

1992

# Joy A. Hoagland v. Colin G. Hoagland : Brief of Appellee

Utah Court of Appeals

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DOCKET NO.

JOY A. HOAGLAND,  
Appellant,

COLIN G. HOAGLAND,

**Appellee.**

**Case No. 920340-CA**

Priority No. 16

AN APPEAL FROM A DECREE OF DIVORCE FROM THE SECOND JUDICIAL  
DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH  
The Honorable Ronald O. Hyde, Presiding

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**FILED**

**OCT 20 1992**

**Mary T. Noonan**  
**Clerk of the Court**

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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JOY A. HOAGLAND,	)	
	)	Case No. 920340-CA
Appellant,	)	
	)	
vs.	)	
	)	
COLIN G. HOAGLAND,	)	Priority No. 16
	)	
Appellee.	)	

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BRIEF OF APPELLEE

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The Honorable Ronald O. Hyde, Presiding

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JURISDICTIONAL STATEMENT

The jurisdiction is proper before this Court under the provisions of Section 78-2a-3(2) (a), Utah Code Annotated.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. It was not an abuse of discretion for the Trial Court to set the amount of the alimony based upon the parties standard of living prior to separation.
- II. It was not an abuse of discretion for the Trial Court to declare the home, currently titled in the Appellant's name, as marital property to be divided.
- III. It was not an abuse of discretion for the Trial Court to deny Appellant an award of attorney's fees.
- IV. The Trial Court did not err in denying judgment interest on payments to Appellant upon a judgment for temporary alimony awarded to her prior to the trial herein.

STATEMENT OF THE CASE

Joy A. Hoagland (hereinafter "Appellant/Plaintiff") filed an action for divorce against her husband, Colin G. Hoagland (hereinafter "Appellee/Defendant") on August 28, 1989. Record, p. 001. This case was tried before the Honorable Ronald O. Hyde, District Court Judge, on the 28th day of October, 1991. Transcript, p. 1. The Court took the matter under advisement and issued its Memorandum Decision on the 7th day of November, 1991. R. p. 272. Thereafter, counsel for Appellee prepared the initial Findings of Fact and Conclusions of Law as well as the Decree of Divorce. R. p. 293. The Findings of Fact and Conclusions of Law, and the Decree of Divorce, were entered with the Court on the 4th day of December, 1991. R. pp. 293, 303. Appellant filed her Objection to Entry of Findings of Fact on December 12, 1991, R. p. 307, leading to the eventual filing of the Amended Findings of Fact and Conclusions of Law, R. p. 335, and Second Amended Findings of Fact. R. p. 355.

STATEMENT OF THE FACTS

Appellant/Plaintiff, Joy A. Hoagland and Appellee/Defendant, Colin C. Hoagland were married in Elko, Nevada, September 5, 1973. Tr. pp. 7, 115. At the time of their marriage the Appellee worked for Smith's as a manager for one of their stores. Tr. pp. 26, 60. Appellant, a divorced woman with four minor children to support and

who had had trouble getting child support payments from her ex-husband, also worked at Smith's where she worked as a backup bookkeeper. Tr. pp. 42, 67, 68. Appellant's Exhibit No. 15 Four months after their marriage, the Appellee was promoted to District manager for Smith's and was responsible for stores in Salt Lake, Orem, and Provo. Tr. pp. 20, 117. Appellee loved the Appellant's children and substantially supported them financially during the entire time that the parties were married. R. p. 356. No child was born of this marriage. R. p. 356.

When the parties were married they first lived in a house at 240 West 4800 South in Ogden, Utah, which had been awarded to Appellant from her previous divorce. Tr. pp. 12. After three years of marriage, the parties decided to purchase a new home at 151 West 5400 South, Washington Terrace, Utah. The home purchase closed in June of 1976. Tr. p. 14. The parties resided there until December of 1986 when Appellee was forced to move to Nevada in order to obtain work. Tr. pp. 8, 167. Both Appellant and Appellee considered both homes as "our" home, as indicated by testimony. Tr. pp. 12-13, 124.

In 1978, the Appellee quit working for Smith's as district manager and a partnership was formed to run a grocery business. Tr. p. 117. There were four partners: the Appellee, the Appellant, the Appellee's brother, and the Appellant's son. Tr. p. 27. A store was purchased and the name was changed to Hoagie's Freeway Market. Tr. p. 117. At first, the businesses were very

successful and gradually totalled three stores. Tr. p. 123. The Appellee consistently worked at one of the businesses as a manager, the Appellant at first worked full time as a cashier, later as a bookkeeper, and after a short time worked only on a part time basis. Tr. p. 43. By 1984 however, the stores were beginning to run in the negative and by 1985 they were very heavy in the negative. Tr. p. 154.

In 1986, a creditor of the partnership, Utah Bank and Trust, in Salt Lake City, approached the Appellee and wanted a lien on the marital residence for the bank. However, the Appellee refused the bank a lien. Tr. p. 122. The Appellee, by that time realized that the partnership would probably be forced into Bankruptcy, and decided to take action in order to save as much of the marital assets that had been accumulated by the parties as possible. Thereafter, the partnership was converted into two (2) corporations, in May of 1986. Tr. p. 121. Also, in May of 1986 the Appellee executed a Quit-Claim Deed to the marital residence to the Appellant in furtherance of the parties' efforts to protect the marital estate. Tr. p. 121. Both parties understood that the sole reason for the Quit-Claim Deed was to protect the marital residence from the claims of creditors of the family business. Tr. p. 156. The transfer of title to the Appellant was in no way intended by the parties to deny the Appellee his rights to the marital estate. Appellee's intention was to keep the Appellant and himself out of personal bankruptcy. Tr. pp. 120, 155. The corporations filed



bankruptcy in November of 1986. Tr. pp. 73, 88.

The day before bankruptcy was filed Appellee and his brother brought home cash that was on hand at the businesses and the money was divided. The share received by the Appellee and the Appellant was approximately \$8,000.00 to \$10,000.00. R. 358, Tr. pp. 18, 140. The Appellee handed the money to the Appellant and never saw any of the money again. R. p. 358, Tr. p. 140. When the Appellee accepted employment in December 1986, in Las Vegas, Appellant retained all of the marital assets, including the \$8,000.00 to \$10,000.00 cash, two automobiles, a motor home, all of the home furniture, furnishings, and the four bedroom home with swimming pool. R. p. 358. In contrast, when Appellee left for Las Vegas, he took with him \$300.00, together with a pickup truck that was encumbered, and a motorcycle. R. pp.357-358.

After the Bankruptcy Creditors Hearing, Appellee looked for a job and eventually received an offer in the Ogden area as a stocker/freight unloader for Harmon's, earning \$7.00 per hour. Tr. p. 162. Thereafter, Appellee was offered a job by Smith's in either Tucson, Arizona or Las Vegas, Nevada. Tr. p. 162. Appellee accepted the job with Smith's and on December 28, 1986 he packed up and moved to Las Vegas, Nevada. R. p. 356, Tr. p. 16. Appellee began working for Smith's in Las Vegas in January of 1987. R. p. 357.

Appellee saved his money from his job in Las Vegas in order to purchase a house in Henderson, Nevada for he and the Appellant.

Tr. p. 187. In March of 1987, the Appellant visited the Appellee in Las Vegas. Appellee showed Appellant the new house on which he had already made a \$2,500.00 down payment. Tr. pp. 79, 170. The Appellee informed the Appellant that the mortgage loan was already approved and the only thing needed was for her to sign the papers. Tr. p. 158. Appellant refused to move to Las Vegas and stated, "We have a house in Ogden." Tr. pp. 79, 80, 81, 157. The Appellant thereafter abandoned the Appellee and it became clear to Appellee that there could be no hope for the marriage. The parties were permanently separated after Appellant's March, 1987 visit to Appellee. Agreement was thereafter reached between the parties whereby, Appellant agreed to forego alimony in exchange for Appellee giving Appellant all of the marital assets. Tr. pp. 185, 186, R. p. 358. Appellee lived by the agreement, and, in addition, voluntarily sent Appellant money for Appellant's mortgage payments on the marital residence until he was served in September of 1989 with a divorce complaint in Reno, Nevada, where he had been transferred. Appellee then realized that Appellant had violated their agreement and was seeking alimony, and all of the marital assets as well. R. p. 358, Tr. pp. 185-186.

Subsequent to the separation of the parties, Appellee was promoted by Smith's to store manager in May of 1987. Tr. p. 127. Later, he was transferred to Reno by Smith's and then transferred again to Phoenix, Arizona. R. p. 359. In January, of 1991, the Appellee was forced to change his employment from store manager to

buyer for Smith's because of his rheumatoid arthritis. R. p. 360, Tr. p. 128. Meanwhile, Appellant lived off the money that the Appellee had left with her. Tr. p. 20, appellant's Exhibit No. 6. When the money ran out, Appellant got a job working as a cashier in a grocery store. Tr. p. 43. In 1989, Appellant was hired by the Internal Revenue Service as a seasonal employee and is presently employed by the IRS. Tr. p. 44.

It was not until after Appellee had experienced some success in his employment with Smith's, that the Appellant decided to renege on the parties' agreement and she filed for a divorce on August 28, 1989, seeking not only all the marital estate, but also alimony of \$1,500.00 per month in addition to the income from her job. Tr. pp. 59, 60. That month the Appellee was served in Reno, Nevada with a Summons and a Complaint and with an Order to Show Cause for Temporary Support. R. 1-10 Tr. 5-10. The Appellee filed an answer to the Complaint. R. p. 27. A Hearing was held on the Order to Show Cause for Temporary Support. R. p. 11. The Appellee was unable to attend because of his work in Nevada. R. p. 358. However, Appellee did file an Objection to the Request for Temporary Alimony, but no action was ever taken on his objection to the Order. R. p. 275. Temporary alimony was awarded to the Appellant in the amount of \$1,500.00 a month. R. p. 275, 359.

At the time of the trial, the Appellee was found to be \$27,507.00 in arrears. R. p. 359. However, Appellee contends that he was not given credit for the amounts of money paid to Appellant.

SUMMARY OF ARGUMENTS

I. IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO SET THE AMOUNT OF THE ALIMONY BASED UPON THE PARTIES' STANDARD OF LIVING PRIOR TO SEPARATION.

Utah precedents dictate that three factors must be considered by the Trial Court when it awards alimony, and that there must be a clear abuse of discretion for the Trial Court's award to be overruled. The determination of the standard of living is very fact sensitive and the Trial has the discretion to consider various factors, besides the three factors to determine the standard of living that is most equitable given the specific facts of the case. The award of alimony to Appellant should be upheld because the facts support the Court's decision.

II. IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DECLARE THE HOME, CURRENTLY TITLED IN THE APPELLANT'S NAME, AS MARITAL PROPERTY TO BE DIVIDED.

Credibility of witnesses is in the Trial Court's discretion. The Trial Court correctly believed the Appellee and found the Quit-Claim Deed was executed solely to protect the family home from the Business Creditors. A Utah case, Hogue, demonstrates that a home may be found a marital asset even where one spouse has quit-claimed all rights to the other spouse. The Doctrine of Judicial and Quasi Estoppel is not applicable here because Appellee did not disclaim his interest in the home in the corporate bankruptcy, and because Appellant did not raise these theories in the Trial so she is

barred from raising them on appeal. Regardless, the State of Title is not binding on the Trial Court and it has discretion to distribute marital property as the Court finds equitable.

III. IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY APPELLANT AN AWARD OF ATTORNEY'S FEES.

The Trial Court's findings are adequate. In the alternative, the Trial Court's analysis was sound based upon the evidence set forth in the record. In addition, Appellant did not present sufficient evidence of her financial need, to justify any change in the decision of the Trial Court.

IV. THE TRIAL COURT DID NOT ERR IN DENYING JUDGMENT INTEREST ON PAYMENTS TO PLAINTIFF UPON A JUDGMENT FOR TEMPORARY ALIMONY AWARDED TO HER PRIOR TO THE TRIAL HEREIN.

The "judgment" for temporary alimony referred to by Appellant is not a final judgment for purposes of Section 15-1-4 of the Utah Code. Further, neither temporary nor permanent alimony are governed by Section 30-3-10.6 of the Utah Code. Interest should not be awarded on past due temporary alimony payments before the divorce decree is entered.

ARGUMENT

I. IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO SET THE AMOUNT OF ALIMONY BASED UPON THE PARTIES' STANDARD OF LIVING PRIOR TO SEPARATION.

The Utah Supreme Court has stated that "The most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during marriage, and to prevent the wife from becoming a public charge." English v. English, 565 P.2d 409, 411 (Utah 1977). The Court goes on to state that three factors must be considered in fixing a reasonable alimony award: 1. The financial conditions and needs of the wife. 2. The ability of the wife to produce a sufficient income for herself. 3. The ability of the husband to provide support. See, Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985). In Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986), the Supreme Court stated, "This Court will not interfere with the Trial Court's award of such support in a divorce proceeding absent showing of a clear and prejudicial abuse of discretion." The Court further states that the failure to consider the three factors as listed in English, constitutes an abuse of discretion. These three factors were considered by the Trial Court along with other relevant facts and support the Court's award of alimony, therefore, this Court should uphold the Trial Court's award of alimony.

From a recent case it becomes evident that the Court did not

abuse its discretion regardless of how the standard of living was determined. In Whitehead v. Whitehead, 193 Utah Adv. Rep. 8, 10 (Utah App. 1992), the Court found that where Mrs. Whitehead's monthly living expenses were "unsubstantiated," it was not an abuse of the Trial Court's discretion to deny alimony. Here, the Trial Court labeled Appellants' Affidavit of Monthly Living Expenses a "wish list" and adds that it "reflects a desire on the part of the Plaintiff to obtain high alimony rather than reasonably advising the Court of the Plaintiff's actual expenses." R. p. 361. Besides the discrepancies discussed by the Court, Appellant denied she ever spent close to the requested \$60.00 per month clothing expense, but stated, "This is what I should spend." Tr. p. 106. Under the Whitehead holding, the Appellant could be denied any alimony because she did not provide the Court with an accurate account of her expenses and failed to prove the first of the three factors.

A Trial Court is not obligated to award alimony in divorce actions, even where there is considerable difference between the parties' income. In Burt v. Burt, 799 P. 2d 1166, 1170 (Utah App. 1990), the Court stated:

"While equity should be the watchword as the trial court apportions property and calculates alimony payments, See Newmeyer v. Newmeyer, 745 P. 2d 1276, 1278 (Utah 1987), alimony may not be automatically awarded whenever there is disparity between the parties income."

In Newmeyer, 745 P.2d at 1297, the Supreme Court upheld the Trial Court's award of one dollar per year alimony to Mrs.

Newmeyer. The Court stated that although Mrs. Newmeyer had a relatively poor ability to earn income sufficient to maintain as nearly as possible the standard of living that the parties enjoyed when married, worked at the time of divorce, but only 'episodically' and at low paying jobs during the marriage and her prospect for future earnings were not as great as Mr. Newmeyer's, Mrs. Newmeyer had received a majority of the marital assets. The facts stated by the Court match those in this case where Appellant received not only one-half interest in the marital home, but all the other marital assets the parties had accumulated. R. p. 358, 362.

The Trial Court's denial of alimony was upheld by the Supreme Court in another case. In Walker v. Walker, 707 P. 2d 110, 113 (Utah 1985), the Court found that the wife had not shown a unique need and even though her annual income of \$11,000.00 was only about half of the husband's annual income it was in the Trial Court's discretion to deny the wife alimony. Walker would also support the Trial Court's decision even if the Trial Court had completely denied alimony to the Appellant.

Another factor which is determinative in this case is the agreement made between the parties in which the Appellant agreed to forego alimony in exchange for all marital assets. R. p. 358. In Huck v. Huck, 734 P. 2d 417, 419 (Utah 1986), the Supreme Court



states that the agreements of the parties are not binding on the Court, but serve "as a recommendation". The Court stated in Nunley v. Nunley, 737 P. 2d 473, 475 (Utah App. 1988), that agreements between the parties should be "respected and given considerable weight in the Court's determination of an equitable division." Citing Clausen v. Clausen, 675 P. 2d 562, 564 (Utah 1983). Therefore, the Trial Court had the discretion to follow the terms of the agreement and deny Appellant any alimony. Equally within the Court's discretion, it divided the marital assets and awarded alimony, which allows Appellant to enjoy a standard of living similar to that she enjoyed during the marriage.

Other statements made by the Supreme Court support the Trial Court's decision. In English, 565 P.2d at 412 the Court states:

"This court ruled the trial court may properly consider a husband's historical earning ability, when he has experienced a temporary decrease in income, when determining the amount he should contribute for the support and maintenance of his family. This principle should be equally applicable, when the husband's experience prospers during one year."

The purpose of using historical earnings is to prevent a spouse from taking advantage of temporary circumstances in the determination of alimony. From the facts it could be observed by the Court that the Appellant is an opportunist trying to cash-in on the Appellees' post-separation financial success.

Financial contributions made by each of the parties to their

joint financial success is a valid factor to influence the Trial Court's award of alimony. English, 565 P.2d at 412. Here, the Appellee not only substantially supported the parties, but also the Appellant's four minor children from her first unsuccessful marriage. R. p. 356. Similarly, it was the Appellee who financed the purchase of the 1978 Delta motor home that Appellant sold for \$9,000.00. Appellant's Exhibit 7. Appellee also left the \$8,000.00 - \$10,000.00 with Appellant when he moved to Nevada, and sent the Appellant \$15,500.00 for mortgage payments before the Appellant filed for divorce and contributed a total of \$25,337.00 to Appellant between December, 1986 and the trial. R. p. 358, Tr. p. 100, 176. These facts support the Trial Court's decision.

The Court found the Appellant in good health, with no disabilities, R. p. 360. However, she only works as a seasonal employee of the Internal Revenue Service. Appellant went to great lengths to give a detailed account of her work history and her "persistent" struggle to obtain full time employment. Tr. pp. 48-57, 104. Appellant Exhibits 15, 23-30. Her age is offered as the excuse for her inability to obtain full-time employment. However, the Appellant did not attribute her failure to her lack of education or training, which is the one action Appellant blatantly refuses to do. Tr. pp. 84-85. The Appellee testified and the Appellant acknowledges that the Defendant offered to pay tuition and to financially support Appellant for several years so that she

could get the education or training needed to become a self supporting person. Tr. pp. 103, 159.

In Reed v. Reed, 594 P. 2d 871, 872 (Utah 1979) citing Wilson v. Wilson, 5 Utah 2d 79, 296 P. 2d 977 (Utah 1956), it states:

"The court may, and as a practical matter invariably does, consider the relative loyalty or disloyalty of the parties to their marriage vows, or the relative guilt or innocence in causing the breaking of the marriage."

Findings of the Court demonstrate that the Court rightly believed that the Appellee did desire and intend for the Appellant to move to Nevada and for the marriage to continue. R. p. 362. On the other-hand, Appellant abandoned the Appellee when he needed her the most. The grocery business had failed, and Appellee was forced to move to another state and live in much less comfortable circumstances than he enjoyed in Ogden, in order to obtain employment to support the family. His ego shattered, his life a mess, Appellant poured salt into his wounds by her refusal to move to Nevada to be with the Appellee, stating the house he had in Nevada did not compare with the home in Ogden. Tr. p. 80, 161. Under these circumstances, the Trial Court had discretion to favorably treat the Appellee.

According to Howell v. Howell, 806 P. 2d 1209, 1211 (Utah App. 1991), a case upon which the Appellant so heavily relies, this Court stated, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Utah R. Civ. P. 52(a): Jense v. Jense, 784 P.2d 1249, 1251 (Utah Ct. App.

1989)." The preponderance of the evidence in this case supports the Court's apparent credibility judgement in favor of the Appellee. Consequently, the Court has the discretion to make decisions which reflect its credibility judgement and favorably treat the Appellee in the Court's subsequent decisions.

Appellant seems to believe that Howell is directly on point with this case. This is an erroneous application of Howell. In contrast to the Howell case, there were no children born of this marriage which Appellant stayed home to raise. Even if it was only part-time, the Appellant did work throughout most of the marriage, while Mrs. Howell did not work. Also, the time between separation and the divorce filing and the Divorce Decree is twice as long in this case than in Howell.

The most important difference between the two cases deals with employment of the husbands. Mr. Howell never changed his job. He was a pilot for Western Airlines which was taken over by Delta Airlines. As a consequence of the takeover, Mr. Howell's income doubled. Howell 806 P.2d at 1210. This Court found that his salary increase was a type of "deferred income", even though as the dissent states, there was no commitment from Western that Mr. Howell's income "would increase if and because he stayed with the airline." Id. at 1215, n.2. But there is no way that the Appellee's income can be considered deferred income. Appellee worked for Smith's, quit to start a family business which failed,

then worked for Smith's again. Appellant's contention that Appellee's financial success was due to the experience of owning his own stores is ludicrous. Appellee was a store manager for Smith's before the parties married and was promoted to district manager only four months after the marriage. Tr. p. 117. The Appellant testifies that during the time the parties owned their own grocery business, Smith's repeatedly visited the store and tried to convince Appellee to resume employment with Smith's. Tr. p. 83. Finally, when Appellee did return to work for Smith's he was not made a store manager immediately. Tr. p. 127. His post-separation financial success was found by the Court to be a result of his efforts after the separation. R. p. 274.

When the Court held that the facts of Howell required a determination of standard of living at the time of Trial rather than at the time of separation, this Court wisely stated:

"In so concluding we do not intend to establish a rigid rule which must be followed in all domestic cases, but acknowledge that trial courts have discretion to determine the standard of living which existed during the marriage after consideration of all relevant facts and equitable principles."

Howell 806 P.2d at 1212

The principle applied in Howell is very fact specific and this Court did not mention or apply Howell to two subsequent cases. Rudman v. Rudman, 812 P. 2d 73, 76 (Utah App. 1991); Roberts v. Roberts, 188 Utah Adv. Rep. 26, 28 (Utah App. 1992). (No case was found where Howell was followed)

Gardner v. Gardner, 748 P. 2d 1076 (Utah 1988) is referred to by Appellant to show that alimony should try to "equalize the parties respective standard of living enjoyed during the marriage." Here again it is important to note the requirement "enjoyed during the marriage." The Court also stated that Mrs. Gardner had not worked for almost thirty years, and had actually enjoyed the benefits of Mr. Gardner's \$6,000.00 per month salary. Also, the Court mentioned that the amount of alimony awarded by the Trial Court was not sufficient to meet the needs of the monthly expenses listed on an affidavit executed by Mrs. Gardner prior to trial. Id. at 1081. All this drastically contrasts to the facts of this case.

As the Trial Court accurately found, the Appellant did not enjoy a high standard of living. R. p. 360. The Court found that previous to the parties' business bankruptcy and separation, Appellant's take home pay was \$500.00 per week. R. p. 360. The exhibits admitted by both parties show that the average annual income for the years 1983 to 1986 was \$2,701.74. If 1987 income is included, the annual average is increased to \$8,513.19. Appellant's Exhibit No. 17, 18, Appellee's Exhibits No. 15, 16, 17. Appellant's current income of \$9,780.00 or more is \$1,266.81 more than the parties averaged from 1983 to 1987. With alimony and her own income, Appellant will have an annual income of about \$22,000.00, "which is almost equal to that which the parties were

living on when the Defendant was drawing \$500.00 per week from his business prior to separation of the parties, and represents a monthly amount greater than the amounts set out in the Affidavit of monthly expenses as filed by the Plaintiff." R. p. 364.

Two more cases are presented by the Appellant in an attempt to show that alimony should be set to maintain "a standard of living not unduly disproportionate to that which they would have enjoyed had the marriage continued." Savage v. Savage, 658 P. 2d 1201, 1205 (Utah 1983), see also Naranjo v. Naranjo, 751 P. 2d 1144, 1147 (Utah App. 1988). It is worth noting that the Court in both cases stated in the opinions that alimony should maintain the standard of living "enjoyed during the marriage." Savage, 658 P.2d at 1205; Naranjo 751 P.2d at 1146, 1147. (Emphasis added) Even so, these two cases can be factually differentiated from this case to show that "had the marriage continued" theory is inapplicable here.

In Savage, the husband had continued employment with the same company throughout the marriage and divorce. Savage 658 P.2d at 1202. The wife remained a full-time homemaker and caretaker for the parties' three children. Id. at 1203. Additionally, the Court found Mrs. Savage had enjoyed a high standard of living during the marriage and that the alimony awarded by the Trial Court was just barely over one-half of Mrs. Savage's monthly expenses. Id. at 1205. In Naranjo, the wife had been a full-time homemaker for the sixteen years prior to the divorce while the husband had developed

a successful trucking business. Naranjo 751 P.2d at 1147.

Despite the wording of these two cases, the Trial Court did not abuse its discretion in the amount of alimony awarded in this case. In Howell 806 P.2d at 1212, this Court stated that a Court "can properly address what situation would have existed if the parties had not separated earlier." Appellant testified that the only way the separation would not have occurred is if Appellee had remained in Ogden. Tr. p. 82. Appellee did not receive a job offer from Smith's to work in Utah. Tr. p. 162. The only job offer Appellee received in the Ogden area was a job as freight unloader/stocker with Harmon's earning seven dollars an hour. Tr. p. 162. The standard of living that the Appellant would have enjoyed if the separation had not occurred earlier, or if there was no divorce, would be a very minimal standard of living, which standard the Appellant surpasses with her current income plus the alimony awarded by the Trial Court.

Judicial economy does not necessarily require that the Court use the standard of living of the parties at the time of the trial to determine the amount of alimony. When the Trial Court awards alimony, it is presented with all the facts relevant to the case, including the standard of living actually enjoyed by the parties before the separation of the parties and the standard of living they enjoyed at the time of trial. Any material change in circumstances prior to the divorce will be considered and included



in the Court's decision, and any future changes in the alimony award will be because the Trial Court abused its discretion, not simply because of a pretrial material change of circumstances. Consequently, judicial economy is achieved regardless of which standard of living is used.

Cases have been cited by Appellant to show that the value of marital assets be determined at the time of trial. Berger v. Berger, 713 P.2d 695, 697 (Utah 1985); See also Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980). The implication is that the standard of living must also be determined at the time of trial. However, this Court points out in Howell, 806 P.2d at 1211, the "courts can, however, in the exercise of their equitable powers, use a different date, such as the date of separation, if one party has 'acted obstructively,...'" citing Peck v. Peck, 738 P.2d 1050, 1052 (Utah App. 1987). The Trial Court has the discretion to equitably determine the value of marital property, as well as the standard of living at the time of separation. The facts in this case support the Trial Court's equitable determination that the applicable standard of living was that which the parties enjoyed at the time of their separation. Appellant did not meet the burden of proof to show the findings were "clearly erroneous." Riche v. Riche, 784 P.2d 465, 468 (Utah App. 1989); citing Matter of Estate of Bartell, 776 P.2d 885, 886 (Utah 1989) (quoting State v. Walker, 743 P.2d 191, 193 (Utah 1987)).

II. IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DECLARE THE HOME, CURRENTLY TITLED IN THE APPELLANT'S NAME, AS MARITAL PROPERTY TO BE DIVIDED.

The general rule is that "property acquired after {Marriage} is marital property." Walters v. Walters, 812 P. 2d 64, 68 (Utah App. 1991). In the distribution of property in a divorce, the trial court has "wide discretion", Fletcher v. Fletcher, 615 P. 2d 1218, 1222 (Utah 1980), and its decisions will not be disturbed unless it is clearly unjust or a clear abuse of discretion. Gardner v. Gardner, 748 P. 2d 1076, 1078 (Utah 1988). Appellant has the burden to show error. Berger v. Berger, 713 P. 2d 695, 697 (Utah 1985).

The Trial Court properly found the family residence to be a marital asset, and the Appellant's interest in the partnership was found to have no equity. R. p. 361. Although, Appellant denies any knowledge of this fact, in view of all the stress due to the bankruptcy it is "highly unlikely" that Appellant didn't know. Secondly, the Quit-Claim Deed, the incorporation, and the corporate bankruptcy all occurred in a short period of time. Another fact which supports the Court's decision is that the \$8000 - \$10,000 received and kept by Appellant as a share of the stores' cash on-hand at the time of the corporation bankruptcy was given to both Appellant and Appellee. R. p. 358. Appellant testified that the money was to "be split between Colin and I, for us together". Tr. p. 18. Perhaps the most convincing evidence to the Trial Court's decision comes from the Appellant herself. In recounting a

discussion between the parties which occurred after the Quit Claim Deed was executed, the Appellant repeatedly states, in her testimony, "We have a house in Ogden." Tr. pp 79, 80, 81. Obviously, Appellant considered the home to be a marital asset.

A case which has many similarities to the case at hand is Hogue v. Hogue, 184 Utah Adv. Rep 63 (Utah App. 1992). In Hogue, Mr. Hogue purchased a ranch with his own money after his divorce from Mrs. Hogue. Later Mr. Hogue conveyed, by Quit-Claim Deed, sole ownership of the ranch to Mrs. Hogue. The next month Mr. and Mrs. Hogue were remarried. The second divorce decree, which was upheld by the Appellate Court, declared the ranch to be a marital asset. Id., at 64.

Appellant would have this Court believe that the court in Hogue was correct when it found the ranch was marital property, but then argues it would be an abuse of discretion to find the home, marital property, in this case. The argument of Appellant is without merit. The general rule that property acquired during a marriage is marital property applies to this case, since the home was purchased while the parties were married. It is inapplicable to Hogue, however, because the ranch was purchased by Mr. Hogue while he was single; between his two marriages to Mrs. Hogue. Equally illogical, is Appellant's assertion that the Quit-Claim signed by Mr. Hogue has less validity than the Quit-Claim Deed signed by Appellee. If one Quit-Claim Deed has more validity than the other,

then Mr. Hogue's quit-claim deed would be more valid. Mr. Hogue purchased the ranch while he was single, had sole ownership of the property, and had not yet remarried Mrs. Hogue when he executed the Quit-Claim Deed to her. Whereas, in this case, the parties purchased the home during the marriage, had joint ownership of the home, and Appellee executed the quit claim deed to his spouse, the Appellant.

When a Trial Court must distribute property in a divorce a factor that affects the Courts' decision is the credibility of the witnesses. Howell 806 P.2d at 1211. In addition to the issues previously discussed regarding the credibility of the Appellant's testimony, a few other discrepancies in her testimony may have influenced the Courts' decisions. First, Appellant emphatically denies that the Quit-claim Deed was signed to protect the home from the business creditors' claims, yet she readily admits that the title to the Lincoln automobile was signed over to Appellant's daughter for that very reason, Tr. pp. 86 & 88. Appellant admits that it was a smart thing to do. Tr. p 88. Another example is Appellant's statement that Appellee said at the time of conveyance that he wanted out of "her" house. Tr. pp. 32, 87. But Appellee stayed in "her" house for another seven months and moved out only because he was forced to move to Las Vegas, Nevada in order to get a decent job. Tr. pp. 162, 83. Appellant claims that she was a partner in the grocery business and that Appellee executed the

Quit- Claim Deed in exchange for her interest in the partnership. Tr. pp. 28, 32, 87. Yet, when asked who were partners in the business, Appellant omits herself as a partner. Tr. p. 26, 27. Lastly, the Appellant stated that the bankruptcy was "from our business" (emphasis added), not Appellee's business. Tr. p. 19.

As previously discussed, loyalty or disloyalty of the parties to the marriage may properly be considered by the Trial Court. Reed, 594 P.2d at 872. This principle is equally or even more applicable to the distribution of marital property than it is to the determination of alimony. Appellant should not be rewarded by receiving sole ownership in the family residence when it is Appellant that cruelly abandoned Appellee.

Judicial, or Quasi Estoppel, is not applicable to this case. The bankruptcy filed in November, 1986 was a corporate bankruptcy. Since Appellee refused to sign the lien as requested by the Utah Bank and Trust, Tr. p. 122, there was no claim by the corporation's creditors against the marital residence so Appellee did not have to disclaim his interest in the house. Furthermore, there was no attempt by any creditor to set aside the corporate identity as a "sham", so the personal assets of the parties were never a part of the bankruptcy. Tr. p. 123. Consequently, the Appellee never obtained any relief in a previous action by disclaiming his interest in the home so the Appellant's claim of Judicial or Quasi Estoppel is totally without merit. These circumstances do not in

any way undermine the Trial Courts' position that the Quit-Claim Deed was solely for the purpose of protecting the marital residence from the claims of business creditors. The parties fears of the impending bankruptcy and the possibility of an attempt to pierce the corporate veil were real and it was logical and reasonable for the parties to put as much distance, as possible, between the business creditors and the parties ownership of the marital residence. These circumstances, the potential bankruptcy, explains why Appellant was never made an officer or director of the corporation, and also why she was requested not to come to work at the business for several weeks before the bankruptcy was filed. Tr. p. 120.

Even if Appellee had actually disclaimed any interest in the marital residence in the corporation's bankruptcy, which he did not, there are defenses to Appellant's argument of Judicial and Quasi Estoppel. In Hogue, Mr. Hogue filed for bankruptcy under Chapter 7 and claimed no interest in the ranch. This occurred three years after the Quit-Claim Deed to Mrs. Hogue. Hogue, p. 64. Neither the Trial Court nor the Appellate Court had a problem with Judicial and Quasi Estoppel and declared the ranch marital property. If these doctrines were not applicable in Hogue they are even less applicable here, because in this case the bankruptcy was corporate not personal, as in Hogue.

Another valid defense exists to Appellant's claim of Judicial

or Quasi Estoppel. There is a well established rule in Utah that "an appellant cannot raise a theory on appeal for the first time different from that presented to trial court." First Equity Corp. of Florida v. Utah State Univ., 544 P. 2d 887 (Utah 1975); see also Ream v. Fitzen, 581 P. 2d 145 (Utah 1978); Bullock v. Joe Bailey Auction Co., 580 P. 2d 225, (Utah 1978); Hanover Ltd. v. Fields, 568 P. 2d 751 (Utah 1977); Nelson v. Newman, 583 P. 2d 601 (Utah 1978). Nowhere in the pleadings of record, or in the trial transcript did the Appellant assert the theory of Judicial or Quasi Estoppel. Therefore, Appellant is barred from asserting these theories on appeal. Failure of the Court to address this theory was not an abuse of the Court's discretion since it was not the responsibility of the Court to argue Appellant's case.

Finally, if the Court had found the Quit-claim deed valid and that Appellant had sole ownership of the home, the Trial Court still has the discretion to declare the home marital property. If Appellant did receive sole ownership of the family residence it was during the marriage and under the general rule the family residence would be considered marital property. There are ample Utah precedents that state that even when a party brings separate property into a marriage it may be declared marital property if the other spouse has, through his or her own, "contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it." Osguthorpe v. Osguthorpe

804 P.2d 530, 535 (Utah App. 1990); citing Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988); Burt v. Burt, 799 P.2d 1166, 1169 (Utah App. 1990); Dubois v. Dubois, 29 Utah 2d 75, 504 P.2d 1380, 1381 (Utah 1973). State of title is not binding on the Court when it determines what property is part of the marital estate. Smith v. Smith, 738 P.2d 655, 657 (Utah App. 1987); Huck v. Huck, 734 P. 2d 417, 420 (Utah 1986); Workman v. Workman, 652 P. 2d 931, 933 (Utah 1982); Jackson v. Jackson, 617 P. 2d 338, 340-41 (Utah 1980). The overriding consideration of the disposition of the marital assets is that it is fair and equitable. Newmeyer 745 P.2d at 1278. Equity demands that the residence be held by the court to be a marital asset.

III. IT WAS NOT AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY APPELLANT AN AWARD OF ATTORNEY'S FEES.

Section 30-3-3 Utah Code Annotated, 1953, as amended, allows a trial court to award attorney fees in divorce proceedings. On the question of attorney's fees, the Utah Court of Appeals has stated: "If either financial need or resonableness has not been shown, we have reversed awards of attorney's fees." Haumont v. Haumont 793 P.2d 421, 426 (Utah App. 1990). "Where insufficient evidence is presented on the reasonableness of the requested attorney's fees or the financial need of the receiving spouse, no fees are awarded." Hagen v. Hagen, 810 P.2d 478, 484 (Utah App. 1991). Ordinarily, when fees in a divorce were awarded below to



the party who then prevailed on appeal, fees will also be awarded to that party on appeal. Conversely, when they were not awarded below, we will not generally award them on appeal, except when a party has presented a well-supported claim of changed circumstances." Burt v. Burt, 799 P. 2d 1166, 1171 (Utah App. 1990).

The award of attorney's fees must be based upon three factors: "One, evidence of financial need of the receiving spouse; Two, the ability of the other spouse to pay; and Three, the reasonableness of requested fees." Rasband v. Rasband, 752 P. 2d 1331, 1337 (Utah App. 1988). Appellant contends that the Trial Court's findings are inadequate and that financial need exists on the part of the Appellant.

A. THE TRIAL COURT'S FINDINGS ARE ADEQUATE.

The Trial Court did make adequate findings. The findings are found in the Second Amended Findings of Fact and Conclusions of Law dated May 7, 1992. Regarding Appellant's contention that the Trial Court's findings in this case are inadequate, this Court has stated:

"A footnote in a recent Utah Supreme Court Case suggests that, where there are no findings, or where the findings are inadequate, the general rule requires us to affirm whenever it would be reasonable to find facts to support a given conclusion. State v. Ramirez 817 P. 2d 774, 787, n. 6, (Utah 1991). ....Rule 52(c) permits findings and conclusions to be waived under certain circumstances except in divorce actions, lending further support for the requirement that findings must be made by the trial court in a divorce action. ....if we were to infer findings where there are none, as suggested by

Ramirez, it would be only reasonable to place the burden on the one challenging the implied findings and the resulting conclusion to marshal the evidence in support of such findings and to show how the evidence, viewed in the light most favorable to the trial court, is nevertheless insufficient to support the implied findings. *Doelle v. Bradley*, 784 P. 2d 1176, 1178 (Utah 1989). Without this requirement, the burden on the appellate courts to go through volumes of transcripts and exhibits in search of evidence supporting the implied findings would be prohibitive. It would also place the reviewing court in the untenable position of 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, 76 (Utah App. 1991).

The footnote in *Rudman* would indicate that the Appellant in this case needed to marshal the evidence in support of the findings and to show how the evidence viewed in the light most favorable to the Trial Court, is nevertheless insufficient to support the findings and conclusions of law rendered by the Trial Court. *Rudman* is not the only divorce case which holds that the Appellant must marshal the evidence:

"However, Husband does not 'marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" *Riche v. Riche*, 784 P.2d 465, 468 (Utah App. 1989).

In spite of the requirement to marshal the evidence, Appellant has only argued the facts favorable to her case, while ignoring the Trial Court's findings, similar to the following case:

[Plaintiff] "has not even attempted to marshal the evidence in support of the trial court's findings, nor has she attempted to demonstrate that the trial court's findings are against the clear weight of the evidence, as required by Walker. Instead, she has essentially reargued the factual

case submitted below, construing all evidence in a light most favorable to her case and largely ignoring the evidence supportive of the trial court's findings. This leads us to rely heavily on the presumption of correctness that attends these findings under Rule 52(a)." Matter of Estate of Bartell, 776 P.2d 885, 886 (Utah 1989)

B. IN ANY EVENT, THE TRIAL COURT'S ANALYSIS WAS SOUND,  
BASED ON THE EVIDENCE SET FORTH IN THE RECORD.

The evidence as found by the Trial Court included the amounts of money that Appellant would have at her disposal in order to pay her attorney's fees, which are: the seasonal employment with the Internal Revenue Service including unemployment compensation at over \$9,780.00 per year; \$400.00 per month in alimony, plus \$600.00 per month against the substantial arrearage in alimony amounting to \$27,507.00; \$9,000.00 from the sale of the motor home by Appellant; \$8,000.00 or \$9,000.00 in cash left by the Appellee for the benefit of Appellant; the first \$19,672.00 from the sale of the marital house valued at \$85,000.00 to \$97,000.00; one half of the balance of the proceeds from the sale of the parties' residence representing another \$35,000.00 plus to Appellant; and essentially all of the other marital assets. The evidence clearly establishes that Appellant has no financial need for assistance in paying her attorney's fees. To the contrary, the evidence shows that Appellant has the financial resources to pay her attorney's fees. And it is fair and equitable that she do so.

The Utah Supreme Court and the Utah Court of Appeals have held in two separate cases that the Trial Court record disclosed sufficient evidence regarding financial need:

"Evidence of defendant's need for assistance in paying her attorney fees unfolded during the entire trial, so a special proceeding specifically concerned with determination of her need is not necessary. The Utah Supreme Court similarly concluded in *Newmeyer v. Newmeyer*, 745 P. 2d 1276, 1279 (Utah 1987), stating: 'because ample evidence of [the wife's] financial condition was before the court we reject [the husband's] argument that the trial court's finding of need was unsupported by the evidence.'" Porco v. Porco, 752 P.2d 365, 368 (Utah App. 1988)

"Plaintiff also contends that the district court erred in not ordering defendant to pay her attorney's fees, and she requests attorney's fees for the purposes of this appeal. An award of attorney's fees is largely discretionary with the court, and as the record shows that plaintiff is working and earning money, and does not disclose any necessity on the part of plaintiff for such award, or her inability to pay her own attorney's fees, we do not find any abuse of the court's discretion in its denial of such fees. Attorney's fees on appeal are denied for the same reason." Adams v. Adams, 593 P. 2d 147, 149 (Utah 1979).

In this case Appellant is working and earning money from her seasonal employment with the Internal Revenue Service. When she is not working with the I.R.S., she receives unemployment compensation, all of which totals in excess of \$9,780.00 per year. The findings in the Trial Court, as found by the Honorable Ronald O. Hyde District Judge, indicated that her list of monthly expenses reflected a desire on her part to obtain high alimony rather than reasonably advising the court as to her actual needs. If, as the Appellant contends, the Trial Court's findings are deficient because they fail to evaluate the Appellant's financial need, it is reasonable to conclude that the Trial Court found that Appellant did not have any financial need for an award for attorney's fees to be paid. This Court emphasized the need for specific findings:

"We therefore remand the issue of fees for specific findings regarding the financial needs for Mrs. Rudman. In the event the court on remand determines that need exists, the court should then make findings as to the reasonableness of .... the attorney fees." Rudman, 812 P. 2d 73, at 77. (emphasis added).

The Trial Court did make specific findings regarding Appellant's financial need, which are discussed below.

It would seem reasonable that the Trial Court determined that Appellant's financial condition did not require that her attorney's fees be paid by the Appellee. If the Trial Court had made a finding that need existed, then the Trial Court would have made findings regarding the reasonableness of her attorney's fees.

C. APPELLANT/PLAINTIFF HAS NOT PRESENTED SUFFICIENT EVIDENCE OF HER FINANCIAL NEED.

Factor Two in the awarding of attorney's fees is the ability of the other spouse to pay. The Trial Court analyzed and considered Appellee's ability to pay Appellant's attorney's fees and found that after the bankruptcies, the Appellee reobtained employment with Smith's and became a store manager, but he later developed rheumatoid arthritis and had to down grade his job to that of a buyer.

Regarding Factor One, evidence of financial need of the receiving spouse, the Trial Court found that the Appellee had left in the possession of the Appellant approximately \$8,000.00 to \$10,000.00 in cash and the motor home of the parties, which at a later time the Appellant sold for \$9,000.00 cash, which she also

retained entirely. The Appellee also left with the Appellant all of the house furnishings, furniture, the house and lot with swimming pool, a 1980 Lincoln Town Car, and a 1976 Chevrolet, of which she has had sole control and use since December of 1986. The Court also found that none of the \$8,000.00 to \$10,000.00 cash or the \$9,000.00 received by the Appellant from sale of the motor home was shared by Appellant with the Appellee.

The Trial Court also found that Appellant is currently employed as she has been for some time, with the United States Treasury Department, Internal Revenue Service, as a GS-5 step 1, with a part time gross pay of \$8,280.00 plus unemployment for ten weeks giving her a total gross yearly income of \$9,780.00. In addition, the Court found that Appellant testified that she would receive an increased income from her employment in 1992. The Court also found that Appellant's health is good and she suffers no disabilities.

Furthermore, the Trial Court found:

"that Plaintiff [Appellant] filed an Affidavit of Monthly Expenses showing present monthly expenses of \$1796.00 per month; however, Plaintiff's claims, of her expenses, is more a 'wish list than a needs list'.

An example of that fact is that her transportation expense list shows \$531.00 for transportation expense though her testimony is that she drives very little. She also indicates that her personal expenses of \$270.00 per month includes recreation and travel of over \$130.00, and she testified that she does not travel and that she spends very little money on recreation. In addition, she recites that her personal food expenses totaled \$350.00 per month which is not a realistic sum to spend for one person, and reflects a desire on the part

of the Plaintiff to obtain high alimony rather than reasonably advising the Court of the Plaintiff's actual expenses."

See Finding No. 23 in the Second Amended Findings of Fact and Conclusions of Law, by Ronald O. Hyde, Judge, dated May 7, 1992.

The Trial Court, in its Conclusions of Law stated that the house and lot should be sold, and that from the net sale proceeds the Appellant should be awarded the first \$19,672.00 without interest, representing Appellant's equity from her prior home, prior to the marriage of the parties, and the balance of the remaining equity should be divided, one-half to the Appellant, and one-half to the Appellee. The house and lot had been appraised twice for \$97,000.00 and \$85,000.00. The Court also concluded that there was delinquent alimony owed to the Appellant in the sum of \$27,507.00, that the Appellant should be awarded ongoing alimony, and that the Appellee should pay to the Appellant the sum of \$600.00 per month in liquidation of the delinquent alimony sum of \$27,507.00 which the Court calculated will take 45.845 months and that the Appellee should not be required to pay interest on the delinquent alimony. The Court also concluded that neither party had much retirement benefits accumulated, but each should have an interest in the other's retirement per the Woodward v. Woodward formula. Woodward v. Woodward, 656 P.2d 431 (Utah 1982)

In addition, the Court concluded:

"The Plaintiff [Appellant] in receiving \$12,000.00 a year for 3.8 years from the Defendant, plus her current earnings on a part time basis of \$9,780.00, or more, will provide Plaintiff with a gross income of almost \$22,000.00 per year which is

almost equal to the income both parties were living on when the Defendant was drawing \$500.00 per week from his business prior to the separation of the parties, and represents a monthly amount greater than the amounts set out in the Affidavit of Monthly Expenses as filed by the Plaintiff. Therefore, the Plaintiff and the Defendant should each pay their own attorney's fees and costs." See Conclusion of Law No. 14, Second Amended Findings of Fact and Conclusions of Law, dated May 7, 1992.

It is apparent that the Trial Court considered that the Appellant's financial need was in question. The Trial Court Judge stated in his Memorandum Decision and in the Second Amended Findings of Fact and Conclusions of Law, that the Appellant's Affidavit of Monthly Expenses was made more "with the view to obtain high alimony than to advising the Court of her actual expenses." It seems reasonable to conclude that the Trial Court thought that Appellant had inflated claimed expenses to indicate a financial need greater than existed, or perhaps where none existed.

The Appellant in this case has adequate resources to pay her attorney's fees as found by the Trial Court. The findings adequately show that Appellant has no financial need for an award of attorney's fees and that both parties are able to pay for their own attorney's fees:

"Wife requests attorney fees at trial and on appeal. Attorney fee determinations at trial lie within the trial court's sound discretion. *Munns v. Munns* 790 P. 2d 116, 123 (Utah App. 1990). Consequently, we will not disturb the court's finding that 'both parties are capable of paying the same, because we find no abuse of discretion.'" *Roberts v. Roberts*, 188 Utah Adv. Rep. 26, at 29 (Utah App. 1992).

In a 1990 case, this Court held that a substantial judgment for arrearages in alimony could be used to satisfy payment of



attorney's fees. The Trial Court heard evidence on need and chose not to award the wife attorney's fees and costs. In its opinion the Utah Court of Appeals stated the following:

"Wife does not challenge the court's denial of attorney's fees below nor does she assert on appeal any facts in addition to those presented to the trial court concerning her financial need. She does not claim her situation has deteriorated since the trial....furthermore, the wife was awarded a substantial judgment for arrearages in alimony which could be used to satisfy her fees." Bagshaw v. Bagshaw, 788 P.2d 1057, 1062 (Utah App. 1990).

As in Bagshaw, this Appellant has received a substantial judgment for arrearages in alimony which could be used to satisfy her attorney's fees. It is reasonable to conclude that the trial Court did not abuse its discretion in determining that the Appellant has adequate financial resources to pay her attorney's fees.

IV. THE TRIAL COURT DID NOT ERR IN DENYING JUDGMENT INTEREST ON PAYMENTS TO APPELLANT UPON A JUDGMENT FOR TEMPORARY ALIMONY AWARDED TO HER PRIOR TO THE TRIAL HEREIN.

Argument I. THE "JUDGMENT" REFERRED TO BY APPELLANT IS NOT A FINAL JUDGMENT FOR PURPOSES OF SECTION 15-1-4 OF THE UTAH CODE.

A. THE "JUDGMENT" FOR TEMPORARY ALIMONY AS REFERRED TO BY APPELLANT, IS ENTITLED "RECOMMENDED ORDER ON ORDER TO SHOW CAUSE AND ORDER" DATED MAY, 1991 AND IS NOT A FINAL JUDGMENT. IT IS AN INTERLOCUTORY ORDER.

Appellant contends that past due alimony in the amount of \$21,935.00 was reduced to "judgment" at a hearing held in May in 1991. The hearing regarding the past due temporary alimony was

held on April 30, 1991 before the Honorable Maurice Richards, domestic relations commissioner, who presented recommendations to the Honorable Ronald O. Hyde, District Judge. Those recommendations were embodied in a "Recommended Order on Order to Show Cause and Order." Appellee (Defendant) asserts that the Order entitled "Recommended Order on Order to Show Cause and Order" is not a final judgment for purposes of appeal. Appellee asserts that the Order is interlocutory, which means that it is not a final decision of the whole controversy; it merely determines one point in the cause of action, and only decides some intervening matter pertaining to the cause, which requires some further steps to be taken in order to enable the Court to adjudicate the entire cause of action on the merits. An order is not a final judgment when claims and issues remain pending in the trial court:

"For purposes of appeal, 'final judgment' is one which ends litigation and leaves no claim remaining for resolution."

Tippets v. Page Petroleum, Inc., 738 P. 2d 635 (Utah 1987).

In this case, the "Recommended Order on Order to Show Cause and Order" was an interlocutory order and is not a final judgment because the divorce decree had not been executed or entered by the Trial Court. The Order is not a final judgment because claims regarding other divorce issues were pending in the Trial Court. The "Recommended Order on Order to Show Cause and Order," for temporary alimony, referred to by Appellant as a judgment, is not a final judgment but is an interlocutory order.

B. IN ANY EVENT, WHETHER SAID ORDER IS INTERLOCUTORY OR IS A FINAL JUDGMENT, APPELLANT DID NOT COMPLY WITH THE UTAH RULES OF CIVIL PROCEDURE AND THE UTAH RULES OF APPELLATE PROCEDURE.

Rule 54 of the Utah Rules of Civil Procedure states:

(a) "judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings. (b) When more than one claim for relief is presented in an action, .... the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination by the court that there is no just reason for delay and upon an expressed direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or all the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Utah R. Civ. P. 54.

In this case the "Recommended Order on Order to Show Cause and Order" did not have an express determination by the Court that there was no just reason for delay and did not have an express direction for the entry of judgment. As such, the "Recommended Order on Order to Show Cause and Order" is not a final judgment for purposes of Rule 54.

Rule 58A(c) and (d) state:

"A judgment is complete and shall be deemed entered for all purposes, ....when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the Register of Actions and the Judgment Docket. The prevailing party shall promptly give notice of the signing or entry of the judgment to all other parties and shall provide proof of service of such notice with the clerk of the court. ...." Utah R. Civ. P. 58A.

If the Appellant considered the "Recommended Order on Order to Show Cause and Order" as a final judgment, Appellant did not have the clerk make a notation of the judgment in the Register of Actions and the Judgment Docket. Neither did the Appellant promptly give notice of the signing or entry of judgment to other parties and file proof of service of such notice with the clerk of the court.

The Utah Rules of Appellate Procedure, Rule 4(a) states:

"In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from."

Rule 5(a): "An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court, with proof of service on all other parties to the action." Utah R. App. P. 4,5.

If Appellant considered the "Recommended Order on Order to Show Cause and Order" to be a judgment or an interlocutory order, on which right of appeal did exist, Appellant did not file the proper notice of appeal within the required number of days. For judicial economy and to save time, Appellant has appealed this particular "Order" with her appeal of the divorce decree. It is reasonable to conclude that Appellant did not consider the "Order" as a final judgment and waited to appeal the "Recommended Order on Order to Show Cause and Order" until the Memorandum Decision and Decree of Divorce were executed and entered by the Trial Court.

Therefore, the "Recommended Order on Order to Show Cause and Order" is not a final judgment.

"The final judgment rule, which underlies what is now Utah Rules of Appellate Procedure 3, precludes a party from taking an Appeal from any orders or judgments that are not final. However, there are exceptions to the final judgment rule when the order in question is eligible for certification under Utah Rule of Civil Procedure, 54(b) and has been properly certified or when we have given permission in advance to the parties to take an appeal from an interlocutory order under Utah Rule of Appellate Procedure 5. [Citations omitted]. Here, because the order appealed from was not final and was not certified nor eligible for certification under Rule 54(b), it was not properly taken." A.J. Mackay Co. v. Okland Const. Co., 817 P. 2d 323, 325 (Utah 1991).

The "Recommended Order on Order to Show Cause and Order" is not a final judgment, according to the Utah Rules of Appellate procedure. Appellant neither certified the "Order" nor received permission to appeal the "Order". As stated in Utah Rules of Civil Procedure, Rule 54, this particular Order was not a final Order at the time it was rendered. The Order was not final for the simple reason that other claims and issues in the case were pending before the Trial Court. Therefore, the "judgment" received in May of 1991 was merged into the divorce decree.

C. IN THE ALTERNATIVE, SAID ORDER WAS IMPROPERLY  
EXECUTED AND IS THEREFORE, DEFECTIVE.

The "Recommended Order on Order to Show Cause and Order" may not be considered a final judgment because it is defective. As stated above, the hearing was held on April 30th, 1991, and the recommendations were signed by the Domestic Relations Commissioner on May 20, 1991. A Notice attached to the Order indicates that the

Appellee had ten days from May 9, 1991 to file any written objections and the document was dated and mailed May 10, 1991. Ten days from that date would be the 19th or 20th of May, 1991. However, there is also the Order itself which states:

"That ten days having expired since the date of hearing, defendant [appellee] failed to file any objections, it is hereby ordered that said recommendations be and are hereby approved and ordered."

Ten days from the date of hearing would be May 10, 1991. But the Order was signed by Ronald O. Hyde, District Court Judge on May 8, 1991. The "Recommended Order on Order to Show Cause and Order" was filed on May 28, and entered May 29, 1991. It is obvious that since the Judge signed the Order on May 8, and ten days for the Notice expires on May 19 or May 20, of 1991, and ten days from hearing expires on May 10, 1991, that the Order is defective.

During the time that the appeal was in process, Appellee's Counsel made a call to the clerk of the Second District Court inquiring about exhibits and also inquiring about dates on this particular Order. Appellee's Counsel was informed that the signature of the Judge was May 8, of 1991. When the Pleadings were received by this office in September, 1992, it was apparent that someone had altered the date on the Order attached to the "Recommended Order on Order to Show Cause and Order". A "2" had been inserted in front of the "8" on the dateline of the Order, making the date of the Order to appear to be May 28, 1991. A copy of the altered Order is included with this brief.

Argument II. ALIMONY IS NOT GOVERNED BY SECTION 30-3-10.6 OF  
THE UTAH CODE.

Section 30-3-10.6 of the Utah Code Annotated reads:

"(1) each payment or installment of child or spousal support under any child support order as defined by subsection 62A-11-401(3) is, on and after the date it is due:

(a) A judgment with the same attributes and effect of any judgment of a district court, ....

(b) Entitled, as a judgment, to full faith and credit in this and in any other jurisdiction; ...." Section 30-3-10.6 Utah Code Annotated 1953, as amended.

Section 62A-11-401 of the Utah Code defines what "child support order" means:

"(3) 'Child Support Order' means a judgment, decree, or order of a court or administrative body whether interlocutory or final, whether or not prospectively or retroactively modifiable, whether incidental to a proceeding for a divorce, judicial or legal separation, separate maintenance, paternity, guardianship, civil protection, or otherwise, which:

(a) establishes or modifies child support;

(b) reduces child support arrearages to judgment; or

(c) establishes child support or confirms a child support order under Chapter 31, Title 77." Section 62A-11-401, Utah Code Annotated, 1953 as amended.

Section 30-3-10.6 refers to child support or spousal support under any child support order, as defined by Section 62A-11-401 of the Utah Code. Alimony is not governed by Section 30-3-10.6, as the Appellant contends. Appellant argues that Whitehead v. Whitehead, 193 Utah Adv. Rep. 8 (Utah App. 1992), requires that interest must be awarded on temporary alimony arrearages. But the Appellant misreads Whitehead, because only child and spousal

support payments are governed by section 30-3-10.6 which is defined by subsection 62A-11-401(3). Alimony itself is covered in another section of the Whitehead opinion. The Court does not connect child and spousal support payments with alimony in the opinion.

Appellant also cites Stroud v. Stroud 738 P.2d 649 (Utah 1987), aff'd 758 P.2d 905 (Utah 1988), as a case to show that interest should be allowed on temporary alimony granted before the divorce decree. In the Stroud case, plaintiff, Karen Stroud, asked the Court to issue an Order to Show Cause why judgment should not be entered against the defendant for past due child support. Plaintiff, Karen Stroud and Defendant James Stroud were divorced on June 20, 1972. The decree had ordered defendant to pay child support of \$75.00 per child per month. On September 20, 1983, the Trial Court issued an Order to Show Cause why judgment should not be entered against defendant for past due child support. The Trial Court found in favor of the plaintiff and ordered defendant to pay her \$18,815.00 in principle and interest plus attorney's fees and court costs, with interest on the unpaid balance to accrue at 12% per annum until paid. Defendant asked the court to prohibit the accrual of interest on the unpaid judgment provided he remained current on his payments. However the Court could not waive the interest on the judgment.

Appellant in the instant case, compares the Stroud case with the facts herein before the Court to claim interest on temporary



alimony to be awarded before the divorce decree and to be governed by a child support order statute. This is clearly not the law.

Appellant is urging this court to award pre-judgment interest on alimony arrearages which occurred before the trial date, and before the divorce decree was entered. Section 30-3-10.6 is not applicable to alimony, but only child and spousal support payments under a child support order.

Argument III. INTEREST SHOULD NOT BE AWARDED ON PAST DUE  
TEMPORARY ALIMONY PAYMENTS BEFORE THE DIVORCE  
DECREE IS ENTERED.

There is persuasive law which states that interest should not be awarded on temporary alimony ordered before the divorce decree is entered.

In Dube v. Dube, plaintiff attempted to revive a temporary alimony order granted 3 years before the final divorce decree was filed. The Court ruled that the temporary order was not a final judgment capable of being revived and stated:

"Temporary alimony or support is also referred to as alimony pendente lite interim alimony, or interlocutory alimony and 'is an allowance by the court for the maintenance of a spouse during pendency of a matrimonial action. [Kansas law] allows a court to award maintenance pendente lite .... an award of temporary maintenance lies within the discretion of the Court. The amount is subject to modification as the circumstances change. In any event, the temporary maintenance ceases when the divorce action terminates.' In Edwards v. Edwards, 182 Kan. 737, 324 P. 2d 150 (1958), the court said: 'an allowance of support...pendente lite does not become a final judgment on which execution can issue, but is merely a temporary or ad interim provision for their support until the final determination of the action.....'

When addressing the issue of past due installments of temporary support, however, the court in Edwards said: 'The

rule that past due installments for child support [or permanent alimony] ordered paid by the final decree become final judgments as of the dates due and may be collected in the same manner as other judgments, is clearly inapplicable to past due installments of support allowed pendente lite.' Further the court said: 'An order allowing temporary alimony is not in the nature of a final judgment on which execution can issue, nor is it a decree in equity for the payment of money. No vested rights are acquired in the amount allowed. Like other interlocutory orders, an order for support money pendente lite remain solely in the sound judicial discretion of the court which made it and may be modified as varying circumstances justify during the time the action is pending in any form in the district court, even to the extent of discharging accrued and unpaid installments.'

The past due installments .... did not become final judgments.... which could be collected by execution.... those installments, when due, were subject to enforcement by attachment.... or by contempt proceedings." Dube v. Dube, 809 P. 2d 1245, 1248 (Kan. App. 1991) See Edwards v. Edwards, 324 P.2d 150 (Kan. 1958) cited as a footnote in Eskelson v. Eskelson, 528 P.2d 1186 (Utah 1974) (emphasis added)

The Court in Dube also pointed out:

"`A temporary alimony award pending the final judgment in the lower court is merged in the judgment and does not continue after the judgment." Dube, 809 P.2d at 1248. quoting Rankin v. Rankin, 275 So.2d 283, 284 (Fla. Dist. App. 1973).

The Dube case is persuasive and would indicate that the temporary alimony ordered in the instant case should not be considered as a final judgment, that it merged into the divorce decree entered December 4, 1991, and that interest on the temporary arrearages should not be awarded. Awarding of such interest must be kept discretionary with the Trial Court:

"Given the highly discretionary nature of property division cases, we hold that a trial court may award pre-judgment interest in divorce proceedings. It is not required, however, and interest should not be awarded where it 'would do an injustice.' The trial court should consider the facts of each particular case. A party in a divorce proceeding is not 'entitled' to such interest in every case, because the trial court must have broad discretion to

determine the most equitable distribution of marital property under the particular circumstances." Morris v. Morris, 724 P.2d 527, 530, (Alaska 1986).

Appellee respectfully urges this Court to not award interest on the temporary alimony which was ordered to be paid to the Appellant by the Appellee. Appellant filed for a divorce in Utah and served the Appellee in Nevada. Appellant obtained a temporary order of \$1500.00 per month alimony, but Appellee filed a written objection to the request for temporary alimony. Appellee did not attend the hearing because he did not want to jeopardize his employment, but no action was ever taken on his written objection to the order. During the trial Appellee testified that he paid \$25,337.00 to the Appellant, which included amounts paid to her since the separation and garnishment. Tr. p. 176. By the time of trial, however, Appellant claimed delinquent temporary alimony amounted to the sum of \$27,507.00.

In its findings, the Trial Court found that Appellee owed Appellant the full \$27,507.00 in delinquent alimony and that the Appellant should be awarded ongoing alimony. In its Conclusions of Law, the Court stated that the Appellee should pay to the Appellant the sum of \$400.00 per month ongoing alimony, and the sum of \$600.00 per month in liquidation of the delinquent alimony sum of \$27,507.00, which the Court calculated would take 45.845 months, and that the Appellee should not be required to pay interest on the

delinquent alimony. In any event, the past due alimony has been merged into and included in the final divorce decree. It is reasonable to conclude that based on its findings, the Trial Court concluded that requiring interest on the temporary alimony arrearage would be unfair and inequitable as to the Appellee.

The Trial Court denied interest based on the following grounds:

The motion of the Plaintiff that she be awarded interest on the Plaintiff's Judgment for delinquent alimony that has been awarded Plaintiff by the Court should be and hereby is denied, it appearing that any delay in the performance of the terms of the Decree of Divorce with respect to payment of past due alimony to the Plaintiff, by the Defendant, will be caused, if at all, solely by the Appeal of this case by the Plaintiff.

See Order, executed by Ronald O. Hyde, District Judge on February 25, 1992.

Appellee urges this court that awarding interest on the temporary alimony arrearages will not only increase the burden of Appellee in paying the arrearages and the ongoing alimony, but will also affect future divorce cases where interest on temporary alimony payments may be considered. In its effort to find equity to the parties, the Trial Court is given discretion as to whether interest should be assessed. Divorce is extremely difficult, both financially, and emotionally, on both parties in the divorce case.

#### CONCLUSION

A Trial Court's decision will not be disturbed unless the facts, viewed in a light most favorable to the Trial Court's

decision, demonstrate a clear abuse of discretion. Utah case law and the specific facts of this case would support a total denial of alimony to Appellant, and certainly support the alimony awarded by the Trial Court.

The Trial Court has the discretion to determine the standard of living at the time of separation, if the facts of the case demonstrate that is fair and equitable. Several of the reasons the Trial Court was justified in the award of alimony: Appellant's unsubstantiated monthly living expenses, the agreement between the parties, Appellant's obvious credibility problem, and the Appellant's abandonment of Appellee.

The Quit-Claim Deed was executed by the Appellee to protect the marital residence from the parties' business creditors and not to buy the Appellant's worthless interest in the partnership. Regardless, the Court is not bound by the state of title in the distribution of marital assets. The Appellee did not disclaim his interest in the marital residence in the corporate bankruptcy, therefore, Judicial or Quasi Estoppel is not applicable here.

On the issue of attorney's fees, the Trial Court discussed at length its findings regarding Appellant's financial need. Appellant has not marshalled the evidence in support of the findings to show how that evidence viewed in the light most favorable to the Trial Court is nevertheless insufficient to support the findings and conclusions of law rendered by the Trial

Court. In addition evidence regarding Appellant's financial need was adequately set forth in the trial record, including an inflated Affidavit of Monthly Expenses labeled by the Trial Court as more a "wish list than a needs list."

The Trial Court did not err in denying interest on temporary alimony payments awarded to the Appellant before trial. The "judgment" entitled "Recommended Order on Order To Show Cause and Order" is not a final judgment, but is an interlocutory order. Appellant did not comply with the Utah Rules of Civil Procedure or the Utah Rules of Appellate Procedure. In the alternative, said "Order" is defective. Further, Section 30-3-10.6 is not applicable to alimony but only child and spousal support payments under a child support order.

Based upon the aforementioned reasons, Appellee respectfully prays this court to deny Appellant's appeal and affirm the Trial Court's decision.

Respectfully submitted this 19th day of October, 1992.



DON E. CASSITY  
ATTORNEY FOR APPELLEE

CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing Brief of Appellee was mailed, postage prepaid, to Plaintiff/Appellant Joy A. Hoagland, by and through her attorneys of record, David Bert Havas, Thomas A. Blakely, Havas and Associates, 2604 Madison Avenue, Ogden, Utah, 84401, this 19th day of October, 1992.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

---

JOY A. HOAGLAND,	)	
	)	Case No. 920340-CA
Appellant,	)	
	)	
vs.	)	
	)	
COLIN G. HOAGLAND,	)	Priority No. 16
	)	
Appellee.	)	

---

ADDENDUM TO BRIEF OF APPELLEE

---

AN APPEAL FROM A DECREE OF DIVORCE FROM THE SECOND JUDICIAL  
DISTRICT COURT OF WEBER COUNTY, STATE OF UTAH  
The Honorable Ronald O. Hyde, Presiding

---

Donn E. Cassity  
Sylvia O. Kralik  
Loris D. Williams  
ROMNEY, NELSON & CASSITY  
115 Social Hall Avenue  
Salt Lake City, Utah 84111  
Attorneys for Appellee

David Bert Havas  
Thomas A. Blakely  
HAVAS & ASSOCIATES  
2604 Madison Avenue  
Ogden, Utah 84401  
Attorneys for Appellant

## ADDENDUM INDEX

Exhibit  
No.

Document

### Trial Court Documents

1. Recommended Order on Order to Show Cause and Order
2. Memorandum Decision
3. Decree of Divorce
4. Findings of Fact and Conclusions of Law
5. Order
6. Amended Findings of Fact and Conclusions of Law
7. Amended Order
8. Second Amended Findings of Fact and Conclusions of Law

### Statutory Provisions

9. Utah Code Annotated (1953, as amended) 15-1-4
10. Utah Code Annotated (1953, as amended) 30-3-3
11. Utah Code Annotated (1953, as amended) 30-3-10.6
12. Utah Code Annotated (1953, as amended) 62A-11-401

### Court Rules

13. Utah Rules of Civil Procedure, Rule 52(b)
14. Utah Rules of Civil Procedure, Rule 54(a), (b)
15. Utah Rules of Civil Procedure, Rule 58A
16. Utah Rules of Civil Procedure, Rule 4(a)
17. Utah Rules of Civil Procedure, Rule 5(a)



**Tab 1**

DAVID BERT HAVAS, No. 1424 of  
DAVID BERT HAVAS AND ASSOCIATES  
Attorneys for Plaintiff  
2604 Madison Avenue  
Ogden, Utah 84401  
Telephone: (801)399-9636

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IN THE SECOND JUDICIAL DISTRICT COURT OF  
WEBER COUNTY, STATE OF UTAH

JOY A. HOAGLAND,	:	
Plaintiff,	:	RECOMMENDED ORDER ON
	:	ORDER TO SHOW CAUSE
vs.	:	AND ORDER
	:	
COLIN G. HOAGLAND,	:	Civil No. 890903214
Defendant.	:	JUDGE RONALD O. HYDE

MAY 28 1991

The above captioned matter came on regularly for hearing on the 30th day of April, 1991, before the Honorable Maurice Richards, Domestic Relations Commissioner, upon Plaintiff's Order To Show Cause In Re Contempt and Entry of Judgment. Plaintiff was present and represented by counsel, Michelle E. Heward on behalf of David Bert Havas and Associates, and Defendant was not present nor was he represented by counsel. The Commissioner having been fully apprised in the circumstances, now makes the following findings:

1. Plaintiff and Defendant were married on September 6, 1973, and have lived separate and apart since December 28, 1986.
2. Defendant in an Order to Show Cause hearing held on September 19, 1989, was ordered to pay Plaintiff temporary alimony in the amount of Fifteen Hundred Dollars (\$1,500.00) per month.

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3. In addition, Defendant was ordered to pay Plaintiff's attorney's fees in the amount of Two Hundred Dollars (\$200.00).

4. Defendant has paid a total of Eight Thousand Fifty Dollars (\$8,050.00) alimony from September 1989, to March 1991.

5. Defendant is in arrears of alimony in the amount of Twenty One Thousand One Hundred Fifty Dollars (\$21,150.00) for the period September 1989 through April, 1991, and attorney's fees in the amount of Two Hundred Dollars (\$200.00).

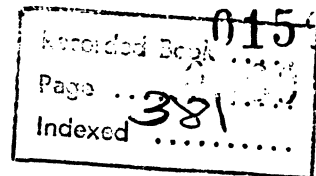
6. Defendant had the ability to pay the alimony payments as ordered since he earned in excess of \$6,600.00 gross per month during the year 1990.

7. Defendant is in contempt of Court for his failure to pay the alimony and attorney's fees as ordered.

8. Plaintiff has incurred reasonable attorney's fees and costs to pursue this matter.

From the foregoing findings the Commissioner makes the following RECOMMENDATIONS:

1. Plaintiff be awarded a judgment in the amount of Twenty One Thousand One Hundred Fifty Dollars (\$21,150.00) against Defendant for arrearages in alimony for the period September 1989, through April 1991, plus interest at the statutory rate of twelve percent (12%) per annum.



2. Defendant be ordered to pay Plaintiff's attorney's fees for this Order to Show Cause in the amount of Five Hundred Dollars (\$500.00) plus costs of Eighty Five Dollars (\$85.00)

3. Plaintiff be awarded a judgment in the amount of Two Hundred Dollars (\$200.00) for attorney's fees previously ordered to be paid by Defendant.

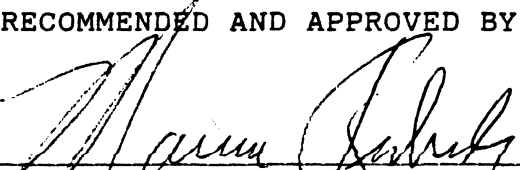
4. The total judgment amount to be awarded is Twenty One Thousand Nine Hundred Thirty-Five Dollars (\$21,935.00).

5. It is recommended that Defendant be held in contempt of the Court's order for failure to pay alimony in a timely manner. That Defendant be ordered to serve five (5) days jail sentence unless Defendant purges himself by paying the above judgment within ten days from the entry of the Order herein.

6. That this order become final ten (10) days from the date of mailing.

DATED this 20 day of May, 1991.

RECOMMENDED AND APPROVED BY:

  
\_\_\_\_\_  
MAURICE RICHARDS  
DOMESTIC RELATIONS COMMISSIONER

HOAGLAND v. HOAGLAND  
Recommendations and Order On  
Order To Show Cause and Order

Civil No. 890903214

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NOTICE TO DEFENDANT

TO THE ABOVE NAMED DEFENDANT:

YOU WILL PLEASE TAKE NOTICE that you have ten (10) days from the date of May 9, 1991, to file a written objection to the above recommendations with the Domestic Relations Clerk, Second District Court of Weber County, 6th Floor, Ogden, Utah 84401, pursuant to Section 30-3-4.4(3), Utah Code Annotated, 1953 as amended. Failure to do so will result in the following Order being signed by a District Court Judge and the recommendations shall then become order of the Court. Govern yourself accordingly.

DATED this 10th day of May, 1991.

  
MICHELLE E. HEWARD, No. 5084 of  
DAVID BERT HAVAS AND ASSOCIATES  
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Recommended Order on Order To Show Cause to Donn E. Cassity of Romney, Nelson & Cassity, 115 Social Hall Avenue, Salt Lake City, Utah 84111; postage prepaid this 10th day of May, 1991.

  
REBECCA LASILOO, Secretary

JEAN V. MCANGLAND  
commendations and Order On  
r To Show Cause and Order

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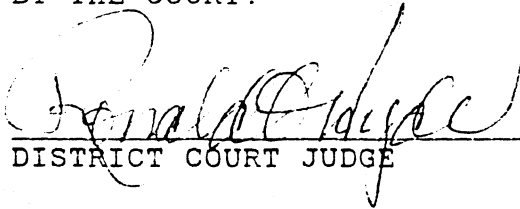
ORDER

Notice having been given to the above named Defendant,  
ten days having expired since the date of hearing herein and  
Defendant having failed to file any objections to the recommenda-  
tions herein

IT IS HEREBY ORDERED that said recommendations be and are  
hereby approved and ordered.

DAIED this 28 day of May, 1991.

BY THE COURT:

  
DISTRICT COURT JUDGE

Tab 2

013260

DISTRICT COURT  
WEBER COUNTY

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY  
STATE OF UTAH

JOY A. HOAGLAND,

Plaintiff,

vs.

COLIN G. HOAGLAND,

Defendant.

}

}

}

MEMORANDUM DECISION

Case No. 890903214

NOV. 7 1991

Both parties agree this relationship has irreconcilable differences. Each of the parties is granted a divorce against the other on the grounds that there are irreconcilable differences between the parties. The divorce shall become final upon signing and entry.

The problem here is the division of property and question of alimony. Plaintiff claims the home was given to her by the defendant in exchange for any interest in the business. Defendant claim is that the title to the property was placed in the plaintiff's name in order to protect it because the business was failing. He testified that the banks wanted the home placed for additional security and he would not do this. I hold that the property was placed in the plaintiff's name to protect it from business failure and that the home is a marital asset. The



business did fail and the parties divided up some cash that was approximately \$10,000.00 as defendant's portion and neither plaintiff or defendant made the claim that this belonged to the defendant as the remains of the business. It was in fact left with the plaintiff when defendant went looking for work. The evidence does show that the initial payment on the family home came from the plaintiff's home that she had prior to this marriage. Plaintiff's claim for \$19,672.00 which was the down payment on the new home is awarded to the plaintiff. He has purchased an additional home, furniture, and vehicles since the separation. The evidence indicates that none of these has any equity as the amounts owed are equal to the value. The household furniture and fixtures in the family home in Ogden have not been valued. The furniture, fixture, and personal property in plaintiff's possession is awarded to her. The furniture, vehicles, and property in defendant's possession is awarded to him, the home is to be divided as a martial asset.

The parties were married fourteen years prior to the failure of the business and the defendant leaving and looking for employment. At the present time it is a eighteen year marriage. This is not an instance were plaintiff stayed home and raised the children while the defendant progressed through the business world to arrive at a favorable position. The

plaintiff had four children prior to her marriage to the defendant and the defendant accepted them as family and assisted in their growth and well being. Defendant's position in the business world was arrived at after his separation from the plaintiff. The evidence shows that he still looks at her children as his family. It also supports his version that he wanted her to join him in Las Vegas but she refused. She claims they did not discuss her moving, however she does acknowledge that they did discuss renting out the home here in Ogden.

This is also not a case where plaintiff has become accustomed to a high standard of living. Prior to defendant's business failing the evidence is that he was grossing \$500.00 per week. This is a gross of \$26,000.00 a year which was used for the family needs. His tax returns indicate actual income considerably less. Plaintiff is now employed part time at Internal Revenue Service as a GS-5 Step 1 with a gross yearly salary of \$16,973. Being part time her gross pay was \$8,280.00 in addition thereto she drew unemployment for ten weeks which would give her a gross \$9,780. Her testimony was that when she goes back to work this year it will be at an increased amount. Employment history indicates since she graduated from high school in 1953 she has basically worked in clerking positions or assembly line positions she has never earned high income. Her

health is good and she is suffering no disabilities. Evidence shows that by leaving the area the defendant was able to go to work for Smith's and at one time was a store manager. By reason of his contracting rheumatoid arthritis he has had to downgrade his job to that of a buyer. Evidence indicates his income will be approximately \$56,000. When defendant left he did not totally abandon plaintiff. He left between \$8,000.00 and \$10,000.00 cash which she could use for house payments and payment of bills and in addition thereto she has sold off some property like the recreational vehicle for some \$9,000.00 plus he did send her some funds. Plaintiff did obtain a temporary order of \$1,500.00 per month alimony. Defendant filed an objection to the request for temporary alimony but he was not present at the hearing and no action was ever taken on his objection to the order.

Plaintiff filed an affidavit of monthly expenses showing present monthly expense of \$1,796.00 per month, her request for alimony would cover this with the exception of approximately \$300. The problem with her affidavit is it is not a true indication of her expenses. It is more a wish list than a needs list. Example would be the transportation figure of some \$531.00 a month and her testimony is she drives very little. Her personal expenses of \$270.00 per month includes recreational

and travel of over \$130.00 and she testified she does not travel and spends very little on recreation. Her food expenses total \$350.00 a month simply is not realistic. It appears the affidavit is made more with the view to obtain high alimony than to advising the court of her actual expenses.

I hold that the home is a marital asset and is to be subject to division between the parties. The home is to be sold. The plaintiff is to be awarded the first \$19,672.00 which would be for her equity of her home prior to the marriage. After the expense of sale is deducted, the remaining equity is to be divided between the parties.

The request for all of the home plus alimony is not realistic or fair.

The plaintiff did obtain an order for temporary support of \$1,500.00 a month, plaintiff has been unable to make these payments and is delinquent in the sum of \$27,507. I order that the defendant is to pay to the plaintiff the sum of \$1,000 per month. This \$1,000.00 shall be a payment of \$600.00 per month on the back alimony that was awarded and \$400.00 per month on going. Plaintiff shall have the use and occupancy of the home until it is sold and the the defendant's lien thereon shall not draw interest. The payment of the \$27,507.00 accumulated alimony at \$600.00 a month will take 45 months to clear up and

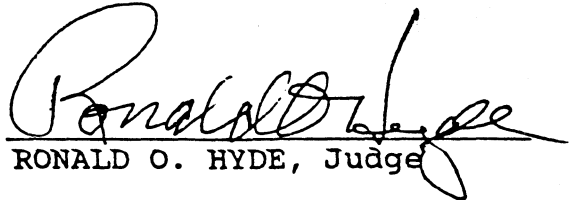
this figure also shall not draw interest. The payment of the back award will take 3.8 years and by that time plaintiff should be employed on a full time basis. The \$400.00 per month continuing alimony shall continue as an assistance fro her subsequent housing.

Neither party has much retirement accumulated, however each shall have interest in the others per the Woodward formula. Plaintiff testified she did not know if health and accident insurance was available to her through her employment. If it is she should obtain that, if it is not, then the defendant is to assist in obtaining whatever benefit he can through his employment at her expense.

His payment of \$12,000.00 a year plus her current earnings even on a part time basis of \$9,780.00 a year give her a gross income of almost \$22,000.00 per year. This equates almost to a figure equal to what the family was living on when defendant was drawing \$500.00 a week from the business prior to the separation and is a monthly amount greater than the amounts set out in the affidavit of monthly expenses as filed by the plaintiff. Therefore each party is to pay their own attorney's fees and costs.

Defendant's counsel to prepare findings, conclusion, and judgment in accordance herewith.

DATED this 2 day of November, 1991.

  
RONALD O. HYDE, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 7 day of November, 1991, I sent a true and correct copy of the foregoing Memorandum Decision to counsel as follows:

David B. Havas  
2604 Madison Avenue  
Ogden, Utah 84401

Don E. Cassity  
115 Social Hall Avenue  
Salt Lake City, Utah 84111

  
Deputy Court Clerk

Tab 3

Recorded Book 158  
Page 1460...  
Indexed .....

DISTRICT COURT  
WEBER COUNTY

DONN E. CASSITY (#594)  
ROMNEY, NELSON & CASSITY  
Attorneys for Defendant  
115 Social Hall Avenue  
Salt Lake City, Utah 84111  
Telephone: (801) 328-3261

'91 DEC 4 PM 2 44

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

---

JOY A. HOAGLAND,	)	
	)	DECREE OF DIVORCE
Plaintiff,	)	
	)	
vs.	)	
	)	CASE NO. 890903214
COLIN G. HOAGLAND,	)	RONALD O. HYDE, JUDGE
	)	
Defendant.	)	

---

DEC 04 1991

The above-entitled matter having come on for Trial on the 28th day of November, 1991, before the Honorable Ronald O. Hyde, Judge, sitting without a jury, and the Court having heard the evidence presented in behalf of and by the Plaintiff, and in behalf of and by the Defendant, and the Court having heretofore entered its Findings of Fact and Conclusions of Law, and good cause appearing therefore, it is now,

ORDERED, ADJUDGED AND DECREED as follows:

1. That the Plaintiff and the Defendant should be and hereby are divorced from each other, said Decree of Divorce to become final upon execution by the Court and upon entry of the Decree of Divorce.

2. That the real estate and improvements thereon accumulated by the parties, Plaintiff and Defendant, during the marriage,



commonly described as 151 West 5400 South, Washington Terrace,  
Weber County, State of Utah, and more particularly described as

Lot 163, South Ridge Subdivision No.  
7 located in Weber County, State of  
Utah as Recorded in the Weber County  
Recorder's Office

should be and hereby is determined to be a marital asset.

3. It is hereby ordered that the said real estate and improvements is to be forthwith listed for sale, and is to be sold, and the Plaintiff and Defendant are ordered to execute any and all documents both with respect to the offering of the property for sale, and the closing and deeding of the property to the buyer, as will become necessary on a timely and appropriate basis, consistent with the need of sales persons, title company personnel, and the terms of the Sales Agreement between the Seller and the Buyer. The Plaintiff and Defendant are both ordered to be cooperative in all respects with regard to the offering of sale, and the closing of the sale of the said real estate and improvements.

4. The Plaintiff should be and hereby is awarded from the net sale proceeds of the said real estate the first \$19,672.00, and it is ordered that the balance of the proceeds from the sale of the real estate is to be paid one-half to the Plaintiff and one-half to the Defendant.

5. Judgment for unpaid temporary alimony in the sum of \$27,507.00 is hereby awarded to the Plaintiff, and against the Defendant, said sum to be paid to the Defendant at the rate of \$600.00 per month, until the full sum of \$27,507.00 has been paid to the Plaintiff.

6. That ongoing alimony should be and hereby is ordered to be paid by the Defendant to the Plaintiff in the sum of \$400.00 per month.

7. That Plaintiff shall be permitted to use and occupy the residence of the parties until it is sold. Plaintiff is ordered to cooperate in all reasonable manner with the sales persons engaged in obtaining a qualified buyer for the said real estate.

8. The Defendant shall have a lien for his portion of the equity in the real estate described in paragraph 3 above, which lien shall not draw interest, nor shall interest be incurred as to the Plaintiff's \$19,672.00 sum to be paid out of the sale proceeds, nor shall interest be paid or accumulate on the past due alimony awarded to the Plaintiff, in the sum of \$27,507.00.

9. That it is hereby ordered that based upon Woodward vs. Woodward, and the formula setforth therein for division of retirement income, that each of the parties shall have claim in the other parties retirement income to the extent it was earned by Plaintiff and Defendant as of October 28, 1991.

10. It is ordered that the Plaintiff shall, if health and accident insurance is available to her through her employment, to obtain said insurance, and it is further ordered that in the event that it is not available to the Plaintiff at her employment, that the Defendant is to assist the Plaintiff in obtaining whatever insurance benefit, if any, he can for the Plaintiff through his own employment, at the expense of the Plaintiff.

11. That the Plaintiff and the Defendant should, and it is

hereby Ordered that each party shall pay their own attorneys fees and costs incurred herein.

DATED this 4 day of Dec, 1991.

BY THE COURT:

Ronald O. Hyde  
RONALD O. HYDE, JUDGE

870703214

CERTIFICATE OF MAILING

On this 27 day of November, 1991, I certify that I mailed, postage prepaid, a copy of the foregoing Decree of Divorce to the Plaintiff by mailing a copy thereof to her attorney, David Burt Havas, at his office at 2604 Madison Avenue, Ogden, Utah 84401.

Paula Carr

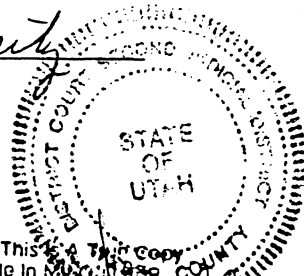
STATE OF UTAH )  
COUNTY OF WEBER ) ss:

I Hereby Certify That This is a True Copy  
Of The Original On File In My Office

DATED THIS 30 DAY OF Jan 1992

PAULA CARR  
CLERK OF THE COURT

BY [Signature] DEPUTY



Tab 4

DONN E. CASSITY (#594)  
ROMNEY, NELSON & CASSITY  
Attorneys for Defendant  
115 Social Hall Avenue  
Salt Lake City, Utah 84111  
Telephone: (801) 328-3261

DISTRICT COURT  
WEBER COUNTY

'91 DEC 4 PM 2 44

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

---

JOY A. HOAGLAND,	)	
	)	FINDINGS OF FACT AND
Plaintiff,	)	CONCLUSIONS OF LAW
	)	
vs.	)	
	)	CASE NO. 890903214
COLIN G. HOAGLAND,	)	JUDGE: RONALD O. HYDE
	)	
Defendant.	)	

---

DEC 04 1991

The above-entitled matter came on for Trial before the Honorable Ronald O. Hyde, Second Judicial District Court Judge for Weber County, sitting without a Jury, at 9:30 a.m. on the 28th day of October, 1991, and the Plaintiff, Joy A. Hoagland, and her attorney, David Burt Havas, were present, and the Defendant, Colin G. Hoagland, and his attorney, Donn E. Cassity, were present, and the Plaintiff having presented her testimony, exhibits and evidence, and the Defendant having presented his testimony, exhibits and testimony, and the attorneys having made their closing arguments, and the Court now being fully informed in the premises, now makes its

FINDINGS OF FACT

1. That the Plaintiff, Joy A. Hoagland, resided in Weber

County, State of Utah in excess of 90 days prior to the filing of the Complaint in the above-entitled matter by the Plaintiff.

2. That the Plaintiff and Defendant were married in Elko, Nevada on the 5th day of September, 1973.

3. That no children were born as issue of the marriage, but at the time of the marriage of the Plaintiff and the Defendant four children, siblings of the Plaintiff from another marriage lived in the home and were raised substantially by the Plaintiff and Defendant, with the Defendant, Step-Father, providing a substantial part of the support economically for the children, and which Defendant developed a very close and loving relationship with each of Plaintiff's children, which relationship has continued to the present.

4. That during the year of 1985 marital problems arose between the parties, and they were separated twice for a few weeks but were reunited near the end of 1986, at which time the Defendant who was unemployed, and, whose grocery business had been closed, and gone through Bankruptcy, left the residence of the parties in Ogden Utah to seek employment, which he found in Las Vegas, Nevada.

5. That when the Plaintiff married the Defendant he was an employee of Smiths, a grocery company business, but later Defendant quit his employment at Smiths and opened his own grocery store, which business was operated until August of 1986, at which time the Defendant and his brother closed the business and filed the Business Corporation in Bankruptcy.

6. That prior to the closing of the business the Defendant

conveyed title to the residence and lot of the parties to the Plaintiff as a security against the possibility that Creditors might claim against the real and/or personal property of the Plaintiff and Defendant. No such claim was ever made by any Creditor, however.

7. That during 1986 the parties developed serious problems in their marriage relationship.

8. That the Defendant in January of 1987 found gainful employment in Las Vegas, Nevada, again working for Smiths in the grocery business. After being settled in Las Vegas in his new employment, Defendant purchased a newly constructed residence and lot and, invited the Plaintiff to come to Las Vegas. At the time of the visit the Defendant showed the Plaintiff the house, but when the Defendant asked her to move to Nevada so they could live together in the new home, she refused, stating, "My home is in Ogden, Utah". The Defendant told the Plaintiff that they could lease the home in Ogden and thus retain it, and that a good business friend in Ogden would manage it and make certain that it was protected in their absence. The Plaintiff refused to move to Nevada, and effectively the parties were then separated and have never since that period lived together. The marital parties have, and have had irreconcilable differences since at least April of 1987.

9. That at the time Defendant left the parties home in his pursuit of employment in Nevada the Defendant took with him some \$300.00 plus dollars, together with a pick-up truck that was

encumbered and a motorcycle. He left in the possession of the Plaintiff approximately \$8,000.00 to \$10,000.00 in cash, a motor home of the parties, which the Defendant believed had a value of \$12,000.00 to \$15,000.00, but which at a later time the Plaintiff sold for \$9,000.00 cash. The Defendant also left with the Plaintiff all of the furniture, the house, lot, swimming pool, and a 1980 Lincoln Town Car, and a 1976 Chevrolet. None of the vehicles were encumbered at that time. That none of the \$8,000.00 - \$10,000.00 cash, or the \$9,000.00 received by the Plaintiff from sale of the motor home was shared by Plaintiff with the Defendant.

10. That after it became obvious by April of 1987 that the Plaintiff was flatly refusing to rejoin the Defendant, as his wife, the Plaintiff and Defendant agreed upon a divorce, and the Defendant proposed that the Plaintiff retain as her sole property all of the vehicles, money, house and lot, furniture and household furnishings, and other personal property that he had left with Plaintiff at the time Defendant went to Nevada, and that the Plaintiff forego any claim to alimony from the Defendant. The Defendant believed, until the Complaint for Divorce was filed by Plaintiff that Plaintiff had agreed to accept the marital assets as her own, in lieu of any claim for alimony from the Defendant.

By the time the Complaint in the above matter was filed by the Plaintiff the Defendant had been transferred by his employer from Las Vegas to Reno, Nevada.

11. A Hearing on an Order to Show Cause was held in the absence of the Defendant, he being in Nevada at his work, and an



Order for temporary alimony was ordered by the Court in the sum of \$1,500.00 per month. That at the time of Trial of the case, temporary unpaid alimony had accrued in the total sum of \$27,507.00.

12. That at the time of the marriage of the Plaintiff and the Defendant the Plaintiff had an equity in a house and lot and the Plaintiff and Defendant lived in the said house for a period of time. The Plaintiff house was sold. During the time that the Plaintiff and the Defendant lived in the Plaintiff's home the Defendant made the mortgage payments. Defendant also essentially paid all of the mortgage payments on the home that the parties own at the present time, and which was purchased by the parties subsequent to the sale of the Plaintiff's home.

13. That since the separation of the parties the Plaintiff temporarily had a daughter and a child live with her, but otherwise Plaintiff has lived in the home, alone, since the separation of the parties. The home is a four bedroom, two level home, with swimming pool, patio and covered porch, two car garage within the house, and no mortgage is owing on the said real estate. The house and lot have been appraised twice, for \$97,000 and for \$85,000.00

14. That neither the Plaintiff nor Defendant has much retirement benefits accumulated, if any.

15. That since the filing of the divorce the Defendant has been transferred from Reno, Nevada by his employer to Phoenix, Arizona, and Defendant has purchased a house and lot in Glendale, Arizona, and a pick-up truck and a boat in which there is

essentially no equity.

16. That the Plaintiff has had the sole use of the parties real estate, furniture, fixtures and all of the other personal property accumulated by the parties during the marriage since the separation of the parties in December of 1986.

17. That the Plaintiff had not become accustomed to a high standard of living during the marriage, it appearing from the evidence that prior to Defendant's business failing in 1986 he was grossing approximately \$500.00 per week which was used for family needs. The parties income tax returns for years prior thereto indicate actual income considerably less.

18. Plaintiff is employed currently as she has been for some time with the United States Treasury Department, Internal Revenue Services as a GS-5 Step One with a gross yearly salary of \$16,973.00, and a part-time gross pay of \$8,280.00, plus unemployment for ten weeks giving her a gross income of \$9,780.00 per year.

19. Plaintiff testified that she would receive an increased income when she returns to work in 1992.

20. That the Plaintiff's employment history indicates that she graduated from High School in 1953 and has basically worked in clerking positions or assembly line positions, and has never earned a high income.

21. Plaintiff's health is good and she suffers no disabilities.

22. Defendant after reobtaining employment with Smiths became

a Store Manager, but he developed Rheumatoid Arthritis and has had to down grade his job to that of a buyer, and his income will be approximately \$56,000.00 per annum.

23. That Plaintiff filed an Affidavit of monthly expenses showing present monthly expenses of \$1,796.00 per month, however, Plaintiff's Affidavit is more a wish list than a needs list.

An example of that fact is that the transportation figure that the Plaintiff uses in her monthly expenses list shows \$531.00 for transportation expense though her testimony is that she drives very little. She also indicates that her personal expenses of \$270.00 per month includes recreational and travel of over \$130.00, and she testified that she does not travel and spends very little money on recreation. In addition, she recites that her food expenses totalled \$350.00 per month which is not a realistic sum to spend for one person, and reflects a desire on the part of the Plaintiff to obtain high alimony rather than reasonably advising the Court of the Plaintiff's actual expenses.

24. That the Plaintiff claims that the house and lot in Washington Terrace was deeded to her in exchange for any claim she had against ownership of the grocery store business that was operated by the Defendant and his brother.

25. The Court finds, however, that the Deed was conveyed at a time when the grocery business of the Defendant and his brother was closing down and near Bankruptcy and ultimately went into Bankruptcy, and that there was little, or no value in the business at the time of the conveyance by Defendant of title by Quit Claim

Deed to the Plaintiff.

26. The evidence shows that the Defendant still, at this date, looks at the Plaintiff's children as his family, which fact supports Defendants version that he wanted Plaintiff to join him in Las Vegas to continue the marriage, but that Plaintiff refused to do so.

27. The Plaintiff claims that no such discussion of her moving to Nevada took place, but Plaintiff does acknowledge that Plaintiff and Defendant did discuss renting out the residence and lot in Washington Terrace, Ogden, Utah.

The Court having entered its Findings of Fact now enters its

#### CONCLUSIONS OF LAW

1. That the Court has jurisdiction in the above-entitled matter.

2. That the parties have irreconcilable differences one with the other, and they should be divorced from each other, and the divorce should be final upon execution and entry by the Court.

3. That the residence and lot located at 151 West 5400 South, Washington Terrace, Weber County, State of Utah, is a marital asset.

4. That the said real estate should be sold.

5. That from the sale proceeds, the Plaintiff should be awarded, the first \$19,672.00, without interest, representing Plaintiff's equity from her home prior to the marriage of the parties.

6. That after the expenses of sale are deducted the balance of the remaining equity should be divided, one-half to the Plaintiff, and one-half to the Defendant.

7. That the Court determines that there is delinquent alimony owed to the Plaintiff in the sum of \$27,507.00.

8. That the Plaintiff should be awarded on going alimony.

9. That the Defendant should pay to the Plaintiff the sum of \$600.00 per month in liquidation of the delinquent alimony sum of \$27,507.00, which the Court calculates will take 45.845 months, and the Defendant should not be required to pay interest on the delinquent alimony.

10. The payment of the back alimony will take Defendant 3.82 years, and by that time the Plaintiff should be employed on a full time basis.

11. That the Plaintiff should have the use and occupancy of the parties house and lot until it is sold, and the Defendant's lien on the equity in the real estate should not draw interest.

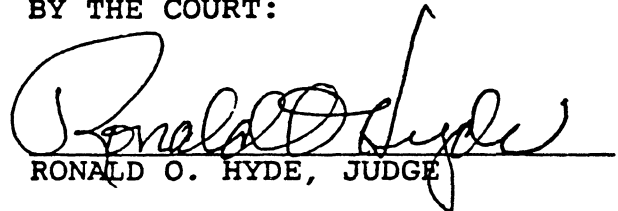
12. That neither party has much retirement benefits accumulated, but each should have an interest in the others retirement per the Woodward v. Woodward formula.

13. If the Plaintiff can obtain health and accident insurance through her employment she should obtain that, but if the said insurance is not available to the Plaintiff then the Defendant should assist the Plaintiff in obtaining whatever medical benefit, if any, she can through Defendants employment, at the Plaintiff's expense.

14. The Plaintiff in receiving \$12,000.00 a year for 3.8 years from the Defendant, plus her current earnings on a part time basis of \$9,780.00 or more, will provide Plaintiff with a gross income of almost \$22,000.00 per year, which is almost equal to the income which the parties were living on when the Defendant was drawing \$500.00 per week from his business prior to the separation of the parties, and represents a monthly amount greater than the amounts set out in the Affidavit of monthly expenses as filed by the Plaintiff. Therefore, the Plaintiff and the Defendant should each pay their own attorneys fees and costs.

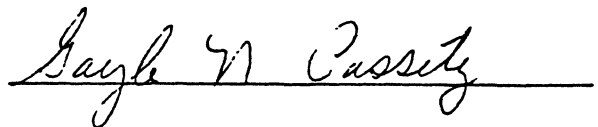
DATED this 4 day of Dec, 1991.

BY THE COURT:

  
RONALD O. HYDE, JUDGE

CERTIFICATE OF MAILING

On this 27 day of November, 1991, I certify that I mailed, postage prepaid, to the Plaintiff's attorney, David Burt Havas, at his office at 2604 Madison Avenue, Ogden, Utah 84401, a copy of the foregoing Findings of Fact and Conclusions of Law in the above-entitled case.



Tab 5

DONN E. CASSITY (#594)  
ROMNEY, NELSON & CASSITY  
Attorneys for Defendant  
115 Social Hall Avenue  
Salt Lake City, Utah 84111  
Telephone: (801) 328-3261

DISTRICT COURT  
WEBER COUNTY

1992 FEB 25 AM 11 08

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

JOY A. HOAGLAND,

Plaintiff,

vs.

COLIN G. HOAGLAND,

Defendant.

ORDER

CASE NO. 890903214  
RONALD O. HYDE, JUDGE

FEB 25 1992

On the 9th day of January, 1992, at the hour of 10:00 a.m. the Motion of the Plaintiff to Amend Findings of Fact in the above-entitled matter came on for Hearing, and the Plaintiff was present and represented by her counsel, David Burt Havas, and the Defendant was not present but was represented by his counsel, Donn E. Cassity, and after argument in behalf of Plaintiff's Motion by Plaintiff's counsel, and the objection and argument of counsel for the Defendant, Donn E. Cassity, the Court now being fully advised in the premises does now

ORDER that the Findings of Fact heretofore executed by the Court on the 4th day of December, 1991, be amended as to Paragraph 9 of the Findings of Fact wherein on page 4, third line down, the words "which the Defendant believed had a value of \$12,000.00 to \$15,000.00, but" be deleted and the balance of said sentence in



said Paragraph 9 be left as written, and it is further Ordered the Paragraph 10 of the Findings of Fact be amended by deleting the first three lines of Paragraph 10 including the first word of the fourth line of Paragraph 10, and insert in place of those words as follows "That the parties had conversation regarding distribution of the marital assets, and the Defendant", and starting with the word "proposed" in the fourth line of the Findings of Fact the balance of the Paragraph 10 is to remain as previously written.

IT IS FURTHER ORDERED that the last sentence of Paragraph 12 on Page 5 of the Findings of Fact shall be amended by deleting the said sentence beginning with the word "Defendant" and ending with the word "home".

IT IS FURTHER ORDERED that no further amendments proposed by the Plaintiff are approved, and are hereby denied.

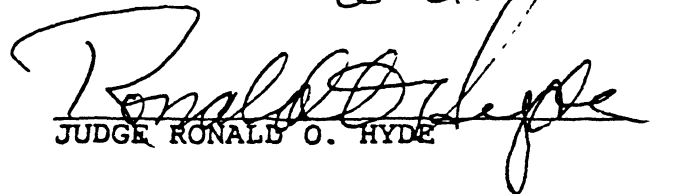
IT IS FURTHER ORDERED that in the event sale of the marital real estate and division of the net proceeds thereof are upheld by the Utah Court of Appeals, that in view of the fact that the real estate of the parties commonly known as 151 West 5400 South Washington Terrace, Weber County, State of Utah, is by decree of divorce ordered to be sold, and since the Defendant's equity in the said marital real estate will not, because of Plaintiff's appeal, be timely paid to Defendant, due to Plaintiff's appeal of the Court's decision, that interest on the net equity of the Defendant in the said real estate, when it is sold, shall bear interest from date of Plaintiffs Notice of Appeal at the rate of ten (10%) percent per annum, which interest shall be paid to the Defendant in

addition to the principal amount of the net sales price awarded to Defendant, following sale of the marital real estate, so long as the Defendant pays the Plaintiff alimony consistent with the provisions of the Decree of Divorce, executed and entered by the Court on December 4, 1991.

The motion of the Plaintiff that she be awarded interest on the Plaintiff's Judgment for delinquent alimony that has been awarded Plaintiff by the Court should be and hereby is denied, it appearing that any delay in the performance of the terms of the Decree of Divorce with respect to payment of past due alimony to the Plaintiff, by the Defendant, will be caused, if at all, solely by the Appeal of this case by the Plaintiff.

The Order of the Court as to payment of interest to the Defendant, is not intended by the Court to limit any right Defendant otherwise has with respect to the marital estate.

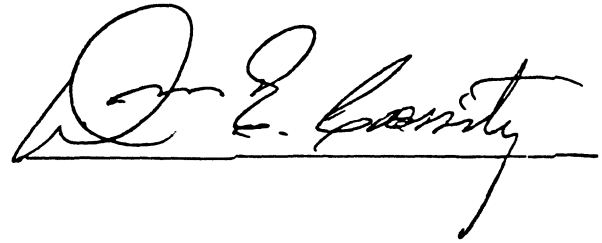
BY THE COURT:

2-25-92  
  
 JUDGE RONALD O. HYDE

CERTIFICATE OF MAILING

I certify that on the 16<sup>th</sup> day of January, 1992, I mailed, postage prepaid, a copy of the foregoing Order in the above-entitled case to the Plaintiff by mailing a copy thereof to her

counsel, David Burt Havas, at his office at 2604 Madison Avenue,  
Ogden, Utah 84401.

A handwritten signature in cursive script, appearing to read "D. B. Havas", is written over a horizontal line.

Tab 6

DISTRICT COURT  
WEBER COUNTY

'92 FEB 25 AM 11 08

DONN E. CASSITY (#594,  
ROMNEY, NELSON & CASSITY  
Attorneys for Defendant  
115 Social Hall Avenue  
Salt Lake City, Utah 84111  
Telephone: (801) 328-3261

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

---

JOY A. HOAGLAND,	)	AMENDED FINDINGS
	)	OF FACT AND
Plaintiff,	)	CONCLUSIONS OF LAW
	)	
vs.	)	
	)	CASE NO. 890903214
COLIN G. HOAGLAND,	)	JUDGE: RONALD O. HYDE
	)	
Defendant.	)	

---

FEB 25 1992

The above-entitled matter came on for Trial before the Honorable Ronald O. Hyde, Second Judicial District Court Judge for Weber County, sitting without a Jury, at 9:30 a.m. on the 28th day of October, 1991, and the Plaintiff, Joy A. Hoagland, and her attorney, David Burt Iavas, were present, and the Defendant, Colin G. Hoagland, and his attorney, Donn E. Cassity, were present, and the Plaintiff having presented her testimony, exhibits and evidence, and the Defendant having presented his testimony, exhibits and testimony, and the attorneys having made their closing arguments, and the Court now being fully informed in the premises, now makes its

FINDINGS OF FACT

1. That the Plaintiff, Joy A. Hoagland, resided in Weber

County, State of Utah in excess of 90 days prior to the filing of the Complaint in the above-entitled matter by the Plaintiff.

2. That the Plaintiff and Defendant were married in Elko, Nevada on the 5th day of September, 1973.

3. That no children were born as issue of the marriage, but at the time of the marriage of the Plaintiff and the Defendant four children, siblings of the Plaintiff from another marriage lived in the home and were raised substantially by the Plaintiff and Defendant, with the Defendant, Step-Father, providing a substantial part of the support economically for the children, and which Defendant developed a very close and loving relationship with each of Plaintiff's children, which relationship has continued to the present.

4. That during the year of 1986 marital problems arose between the parties, and they were separated twice for a few weeks but were reunited near the end of 1986, at which time the Defendant who was unemployed, and, whose grocery business had been closed, and gone through Bankruptcy, left the residence of the parties in Ogden Utah to seek employment, which he found in Las Vegas, Nevada.

5. That when the Plaintiff married the Defendant he was an employee of Smiths, a grocery company business, but later Defendant quit his employment at Smiths and opened his own grocery store, which business was operated until August of 1986, at which time the Defendant and his brother closed the business and filed the Business Corporation in Bankruptcy.

6. That prior to the closing of the business the Defendant

conveyed title to the residence and lot of the parties to the Plaintiff as a security against the possibility that Creditors might claim against the real and/or personal property of the Plaintiff and Defendant. No such claim was ever made by any Creditor, however.

7. That during 1986 the parties developed serious problems in their marriage relationship.

8. That the Defendant in January of 1987 found gainful employment in Las Vegas, Nevada, again working for Smiths in the grocery business. After being settled in Las Vegas in his new employment, Defendant purchased a newly constructed residence and lot and, invited the Plaintiff to come to Las Vegas. At the time of the visit the Defendant showed the Plaintiff the house, but when the Defendant asked her to move to Nevada so they could live together in the new home, she refused, stating, "My home is in Ogden, Utah". The Defendant told the Plaintiff that they could lease the home in Ogden and thus retain it, and that a good business friend in Ogden would manage it and make certain that it was protected in their absence. The Plaintiff refused to move to Nevada, and effectively the parties were then separated and have never since that period lived together. The marital parties have, and have had irreconcilable differences since at least April of 1987.

9. That at the time Defendant left the parties home in his pursuit of employment in Nevada the Defendant took with him some \$300.00 plus dollars, together with a pick-up truck that was

encumbered and a motorcycle. He left in the possession of the Plaintiff approximately \$8,000.00 to \$10,000.00 in cash, a motor home of the parties, which at a later time the Plaintiff sold for \$9,000.00 cash. The Defendant also left with the Plaintiff all of the furniture, the house, lot, swimming pool, and a 1980 Lincoln Town Car, and a 1976 Chevrolet. None of the vehicles were encumbered at that time. That none of the \$8,000.00 - \$10,000.00 cash, or the \$9,000.00 received by the Plaintiff from sale of the motor home was shared by Plaintiff with the Defendant.

10. That the parties had irreconcilable differences. That the parties had conversation regarding distribution of the marital assets, and the Defendant proposed that the Plaintiff retain as her sole property all of the vehicles, money, house and lot, furniture and household furnishings, and other personal property that he had left with Plaintiff at the time Defendant went to Nevada, and that the Plaintiff forego any claim to alimony from the Defendant. The Defendant believed, until the Complaint for Divorce was filed by Plaintiff that Plaintiff had agreed to accept the marital assets as her own, in lieu of any claim for alimony from the Defendant.

By the time the Complaint in the above matter was filed by the Plaintiff the Defendant had been transferred by his employer from Las Vegas to Reno, Nevada.

11. A Hearing on an Order to Show Cause was held in the absence of the Defendant, he being in Nevada at his work, and an Order for temporary alimony was ordered by the Court in the sum of \$1,500.00 per month. That at the time of Trial of the case,



temporary unpaid alimony had accrued in the total sum of \$27,507.00.

12. That at the time of the marriage of the Plaintiff and the Defendant the Plaintiff had an equity in a house and lot and the Plaintiff and Defendant lived in the said house for a period of time. The Plaintiff house was sold. During the time that the Plaintiff and the Defendant lived in the Plaintiff's home the Defendant made the mortgage payments. That following the separation of the parties the Defendant sent monies to the Plaintiff for some time thereafter.

13. That since the separation of the parties the Plaintiff temporarily had a daughter and a child live with her, but otherwise Plaintiff has lived in the home, alone, since the separation of the parties. The home is a four bedroom, two level home, with swimming pool, patio and covered porch, two car garage within the house, and no mortgage is owing on the said real estate. The house and lot have been appraised twice, for \$97,000 and for \$85,000.00

14. That neither the Plaintiff nor Defendant has much retirement benefits accumulated, if any.

15. That since the filing of the divorce the Defendant has been transferred from Reno, Nevada by his employer to Phoenix, Arizona, and Defendant has purchased a house and lot in Glendale, Arizona, and a pick-up truck and a boat in which there is essentially no equity.

16. That the Plaintiff has had the sole use of the parties real estate, furniture, fixtures and all of the other personal

property accumulated by the parties during the marriage since the separation of the parties in December of 1986.

17. That the Plaintiff had not become accustomed to a high standard of living during the marriage, it appearing from the evidence that prior to Defendant's business failing in 1986 he was grossing approximately \$500.00 per week which was used for family needs. The parties income tax returns for years prior thereto indicate actual income considerably less.

18. Plaintiff is employed currently as she has been for some time with the United States Treasury Department, Internal Revenue Services as a GS-5 Step One with a gross yearly salary of \$16,973.00, and a part-time gross pay of \$8,280.00, plus unemployment for ten weeks giving her a gross income of \$9,780.00 per year.

19. Plaintiff testified that she would receive an increased income when she returns to work in 1992.

20. That the Plaintiff's employment history indicates that she graduated from High School in 1953 and has basically worked in clerking positions or assembly line positions, and has never earned a high income.

21. Plaintiff's health is good and she suffers no disabilities.

22. Defendant after reobtaining employment with Smiths became a Store Manager, but he developed Rheumatoid Arthritis and has had to down grade his job to that of a buyer, and his income will be approximately \$56,000.00 per annum.

23. That Plaintiff filed an Affidavit of monthly expenses showing present monthly expenses of \$1,796.00 per month, however, Plaintiff's Affidavit is more a wish list than a needs list.

An example of that fact is that the transportation figure that the Plaintiff uses in her monthly expenses list shows \$531.00 for transportation expense though her testimony is that she drives very little. She also indicates that her personal expenses of \$270.00 per month includes recreational and travel of over \$130.00, and she testified that she does not travel and spends very little money on recreation. In addition, she recites that her food expenses totalled \$350.00 per month which is not a realistic sum to spend for one person, and reflects a desire on the part of the Plaintiff to obtain high alimony rather than reasonably advising the Court of the Plaintiff's actual expenses.

24. That the Plaintiff claims that the house and lot in Washington Terrace was deeded to her in exchange for any claim she had against ownership of the grocery store business that was operated by the Defendant and his brother.

25. The Court finds, however, that the Deed was conveyed at a time when the grocery business of the Defendant and his brother was closing down and near Bankruptcy and ultimately went into Bankruptcy, and that there was little, or no value in the business at the time of the conveyance by Defendant of title by Quit Claim Deed to the Plaintiff.

26. The evidence shows that the Defendant still, at this date, looks at the Plaintiff's children as his family, which fact

supports Defendants version that he wanted Plaintiff to join him in Las Vegas to continue the marriage, but that Plaintiff refused to do so.

27. The Plaintiff claims that no such discussion of her moving to Nevada took place, but Plaintiff does acknowledge that Plaintiff and Defendant did discuss renting out the residence and lot in Washington Terrace, Ogden, Utah.

The Court having entered its Findings of Fact now enters its

#### CONCLUSIONS OF LAW

1. That the Court has jurisdiction in the above-entitled matter.

2. That the parties have irreconcilable differences one with the other, and they should be divorced from each other, and the divorce should be final upon execution and entry by the Court.

3. That the residence and lot located at 151 West 5400 South, Washington Terrace, Weber County, State of Utah, is a marital asset.

4. That the said real estate should be sold.

5. That from the sale proceeds, the Plaintiff should be awarded, the first \$19,672.00, without interest, representing Plaintiff's equity from her home prior to the marriage of the parties.

6. That after the expenses of sale are deducted the balance of the remaining equity should be divided, one-half to the Plaintiff, and one-half to the Defendant.

7. That the Court determines that there is delinquent alimony owed to the Plaintiff in the sum of \$27,507.00.

8. That the Plaintiff should be awarded on going alimony.

9. That the Defendant should pay to the Plaintiff the sum of \$600.00 per month in liquidation of the delinquent alimony sum of \$27,507.00, which the Court calculates will take 45.845 months, and the Defendant should not be required to pay interest on the delinquent alimony.

10. The payment of the back alimony will take Defendant 3.82 years, and by that time the Plaintiff should be employed on a full time basis.

11. That the Plaintiff should have the use and occupancy of the parties house and lot until it is sold, and the Defendant's lien on the equity in the real estate should not draw interest.

12. That neither party has much retirement benefits accumulated, but each should have an interest in the others retirement per the Woodward v. Woodward formula.

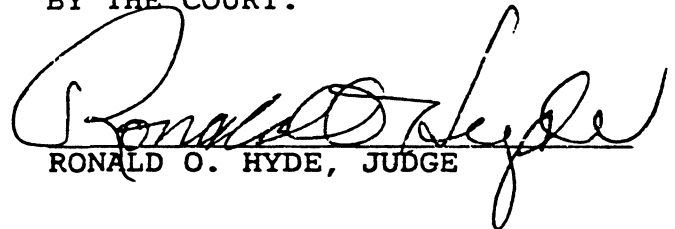
13. If the Plaintiff can obtain health and accident insurance through her employment she should obtain that, but if the said insurance is not available to the Plaintiff then the Defendant should assist the Plaintiff in obtaining whatever medical benefit, if any, she can through Defendants employment, at the Plaintiff's expense.

14. The Plaintiff in receiving \$12,000.00 a year for 3.8 years from the Defendant, plus her current earnings on a part time basis of \$9,780.00 or more, will provide Plaintiff with a gross

income of almost \$22,000.00 per year, which is almost equal to the income which the parties were living on when the Defendant was drawing \$500.00 per week from his business prior to the separation of the parties, and represents a monthly amount greater than the amounts set out in the Affidavit of monthly expenses as filed by the Plaintiff. Therefore, the Plaintiff and the Defendant should each pay their own attorneys fees and costs.

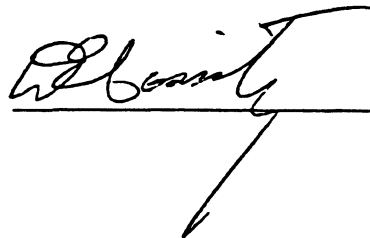
DATED this 25 day of ~~January~~ <sup>Feb</sup>, 1992.

BY THE COURT:

  
RONALD O. HYDE, JUDGE

CERTIFICATE OF MAILING

On this 16<sup>th</sup> day of January, 1992, I certify that I mailed, postage prepaid, to the Plaintiff's attorney, David Burt Havas, at his office at 2604 Madison Avenue, Ogden, Utah 84401, a copy of the foregoing Amended Findings of Fact and Conclusions of Law in the above-entitled case.

  
\_\_\_\_\_

Tab 7

DONN E. CASSITY (#594)  
ROMNEY, NELSON & CASSITY  
Attorneys for Defendant  
115 Social Hall Avenue  
Salt Lake City, Utah 84111  
Telephone: (801) 328-3261

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

---

JOY A. HOAGLAND,	)	
	)	AMENDED ORDER
Plaintiff,	)	
	)	
vs.	)	
	)	CASE NO. 890903214
COLIN G. HOAGLAND,	)	RONALD O. HYDE, JUDGE
	)	
Defendant.	)	

---

On the 9th day of January, 1992, at the hour of 10:00 a.m. the Motion of the Plaintiff to Amend Findings of Fact in the above-entitled matter came on for Hearing, and the Plaintiff was present and represented by her counsel, David Burt Havas, and the Defendant was not present but was represented by his counsel, Donn E. Cassity, and after argument in behalf of Plaintiff's Motion by Plaintiff's counsel, and the objection and argument of counsel for the Defendant, Donn E. Cassity, the Court now being fully advised in the premises does now

ORDER that the Findings of Fact heretofore executed by the Court on the 4th day of December, 1991, be amended as to Paragraph 3 so as to be factually and grammatically correct, amended as to Paragraph 9 of the Findings of Fact, wherein on page 4, third line down, the words "which the Defendant believed had a value of



\$12,000.00 to \$15,000.00, but" be deleted and the balance of said sentence in said Paragraph 9 be left as written, and it is further Ordered the Paragraph 10 of the Findings of Fact be amended by deleting the first three lines of Paragraph 10 including the first word of the fourth line of Paragraph 10, and insert in place of those words as follows "That the Defendant testified that the parties had conversation regarding distribution of the marital assets, and that the Defendant", and starting with the word "proposed" in the fourth line of the Findings of Fact the balance of the Paragraph 10 is to remain as previously written, excepting that the last sentence of Paragraph 10 will read as follows: "The Defendant testified that until the Complaint for divorce was filed by the Plaintiff that the Defendant believed that Plaintiff had agreed with him to accept the marital assets as her own in lieu of Plaintiff making any claim for alimony from the Defendant."

IT IS FURTHER ORDERED that the third and fourth sentences of Paragraph 12 on Page 5 of the Findings of Fact shall be deleted.

IT IS FURTHER ORDERED that no further amendments proposed by the Plaintiff are approved, and are hereby denied.

IT IS FURTHER ORDERED that in the event sale of the marital real estate and division of the net proceeds thereof are upheld by the Utah Court of Appeals, that in view of the fact that the real estate of the parties commonly known as 151 West 5400 South Washington Terrace, Weber County, State of Utah, is by decree of divorce ordered to be sold, and since the Defendant's equity in the said marital real estate will not, because of Plaintiff's appeal,

be timely paid to Defendant due to Plaintiff's appeal of the Court's decision that interest on the net equity of the Defendant in the said real estate, when it is sold, shall bear interest from date of Plaintiff's Notice of Appeal at the rate of ten (10%) percent per annum, which interest shall be paid to the Defendant in addition to the principal amount of the net sales price awarded to Defendant, following sale of the marital real estate, so long as the Defendant pays the Plaintiff alimony consistent with the provisions of the Decree of Divorce, executed and entered by the Court on December 4, 1991.

The Motion of the Plaintiff that she be awarded interest on the Plaintiff's Judgment for delinquent alimony that has been awarded Plaintiff by the Court should be and hereby is denied.

The Order of the Court as to payment of interest to the Defendant, is not intended by the Court to limit any right Defendant otherwise has with respect to the marital estate.

DATED this \_\_\_\_ day of \_\_\_\_\_, 1992.

BY THE COURT:

\_\_\_\_\_  
JUDGE RONALD O. HYDE

CERTIFICATE OF MAILING

I certify that on the 17<sup>th</sup> day of April, 1992, I mailed,

postage prepaid, a copy of the foregoing Order in the above-entitled case to the Plaintiff by mailing a copy thereof to her counsel, David Burt Havas, at his office at 2604 Madison Avenue, Ogden, Utah 84401.

Gayle N Cassidy

Tab 8

DONN E. CASSITY (#594)  
ROMNEY, NELSON & CASSITY  
Attorneys for Defendant  
115 Social Hall Avenue  
Salt Lake City, Utah 84111  
Telephone: (801) 328-3261

COURT  
CLERK  
MAY 7 7 PM 12 05

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

---

JOY A. HOAGLAND,	)	SECOND AMENDED FINDINGS
	)	OF FACT AND
Plaintiff,	)	CONCLUSIONS OF LAW
	)	
vs.	)	
	)	CASE NO. 890903214
COLIN G. HOAGLAND,	)	JUDGE: RONALD O. HYDE
	)	
Defendant.	)	

---

MAY 7 1991

The above-entitled matter came on for Trial before the Honorable Ronald O. Hyde, Second Judicial District Court Judge for Weber County, sitting without a Jury, at 9:30 a.m. on the 28th day of October, 1991, and the Plaintiff, Joy A. Hoagland, and her attorney, David Burt Navas, were present, and the Defendant, Colin G. Hoagland, and his attorney, Donn E. Cassity, were present, and the Plaintiff having presented her testimony, exhibits and evidence, and the Defendant having presented his testimony, exhibits and evidence and the attorneys having made their closing arguments and the Court now being fully informed in the premises, now makes its

FINDINGS OF FACT

1. That the Plaintiff, Joy A. Hoagland, resided in Weber

County, State of Utah in excess of 90 days prior to the filing of the Complaint in the above-entitled matter by the Plaintiff.

2. That the Plaintiff and Defendant were married in Elko, Nevada on the 5th day of September, 1973.

3. That no children were born as issue of the marriage, but from the time of the marriage of the Plaintiff and the Defendant four children, each borne of the Plaintiff from a prior marriage lived in the parties home and were raised by the Plaintiff and Defendant, with the Defendant, Step-Father, providing the substantial part of the support economically for the children, during which time the Defendant developed a very close and loving relationship with each of Plaintiff's children, which relationship has continued to the present.

4. That during the year of 1986 marital problems arose between the parties, and they were separated twice for a few weeks but were reunited near the end of 1986, at which time the Defendant who was unemployed and whose grocery business had been closed, and gone through Bankruptcy, left the residence of the parties in Ogden Utah to seek employment, which he found in Las Vegas, Nevada.

5. That when the Plaintiff married the Defendant he was an employee of Smiths, a grocery company business, but later Defendant quit his employment at Smiths and opened his own grocery store, which business was operated until August of 1986, at which time the Defendant and his brother closed the business and filed the Business Corporation in Bankruptcy.

6. That prior to the closing of the business the Defendant

conveyed title to the residence and lot of the parties to the Plaintiff as a security against the possibility that Creditors might claim against the real and/or personal property of the Plaintiff and Defendant. No such claim was ever made by any Creditor, however.

7. That during 1986 the parties developed serious problems in their marriage relationship.

8. That the Defendant in January of 1987 found gainful employment in Las Vegas, Nevada, again working for Smiths in the grocery business. After being settled in Las Vegas in his new employment, Defendant purchased a newly constructed residence and lot, and invited the Plaintiff to come to Las Vegas. At the time of the visit the Defendant showed the Plaintiff the house, but when the Defendant asked her to move to Nevada so they could live together in the new home, she refused, stating, "My home is in Ogden, Utah". The Defendant told the Plaintiff that they could lease the home in Ogden and thus retain it, and that a good business friend in Ogden would manage it and make certain that it was protected in their absence. The Plaintiff refused to move to Nevada, and effectively the parties were then separated and have never since that period lived together. The marital parties have, and have had irreconcilable differences since at least April of 1987.

9. That at the time Defendant left the parties home in his pursuit of employment in Nevada the Defendant took with him some \$300.00 plus dollars, together with a pick-up truck that was

encumbered and a motorcycle. He left in the possession of the Plaintiff approximately \$8,000.00 to \$10,000.00 in cash, the motor home of the parties, which at a later time the Plaintiff sold for \$9,000.00 cash. The Defendant also left with the Plaintiff all of the furniture, the house lot, swimming pool, and a 1980 Lincoln Town Car, and a 1976 Chevrolet. None of the vehicles were encumbered at that time. That none of the \$8,000.00 - \$10,000.00 cash, or the \$9,000.00 received by the Plaintiff from sale of the motor home was shared by Plaintiff with the Defendant.

10. That the parties had irreconcilable differences. That the Defendant testified that the parties had conversation regarding distribution of the marital assets, and that the Defendant proposed that the Plaintiff retain as her sole property all of the vehicles, money, house and lot, furniture and household furnishings, and other personal property that he had left with the Plaintiff at the time Defendant went to Nevada, and that the Plaintiff forego any claim to alimony from the Defendant. The Defendant testified that until the Complaint for Divorce was filed by the Plaintiff that he believed that Plaintiff had agreed with him to accept the marital assets as her own, in lieu of Plaintiff making any claim for alimony from the Defendant.

By the time the Complaint in the above matter was filed by the Plaintiff the Defendant had been transferred by his employer from Las Vegas to Reno, Nevada.

11. A Hearing on an Order to Show Cause was held in the absence of the Defendant, he being in Nevada at his work, and an



Order for temporary alimony was ordered by the Court in the sum of \$1,500.00 per month. That at the time of Trial of the case, temporary unpaid alimony had accrued in the total sum of \$27,507.00.

12. That at the time of the marriage of the Plaintiff and the Defendant the Plaintiff had an equity in a house and lot and the Plaintiff and Defendant lived in the said house for a period of time. The Plaintiff's house was sold. That following the separation of the parties the Defendant sent monies to the Plaintiff for some time thereafter.

13. That since the separation of the parties the Plaintiff temporarily had a daughter and a child live with her, but otherwise Plaintiff has lived in the home, alone, since the separation of the parties. The home is a four bedroom, two level home, with swimming pool, patio and covered porch, two car garage within the house, and no mortgage is owing on the said real estate. The house and lot have been appraised twice, for \$97,000.00 and for \$85,000.00.

14. That neither the Plaintiff nor Defendant has much retirement benefits accumulated, if any.

15. That since the filing of the divorce the Defendant has been transferred from Reno, Nevada by his employer to Phoenix, Arizona, and Defendant has purchased a house and lot in Glendale, Arizona, and a pick-up truck, and a boat in which there is essentially no equity.

16. That the Plaintiff has had the sole use of the parties real estate, furniture, fixtures and all of the other personal

property accumulated by the parties during the marriage since the separation of the parties in December of 1986.

17. That the Plaintiff had not become accustomed to a high standard of living during the marriage, it appearing from the evidence that prior to Defendant's business failing in 1986 he was grossing approximately \$500.00 per week which was used for family needs. The parties income tax returns for years prior thereto indicate actual income considerably less.

18. Plaintiff is employed currently as she has been for some time with the United States Treasury Department, Internal Revenue Service as a GS-5 Step One with a gross yearly salary of \$16,973.00, and a part-time gross pay of \$8,280.00, plus unemployment for ten weeks giving her a gross income of \$9,780.00 per year.

19. Plaintiff testified that she would receive an increased income when she returns to work in 1992.

20. That the Plaintiff's employment history indicates that she graduated from High School in 1953 and has basically worked in clerking positions or assembly line positions, and has never earned a high income.

21. Plaintiff's health is good and she suffers no disabilities.

22. Defendant after reobtaining employment with Smiths became a Store Manager, but he developed Rheumatoid Arthritis and has had to down grade his job to that of a buyer, and his income will be approximately \$56,000.00 per annum.

23. That Plaintiff filed an Affidavit of monthly expenses showing present monthly expenses of \$1,796.00 per month, however, Plaintiff's Affidavit is more a wish list than a needs list.

An example of that fact is that the transportation figure that the Plaintiff uses in her monthly expenses list shows \$531.00 for transportation expense though her testimony is that she drives very little. She also indicates that her personal expenses of \$270.00 per month includes recreational and travel of over \$130.00, and she testified that she does not travel and spends very little money on recreation. In addition, she recites that her food expenses totalled \$350.00 per month which is not a realistic sum to spend for one person, and reflects a desire on the part of the Plaintiff to obtain high alimony rather than reasonably advising the Court of the Plaintiff's actual expenses.

24. That the Plaintiff claims that the house and lot in Washington Terrace was deeded to her in exchange for any claim she had against ownership of the grocery store business that was operated by the Defendant and his brother.

25. The Court finds, however, that the Deed was conveyed at a time when the grocery business of the Defendant and his brother was closing down and near Bankruptcy and ultimately went into Bankruptcy, and that there was little, or no value in the business at the time of the conveyance by Defendant of title by Quit-Claim Deed to the Plaintiff.

26. The evidence shows that the Defendant still, at this date, looks at the Plaintiff's children as his family, which fact

supports Defendant's version that he wanted Plaintiff to join him in Las Vegas to continue the marriage, but that Plaintiff refused to do so.

27. The Plaintiff claims that no such discussion of her moving to Nevada took place, but Plaintiff does acknowledge that Plaintiff and Defendant did discuss renting out the residence and lot in Washington Terrace, Ogden, Utah.

The Court having entered its Findings of Fact now enters its

#### CONCLUSIONS OF LAW

1. That the Court has jurisdiction in the above-entitled matter.

2. That the parties have irreconcilable differences one with the other, and they should be divorced from each other, and the divorce should be final upon execution and entry by the Court.

3. That the residence and lot located at 151 West 5400 South, Washington Terrace, Weber County, State of Utah, is a marital asset.

4. That the said real estate should be sold.

5. That from the sale proceeds, the Plaintiff should be awarded, the first \$19,672.00, without interest, representing Plaintiff's equity from her prior home prior to the marriage of the parties.

6. That after the expenses of sale are deducted the balance of the remaining equity should be divided, one-half to the Plaintiff, and one-half to the Defendant.

7. That the Court determines that there is delinquent alimony owed to the Plaintiff in the sum of \$27,507.00.

8. That the Plaintiff should be awarded on going alimony.

9. That the Defendant should pay to the Plaintiff the sum of \$600.00 per month in liquidation of the delinquent alimony sum of \$27,507.00, which the Court calculates will take 45.845 months, and the Defendant should not be required to pay interest on the delinquent alimony.

10. The payment of the back alimony will take Defendant 3.82 years, and by that time the Plaintiff should be employed on a full time basis.

11. That the Plaintiff should have the use and occupancy of the parties house and lot until it is sold, and the Defendant's lien on the equity in the real estate should not draw interest.

12. That neither party has much retirement benefits accumulated, but each should have an interest in the others retirement per the Woodward v. Woodward formula.

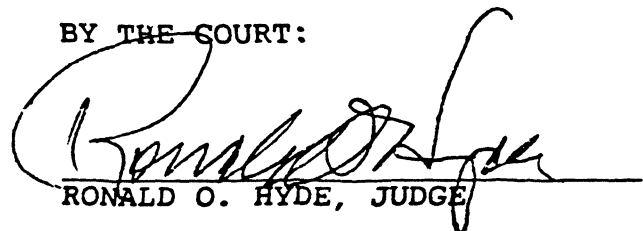
13. If the Plaintiff can obtain health and accident insurance through her employment she should obtain that, but if the said insurance is not available to the Plaintiff then the Defendant should assist the Plaintiff in obtaining whatever medical benefit, if any, she can through Defendant's employment, at the Plaintiff's expense.

14. The Plaintiff in receiving \$12,000.00 a year for 3.8 years from the Defendant, plus her current earnings on a part time basis of \$9,780.00, or more, will provide Plaintiff with a gross

income of almost \$22,000.00 per year, which is almost equal to the income which the parties were living on when the Defendant was drawing \$500.00 per week from his business prior to the separation of the parties, and represents a monthly amount greater than the amounts set out in the Affidavit of monthly expenses as filed by the Plaintiff. Therefore, the Plaintiff and the Defendant should each pay their own attorneys fees and costs.

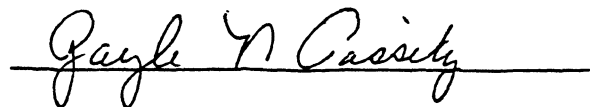
DATED this 7 day of May, 1992.

BY THE COURT:

  
RONALD O. HYDE, JUDGE

CERTIFICATE OF MAILING

On this 17<sup>th</sup> day of April, 1992, I certify that I mailed, postage prepaid, to the Plaintiff's attorney, David Burt Havas, at his office at 2604 Madison Avenue, Ogden, Utah 84401, a copy of the foregoing Second Amended Findings of Fact and Conclusions of Law in the above-entitled case.



Tab 9

**15-1-2, 15-1-2a. Repealed.**

**Repeals.** — Sections 15-1-2, 15-1-2a (L. 1907, ch. 46, § 2; C.L. 1907, § 1241x; C.L. 1917, § 3321; R.S. 1933, 44-0-2; L. 1935, ch. 42, § 1; C. 1943, 44-0-2; L. 1953, ch. 24, §§ 1, 2; 1955, ch. 20, § 1; 1965, ch. 25, § 1), relating to maximum interest rates on loans and conditional sales contracts, were repealed by Laws 1969, ch. 18, § 9.103.

**15-1-3. Calculated by the year.**

Whenever in any statute or deed, or written or verbal contract, or in any public or private instrument whatever, any certain rate of interest is mentioned and no period of time is stated, interest shall be calculated at the rate mentioned by the year.

**History:** L. 1907, ch. 46, § 7; C.L. 1907, § 1241x5; C.L. 1917, § 3326; R.S. 1933 & C. 1943, 44-0-3.

**COLLATERAL REFERENCES**

C.J.S. — 47 C.J.S. Interest § 42.  
Key Numbers. — Interest ⇐ 40.

**15-1-4. Interest on judgments.**

Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of 12% per annum.

**History:** L. 1907, ch. 46, § 11; C.L. 1907, § 1241x9; C.L. 1917, § 3330; R.S. 1933 & C. 1943, 44-0-4; L. 1981, ch. 73, § 2.

**Amendment Notes.** — The 1981 amendment increased the interest rate from 8% to 12%.

**Cross-References.** — Interest to be included in judgment entry, Rules of Civil Procedure, Rule 54(e).

**NOTES TO DECISIONS****ANALYSIS**

Allowance of interest before judgment.  
Amendment of judgment.  
Collection of interest.  
Eminent domain.  
Estates of decedents.  
Federal court judgment.  
Interest during pendency of appeal.  
Late payment of property division in divorce action.  
Personal judgments.  
Prejudgment interest.  
Reinstatement of judgment.  
Renewal of judgment.



Tab 10

NOTES TO DECISIONS

ANALYSIS

Both parties at fault.  
Cruel treatment.

Both parties at fault.

Marriage may be dissolved by making a grant of divorce to each party where each was equally at fault. *Mullins v. Mullins*, 26 Utah 2d 82, 485 P.2d 663 (1971).

Cruel treatment.

Acts constituting cruel conduct sufficient to cause great mental distress need not be aggravated and more severe when directed toward the husband than when directed toward the wife. *Hansen v. Hansen*, 537 P.2d 491 (Utah 1975).

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

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

History: R.S. 1898 & C.L. 1907, § 1210; C.L. 1917, § 2998; R.S. 1933 & C. 1943, 40-3-3.

NOTES TO DECISIONS

ANALYSIS

Appealability of order.  
Appeal from order.  
Attorney fees.  
Attorney fees for appeal.  
Attorney's lien on alimony.  
Contempt proceedings.  
Contesting petitioner for modification.  
Costs and expenses on appeal.  
Discretion of trial court.  
Enforcement of order or decree.  
Jurisdiction.  
Mandamus.  
Order of court.  
Stipulation and effect thereof.

**Appealability of order.**

Formal order made in divorce action, called a "judgment" directing that judgment be entered for benefit of defendant's attorneys, is not final and appealable. *Rolando v. District Court*, 72 Utah 459, 271 P. 225 (1928).

**Appeal from order.**

Where there were no findings or evidence in record as to attorney's fees, Supreme Court remanded issue for disposition by trial court but allowed wife's attorney \$100 for services rendered with reference to husband's appeal from judgment modifying divorce decree. *Parish v. Parish*, 84 Utah 390, 35 P.2d 999 (1934).

Supreme Court assumed that evidence supported award of suit money to wife where no testimony as to wife's need was before the court on appeal on judgment roll from the decree of no cause of action in husband and awarding of expenses of suit, attorney's fees

and temporary alimony to wife. *Weiss v. Weiss*, 111 Utah 353, 179 P.2d 1005 (1947).

**Attorney fees.**

Allowance of \$200 as wife's attorney's fee in divorce proceeding was not inadequate even though husband was worth approximately \$40,000, where proceedings from time of commencement until entry of decree lasted less than two months and trial itself was completed in less than two days. *Blair v. Blair*, 40 Utah 306, 121 P. 19, 38 L.R.A. (n.s.) 269, 1914D Ann. Cas. 989 (1912).

Where decree of divorce was obtained by mother of minor children against father, who was required to pay certain sum periodically for support, care, maintenance, and education of such children, and he, without sufficient cause, refused to comply with decree, as result of which mother was compelled to bring proceedings against him, father was required to pay counsel fees in such proceedings. *Tribe v. Tribe*, 59 Utah 112, 202 P. 213 (1921).

Court properly awarded attorney's fees to wife in subsequent proceeding on application of wife for arrears in alimony. *Christensen v. Christensen*, 65 Utah 597, 239 P. 501 (1925).

Fifty dollars was a reasonable fee where wife petitioned to require husband to show cause why he should not be punished for contempt for failure to pay support money and husband filed cross-petition for modification of decree and where it was shown that wife was without means to prosecute the cause or pay counsel. *Scott v. Scott*, 105 Utah 376, 142 P.2d 198 (1943).

While fact that wife is able to pay expenses

Tab 11

Issue 4

30-3-10.6

HUSBAND AND WIFE

(3) If the court finds that an action under this section is filed or answered frivolously and in a manner designed to harass the other party, the court shall assess attorney's fees as costs against the offending party.

**History:** C. 1953, 30-3-10.4, enacted by L. 1988, ch. 106, § 5; 1990, ch. 112, § 2.

**Amendment Notes.** — The 1990 amendment, effective March 8, 1990, rewrote the first two sentences in Subsection (2), which had read "(a) The order of joint legal custody is terminated upon the filing of a motion for termination by: (i) both parents; or (ii) one parent,

when notice of the motion is sent by certified mail to the other parent and an affidavit is filed with the motion, indicating the motion has been mailed as required by this subsection. (b) The order of joint legal custody shall be replaced by the court with an order of sole legal custody under Section 30-30-10."

**30-3-10.6. Payment under child support order — Judgment.**

(1) Each payment or installment of child or spousal support under any child support order, as defined by Subsection 62A-11-401(3), is, on and after the date it is due:

(a) a judgment with the same attributes and effect of any judgment of a district court, except as provided in Subsection (2);

(b) entitled, as a judgment, to full faith and credit in this and in any other jurisdiction; and

(c) not subject to retroactive modification by this or any other jurisdiction, except as provided in Subsection (2).

(2) A child or spousal support payment under a child support order may be modified with respect to any period during which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is the petitioner, or to the obligor, if the obligee is the petitioner.

(3) For purposes of this section, "jurisdiction" means a state or political subdivision, a territory or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(4) The judgment provided for in Subsection (1)(a), to be effective and enforceable as a lien against the real property interest of any third party relying on the public record, shall be docketed in the district court in accordance with Sections 78-22-1 and 62A-11-311.

**History:** C. 1953, 30-3-10.6, enacted by L. 1987, ch. 117, § 1; 1988, ch. 1, § 3; 1988, ch. 203, § 1; 1989, ch. 62, § 1; ch. 115, § 1.

**Amendment Notes.** — The 1989 amendment by ch. 62, effective April 24, 1989, substituted "62A-11-311" for "62A-11-309" at the end of Subsection (4).

The 1989 amendment by ch. 115, effective

April 24, 1989, deleted "reduced to an administrative or judicial judgment for a specific amount and" before "docketed" in Subsection (4).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

Tab 12

(c) The court shall then determine whether ORS must release the location and address of the custodial parent and any children, and issue an order accordingly.

**History:** C. 1953, 62A-11-331, enacted by L. 1989, ch. 108, § 1; recodified as C. 1953, 62A-11-332.

**Compiler's Notes.** — This section was enacted as § 62A-11-331, but was recodified by the Office of Legislative Research and General

Counsel because of the enactment at the same session of another § 62A-11-331.

**Effective Dates.** — Laws 1989, ch. 108 became effective on April 24, 1989, pursuant to Utah Const., Art. VI, Sec. 25.

## PART 4

### INCOME WITHHOLDING

#### 62A-11-401. Definitions.

As used in this part:

(1) "Child" means a son or daughter who is under the age of 18 years, or who is physically or mentally handicapped and incapable of earning income sufficient to support himself.

(2) "Child support" means a financial obligation ordered by a court or administrative body for the support of a child, including current periodic payments and all arrearages. Child support includes court ordered obligations for the support of a spouse or former spouse with whom the child resides if the spousal support is collected with the child support.

(3) "Child support order" means a judgment, decree, or order of a court or administrative body whether interlocutory or final, whether or not prospectively or retroactively modifiable, whether incidental to a proceeding for divorce, judicial or legal separation, separate maintenance, paternity, guardianship, civil protection, or otherwise, which:

(a) establishes or modifies child support;

(b) reduces child support arrearages to judgment; or

(c) establishes child support or confirms a child support order under Chapter 31, Title 77.

(4) "Delinquent" or "delinquency" means that child support in an amount at least equal to current child support payable for one month is overdue.

(5) "Income" means earnings or compensation paid or payable for personal services whether denominated as wages, salary, commission, bonus, or contract payment, or denominated as advances on future wages, salary, commission, bonus, contract payment, or otherwise. "Income" specifically includes, but is not limited to:

(a) all gain derived from capital assets, labor, or both, including profit gained through sale or conversion of capital assets;

(b) periodic payments made under pension or retirement programs or insurance policies of any type;

(c) unemployment compensation benefits; and

(d) workers' compensation benefits.

(6) "Jurisdiction" means a state or political subdivision, a territory or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

- (7) "Obligor" means a person owing a duty of child support.
- (8) "Obligee" means a person to whom a duty of support is owed, or who is entitled to reimbursement of support or public assistance.
- (9) "Office" means the Office of Recovery Services.
- (10) "Payor" means an employer or any person who is a source of income to an obligor.

**History:** C. 1953, 62A-11-401, enacted by L. 1988, ch. 1 § 314; 1989, ch. 62, § 20.

**Amendment Notes.** — The 1989 amendment, effective April 24, 1989, rewrote Subsection (5) which read "'Income' means earnings or compensation for personal services whether denominated as wages, salary, commission, bonus, contract payment, or otherwise, including gain derived from capital assets, periodic payments made under pension programs, retire-

ment programs, or insurance policies, and unemployment compensation insurance benefits"; and rewrote Subsection (8) which read "'Obligee' means a person or entity entitled to receive child support, including an agency of this or another jurisdiction."

**Effective Dates.** — Laws 1988, ch. 1, § 408 makes the act effective on January 19, 1988

### **62A-11-402. Administrative procedures.**

Because the procedures of this part are mandated by federal law they shall be applied for the purposes specified in this part and control over any other statutory administrative procedures.

**History:** C. 1953, 62A-11-402, enacted by L. 1988, ch. 1, § 315.

**Effective Dates.** — Laws 1988, ch. 1, § 408 makes the act effective on January 19, 1988

### **62A-11-403. Provision for income withholding in child support order.**

When a child support order is issued or modified in this state after July 1, 1985, it shall authorize the withholding of income as a means of collecting child support. The order shall specify that when child support is delinquent, as defined by Subsection 62A-11-401(4), appropriate income withholding procedures shall apply to existing and future payors, and that all withheld income shall be submitted to the office. This provision of the order may be effective until the obligor no longer owes child support to the obligee.

**History:** C. 1953, 62A-11-403, enacted by L. 1988, ch. 1, § 316.

**Effective Dates.** — Laws 1988, ch. 1, § 408 makes the act effective on January 19, 1988

### **COLLATERAL REFERENCES**

**Am. Jur. 2d.** — 79 Am Jur 2d Welfare Laws § 81

### **62A-11-404. Procedure for obligee seeking income withholding.**

(1) An obligee may apply for income withholding services by the office, under Title IV-D of the Social Security Act, or seek income withholding in a district court of competent jurisdiction, when a delinquency occurs under a child support order which includes authorization of income withholding. In order to proceed with a civil action, the obligee shall petition the court for a

Tab 13



instructions. *Morgan v. Quailbrook Condominium Co.*, 704 P.2d 573 (Utah 1985).

**Written instructions.**

**—Failure to tender.**

**—Waiver.**

Where plaintiff had failed to tender a written instruction on burden of proof he could not claim error in the lack of such instruction. *Fuller v. Zinik Sporting Goods Co.*, 538 P.2d 1036 (Utah 1975).

**Cited in** *Wellman v. Noble*, 12 Utah 2d 350, 366 P.2d 701 (1961); *Hill v. Cloward*, 14 Utah 2d 55, 377 P.2d 186 (1962); *Ortega v. Thomas*, 14 Utah 2d 296, 383 P.2d 406 (1963); *Meier v. Christensen*, 15 Utah 2d 182, 389 P.2d 734 (1964); *Memmott v. U.S. Fuel Co.*, 22 Utah 2d 356, 453 P.2d 155 (1969); *Telford v. Newell J. Olsen & Sons Constr. Co.*, 25 Utah 2d 270, 480

P.2d 462 (1971); *Flynn v. W.P. Harlin Constr. Co.*, 29 Utah 2d 327, 509 P.2d 356 (1973); *McGinn v. Utah Power & Light Co.*, 529 P.2d 423 (Utah 1974); *Henderson v. Meyer*, 533 P.2d 290 (Utah 1975); *Lamkin v. Lynch*, 600 P.2d 530 (Utah 1979); *State v. Hall*, 671 P.2d 201 (Utah 1983); *Highland Constr. Co. v. Union Pac. R.R.*, 683 P.2d 1042 (Utah 1984); *Gill v. Timm*, 720 P.2d 1352 (Utah 1986); *Penrod v. Carter*, 737 P.2d 199 (Utah 1987); *King v. Fereday*, 739 P.2d 618 (Utah 1987); *State v. Cox*, 751 P.2d 1152 (Utah Ct. App. 1988); *Ramon ex rel. Ramon v. Farr*, 770 P.2d 131 (Utah 1989); *Anton v. Thomas*, 806 P.2d 744 (Utah Ct. App. 1991); *Reeves v. Gentile*, 813 P.2d 111 (Utah 1991); *Hodges v. Gibson Prods. Co.*, 811 P.2d 151 (Utah 1991); *Home Sav. & Loan v. Aetna Cas. & Sur. Co.*, 166 Utah Adv. Rep. 26 (Ct. App. 1991).

**COLLATERAL REFERENCES**

**Am. Jur. 2d.** — 75A Am. Jur. 2d Trial § 1077 et seq.

**C.J.S.** — 88 C.J.S. Trial §§ 266 to 448.

**A.L.R.** — Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R.3d 10.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R.3d 88.

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 A.L.R.3d 170.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Verdict-urging instructions in civil case

stressing desirability and importance of agreement, 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 A.L.R.3d 1154.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 101.

Federal Rules of Civil Procedure, construction and effect of provision in Rule 51, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 A.L.R. Fed. 310.

**Key Numbers.** — Trial ⇌ 182 to 296.

**Rule 52. Findings by the court.**

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be

considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

- (1) by default or by failing to appear at the trial;
- (2) by consent in writing, filed in the cause;
- (3) by oral consent in open court, entered in the minutes.

(Amended effective Jan. 1, 1987.)

**Compiler's Notes.** — This rule is similar to Rule 52, F.R.C.P.

**Cross-References.** — Masters, Rule 53.

#### NOTES TO DECISIONS

##### ANALYSIS

##### Adoption.

- Abandonment of contract.
- Advisory verdict.
- Breach of contract.
- Child custody.
- Contempt.
- Credibility of witnesses.
- Denial of motion.
- Divorce decree modifications.
- Easement
- Evidentiary disputes.
- Juvenile action.
- Material issues.
- Harmless error.
- Submission by prevailing party.
- Court's discretion.
- Water dispute.
- Findings of state engineer.

##### Amendment.

- Motion.
- Conformance with original findings.
- New trial.
- Notice of appeal.

##### —Time.

- Tolling of appeal period.
- When made.
- Overruling or vacation.
- Another district judge.
- Lack of notice.
- Child custody awards.
- Criminal cases.
- Criminal contempt.
- Effect.
- Preclusion of summary judgment.
- Relation to pleadings.
- Failure to object to findings.
- How findings entered.
- Judicial review.
- Equity cases.
- Standard of review.
- Conclusions of law.
- Criminal cases.
- Criminal trials.
- Findings of facts by jury.
- Intent.
- Juvenile proceedings.
- Purpose of rule.
- Stipulations.

Tab 14

eree's order to participate in appeal secured by another creditor, 22 A.L.R.3d 914.

Power of successor or substituted master or referee to render decision or enter judgment on testimony heard by predecessor, 70 A.L.R.3d 1079.

Referee's failure to file report within time

specified by statute, court order, or stipulation as terminating reference, 71 A.L.R.4th 889.

What are "exceptional conditions" justifying reference under Rule of Civil Procedure 53(b), 1 A.L.R. Fed. 922.

**Key Numbers.** — Equity ⇐ 393 to 395, 401, 404 to 406; Reference ⇐ 3 et seq., 35 to 77, 99 et seq.

## PART VII. JUDGMENT.

### Rule 54. Judgments; costs.

(a) **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) **Judgment upon multiple claims and/or involving multiple parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) **Demand for judgment.**

(1) **Generally.** Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) **Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) **Costs.**

(1) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(2) **How assessed.** The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against

demand such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) **Judgment by default.** A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) **Costs.**

(1) **To whom awarded.** Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(2) **How assessed.** The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court in which the judgment was rendered.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

(3), (4) [Deleted.]

(e) **Interest and costs to be included in the judgment.** The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs, if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket (Amended effective January 1, 1985.)

**Amendment Notes.** — Subdivisions (d)(3) and (d)(4), relating to the award of costs by the appellate court and costs in original proceedings before the Supreme Court, were repealed with the adoption of the Utah Rules of Appellate Procedure, effective January 1, 1985. See, now, Rule 34(d), Utah R. App. P.

**Compiler's Notes.** — This rule is similar to Rule 54, F R C P.

**Cross-References.** — Continuances, discretion to require payment of costs, Rule 40(b); Judges' retirement fee, taxing as costs, § 49-6-301; State, payment of costs awarded against, § 78-27-13; Stay of judgment upon multiple claims, Rule 62(h); Witness fees, taxing as costs, § 21-5-8.

Tab 15

**Rule 57. Declaratory judgments.**

The procedure for obtaining a declaratory judgment pursuant to Chapter 33 of Title 78, U.C.A. 1953, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

**Compiler's Notes.** — This rule is similar to Rule 57, F.R.C.P.

## NOTES TO DECISIONS

Cited in *Oil Shale Corp. v. Larson*, 20 Utah 369, 438 P.2d 540 (1968).

## COLLATERAL REFERENCES

**Am. Jur. 2d.** — 22A Am. Jur. 2d Declaratory Judgments §§ 183, 186, 203 et seq.  
**C.J.S.** — 26 C.J.S. Declaratory Judgments §§ 17, 18, 104, 155.  
**A.L.R.** — Right to jury trial in action for declaratory relief in state court, 33 A.L.R.4th 146.  
**Key Numbers.** — Declaratory Judgment 41, 42, 251, 367.

**Rule 58A. Entry.**

(a) **Judgment upon the verdict of a jury.** Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

(b) **Judgment in other cases.** Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

(c) **When judgment entered; notation in register of actions and judgment docket.** A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) **Notice of signing or entry of judgment.** The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

(e) **Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

(f) **Judgment by confession.** Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

(3) It must authorize the entry of judgment for a specified sum.

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

(Amended effective Sept. 4, 1985; Jan. 1, 1987.)

**Advisory Committee Note.** — Paragraph (d) is intended to remedy the difficulties suggested by *Thompson v. Ford Motor Co.*, 14 Utah 2d 334, 384 P.2d 109 (1963).

**Compiler's Notes.** — The subject matter of this rule is dealt with in Rules 58 and 79(a), F.R.C.P.

**Cross-References.** — Judgment against person dying after verdict or decision, not a lien on realty, § 78-22-1.1.

Judgment by confession authorized, § 78-22-3.

## NOTES TO DECISIONS

### ANALYSIS

Death of party.

—During appeal.

Other cases.

—Unsigned minute entry.

When entered.

—Completion.

—Formal judgment.

—Notice to parties.

—Filing.

—Unsigned minute entry.

Cited.

**Death of party.**

—During appeal.

Where jury returned verdict for plaintiff but judge entered judgment notwithstanding the verdict for defendant, death of plaintiff during appeal did not abate appeal since court, under Subdivision (e) of this rule, could still enter judgment on verdict if judgment notwithstanding verdict were reversed. *Bates v. Burns*, 2 Utah 2d 362, 274 P.2d 569 (1954).

**Other cases.**

—Unsigned minute entry.

An appeal from a summary judgment was dismissed where the record showed only an unsigned minute entry and no judgment or order signed by the judge. *Wisden v. City of Salina*, 696 P.2d 1205 (Utah 1985).

**When entered.**

—Completion.

—Formal judgment.

Whether plaintiff had right to have action

dismissed upon payment of costs presented judicial question to be determined by court, so that where court ordered case dismissed and clerk entered "case dismissed" in register of actions but formal judgment had not been entered, action was still pending between parties. *Yusky v. Chief Consol. Mining Co.*, 65 Utah 269, 236 P. 452 (1925).

—Notice to parties.

Under this rule, a judgment is complete and is deemed entered for all purposes when it is signed and filed, and not when notice is received by the parties. In re *Bundy's Estate*, 121 Utah 299, 241 P.2d 462 (1952).

Where a losing party moved to set aside the judgment against her within about a month after learning that the judgment had been entered, and her ignorance of the judgment until that time was due in part to a lack of notice that the prevailing party was required to provide pursuant to this rule, her motion was timely under Rule 60(b). *Workman v. Nagle Constr., Inc.*, 802 P.2d 749 (Utah Ct. App. 1990).

—Filing.

For cases discussing necessity of serving proposed findings, judgments, and orders on opposing counsel in compliance with former Rule 2.9, Rules of Practice — Dist. and Cir. Ct. (now Rule 4-504, Rules of Judicial Administration), see *Bigelow v. Ingersoll*, 618 P.2d 50 (Utah 1980); *Wayne Garff Constr. Co. v. Richards*, 706 P.2d 1065 (Utah 1985); *Calfo v. D.C. Stewart Co.*, 717 P.2d 697 (Utah 1986); *Larsen v. Larsen*, 674 P.2d 116 (Utah 1983).



Tab 16

**Rule 4. Appeal as of right: when taken.**

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

**NOTES TO DECISIONS**

**ANALYSIS**

Attorney fees.  
Cross-appeal.  
Extension of time to appeal.  
Filing of notice.  
Filing with county clerk.

Final order or judgment.  
Post-judgment motions.  
Premature notice.  
Reconsideration of order.  
Timeliness of notice.  
—Date of notice.  
Cited.

Tab 17

## Rule 5

## UTAH RULES OF APPELLATE PROCEDURE

not confer jurisdiction on the court. *Anderson v. Schwendiman*, 764 P.2d 999 (Utah Ct. App. 1988).

### Reconsideration of order.

The Court of Appeals declined to reconsider and overrule its prior denial of the state's request to dismiss an appeal as untimely. *State v. Yates*, 765 P.2d 251 (Utah Ct. App. 1988).

### Timeliness of notice.

Notice of appeal filed within the required period from date of entry of order of contempt was filed timely and Supreme Court had jurisdiction to hear appeal concerning the contempt order. *Burgers v. Maiben*, 652 P.2d 1320 (Utah 1982).

An untimely motion for a new trial had no effect on the running of the time for filing a notice of appeal. *Burgers v. Maiben*, 652 P.2d 1320 (Utah 1982).

Case was temporarily remanded to the juvenile court in order to allow that court to make a determination whether an order extending the time for appeal should be entered by the juvenile court under this rule, when it was not apparent whether the notice of appeal was either timely filed or deemed timely filed by the juvenile court. *State In re M.S.*, 781 P.2d 1287 (Utah Ct. App. 1989).

Where plaintiff, one day after the voluntary withdrawal of its motion for directed verdict, filed a notice of appeal and also moved for an extension of time in which to file a notice of appeal, the notice of appeal was timely filed, irrespective of whether the order granting ad-

ditional time for filing had a nunc pro tunc effect. *Guardian State Bank v. Stangl*, 779 P.2d 1 (Utah 1989).

Notice of appeal placed in the prison mail by an incarcerated criminal defendant within the 30-day period set forth in this rule was not timely, where the notice was filed in the district court more than 30 days after entry of the judgment being appealed. *State v. Palmer*, 777 P.2d 521 (Utah Ct. App. 1989).

By using the disjunctive "or," Subdivision (c) clearly allows the notice of appeal to be filed after the announcement of either a decision, a judgment, or an order. "Decision" is broadly defined to cover final judgments, interlocutory orders, or "the first step leading to a judgment," and includes a trial court's determination of guilt. *City of St. George v. Smith*, 814 P.2d 1154 (Utah Ct. App. 1991).

Appellant's notice of appeal, which was filed after the announcement of the decision of guilt but before sentencing, was timely filed under Subdivision (c). *City of St. George v. Smith*, 814 P.2d 1154 (Utah Ct. App. 1991).

### —Date of notice.

In determining whether a notice of appeal is timely filed and establishes jurisdiction in an appellate court, the appellate court is bound by the filing date on the notice of appeal transmitted to it by the trial court. *State In re M.S.*, 781 P.2d 1287 (Utah Ct. App. 1989).

Cited in *Neerings v. Utah State Bar*, 166 Utah Adv. Rep. 13 (1991).

## COLLATERAL REFERENCES

A.L.R. — When will premature notice of appeal be retroactively validated in federal civil case, 76 A.L.R. Fed. 199.

## Rule 5. Discretionary appeals from interlocutory orders.

(a) **Petition for permission to appeal.** An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court, with proof of service on all other parties to the action.

(b) **Fees and copies of petition.** The petitioner shall file with the Clerk of the Supreme Court an original and seven copies of the petition, or, with the Clerk of the Court of Appeals, an original and four copies, together with the fee for filing a notice of appeal in the trial court and the docketing fee in the appellate court. If an order is issued authorizing the appeal, the clerk of the appellate court shall immediately give notice of the order by mail to the respective parties and shall transmit a certified copy of the order, together with a copy of the petition and filing fee, to the trial court where the petition and order shall be filed in lieu of a notice of appeal. If the petition is denied, the filing fee shall be refunded.

**(c) Content of petition.** The petition shall contain:

(1) A statement of the facts necessary to an understanding of the controlling question of law determined by the order sought to be reviewed;

(2) A *statement of the question of law and a demonstration that the question was properly raised before the trial court and ruled upon;*

(3) A statement of the reasons why an immediate interlocutory appeal should be permitted; and

(4) A statement of the reason why the appeal may materially advance the termination of the litigation.

(5) The petition shall include a copy of the order of the trial court from which an appeal is sought and any related findings of fact, conclusions of law and opinion.

(d) **Answer.** Within 10 days after service of the petition, any other party may file an answer in opposition or concurrence. An original and seven copies of the answer shall be filed in the Supreme Court. An original and four copies shall be filed in the Court of Appeals. The petition and any answer shall be submitted without oral argument unless otherwise ordered.

(e) **Grant of permission.** An appeal from an interlocutory order may be granted only if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice. The order permitting the appeal may set forth the particular issue or point of law which will be considered and may be on such terms, including the filing of a bond for costs and damages, as the appellate court may determine. If the petition is granted, the appeal shall be deemed to have been docketed by the granting of the petition, and all proceedings subsequent to the granting of the petition shall be as, and within the time required, for appeals from final judgments.

## NOTES TO DECISIONS

## ANALYSIS

Challenge to sufficiency of evidence.

Determination regarding substantial rights.

Irreparable damage.

New trial motion.

—Arbitrary exercise of authority.

Order vacating summary judgment.

Purpose in granting.

When to grant.

Cited.

**Challenge to sufficiency of evidence.**

Intermediate appeal, and not writ of habeas corpus, was only proper means to challenge sufficiency of evidence to support issuance of indictment and trial court's denial of defendant's request for discovery of testimony of witnesses before grand jury. *Granato v. Salt Lake County Grand Jury*, 557 P.2d 750 (Utah 1976).

**Determination regarding substantial rights.**

Where plaintiff sued for injuries suffered when her son's car, in which she was riding, collided with a cow which had fallen on high-

way from defendant's truck, preliminary order by the trial court that unlawful loading of the truck was negligence as a matter of law and that the trial should be held only on the issue of damages involved substantial rights of the parties and would materially affect the final decision and, therefore, was subject to an intermediate appeal. *Klafta v. Smith*, 17 Utah 2d 65, 404 P.2d 659 (1965).

**Irreparable damage.**

Temporary order allocating water usage by plaintiff pending further study by court raised sufficient issue of irreparable damage pending the filing of the final order fixing and decreeing the water rights of the respective parties as to be appealable. *In re Water Rights*, 10 Utah 2d 77, 348 P.2d 679 (1960).

**New trial motion.**

—Arbitrary exercise of authority.

If a trial court's authority with respect to a motion for a new trial is exercised arbitrarily, the proper redress is either in a petition for interlocutory appeal, which may be granted in