Plaintiff paid or would pay toward the remodeling of the home. At no time was Defendant's attorney present at any of the meetings held between the parties and Plaintiff's attorney, nor did Plaintiff's attorney send the Warranty Deed to Defendant's attorney for his review. Moreover, at no time did Plaintiff's attorney confer with Defendant's attorney regarding the propriety of placing Plaintiff's name on the title to Defendant's unencumbered home. (Findings of Fact, pp. 3-4, par. 9-10; Judge Davis' Decision, pp. 6-7, 16; Trial Transcript, p. 115, ll. 1-4, 8-11, p. 131, ll. 18-20, p. 201, ll. 10-23).

8. Plaintiff has been employed at all times relevant hereto, while Defendant has been unemployed since October, 1991. Plaintiff

has continuously been employed by Brigham Young University in a secretarial position since the parties were married on July 1, 1988. Plaintiff's gross monthly income as of September 1992 was \$1,850.00. By comparison, Defendant has been unemployed since he sold his business in October 1991, and his only income as of trial was \$554.00 per month from unemployment compensation.

9. **Defendant suffers from a physical disability which precludes him from seeking full-time employment in his area of training.** Defendant suffers from a physical disability which necessitated recent knee operations. It is expected that Defendant will be immobilized for six months, and Defendant's disability will preclude him from seeking full-time employment in his area of training—auto-body repair. (Findings of Fact, p. 6; Judge Davis' Decision, p. 2; Trial Transcript, pp. 169-171, ll. 12-25, 1-25, 1-6).

10. **On August 30, 1992, prior to trial of this matter, the parties negotiated and entered into a stipulation of Facts with the advice and consent of counsel.** The stipulated facts were adopted by the trial court and incorporated into its Findings of Fact, Divorce Decree and Decision. (Findings of Fact, p. 1; Divorce Decree, p. 1; Judge Davis' Decision, pp. 4-6).

11. **On August 31, 1992, the divorce proceeding between Plaintiff and Defendant came before the lower Court for trial.** The only issues before the lower Court were: (1) the award of alimony; (2) approval of the parties' stipulation of facts entered into on August 30, 1992; (3) the fair and equitable division of Defendant's premarital home; and (4) the award of attorneys' fees.

12. **The lower Court ruled that:**

a. Alimony is not merited since Defendant has no reasonable or foreseeable ability to obtain employment nor to pay alimony due to his unemployment and physical disability.

b. The parties' August 30, 1992, Stipulation of facts would be adopted by the Court to resolve all issues relative to the personal property division and the parties' financial obligations. The parties had negotiated and entered into the stipulation with the advice of counsel.

c. Defendant's premarital home did not increase in value since the value of Defendant's premarital home in 1988 plus the amount the parties paid toward the remodeling exceeded the appraised value of the home.

d. Plaintiff is not entitled to one-half the value of Defendant's premarital home and that Plaintiff had no life estate.

e. Plaintiff is entitled to be compensated for her actual pre-marriage and post-marriage expenditures for remodeling of the home in the stipulated amount of \$12,562.65.

f. Defendant is awarded his attorneys' fees and costs incurred subsequent to August 12, 1992.

III. SUMMARY OF ARGUMENTS.

The trial court's decision as to the four issues listed above should be upheld.

IV. ARGUMENT.

A. THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S REQUEST FOR ALIMONY.

1. This Court Should Not Disturb The Trial Court's Alimony Ruling Absent Abuse Of Discretion.

This Court has held that trial courts have broad discretion in awarding alimony. Osguthorpe v. Osguthorpe, 791 P.2d 895, 896 (Ut. App. 1990). As long as a trial court exercises its discretion within the bounds and under the standards this Court has set and supports its decision with adequate findings and conclusions, this Court will not disturb the trial court's ruling. Naranjo v. Naranjo, 751 P.2d 1144, 1147 (Ut. App. 1988). The burden of proof is upon the plaintiff that a clear and prejudicial abuse of discretion is shown in the court's decision. Bridenbaugh v. Bridenbaugh, 786 P.2d (Ut. App. 1990).

In awarding alimony, this Court has required trial courts to consider the following three factors: (1) the financial conditions and needs of the receiving spouse; (2) the ability of the receiving spouse to produce a sufficient income for him or herself; and (3) the ability of the responding spouse to provide support. Rudman v. Rudman, 812 P.2d 73, 78 (Ut. App. 1991); Burt v. Burt, 799 P.2d 1166, 1170 (Ut. App. 1990); Haumont v. Haumont, 793 P.2d 421, 423 (Ut. App. 1990); Munns v. Munns, 790 P.2d 116, 121 (Ut. App. 1990). If these three factors have been considered by the trial court, this Court will not disturb the trial court's alimony decision unless a serious inequity has resulted so as to manifest a clear abuse of discretion or manifest injustice may occur. Schindler v. Schindler, 776 P.2d 84 (Utah App. 1989), and Haumont

v. Haumont, 793 P.2d at 424. See also Watson v. Watson, 194 Utah Adv. Rep. 42 (Utah App. August 24, 1992).

This Court has further noted that the three-prong criterion set forth above does not preclude the trial court from considering other factors such as the length of marriage, the parties' ages at marriage, whether children were born into the marriage, etc. Rappleye v. Rappleye, 1993 WL 212747 (Ut. App.); Boyle v. Boyle, 735 P.2d 669, 671 (Ut. App. 1987) (holding that the trial court did not abuse its discretion in denying alimony to the wife following a short-term marriage).

Applying these factors to the situation at bar, the trial court properly denied Plaintiff's request for alimony.

2. The Trial Court Did Not Abuse Its Discretion Because It Addressed All Requisite Factors In Determining Alimony Was Not Merited.

Plaintiff contends that the trial court abused its discretion in denying her alimony claim. Plaintiff argues that the trial court did not properly consider Defendant's ability to provide support. However, contrary to Plaintiff's assertions, the trial court addressed the above-noted requisite factors in the following detail.

a. The trial court considered the circumstances surrounding the parties' marriage and concluded that alimony was not merited.

From the day they were married to the date of their final separation, the parties were only married for 29 months. At the time of their marriage, Plaintiff was 47 years old and Defendant was 56 years old. This was Plaintiff's third marriage and Defendant's second. No children were born into the marriage. (Findings of Fact, p. 2, par. 3-4; Memorandum Decision, pp. 4, 14).

- b. The trial court considered both parties' abilities to produce income and found that Plaintiff's ability to produce income exceeds that of Defendant.

Plaintiff has continuously been employed by Brigham Young University in a secretarial position since 1985. (Memorandum Decision, p. 15; Tr., p. 80, ll. 8-11). Plaintiff's wages have steadily increased during the marriage, and Plaintiff testified that there is a reasonable expectation that they will continue to do so. (Memorandum Decision, p. 15; Tr., p. 81, l. 23 through p. 82 l. 7). As of the date of trial, Plaintiff's gross monthly income was \$1,850.00 from which Plaintiff was depositing approximately \$27.00 per paycheck, or \$54.00 a month, into a B.Y.U.-sponsored retirement and savings account.^{1/} It should also be noted that as of July 1992, one month prior to the date of trial, Plaintiff was depositing from her gross income approximately \$64.75 per paycheck, or \$129.50 a month, into her B.Y.U.-sponsored retirement and savings account. (Tr., p. 45, ll. 18-22).

^{1/} In what seems to be an attempt by Plaintiff to confuse the Court, Plaintiff argues in her Appellant Brief that her income at the time of marriage was \$1,008.58 net per month, that she spent one-half the sum she received for her son's social security on behalf of the marriage, and that she liquidated her separate property assets and paid the proceeds therefrom to her children and in support of the marital community. Plaintiff's earnings at the time of marriage and her expenditures during marriage are irrelevant for purposes of an alimony award. Howell v. Howell, 806 P.2d 1209, 1212 (Utah App. 1991) (holding that trial courts must look to the standard of living existing at or near the time of trial in determining alimony). In reaching its determination that alimony was not warranted in this case, the trial court took notice of both Plaintiff's and Defendant's incomes and expenses as of the date of trial. Plaintiff's above-noted arguments do nothing more than validate the trial court's findings that the parties' standard of living during marriage was financed by the liquidation by both parties of separate property assets and the incurrence of debt.

After the parties' final separation, Plaintiff purchased a condominium, encumbering herself with a mortgage. (Memorandum Decision, p. 3).^{2/}

Even though Plaintiff may have financial need for support, due to her younger age and higher salary, Plaintiff has both the opportunity and ability to recoup her losses and provide for herself, while Defendant's age and health may prevent him from securing steady, full-time employment. (Memorandum Decision, p. 15).

- c. The trial court found that Defendant, because of his physical disabilities, has no reasonably foreseeable ability to obtain employment and pay alimony.

Defendant has been unemployed in a full-time position since October 1991 when he was forced to sell his separate property business at a substantial loss. (Findings of Fact, p. 6, par. 19; Memorandum Decision, p. 15; Tr., p. 159, ll. 6-11). Due to a slowdown in his business and because of his deteriorating health, Defendant had no other alternative than to sell his business. (Memorandum Decision, pp. 2-3; p. 15; Tr., p. 192, ll. 15-20; p. 200, ll. 8-18).

Other than working part-time for a brief period at Utah Valley Community College, Defendant has remained unemployed. (Memorandum

^{2/} Plaintiff claims that, as of trial, she was receiving from her church monthly food assistance and monies to pay the mortgage on her condominium. Even if Plaintiff's allegation is true, Plaintiff fails to take into consideration that Defendant was unemployed at the time of trial and still is unemployed as of this date, that Defendant's physical disability precludes him from employment in his area of expertise, and that Defendant was receiving \$500.00 to \$600.00 per month from his children in order to meet his financial obligations. (Findings of Fact, p. 6, par. 19; Memorandum Decision, pp. 2-4).

Decision, p. 2; Tr., p. 192, ll. 25 through p. 193, l. 24). Even though Defendant was withdrawing \$1,457.00 in salary a month prior to the sale of his business, Defendant's income as of the date of trial, almost 12 months later, was solely that of unemployment compensation in the amount of \$554.00 per month, plus the receipt of proceeds from the sale of his separate property business in the amount of \$500.00 per month.^{3/} (Findings of Fact, p. 6, par. 19; Memorandum Decision, p. 2-3; Tr., p. 159, ll. 2-21; p. 172, ll. 8-18; p. 173, ll. 20-24; p. 175, ll. 11-23). In order to meet his monthly financial obligations of \$1,370.00, Defendant has had to borrow \$500.00 to \$600.00 per month from his children, sell most of his marketable separate property assets, and incur substantial debt.^{4/} (Findings of Fact, p. 6, par. 20; Memorandum Decision, pp. 2-3; Tr., p. 161, ll. 7-17; p. 172, ll. 16-19).

As noted above, Defendant suffers from knee problems which preclude him from seeking full-time employment in his area of training, auto-body repair. (Findings of Fact, p. 6, par. 19; Memorandum Decision, pp. 2-3, 15; Tr., p. 170, ll. 3-5; p. 193, l. 25 through p. 195, ll. 1-4). Furthermore, both of Defendant's knees were operated on in May 1993. It is expected that Defendant

^{3/} As the trial court correctly notes in its Findings of Fact and Memorandum Decision, Defendant's unemployment benefits commenced the second week of July 1992 and terminated the second week of January 1993. (Findings of Fact, p. 6, par. 19; Memorandum Decision, p. 2-3). It should also be noted that Defendant received the last payment from the sale of his business in May 1993.

^{4/} Defendant sold off numerous personal items (a gun collection, snowmobiles, cars, etc.) and assumed new loans during the marriage in an attempt to finance the parties' marriage. At the time of trial, most of Defendant's marketable separate property had been sold. (Memorandum Decision, p. 3; Tr., p. 161, ll. 7-17).

will be immobilized for approximately six months. (Memorandum Decision, p. 2; Tr., p. 170, ll. 11-17).

- d. The trial court found that Defendant experienced a higher dollar net worth decrease than did Plaintiff.

Based on the Stipulation of Facts the parties presented at trial, and after evaluating the evidence presented at trial, the trial court found the following facts:

Prior to the marriage, Plaintiff had a net worth of \$74,000.00. (Findings of Fact, p. 3, par. 7; Memorandum Decision, p. 5). During the marriage, Plaintiff expended \$74,000.00. (Findings of Fact, p. 5, par. 14; Memorandum Decision, p. 5). Plaintiff's net worth at the time of the parties' final separation was \$10,539.00 (exclusive of the \$12,562.65 the trial court ordered Defendant to repay to Plaintiff in the Divorce Decree); therefore, her net decrease was \$63,461.00. (Findings of Fact, p. 5, par. 15; Memorandum Decision, p. 5). Plaintiff's net decrease takes into consideration the following expenditures: (1) prior to marriage Plaintiff repaid to her parents \$18,000.00 on a loan she had received from them to purchase her premarital home; (2) during marriage, Plaintiff paid or gave \$31,000.00 of her separate property assets to her children; and (3) prior to and after marriage, Plaintiff paid the total sum of \$12,562.65 toward the remodeling of Defendant's premarital home. (Findings of Fact, p. 3, par. 7; pp. 4-5, par. 12, 14-15; Memorandum Decision, pp. 4-6).^{5/}

^{5/} Subtracting the amount Plaintiff repaid to her parents on the premarital loan, the amount she paid or gave to her children during marriage, and the amount Defendant was ordered to repay to her for her remodeling expenditures, Plaintiff liquidated and expended

On the other hand, Defendant had a net decrease of \$135,709.00 during the parties' marriage. (Findings of Fact, p. 5, par. 15; Memorandum Decision, p. 5). Defendant's net worth at the time of marriage was \$368,000.00. (Findings of Fact, p. 3, par. 7; Memorandum Decision, p. 5). Defendant expended \$109,114.45 during the marriage. (Findings of Fact, p. 5, par. 14; Memorandum Decision, p. 6). Defendant's net worth at the time of separation was \$232,249.00, and his net decrease was \$135,709.00 or double that of Plaintiff's net decrease. (Findings of Fact, p. 5, par. 15; Memorandum Decision, p. 5).

In its thorough consideration of the foregoing factors, the trial court entered its fact-specific decision. There is no abuse of discretion in the decision rendered. This Court should affirm the opinion of the trial court and deny Plaintiff's request for alimony.

3. **Plaintiff Has Failed To Establish That The Trial Court's Findings Are Inequitable.**

The Utah Supreme Court has held that the burden is on the party challenging the trial court's factual findings to demonstrate that, even viewing the evidence in the light most favorable to the trial court, the evidence is insufficient to support the findings or that the findings are otherwise clearly erroneous. Doelle v. Bradley, 784 P.2d 1176, 1178 (Ut. 1989).^{6/} Plaintiff has failed to demonstrate that the evidence is insufficient to support the

approximately \$1,898.35 from her separate property funds on the parties' marriage.

^{6/} Should this Court hold otherwise, this Court would be second-guessing the trial court's reasons for finding as it did without the advantage of observing witnesses first-hand and assessing their credibility. Rudman v. Rudman, 812 P.2d 73, 77 (Utah App. 1991).

findings. Plaintiff has also failed to cite any authority which supports her erroneous contentions.

In her Appellate Brief, Plaintiff argues that the trial court erred: (1) in concluding that Defendant's medical disability precluded him from performing auto-body work; (2) in concluding that Defendant's income was \$554.00 a month; and (3) in failing to take into consideration other factors regarding the parties and their marriage. Plaintiff fails to demonstrate any evidence to support these conclusions. Plaintiff is mistaken in each and all of her contentions.

a. Defendant's Medical Disability Precluded Him From Performing Auto-body Work.

With respect to Defendant's medical disability, Defendant testified that his doctor informed him that his knees were no longer functional and that sometime in the near future Defendant would need to have them replaced. (Tr., p. 193, l. 25 through p. 195, ll. 1-4). Defendant further testified that his knee problem impaired his ability to find employment. (Tr., p. 169, ll. 18-20).

In Boyle, 735 P.2d at 671, this Court held that trial courts are clearly in the best position to weigh the evidence, determine credibility, and arrive at factual conclusions. In this case, the trial court weighed the evidence before it, determined the credibility of Defendant as a witness, and thereafter concluded that Defendant does suffer from a physical disability which prohibits him from performing the type of work to which he is accustomed. The trial court's finding is also supported by the fact that Defendant has been unable to procure full-time employment

in the auto-body industry since the date of trial. As such, the trial court's conclusions should not be disturbed.

b. Defendant's Income Was \$554.00 Per Month.

As to Plaintiff's contention that the trial court erred in determining Defendant's monthly income, this Court has held that trial courts must determine the parties' standard of living which existed at or near the time of trial. Howell v. Howell, 806 P.2d 1209, 1212 (Utah App. 1991). The trial court determined that at the time of trial, Defendant's sole income was \$554.00 from unemployment insurance, and that Defendant had no other income. In Cummings v. Cummings, 562 P.2d 229, 231 (Ut. 1977), and Westenskow v. Westenskow, 562 P.2d 1256, 1257 (Ut. 1977), the Utah Supreme Court ruled that a trial court may consider a husband's historical earning ability only where a husband has experienced a temporary decrease in income. The key word in the Cummings and Westenskow decisions is "temporary." Defendant's decrease was not temporary.

Defendant has been unemployed in his area of expertise since October 1991, the date he sold his business. (Findings of Fact, p. 6, par. 19; Memorandum Decision, p. 15; Tr., p. 159, ll. 6-11). Even though Defendant was earning \$1,457.00 a month, prior to the sale of his business, Defendant's only income as of the date of trial, almost 12 months later, was unemployment compensation in the amount of \$554.00 per month. (Findings of Fact, p. 6, par. 19; Memorandum Decision, pp. 2-3). Accordingly, due to Defendant's physical disability and the fact that Defendant had been unemployed for close to a year at the time of trial, the trial court properly concluded that Defendant's historical income was too remote to be relied upon in determining whether to award Plaintiff alimony. As

such, the trial court properly considered Defendant's income at the time of trial; that was \$554.00 per month.

c. The Trial Court Took Into Consideration Other Factors Regarding The Parties And Their Marriage.

Contrary to Plaintiff's contention that the trial court failed to take into consideration other factors regarding the parties and their marriage, the trial court's findings clearly demonstrate that the trial court considered: (1) the length of the marriage; (2) the parties' ages upon marriage; (3) the fact that no children were born into the marriage; (4) that both parties had been married before; (5) the value of both parties' estates upon marriage; (6) the amount expended by each party during marriage; and (7) the amount each parties' estate decreased as of their final separation.

In spite of the trial court's above-referenced considerations and findings, Plaintiff argues that the trial court should have awarded her alimony from the equity in Defendant's premarital home.^{2/} In support of this contention, Plaintiff relies on Sampinos v. Sampinos, 750 P.2d 616 (Ut. App. 1988), a case factually distinguishable from the circumstances at hand. In Sampinos, this Court affirmed the lower court's decision to award the wife alimony where the wife had not worked for the last eight years of the 11-year marriage and had no external source of income. Unlike Plaintiff, the wife in Sampinos had devoted her time as a homemaker, and she had no professional training and few marketable

^{2/} Plaintiff fails to take into consideration that the trial court ordered Defendant to reimburse Plaintiff \$12,562.65, the amount she contributed to the remodeling of the home. (Divorce Decree, p. 2, par. 5).

skills. Furthermore, the husband, unlike Defendant, had the ability to support his wife. Id. at 618-19.

In contrast to the facts of the Sampinos case, the trial court, after addressing all the relevant factors, denied Plaintiff's claim to alimony. The trial court determined that due to Plaintiff's younger age and higher salary, Plaintiff has an opportunity and ability to provide for herself and to recoup some of her losses, in contrast to Defendant, whose age and health may prevent him from securing steady, full-time employment. (Memorandum Decision, p. 15). Finally, because Defendant's premarital home is a separate property asset controlled by the parties' Antenuptial Agreement, Plaintiff is not entitled to alimony based on the equity of Defendant's home.

Because the trial court's findings are supported by the evidence before it, and especially in light of the short duration of the marriage, this Court must conclude that the trial court did not abuse its discretion in denying Plaintiff alimony.

B. THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S REQUEST FOR ONE-HALF OF DEFENDANT'S PREMARITAL HOME AND ORDERING PLAINTIFF TO RECONVEY HER INTEREST IN THE HOME TO DEFENDANT.

This Court is called upon to determine whether the trial court abused its discretion in denying Plaintiff's request for one-half the value of Defendant's premarital home and ordering Plaintiff to reconvey her interest in the home to Defendant.

Considerable latitude is given trial courts in adjusting financial and property interests, and its actions are entitled to a presumption of validity. Hogue v. Hogue, 831 P.2d 120, 121 (Ut. App. 1992). Moreover, this Court will not modify a trial court's

property division determination unless there has been a misunderstanding or misapplication of the law, resulting in substantial and prejudicial error, that the evidence is against the clear weight of evidence, or such a serious inequity would result as to manifest a clear abuse of discretion. Id.

Utah courts have held that upon divorce, each party should retain the separate property he or she brought into the marriage. Dunn v. Dunn, 802 P.2d 1314, 1300 (Ut. App. 1990). In making a property division, a trial court should take into consideration all of the pertinent circumstances of the parties' marriage. Woodward v. Woodward, 656 P.2d 431, 432 (Ut. 1982); Jackson v. Jackson, 617 P.2d 338, 340-41 (Ut. 1980); English v. English, 565 P.2d 409, 410 (Ut. 1977).

The pertinent circumstances the trial court must consider are: (1) the duration of the marriage; (2) the parties' ages at the time of the marriage; (3) the parties' ages at the time of divorce; (4) whether any children were born into the marriage; (5) the amount and kind of property to be divided, whether the property was acquired before or during the marriage and the source of the property; (6) the parties' standard of living, respective financial conditions, needs and earning capacity; and (7) the health of the parties. Hogue, 831 P.2d at 121.

1. The Trial Court Considered All Of The Pertinent Circumstances Of The Parties' Marriage In Reaching Its Property Distribution Decision.

In awarding Defendant the entire interest to his premarital separate property home, the trial court, in its Findings of Fact and Memorandum Decision, plainly contemplated all of the pertinent circumstances in formulating an equitable distribution of property

between Plaintiff and Defendant. Specifically, the trial court noted that the parties had entered into a Stipulation of Facts which resolved all property disputes except for the division of Defendant's premarital home. (Memorandum Decision, p. 8). The trial court adopted the parties' Stipulation of Facts and incorporated the same in its Findings of Fact, Divorce Decree and Memorandum Decision.

The facts and circumstances the trial court considered in reaching its decision are set forth in Defendant's Alimony argument above and herein below.

- a. Defendant brought his unencumbered premarital home into the marriage.

In 1966, Defendant built the home in question. Defendant and his deceased former wife raised nine children in this house and paid off a 20-year VA mortgage some time in 1987. In May 1988, to accommodate Plaintiff and Defendant's sons and daughters, who were still living at home, the parties' began remodeling Defendant's premarital home. As of the date of the parties marriage on July 1, 1988, the home and property were unencumbered by mortgage or lien. (Findings of Fact, p. 2, par. 5; Memorandum Decision, pp. 7 and 14; Tr., p. 142, l. 1 through p. 143 ll. 1-8).

- b. Plaintiff seeks to obtain a substantially greater amount of money than she paid toward the remodeling of Defendant's premarital home.

The amount Plaintiff seeks to obtain is \$52,500.00 being one-half the trial court's determined value of the home. That demand substantially exceeds the amount Plaintiff paid toward the remodeling of Defendant's premarital home, which was \$12,562.65. (Memorandum Decision, p. 14).

- c. Prior to the marriage, Plaintiff sold her premarital residence.

In June 1988, against the advice of Defendant and Plaintiff's accountant, Plaintiff sold her personal residence to her parents. From the \$21,000.00 proceeds from the sale, Plaintiff repaid her parents the \$18,000.00 she had borrowed from them to purchase the home. (Findings of Fact, p. 3, par. 6; Memorandum Decision p. 7; Tr., p. 145, l. 9 through p. 146, l. 14).

- d. Prior to marriage, the parties entered into a valid Antenuptial Agreement, the parties intended for Defendant's premarital home to be protected under the provisions of the Antenuptial Agreement, and the protection provided by the Antenuptial Agreement was not abrogated by Defendant's execution of the Warranty Deed.

In addition to the foregoing facts and circumstances, the trial court also took into consideration the circumstances surrounding the parties execution of an Antenuptial Agreement and Defendant's execution of a Warranty Deed prior to the date of the parties' marriage. Relative to the Antenuptial Agreement, the Court found the following:

- (1) The Antenuptial Agreement executed by the parties was not subject to fraud, coercion or material non-disclosure.**

The parties entered into the Agreement upon Plaintiff's request, Plaintiff's attorney drafted the Agreement, the parties were competent, the Agreement was duly signed and notarized, and as consideration therefor, both parties' separate property was protected. (Memorandum Decision, pp. 8-9). Additionally, Plaintiff's own attorney signed the Agreement and certified that he had consulted with Plaintiff and advised her of her property rights and the legal significance of the Agreement. (Findings of Fact, p.

4, par. 10; Memorandum Decision, p. 9). Accordingly, the Antenuptial Agreement was not subject to fraud, coercion, or material non-disclosure. (Memorandum Decision, p. 8).

(2) Defendant intended to protect his separate premarital home under the provisions of the Antenuptial Agreement and Plaintiff had knowledge of and acquiesced to Defendant's intent.

Plaintiff executed the Antenuptial Agreement on June 28, 1988, and Defendant executed the Antenuptial Agreement on June 30, 1988. (Findings of Fact, p. 3, par. 8; Memorandum Decision, pp. 8 and 16; Tr., p. 126, ll. 20-22). Defendant intended for his premarital assets, including his premarital home, to be protected under the provisions of the Antenuptial Agreement, and Plaintiff had knowledge of and acquiesced to Defendant's intent to protect his premarital home. (Findings of Fact, p. 3, par. 8; Memorandum Decision, p. 15). Plaintiff admitted during trial that she had knowledge of Defendant's intent to include his premarital home under the value of his separate property assets, and this fact was substantiated by the testimony of Plaintiff's attorney. (Tr., p. 72, ll. 12-15; p. 129 l. 23 through p. 130, l. 22).

(3) The Warranty Deed was an afterthought by the parties, and its provisions are patently incompatible with the protection provisions contained in the Antenuptial Agreement.

Nearly contemporaneous with the parties' signing of the Antenuptial Agreement, Defendant executed and placed Plaintiff's name on a Warranty Deed granting Plaintiff a joint interest in his premarital home. (Findings of Fact, pp. 3-4, par. 9; Memorandum Decision, p. 6). Defendant's intent in executing the Warranty Deed

was solely to secure only those monies Plaintiff paid or would pay toward the remodeling of the home. (Tr., p. 151, ll. 15-22).

Only Plaintiff's attorney advised and counseled the parties regarding the execution of the Warranty Deed, and Plaintiff's attorney drafted the Deed. (Findings of Fact, p. 4, par. 10; Memorandum Decision, p. 6). At no time was Defendant's attorney present at any of the meetings held between the parties and Plaintiff's attorney. (Findings of Fact, p. 4, par. 10; Memorandum Decision, p. 7). Plaintiff's attorney, moreover, did not send the Warranty Deed to Defendant's attorney for his review, nor did Plaintiff's attorney speak with Defendant's attorney regarding the Warranty Deed. (Findings of Fact, p. 4, par. 10; Memorandum Decision, p. 7). These facts are substantiated by Plaintiff's attorney's testimony at the time of trial and the dates and notary acknowledgments of Defendant's signature on the Warranty Deed and Antenuptial Agreement. (Memorandum Decision, p. 16).

Furthermore, the Deed was also drafted and executed with extreme haste. The parties were to be married only three days after Defendant executed the Deed. (Memorandum Decision, p. 15). Clearly, the Warranty Deed was an afterthought by the parties, and its provisions are patently incompatible with the protection provisions of the Antenuptial Agreement. (Findings of Fact, p. 4, par. 11; Memorandum Decision, p. 15). The Antenuptial Agreement was clearly intended by the parties to protect their separate property. That is precisely why they sought the services of an attorney. (Findings of Fact, p. 4, par. 11; Memorandum Decision, p. 15). As such, because Defendant intended to retain the equity

in his premarital home as a separate property asset, the Antenuptial Agreement controls this asset.

- e. The post-separation fair market value of Defendant's premarital home did not exceed the premarital value of the home plus the parties' expenditures.

The value of Defendant's premarital home prior to marriage and prior to remodeling was \$77,000.00. (Findings of Fact, p. 4, par. 12; Memorandum Decision, p. 7). Of the \$29,993.65 the parties paid toward the remodeling, Plaintiff contributed \$12,562.65 and Defendant expended \$11,931.00, plus the \$5,500.00 repaid to Plaintiff. (Findings of Fact, pp. 4-5, par. 12; Memorandum Decision, p. 4). Other than Plaintiff's remodeling expenditures, there is no increase in value to attribute to Plaintiff since the value of Defendant's premarital home in 1988 plus the amount of monies the parties paid toward the remodeling, or \$106,993.65, exceeds the \$105,000.00 fair market value of the home. (Findings of Fact, p. 3, par. 7; pp. 4-5, par. 12-13; Memorandum Decision, pp. 16-17).

The above findings clearly support the trial court's decision to award Defendant the entire interest in his premarital home and to reimburse Plaintiff for the amount she contributed toward the remodeling of the home. Given the above findings, the trial court acted well within its discretion in concluding that the house was Defendant's sole property subject only to Plaintiff's remodeling expenditure claim.

2. Plaintiff Has Failed To Establish That The Trial Court Erred In Awarding Defendant The Entire Interest In His Premarital Home.

Plaintiff argues that the trial court erred: (1) in concluding that the Antenuptial Agreement is valid and protects Defendant's premarital home; (2) in concluding that the protection provisions of the Antenuptial Agreement were not abrogated as to Defendant's premarital home when Defendant executed the Warranty Deed in favor of Plaintiff and when Plaintiff expended monies toward the remodeling of Defendant's home; (3) in concluding that it was equitable to return to Defendant the entire interest in his premarital home and that Plaintiff should be reimbursed for her remodeling expenditures; (4) in concluding that the home did not appreciate in value; and (5) in valuing the home as of the date of separation and not as of the date of the Divorce Decree.

a. The trial court properly concluded that the Antenuptial Agreement is valid and protects Defendant's premarital home.

Plaintiff argues for the first time on appeal^{8/} that the Antenuptial Agreement is invalid since it fails to disclose which assets made up Defendant's net worth at the time of marriage.^{2/} Plaintiff is mistaken in her contention.

^{8/} It is a well-settled rule in this jurisdiction that evidence will not be reviewed for the first time on appeal. Munns v. Munns, 790 P.2d 116, 119 (Utah App. 1990). Accordingly, this Court should strike Plaintiff's argument.

^{2/} Central to Plaintiff's argument is the implied contention that the burden of proving fair disclosure is upon Defendant, who is seeking to uphold the agreement. Plaintiff is mistaken. Most jurisdictions have held that the party seeking to avoid an antenuptial agreement has the burden of proving material nondisclosure. In re Marriage of Newman, 653 P.2d 728 (Colo. 1982); Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla. 1962); In re Estate of Parish, 236 N.W.2d 32 (1945).

In Utah, the critical inquiry is whether the agreement was executed after fair disclosure and whether there is an absence of fraud or coercion. D'Aston v. D'Aston, 808 P.2d 111, 112 (Utah App. 1990); Berman, 749 P.2d 1271, 1273 (Utah App. 1988). In defining the meaning of "fair disclosure" as it relates to antenuptial agreements, the Colorado Supreme Court in In re Estate of Lopata, 641 P.2d 952, 955 (Colo. 1982), held as follows:

Fair disclosure is not synonymous with detailed disclosure such as a financial statement of net worth and income. The mere fact that detailed disclosure was not made will not necessarily be sufficient to set aside an otherwise properly executed Antenuptial Agreement. Where the agreement is freely executed, the fact that one party did not disclose in detail to the other party the nature, extent, and value of his or her property will not alone invalidate the agreement or raise a presumption of fraudulent concealment. [citation omitted]. Fair disclosure contemplates that each spouse should be given information, of a general and approximate nature, concerning the net worth of the other. Each party has a duty to consider and evaluate the information received before signing an agreement since they are not assumed to have lost their judgmental faculties because of their pending marriage.

Id. at 955.

Under the Lopata Court's definition of "fair disclosure," the parties' failure to itemize or list their separate property assets does not, in and of itself, invalidate an otherwise valid Antenuptial Agreement. Id.^{10/}

^{10/} See also In re Marriage of Ross, 670 P.2d 26, 29 (Colo. App. 1983) (holding that husband's failure to disclose value of assets is insufficient, standing alone, to invalidate an antenuptial agreement based on nondisclosure); In re Marriage of Stokes, 608 P.2d 824, 827-28 (Colo. App. 1980) (holding that parties' antenuptial agreement was valid, even though valuation of husband's assets set forth therein was only an approximation, and husband had failed to supply itemized list of assets); Laird v. Laird, 597 P.2d 463, 467-68 (Wyo. 1979) (holding that antenuptial agreement was not invalid even though wife allegedly failed to disclose her assets prior to execution of agreement).

In this case, Plaintiff has failed to proffer evidence establishing fraud, coercion, or material nondisclosure on the part of Defendant. Thus, Plaintiff has failed to meet her burden of proof.

In addition, Plaintiff disregards the circumstances surrounding the execution of the Agreement and the language contained in the Agreement. Recital "C" of the Agreement states:

Each of the parties has made a full disclosure to the other party of all of his or her property and assets and of the value thereof, and this Agreement is entered into with a full knowledge on the part of each as to the extent and probable value of the estate of the other, and of all the rights conferred by law on each in the estate of the other by virtue of such proposed marriage.

Additionally, Article 9 of the Agreement recites language similar to that set forth in Recital "C" and establishes the approximate value of each party's separate property assets.

By executing the Agreement, Plaintiff certified that she had full knowledge of the nature, extent, and value of Defendant's premarital separate property. Additionally, prior to executing the Agreement, Plaintiff's attorney advised her of her property rights and the legal significance and meaning of the Agreement. (Findings of Fact, p. 4, par. 10; Memorandum Decision, p. 9; Tr., p. 70, ll. 6-11). Plaintiff also testified that she had knowledge of Defendant's intent to protect his premarital home, as well as his other separate property assets, under the provisions and values set forth in the Antenuptial Agreement. (Findings of Fact, p. 3, par. 8; Memorandum Decision, p. 15; Tr., p. 72, l. 12 through p. 73, l. 4). This fact was also substantiated by the testimony of Plaintiff's attorney. (Tr., p. 72, ll. 12-15; p. 129 l. 23 through p. 130, l. 22).

In Berman, 749 P.2d at 1273, this Court held that antenuptial agreements are to be construed and treated in the same manner as other contracts. The ordinary and usual meaning of the words used is given effect, and effect is to be given to the entire agreement without ignoring any part thereof. Giving effect to the language of the Antenuptial Agreement entered into by the parties, the trial court did not abuse its discretion in ruling that the Antenuptial Agreement was valid. The evidence clearly shows that prior to marriage, Plaintiff had knowledge of the nature, extent, and value of Defendant's separate property assets. Furthermore, Plaintiff knew that Defendant intended to protect his premarital home under the Antenuptial Agreement. Finally, Plaintiff has failed to meet her burden of proof and demonstrate that Defendant fraudulently concealed his assets. Accordingly, the factual situation present here does not justify disturbing the trial court's determination and undoing what the parties contractually agreed to accomplish in their Antenuptial Agreement.

- b. The trial court properly concluded that the protection provisions of the Antenuptial Agreement were not abrogated as to Defendant's premarital home.

Plaintiff next argues that the Antenuptial Agreement was abrogated as to Defendant's premarital home when Defendant executed a Warranty Deed in favor of Plaintiff and when Plaintiff expended her separate property monies to remodel Defendant's home.

In reaching its decision that Plaintiff was not entitled to a one-half interest in Defendant's premarital home, the trial court held that the Antenuptial Agreement was not abrogated when Defendant executed a Warranty Deed in favor of Plaintiff and when

Plaintiff expended her separate property monies to remodel Defendant's home.

While Utah courts have not directly addressed the question of whether a Warranty Deed with rights of survivorship, executed subsequent to an antenuptial agreement, abrogates the terms and provisions of the antenuptial agreement, another jurisdiction has confronted this very issue. In Peet v. Monger, 56 N.W.2d 589 (Iowa 1953), the parties entered into an antenuptial agreement prior to their marriage. Subsequent to the parties' execution of the antenuptial agreement, the wife executed a joint tenancy deed which contained no language expressly affecting the cancellation of the antenuptial agreement. The Iowa Supreme Court upheld the lower court's decision by finding that, under the antenuptial agreement, the husband had no interest in or control over the joint tenancy property unless he survived the wife. See also, In Re: Marriage of van Brocklin, 468 N.W.2d 40 (Iowa App. 1991).

In the case at hand, the Warranty Deed is void of language expressly canceling the Antenuptial Agreement. (Memorandum Decision, p. 10). In fact, the Deed expressly states that the Deed is subject to all existing covenants of whatever nature. (See Warranty Deed and Memorandum Decision, p. 10). Additionally, the Antenuptial Agreement existed at the time the Warranty Deed was executed, and Plaintiff had knowledge that the Antenuptial Agreement she executed on June 28, 1988, attempted to control and preserve the same property covered by the Warranty Deed. (Memorandum Decision, p. 10).

Accordingly, under the Peet decision, and pursuant to the language of the Warranty Deed, the trial court did not abuse its

discretion in determining that Defendant's execution of the Warranty Deed did not abrogate the protection provisions afforded his premarital home under the Antenuptial Agreement.

Plaintiff next argues that the Antenuptial Agreement was abrogated when she liquidated and expended her separate property monies on the remodeling of Defendant's premarital home.

In affirming the trial court's decision, this Court held in Rudman v. Rudman, 812 P.2d 73, 77-79 (Ut. App. 1991), that even though a wife had contributed labor and/or assets to her husband's premarital property, the property was not converted to marital property since the parties had entered into a prenuptial agreement.

Like the wife in Rudman, Plaintiff claims that the trial court abused its discretion in failing to find that she contributed labor and/or assets to Defendant's premarital home, thus converting it to marital property. Also, like the wife in Rudman, Plaintiff fails to give due regard to the Antenuptial Agreement she entered into with Defendant.

In the case at hand, the trial court found that even though Plaintiff had contributed labor and/or assets toward the remodeling of Defendant's premarital home, the home was not converted to marital property, as Plaintiff contends, since the parties had entered into a valid Antenuptial Agreement prior to marriage. (Memorandum Decision, p. 11).

Recital "E" of the Antenuptial Agreement expressly provides:

Each of the parties mutually desires to retain, manage or dispose separately by gift, will or otherwise, all of his or her estate to the same extent as if each of such parties remain single.

Clearly, by executing the Antenuptial Agreement, the parties contractually retained the right to dispose of their separate property by contributing the same in support of the other spouses' property. Accordingly, the trial court's determination that the Antenuptial Agreement was not abrogated when Plaintiff contributed her separate property assets toward the remodeling of Defendant's premarital home must be upheld. This is especially true in view of the fact that the trial court ordered Defendant to reimburse Plaintiff for her remodeling expenditures.

- c. It was equitable for the trial court to compel Plaintiff to reconvey title to Defendant's premarital home and order Defendant to reimburse Plaintiff for her remodeling expenditures.

Even if we were to assume that the trial court erred in determining the validity of the Antenuptial Agreement, this Court must still place a presumption of validity on the trial court's equitable property distribution. Hogue, 831 P.2d at 121.

Utah courts have held that equity requires that each party recover the separate property he or she brought into the marriage. Burke v. Burke, 733 P.2d 133, 135 (Ut. 1987); Georgedes v. Georgedes, 627 P.2d 44, 45 (Ut. 1981); Jespersion v. Jespersen, 610 P.2d 326, 328 (Ut. 1988); Lundgreen v. Lundgreen, 184 P.2d 670 (Ut. 1947). To this end, trial courts are not bound by the state of title to real property prior to the issuance of a divorce decree and are empowered to make distributions and compel conveyances as are just and equitable. Georgedes, 627 P.2d at 45; Jackson v. Jackson, 617 P.2d 338, 340-41 (Ut. 1980); Jespersion, 610 P.2d at 328; Lundgreen, 184 P.2d at 670.

In determining that it was equitable to compel Plaintiff to reconvey title to Defendant's premarital home and order Defendant to reimburse Plaintiff for her remodeling expenditures, the trial court considered all the pertinent circumstances surrounding the parties' marriage and, thereafter, looked to such landmark cases as Georgedes, 627 P.2d 44, Jespersion, 610 P.2d 326, and Lundgreen, 184 P.2d 670. The trial court found that a common factual theme exists between those cases and the case at hand. In each situation, the parties were married for less than seven years, no children were born into the marriage, both parties had been married before, one of the parties either brought a premarital home into the marriage or the home was purchased with that party's separate funds, title to the home was placed in joint tenancy within the first year of marriage, and the other party allegedly contributed labor, income and/or assets to remodel or improve the home. (Memorandum Decision, p. 15).

In the case at bar, the trial court did not misunderstand or misapply the applicable law. The trial court's property distribution was predicated on facts similar to those found in other Utah Supreme Court cases. Furthermore, the trial court's decision that Defendant should be awarded his premarital home and order requiring Defendant to reimburse Plaintiff for her remodeling expenditures is not against the clear weight of evidence. The trial court's findings were detailed and clearly supported by the evidence. Finally, an abuse of discretion and serious inequity would have resulted in this case had the trial court ruled otherwise. Clearly, the trial court's equitable property distribution must be upheld.

- d. The trial court properly concluded that Defendant's premarital home did not appreciate in value.

Under the rationale of the Utah Supreme Court in Georgedes, 627 P.2d at 45, Jespersion, 610 P.2d at 328, and Lundgreen, 184 P.2d at 670, where one of the parties contributes separate property assets to remodel or improve a home brought into the marriage by the other spouse, and title to the home is placed in joint tenancy within the first year of marriage, it is equitable to return to the spouse who contributed their separate property assets to remodel or improve the other spouse's premarital home, their actual remodeling or improvement expenditures plus one-half of the increase in value to the property if such increase exists.

In the case at hand, the trial court held that Defendant's premarital home in 1988, prior to the parties' marriage and any improvements, was \$77,000.00. (Findings of Fact, p. 4, par. 12; Memorandum Decision, p. 7). Of the \$29,993.65 the parties paid toward the remodeling, Plaintiff contributed \$12,562.65 and Defendant expended \$11,931.00 plus the \$5,500.00 repaid to Plaintiff. (Findings of Fact, pp. 4-5, par. 12; Memorandum Decision, p. 4). Other than Plaintiff's remodeling expenditures, there is no increase in value to attribute to Plaintiff since the value of Defendant's premarital home in 1988 plus the amount of monies the parties paid toward the remodeling, or \$106,993.65, exceeds the \$105,000.00 fair market value of the home. (Findings of Fact, p. 3, par. 7; pp. 4-5, par. 12-13; Memorandum Decision, pp. 16-17).

The trial court's determination that there is no increase in value beyond the parties' remodeling expenditures is clearly

supported by the evidence. Therefore, the trial court did not err in its decision.

- e. The trial court properly valued Defendant's premarital home as of the date of the parties' separation.

In Plaintiff's last point of error, she contends that the trial court committed reversible error in relying on her appraisal, to value Defendant's premarital home as of the date of the parties' separation, rather than the date of trial.

In Morgan v. Morgan, 1993 WL 176214 (Ut. App.), this Court held that while the marital estate is generally valued at the time of trial, such is not an intractable rule. In Morgan, the court was called upon to determine whether the trial court had abused its discretion in valuing bank accounts prior to the parties' divorce. Id. at page 3. At trial, the husband failed to offer into evidence more recent bank statements to rebut the evidence the trial court relied on in valuing the property. In upholding the trial court's valuation of the property, this Court stated that since there was sufficient reliable evidence to support the trial court's finding regarding the pre-trial valuation of the bank accounts, as well as the husband's failure to provide any documentation to rebut such evidence, the trial court did not abuse its discretion. Like the facts of Morgan, there is sufficient evidence in the case at hand to support the trial court's valuation of Defendant's premarital home at a time other than trial.

After their separation in 1990, both parties had Defendant's premarital home appraised. Plaintiff's appraisal valued the home at \$105,000.00, and Defendant's appraisal valued the home at \$89,000.00. (Tr., p. 216, ll. 6-12). Furthermore, the day prior

to trial, the parties executed a Stipulation of Facts. In the Stipulation, the parties expressly agreed to allow the trial court to use either of the appraisals to determine the net worth and decrease of Defendant's separate property assets during marriage. (Memorandum Decision, p. 5, Stipulation, par. 5). The parties intended for the trial court to rely on and utilize either parties' appraisal in determining the value of Defendant's premarital home. This fact is substantiated by Plaintiff's testimony at trial and the closing argument of her attorney. (Tr., p. 27, l. 25 through p. 28, l. 8; p. 216, ll. 6-21). In reaching its decision that the value of Defendant's premarital home was \$105,000.00 as reflected in Plaintiff's appraisal, the trial court relied on the only evidence presented at trial, the parties' appraisals.

Similar to the facts of Morgan, Plaintiff failed to offer into evidence an appraisal valuing the home as of trial. Like the husband in Morgan, Plaintiff now comes before this Court and claims "foul play," only after she realized that the trial court did not rule in her favor by awarding her one-half of the value of Defendant's premarital home. Like the facts in Morgan, there is sufficient evidence in the case at hand to support the trial court's valuation of the property at a time other than trial. This is especially true in view of the fact that the trial court adopted and relied on Plaintiff's appraisal in valuating the home.

It should also be noted that Plaintiff cites no authority for the proposition that a trial court may not consider appraisals made prior to the date of trial in valuing real property. While this Court has yet to address this exact question, other jurisdictions which normally require marital property to be valuated at the time

of trial have held that appraisals made before the date of trial may be used to determine the value of marital real property. Finch v. Finch, 825 S.W.2d 218, 223 (Tex.App. 1992) (holding trial court did not abuse its discretion in relying on an appraisal made one year prior to date of divorce, in valuing real property for purposes of dividing marital property); In re Marriage of Feisthamel, 739 P.2d 474, 479 (Mont. 1987) (holding trial court did not abuse its discretion in adopting wife's appraised value of the marital home, where appraisal was performed two years prior to trial). Furthermore, whether an appraisal is near enough in time to the date of divorce to be considered in determining the value of the property is a question which should be left to the discretion of the trial court. In Re Marriage of Feisthamel, 739 P.2d at 479.

Accordingly, under the Morgan, Finch and Feisthamel decisions, similar to the facts of Morgan, Plaintiff failed to profer evidence at trial which would rebut the evidence before the court, the parties' appraisals. Like the husband in Morgan, Plaintiff now comes before this Court and claims "foul play," only after she has realized that the trial court did not rule in her favor by awarding her one-half of the value of Defendant's premarital home. Like Morgan, there is sufficient evidence in the case at hand to support the trial court's valuation of the property at a time other than trial.

Accordingly, this Court must hold that the trial court did not err in valuing Defendant's premarital home at a time other than the date of trial.

C. THE LOWER COURT DID NOT ERR IN AWARDING DEFENDANT ATTORNEYS' FEES, AND DEFENDANT IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES ON APPEAL.

In her Appellate Brief, Plaintiff mistakenly argues that there is no other basis for the trial court's award of attorneys' fees to Defendant than Plaintiff's failure to accept Defendant's offer of judgment.

Under Utah Code Annotated § 30-3-3 (1989), a court may award attorneys' fees in a divorce proceeding, as long as the award is based on evidence as to the receiving spouses' financial need, the ability of the paying spouse to pay the fees, and the reasonableness of the award. Rasband v. Rasband, 752 P.2d 1331, 1336 (Ut. 1988). Furthermore, the decision to make such an award and the amount thereof rests primarily in the sound discretion of the trial court. Id. at 1336.

Contrary to Plaintiff's representations, the facts in this case adequately supports the trial court's decision to award Defendant attorneys' fees. In pertinent part, the trial court found: (1) Defendant has been unemployed in a full-time position since October 1991 (Findings of Fact, p. 6, par. 19; Memorandum Decision, p. 15; Tr., p. 159, ll. 6-11); (2) that as of the time of trial, Defendant was not able to meet his financial obligations and was borrowing \$500.00 to \$600.00 per month from his children (Findings of Fact, p. 6, par. 20; Memorandum Decision, pp. 2-3; Tr., p. 161, ll. 7-17; p. 172, ll. 16-19; and (3) that Defendant suffers from knee problems which preclude him from seeking full-time employment in his area of training, auto-body repair (Findings of Fact, p. 6, par. 19; Memorandum Decision, pp. 2-3, 15; Tr., p. 170, ll. 3-5; p. 193, l. 25 through p. 195, ll. 1-4).

Additionally, Defendant's attorneys submitted Affidavits in support of the reasonableness of the attorneys' fees generated on the case. (Memorandum Decision, p. 18). It should be noted that the amount requested by Defendant's attorneys were only a portion of the fees and costs Defendant incurred during the case.

Based on the foregoing, the trial court found that the amounts set forth in the Affidavits were fair and reasonable under the circumstances; \$2,360.00 for the legal services of Mr. Peel and \$2,289.00 for the legal services rendered by Ms. Brown. Accordingly, the trial court ordered Plaintiff to pay to Defendant's attorneys the sum of \$4,649.00. (Memorandum Decision, p. 18).

Thus, the trial court did not abuse its discretion in ordering Plaintiff to pay only a portion of Defendant's attorneys' fees.

Additionally, this Court has held that when fees in a divorce case have been awarded below, fees may be awarded to that party who then substantially prevails on appeal. Bell v. Bell, 810 P.2d 489, 494 (Ut. App. 1991), and Crouse v. Crouse, 817 P.2d 836 (Utah App. 1991). In the case at bar, Defendant was awarded attorneys' fees below and upon substantially prevailing on appeal, Defendant should be awarded the attorneys' fees he has incurred on appeal.

V. CONCLUSION.

For the foregoing reasons, the rulings of the trial court in this matter should be affirmed, and this Court should enter an order awarding Defendant his attorneys' fees and costs on appeal.

DATED this _____ day of July, 1993.

M. Byron Fisher
FABIAN & CLENDENIN,
a Professional Corporation
Attorneys for Defendant/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of July, 1993, I caused to be mailed, postage prepaid, a true and correct copy of BRIEF OF APPELLEE to:

Mary C. Corporon, Esq.
Attorney for Plaintiff
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