

1992

Kaylene S. Smith v. Odell M. Smith, Jr. : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jeff R. Thorne; Mann, Hadfield and Thorne; Attorney for Appellee.

John W. Bradley; Vlahos, Sharp, Wight and Bradley; Attorneys for Appellant.

Recommended Citation

Brief of Appellee, *Smith v. Smith, Jr.*, No. 920750 (Utah Court of Appeals, 1992).

https://digitalcommons.law.byu.edu/byu_ca1/4741

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

COURT OF APPEALS
BRIEF

UT
DL
KBJ
50
AP
DOU

920750

IN THE UTAH COURT OF APPEALS
FOR THE STATE OF UTAH

KAYLENE S. SMITH,	)	BRIEF OF APPELLEE
)	
Plaintiff/Appellee,)	
	)	APPELLATE CASE
	)	NO: 920750-CA
vs.)	
	)	DISTRICT COURT CASE
	)	NO. 910000459
ODELL M. SMITH, JR.,)	
	)	PRIORITY: 15
Defendant/Appellant.)	

An Appeal from the First
Judicial District Court of
Box Elder County, State of Utah
Honorable Clint S. Judkins, Presiding

JEFF R. THORNE, #3250
MANN, HADFIELD & THORNE
Zions Bank Bldg. 98 North Main
P. O. Box 876
Brigham City, Utah 84302-0876
(801) 723-3404

Attorneys for
Plaintiff/Appellee

JOHN W. BRADLEY, #5447
VLAHOS, SHARP, WIGHT & BRADLEY
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401
(801) 621-2464

Attorneys for
Defendant/Appellant

FILED

SEP 13 1993

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS
FOR THE STATE OF UTAH

KAYLENE S. SMITH,	)	BRIEF OF APPELLEE
)	
Plaintiff/Appellee,)	
	)	APPELLATE CASE
vs.	)	NO: 920750-CA
)	
	)	DISTRICT COURT CASE
	)	NO. 910000459
ODELL M. SMITH, JR.,)	
	)	PRIORITY: 15
Defendant/Appellant.)	

An Appeal from the First
Judicial District Court of
Box Elder County, State of Utah
Honorable Clint S. Judkins, Presiding

JEFF R. THORNE, #3250
MANN, HADFIELD & THORNE
Zions Bank Bldg. 98 North Main
P. O. Box 876
Brigham City, Utah 84302-0876
(801) 723-3404

Attorneys for
Plaintiff/Appellee

JOHN W. BRADLEY, #5447
VLAHOS, SHARP, WIGHT & BRADLEY
Legal Forum Building
2447 Kiesel Avenue
Ogden, Utah 84401
(801) 621-2464

Attorneys for
Defendant/Appellant

LIST OF PARTIES

Kaylene S. Smith, Plaintiff and Appellee
Odell M. Smith, Jr., Defendant and Appellant

TABLE OF CONTENTS

LIST OF PARTIES.....	i
TABLE OF CONTENTS.....	ii, iii
TABLE OF AUTHORITIES.....	iv, v
STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS.....	1
STATEMENT OF THE ISSUES ON APPEAL.....	1
STANDARD OF REVIEW ON APPEAL.....	2
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	4
SUMMARY OF ARGUMENTS.....	5
ARGUMENTS	
POINT I.	
THE COURT DID NOT ABUSE ITS DISCRETION IN ITS AWARD OF ALIMONY.....	6
A. The Findings of Fact and Conclusions of Law are Sufficient to Support the Award of Alimony.....	7
B. The Court Did Not Err in Entering the Findings of Fact and Conclusions of Law.....	17
C. The Court Did Not Err in its Exclusion of Certain Evidence.....	19
D. The Court Did Not Err in Awarding Alimony, and Did Not Improperly Award to Plaintiff, Defendant's Premarital Assets.....	22

POINT II.

THE TRIAL COURT DID NOT ERR IN ORDERING DEFENDANT TO PAY THE INCOME TAX LIABILITY.....	28
---	----

POINT III.

THE TRIAL COURT DID NOT ERR IN ORDERING DEFENDANT TO PAY ATTORNEY FEES.....	30
--	----

A. Plaintiff was Entitled to Attorney Fees in the Divorce Action.....	30
--	----

B. Plaintiff is Entitled to Attorney Fees on this Appeal.....	34
--	----

CONCLUSION.....	34
-----------------	----

CERTIFICATE OF MAILING.....	36
-----------------------------	----

ADDENDUM

TABLE OF AUTHORITIES

CASE CITATIONS

<u>Argyle v. Argyle</u> , 688 P.2d 468, 470 (Utah App. 1984).....	29
<u>Baker v. Baker</u> , 551 P.2d 1263 (Utah 1976).....	7
<u>Beals v. Beals</u> , 682 P.2d 862, 864 (Utah 1984).....	30
<u>Bell v. Bell</u> , 810 P.2d 489, 494 (Utah App. 1991).....	34
<u>Burke v. Burke</u> , 733 P.2d 133, 134-35 (Utah 1987).....	23
<u>Burt v. Burt</u> , 799 P.2d 1166, 1171 (Utah App. 1990).....	34
<u>Cabrera v. Cottrell</u> , 694 P.2d 622, 624-25 (Utah 1985).....	30
<u>Crouse v. Crouse</u> , 817 P.2d 836, 840 (Utah App. 1991).....	30
<u>English v. English</u> , 565 P.2d 409 (Utah 1977).....	2, 7
<u>Gardner v. Gardner</u> , 748 P.2d 1076 (Utah 1988).....	8, 29
<u>Haumont v. Haumont</u> , 793 P.2d 421 (Utah App. 1990).....	24, 32
<u>In the Interest of R.R.D.</u> , 791 P.2d 206 (Utah App. 1990).....	21
<u>Jones v. Jones</u> , 700 P.2d 1072, 1075 (Utah 1985).....	8, 12
<u>Lee v. Lee</u> , 744 P.2d 1378, 1380 (Utah App. 1987).....	29
<u>Martindale v. Adams</u> , 777 P.2d 514, 518 (Utah App. 1989).....	32

<u>Martin v. Safeway Stores, Inc.</u> , 565 P.2d 1139, 1141 (Utah 1977).....	21
<u>McFarland v. Skaggs Cos., Inc.</u> , 678 P.2d 298 (Utah 1984).....	21
<u>Morgan v. Morgan</u> , 213 Utah Adv. Rep. 22 (Utah App. 1993).....	17, 30
<u>Newmeyer v. Newmeyer</u> , 745 P.2d 1276, 1279 n.1 (Utah 1987).....	26
<u>Noble v. Noble</u> , 761 P.2d 1369 (Utah 1988).....	23, 26, 27
<u>Paffel v. Paffel</u> , 732 P.2d 96, 100 (Utah 1986).....	11
<u>Pusey v. Pusey</u> , 728 P.2d 117, 119 (Utah 1986).....	29
<u>Rappleye v. Rappleye</u> , 215 Utah Adv. Rep. 45, 47 (Utah App. 1993).....	17
<u>Rasband v. Rasband</u> , 752 P.2d 1331 (Utah App. 1988).....	7, 11, 29, 30, 33
<u>Schindler v. Schindler</u> , 776 P.2d 84, 90 (Utah App. 1989).....	17
<u>Smith v. Smith</u> , 78 Utah Adv. Rep. 39 (Ct. App. 1988).....	29
<u>Terry v. Zions Coop. Mercantile Inst.</u> , 605 P.2d 314, 322-23 (Utah 1979).....	21
<u>Walters v. Walters</u> , 812 P.2d 64, 67 (Utah App. 1991).....	23

STATUTES

Utah Code Annotated

§ 30-3-3 (1989).....	30
§ 30-3-5 (1) (1989).....	23
§ 78-2a-3 (2) (i).....	1

RULES

Utah Rules of Appellate Procedure Rule 3.....	1
Utah Rules of Appellate Procedure Rule 24.....	1
Utah Rules of Evidence Rule 402.....	6, 19
Utah Rules of Evidence Rule 403.....	6, 20
Utah Rules of Judicial Administration Rule 4-504.....	18, 19

CONSTITUTIONAL PROVISIONS

None

KAYLENE S. SMITH,	)	BRIEF OF APPELLEE
)	
Plaintiff/Appellee,	)	APPELLATE CASE
	)	NO: 9207500-CA
)	
vs.	)	DISTRICT COURT CASE
	)	NO: 910000459
ODELL M. SMITH, JR.,)	
)	
Defendant/Appellant.	)	PRIORITY: 15
)	

STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS

The Utah Court of Appeals has jurisdiction pursuant to Utah Code Annotated § 78-2a-3 (2) (i), stating that the Court of Appeals has appellate jurisdiction over appeals from the District Court involving domestic relations cases, including but not limited to divorce and property division. Rule 3 of the Utah Rules of Appellate Procedure also indicates a procedure for taking appeals from judgments and orders of trial courts. This brief follows the structural requirements outlined in Rule 24 of the Utah Rules of Appellant Procedure. This is a brief by Kaylene S. Smith, Plaintiff, in support of a judgment and Decree of Divorce entered below.

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the Trial Court abused its discretion in making the award of alimony that it did.

2. Whether the Findings of Fact and Conclusions of Law are sufficient to support the award of alimony.

3. Whether the Court properly entered its Findings of Fact and Conclusions of Law.

4. Whether the Court erred in obligating Defendant to pay an income tax liability.

5. Whether the Findings of Fact and Conclusions of Law are sufficient to support the award of attorney fees.

STANDARD OF REVIEW ON APPEAL

The Standard of Review on Appeal is that the trial court, in a divorce action, has considerable latitude of discretion in adjusting financial and property interests. Thus, the Appellate Court may reverse only if the appellant proves that there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or the evidence clearly preponderated against the findings; or such a serious inequity has resulted as to manifest a clear abuse of discretion, as set forth in English v. English, 565 P.2d 409, 410 (Utah 1977).

STATEMENT OF THE CASE

This is an appeal from a Judgment and Decree of Divorce entered by the Honorable Clint S. Judkins sitting as a District

Court Judge on or about October 14, 1992. R. 68-78 (Findings of Fact and Conclusions of Law).

At trial, Plaintiff appeared and was represented by Attorney Jeff R. Thorne. Defendant appeared and was represented by Attorney Brent E. Johns. A trial was held on the matter in which the only witnesses were plaintiff, defendant, and plaintiff's daughter. Judge Judkins entered his decision on the day of trial and Plaintiff's attorney prepared Findings of Fact and Conclusions of Law and Decree of Divorce. T. 173-178

Plaintiff's attorney prepared a Findings of Fact and Conclusions of Law and Decree of Divorce and forwarded same to defendant's attorney on or about September 24, 1992. R. 66 (Letter to Brent Johns dated September 24, 1992.) Defendant's attorney objected to paragraphs 10, 15, 16 and 17 of the Findings of Fact and Conclusions of Law and paragraph 14 of the Decree of Divorce as set forth in his letter to plaintiff's attorney dated October 1, 1992. R. 67 (Letter to Jeff Thorne dated October 1, 1992.) Defendant's attorney withdrew as counsel on October 14, 1992. R. 84 (Withdrawal of Counsel.) Plaintiff's attorney forwarded, together with a letter to the Court, the Decree of Divorce, Findings of Fact and Conclusions of Law as well as Brent John's letter of October 1, 1992. R. 65 (Letter to Judge Judkins dated October 5, 1992.) The

Decree and Findings were submitted to the Court together with a letter which indicated in part that it was being submitted for "either signing or modification as you see fit." R. (Letter to Judge Judkins dated October 5, 1992.) Judge Judkins made one change at paragraph 16 of the Findings of Fact, and signed the Decree of Divorce which was entered on October 14, 1992. R. 68-83 (Findings of Fact and Conclusions of Law, Decree of Divorce.)

STATEMENT OF FACTS

Plaintiff and defendant met in the summer of 1980 when plaintiff gained employment as a secretary at defendant's Grain Elevator operation. Both parties were married to other people at the time. (T. 11 and 12) Some time later, the relationship developed into a romantic relationship. (T. 12) Plaintiff obtained a divorce from her husband in 1983. The relationship continued until defendant was divorced. Defendant obtained a divorce from his wife in 1986. (T. 13 and 69) At that time, defendant assisted plaintiff in moving to Brigham City, Utah in January of 1986. (T. 70) Defendant moved to Brigham City, Utah in June of 1986. (T. 70 and 71) The parties maintained separate residences but continued their relationship until they were married on August 14, 1989. (T. 17 and 73-74)

Pursuant to his divorce from his former wife, defendant

received a settlement to compensate him for his interest in the family farm operation. It is disputed as to both the amount of settlement and as to how the amounts were arrived at. Defendant did not work during the time of the marriage. (T. 116) Plaintiff worked for Brigham Realty, Richard's Manufacturing Jewelers and Weinstocks while the parties resided in Brigham City. (T. 51-53)

Plaintiff filed a Verified Complaint, Order to Show Cause and Temporary Restraining Order on September 13, 1991. (R. 1-11) A trial was held on August 28, 1992, and the divorce entered on October 14, 1992. T. 68-78 (Findings of Fact and Conclusions of Law) Defendant filed an appeal from this decision on November 12, 1992. R. 85 and 86 (Notice of Appeal)

SUMMARY OF ARGUMENT

Defendant's Appeal is primarily centered around three issues, those being alimony, division of an income tax liability and attorney fees. The Court did not abuse its discretion in these areas, and entered Findings of Fact and Conclusions of Law which were adequately supported by the evidence.

The Findings of Fact and Conclusions of Law were appropriately entered, irrespective of the withdrawal of defendant's attorney after the trial had ended.

With regard to alimony, the Court did not err in its award to

plaintiff. First, the Findings are adequate and are supported by the evidence at trial. Second, the Findings address the financial condition and needs of the plaintiff; the ability of plaintiff to produce an income for herself; and the ability of defendant to provide support. Finally, the Court properly excluded defendant's exhibits 4 and 5, under the Utah Rules of Evidence, Rules 402 and 403.

The Court did not err in requiring defendant to pay the income tax liability incurred as a result of the parties filing an amended and joint income tax return.

The final issue defendant raises on appeal is attorney fees which were appropriately awarded on the basis that there was a showing of need on the part of the plaintiff for that award, and there was also a showing of the reasonableness of the fees. The trial court in this case entered findings which are supported by the actual evidence taken at trial. As such, the trial court's ruling should be affirmed.

ARGUMENT

POINT I.

THE COURT DID NOT ABUSE ITS DISCRETION IN ITS AWARD OF ALIMONY

The Court should affirm the alimony award on the basis that the Findings of Fact and Conclusions of Law entered below are

sufficient to support the alimony award.

A. The Findings of Fact and Conclusions of Law are Sufficient to Support the Award of Alimony.

The trial court, in a divorce action, has considerable latitude of discretion in adjusting financial and property interests. A party appealing therefrom has the burden to prove there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or the evidence clearly preponderated against the findings; or such a serious inequity has resulted as to manifest a clear abuse of discretion. English v. English, 565 P.2d 409, 410 (Utah 1977) (citing Baker v. Baker, 551 P.2d 1263 (Utah 1976)). The trial court in this case did not abuse its discretion. The award of alimony in this action was consistent with the purposes of an alimony award as articulated by this Court.

The Court has described the purpose of alimony: "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, 565 P.2d at 411. An alimony award should, to the extent possible, equalize the parties' respective post-divorce living standards and maintain them at a level as close as possible to that standard of living enjoyed during the marriage. Rasband v. Rasband,

752 P.2d 1331, 1333 (Utah App. 1988) (citing Gardner v. Gardner, 748 P.2d 1076, 1081 (Utah 1988); Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985)).

In this action the award fulfills the stated purpose of an alimony award. Prior to the parties' marriage the plaintiff was working and earning a net income of approximately \$1,000.00 per month. Plaintiff also was earning \$1,000.00 per month during the marriage. The plaintiff terminated her employment, and is now only making approximately \$400.00 per month in income. R. 73 (Findings of Fact and Conclusions of Law)

The Court found that the plaintiff has suffered an economic disadvantage as a result of the marriage in that she does not have as good as employment as she had before the marriage. R. 77 (Findings of Fact and Conclusions of Law) The Court then ordered defendant to pay alimony to the plaintiff in the amount of \$643.00 per month for a period of one year. Thereafter, defendant was ordered to pay alimony in the amount of \$600.00 per month for the next two years. R. 77-78 (Findings of Fact and Conclusions of Law)

The award of \$600.00 per month alimony will allow plaintiff to maintain the standard of living she enjoyed prior to and during the marriage. The \$400.00 per month income that the plaintiff is now earning, and the \$600.00 per month alimony award will allow

plaintiff to approximate her accustomed standard of living.

The alimony award will also serve to equalize the parties' respective post-divorce living standards. Defendant after paying the \$600.00 per month will still be left with sufficient resources to maintain his standard of living. The record clearly indicates that defendant will have sufficient interest income and social security income to maintain himself in his accustomed standard of living. The record also tends to show that defendant received approximately \$25,000.00 per year in rental income from a lease of three sections of property to his son. T. 232 and 236

Defendant will earn a substantial amount of interest income from Smith Farms, Zions Bank, First Security Bank, and other sources. T. 135 As part of his written settlement agreement with his first wife, defendant was entitled to cash payments of \$210,000.00 and \$150,000.00. The \$210,000.00 was to be paid \$30,000.00 on or before April 20, 1986, \$30,000.00 upon the closing of a loan, \$150,000.00 payable in annual payments of \$25,000.00 per year including interest at the rate of 8 percent. Additionally, defendant was to be paid by his former wife an additional \$150,000.00 within five years from the date of the divorce. R. 70 (Findings of Fact and Conclusions of Law) Defendant will also earn interest on his account with American First Credit Union that had

a balance of \$41,275.00 as of September 14, 1991, as well as on his share savings account that had a balance of \$9,532.16. R. 70 (Findings of Fact and Conclusions of Law)

Defendant also had five different certificates of deposit with First Security Bank in Challis, Idaho. The money was deposited on March 27, 1991, each account had an initial deposit of \$36,000.00, and accrued interest at the rate of 6.83% per annum. These accounts totalled \$180,000.00 on March 17, 1992. R. 71 (Findings of Fact and Conclusions of Law)

Defendant also received the sum of \$249,120.93, on or about March 27, 1991, for his share of any interest in the farm properties he was awarded under his prior divorce decree. Defendant is unable to state whether the money constituted earnings off the farm property or whether it was all principal and interest from the sale of the property. R. 71 (Findings of Fact and Conclusions of Law) Regardless of the source of the money, in the future defendant will be able to earn substantial income in the form of interest from this sum.

Defendant is also eligible for social security. Defendant stated that he would be entitled to approximately \$350.00 per month.

Defendant cannot be heard to claim that he has no income with

which to pay the alimony award. Just because defendant is unemployed and therefore earns no income from wages, this does not mean that defendant has no income. In fact as set out above, defendant has substantial income from interest earnings as well as his entitlement to social security. Defendant is entitled to \$350.00 per month in social security for a total of \$4,200 per year, and defendant receives \$10,000.00 - \$12,000.00 per year in interest income. T. 275 Defendant clearly will be able to maintain his standard of living after paying the alimony award.

The award will also serve to equalize the parties' respective post-divorce living standards. At plaintiff's current income level she is earning only \$4,800.00 per year. Without the alimony, there would be a great disparity between plaintiff's and defendant's respective standards of living. Thus, the award of alimony is necessary to partially equalize the disparity in the parties' post-divorce standards of living.

As the Court has stated, this court will not disturb the trial court's award of spousal support absent a showing of a clear and prejudicial abuse of discretion. Rasband, 752 P.2d at 1333 (citing Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986)). As set out above, the alimony award in this action serves the very purpose of alimony in allowing plaintiff to maintain her standard of living, and

equalizing the parties' post-divorce living standards. Thus, the trial court clearly did not abuse its discretion.

The Court in Jones, 700 P.2d at 1075, articulated three factors that 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; and 3. the ability of the husband to provide support.

The Findings of Fact and Conclusions of Law in this action address the three factors set out above.

First, the financial condition and needs of the plaintiff are addressed in the Findings of Fact and Conclusions of Law. The plaintiff has suffered an economic disadvantage as a result of the marriage in that she does not have as good as employment as she had before the marriage and during the marriage before she quit her employment due, at least in part, to the urging of the defendant. R. 77 (Findings of Fact and Conclusions of Law) The plaintiff is currently employed and earning approximately \$400.00 per month. This is compared with the \$1,000.00 per month plaintiff was earning before and during part of the marriage. R. 73 (Findings of Fact and Conclusions of Law) The plaintiff needs an income on an average monthly basis of \$1,162.00 to enable her to live similar to how she lived during the marriage, and to meet her current living expenses

and obligations. R. 73 (Findings of Fact and Conclusions of Law) Thus plaintiff is in need of approximately \$762.00 per month to maintain her standard of living.

Second, the ability of plaintiff to produce a sufficient income for herself is also stated in the Findings of Fact and Conclusions of Law. As set out under the first factor, plaintiff's current income is only \$400.00 per month. R. 73 (Findings of Fact and Conclusions of Law) Plaintiff has not been able to find employment that will produce sufficient income for her to support herself.

Plaintiff was employed at a job with Weinstocks that would have allowed her to support herself. However, defendant and plaintiff came to a mutual agreement that plaintiff should leave that job. T. 211, 212, and 252 The transcript reveals evidence of defendant's displeasure with plaintiff's job, and his feelings that plaintiff should leave the job. Plaintiff stated that defendant did not want her to work, rather defendant wanted plaintiff to stay home with him. T. 128 and 159 The job at Weinstocks was hard on the marriage since plaintiff often had to work from 4:00 to 5:00 p.m. until midnight. T. 161 and 163 Defendant did not believe the job was worth the expense, and the wear and tear on their car. T. 163, 208, 211, and 212 Defendant also felt that plaintiff's safety

was at risk working at the job at Weinstocks. Defendant stated that he had heard that cars had been broken into and people had been mugged in the parking lot at plaintiff's employment. T. 208 and 209 Plaintiff agreed with defendant's concerns and left her job. Thus, defendant's urging led plaintiff to give up the job that would have allowed her to come closer to supporting herself.

Plaintiff's future ability to produce sufficient income for herself has also been brought into question by her present medical condition. That plaintiff is in need of surgery was established in evidence pursuant to a letter from Dr. C. M. Dibble. Plaintiff's condition requiring this surgery arose during the marriage. R. 73 (Findings of Fact and Conclusions of Law) Plaintiff does not have enough money for the surgery, and it is not clear whether or not she will be physically capable of full-time work until she has had the surgery. T. 132

Third, the ability of the defendant to provide support has also been shown. Although defendant was unable or unwilling to explain his present financial condition, certain facts may be extracted from the Findings of Fact and Conclusions of Law and from the transcript. As part of the settlement agreement with defendant's first wife, he was entitled to cash payments of \$210,000.00 and \$150,000.00. The \$210,000.00 was to be paid

\$30,000.00 on or before April 20, 1986, \$30,000.00 upon the closing of a loan, \$150,000.00 payable in annual payments of \$25,000.00 per year including interest at the rate of 8% per annum. Defendant was also to receive an additional \$150,000.00 within five years from the date of the divorce. R. 70 (Findings of Fact and Conclusions of Law) Defendant also had an account with American First Credit Union with a balance of \$41,275.00, and a share savings account in the amount of \$9,532.16. Defendant also had five different certificates of deposit with First Security Bank in Challis, Idaho. Each account had an initial deposit of \$36,000.00 and accrued interest at the rate of 6.83% per annum. The accounts totalled \$180,000.00 on March 17, 1992. R. 70 and 71 (Findings of Fact and Conclusions of Law)

Defendant also received \$249,120.93 on or about March 27, 1991, for his share of any interest in the farm properties he was awarded under his prior divorce decree. Defendant was unable to articulate how the amount of money was computed. Defendant was also unable to articulate whether the money constituted earnings off the farm property which he held in common with his ex-wife, or whether it was all principal and interest from the sale of the property. R. 71 (Findings of Fact and Conclusions of Law)

Defendant is also eligible for social security of

approximately \$350.00 per month.

Although the Findings of Fact and Conclusions of Law address the defendant's ability to provide support, the Court must also consider the transcript from this action. The Court need only make a cursory review of the transcript, especially the cross-examination of defendant, to understand the difficulty in determining defendant's financial condition. Defendant was clearly unable or unwilling to disclose his financial condition; however, certain facts may be clearly drawn from the transcript.

It is clear that defendant will earn a substantial amount of interest income from Smith Farms, Zions Bank, First Security Bank, and other sources. T. 135 Defendant made over \$17,480.72 in interest income in a two year period during the marriage. Defendant reported this interest income as joint income on his tax returns over the two years. T. 247 and 248

In considering defendant's entire financial position it appears that defendant earns \$350.00 per month from social security, and \$10,000.00 - \$12,000.00 per year in interest income. T. 275 Defendant also stated that he received approximately \$25,000.00 per year in rental income from a lease of three sections of farming property. T. 232 and 236 Despite defendant's inability or unwillingness to completely outline his financial condition,

taking the Findings of Fact and Conclusions of Law and the evidence from the transcript as a whole, it appears clear that defendant has the ability to provide support.

The Court has stated that [i]f these three factors have been considered, we will not disturb the trial court's alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion. Rappleye v. Rappleye, 215 Utah Adv. Rep. 45, 47 (Utah App. 1993) (citing Morgan v. Morgan, 213 Utah Adv. Rep. 22, 26 (Utah App. 1993)) (quoting Schindler v. Schindler, 776 P.2d 84, 90 (Utah App. 1989)) (citation omitted). No serious inequity has resulted in this case. Plaintiff has been placed in a position, due to the alimony award, where she may be able to maintain the standard of living she enjoyed prior to the marriage. The trial court considered the three factors, as set out above, and did not abuse its discretion. Thus, this Court should not disturb the trial court's alimony award.

B. The Court Did Not Err in Entering the Findings of Fact and Conclusions of Law.

The trial court asked plaintiff's attorney to prepare the Findings of Fact and Conclusions of Law, and send them to opposing counsel for approval, and then to see that they were submitted to the court. T. 284 Plaintiff's attorney prepared the Findings and

Conclusions and forwarded them to defendant's attorney, on September 24, 1992. R. 66 Defendant's attorney replied by a letter dated October 1, 1992, indicating that he disagreed in part with the Findings at paragraph 10, 15, 16, and 17 and paragraph 14 of the Decree of Divorce. R. 67 (Letter to Jeff Thorne dated October 1, 1992) Plaintiff's attorney submitted the Findings of Fact and Conclusions of Law to the court with a letter to Judge Judkins dated October 5, 1992. The letter informed the court of plaintiff's and defendant's differences as to the Findings of Fact and Conclusions of Law, and asked the court to modify the documents as the court saw fit. R. 65 (Letter to Judge Judkins dated October 5, 1992) The court was able to review plaintiff's and defendant's positions and it in fact made a change to plaintiff's documents, before issuing its final Findings of Fact and Conclusions of Law and Decree of Divorce.

No violation of Rule 4-504 of the Utah Rules of Judicial Administration occurred. In fact, defendant has not set out any alleged violations in his brief. Defendant cannot request that his attorney withdraw from the case and then subsequently protest that the attorney, who he requested to withdraw, should have proceeded to object to the Findings and Decree of Divorce. Defendant obviously was unhappy with the court's decision; however, he cannot

use his own request to his attorney to withdraw as a basis to have the decision he disagreed with set aside on appeal.

The Findings of Fact and Conclusions of Law are not against the weight of the evidence, and were not improperly entered under Rule 4-504 of the Utah Rules of Judicial Administration.

C. The Court Did Not Err in Its Exclusion of Certain Evidence

Defendant's attorney attempted to admit into evidence, a letter marked Defendant's exhibit #4, which was a letter to plaintiff's girlfriend in Idaho dated January 7, 1990. Defendant testified that he found the letter in the garbage where it was torn up and that he pieced it together. Defendant's attorney also attempted to admit exhibit #5, another letter from plaintiff to her parents, dated January 5, 1990, into evidence. This letter was also found in the trash where it had been torn up and was also pieced back together by defendant. Neither exhibit 4 nor exhibit 5 was admitted into evidence.

The trial court questioned the materiality of the letters. T.

203 Utah Rules of Evidence Rule 402 provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

The court sustained plaintiff's objection, to the admissibility of the letters, stating that it felt that had the letters been delivered there would be a question as to their materiality; however, since plaintiff had torn up and thrown away the letters, they were clearly not material. T. 204 The court stated that it would sustain plaintiff's objection unless defendant could offer anything else to substantiate his claims that the letters should be admitted. T. 204 Defendant's attorney did not offer any other arguments or grounds for the letters' admissibility, but rather moved on to another issue.

As provided in Utah Rules of Evidence Rule 403:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The court clearly questioned the relevancy of the letters. Even if there was a possibility that the letters had some minimal relevancy, the trial court was clearly acting within its proper bounds of discretion in excluding the evidence under Rule 403. Clearly these letters addressed collateral matters which were not central to the divorce proceedings. The trial court properly used its discretion in excluding the exhibits.

The law is clear that in matters of determining materiality the trial court should be accorded a large measure of discretion and should only be reversed if this discretion is abused. Martin v. Safeway Stores, Inc., 565 P.2d 1139, 1141 (Utah 1977).

In In the Interest of R.R.D., 791 P.2d 206 (Utah App. 1990), a case where the issue was whether a juvenile should be treated as an adult, the trial court excluded a comparison of records of other youths within the Youth Corrections. The juvenile appealed the exclusion arguing that the evidence excluded would show that the average youth in secure confinement had committed more offenses than R.R.D. This Court upheld the lower court's exclusion of the evidence. The Court stated that trial courts are given great discretion to determine the relevance and weight of submitted evidence because of their competence in judging the exigencies of a particular case. Terry v. Zions Coop. Mercantile Inst., 605 P.2d 314, 322-23 (Utah 1979), overruled on other grounds, McFarland v. Skaggs Cos., Inc., 678 P.2d 298 (Utah 1984). Consequently, a court's determination in this regard will not be reversed unless it is shown that there was an abuse of that discretion. Terry, 605 P.2d at 323; In the Interest of R.R.D., 791 P.2d at 212. Clearly, in this case the trial court did not abuse its discretion in excluding the exhibits.

D. The Court Did Not Err in Awarding Alimony, and Did Not Improperly Award to Plaintiff, Defendant's Premarital Assets.

The trial court made findings as to defendant's sources of income and the record is replete with testimony regarding defendant's income. Therefore, defendant's argument that the alimony must be paid out of premarital assets is not founded on the evidence in the record. As has been previously set forth, defendant earns \$350.00 per month in social security and \$10,000.00 - \$12,000.00 per year in interest income. T. 275 Defendant has also stated that he received approximately \$25,000.00 per year in rental income from a lease of three sections of farming property. T. 232 and 236 In addition, during the marriage defendant received \$249,120.93 for his share of any interest he held in farm property. Defendant was unable or unwilling to articulate whether this payment constituted earnings off of the farm property. R. 71 (Findings of Fact and Conclusions of Law) As further evidence of defendant's income potential, it should be noted that defendant reported over \$17,480.72 as joint income on his tax returns during the two years of the marriage. T. 247 and 248

The Findings of Fact and Conclusions of Law and the record clearly show that defendant has a substantial stream of income from which to pay the alimony award, and that the alimony is not being

paid out of defendant's premarital assets. Thus, the trial court's award of alimony was proper and not an abuse of discretion.

Even if this Court determined that the alimony is being paid out of premarital assets, the trial court's award of alimony is still proper and not an abuse of discretion. Utah Code Ann. § 30-3-5 (1) (1989) provides in part that "[w]hen a decree of divorce is entered, the court may include in it equitable orders relating to the children, property, and parties ...". The Utah Supreme Court has concluded that this statute confers "broad discretion upon trial courts in the division of property, regardless of its source or time of acquisition." Walters v. Walters, 812 P.2d 64, 67 (Utah App. 1991) (quoting Burke v. Burke, 733 P.2d 133, 134-35 (Utah 1987)). Further, "the purpose of property divisions is to allocate property in the manner which best serves the needs of the parties and best permits them to pursue their separate lives." Noble v. Noble, 761 P.2d 1369, 1373 (Utah 1988) (quoting Burke, 733 P.2d at 135).

The general rule is that premarital property is viewed as separate property. However, this rule is not invariable. "In fashioning an equitable property division, trial courts need consider all of the pertinent circumstances." Burke, 733 P.2d at 135. In Walters 812 P.2d at 67, the court set out several factors

to be considered:

the amount and kind of property to be divided; whether the property was acquired before or during the marriage; the source of the property; the health of the parties; the parties' standard of living, respective financial conditions, needs, and earning capacity; the duration of the marriage; the children of the marriage; the parties' ages at the time of marriage and of divorce; what the parties gave up by the marriage; and the necessary relationship the property division has with the amount of alimony and child support to be awarded.

Where unique circumstances exist, a trial court may reallocate premarital property as part of property division incident to divorce. Haumont v. Haumont, 793 P.2d 421, 424-25 (Utah App. 1990).

Several of the factors listed are of importance in this case. In considering the amount and kind of property to be divided, it is clear that defendant received a substantial amount of interest income and rental income during the course of the marriage. Defendant is also eligible for social security income.

The plaintiff's health is also an important issue in this case. The trial court entered a specific finding as to plaintiff's need for surgery, and that the condition arose during the marriage.

R. 73 (Findings of Fact and Conclusions of Law)

The parties' standard of living, respective financial conditions, needs, and earning capacities have also been addressed at length under POINT I. A.. It is clear that without the award of alimony, plaintiff's standard of living will be dramatically reduced; whereas, the defendant would be able to maintain his standard of living while paying the alimony award. The financial condition, needs, and earning capacity of plaintiff have also been established. Plaintiff's ability to produce income is approximately \$762.00 per month less than the amount she needs to live on. Defendant's financial condition is substantially stronger than plaintiff's, and he will easily be able to cover his needs and pay the award of alimony to plaintiff.

The relationship between the property division and the amount of alimony is also an important factor in this action. There is a vast disparity between the amount of property awarded to plaintiff and that awarded to defendant. Plaintiff cannot use the minimal amount of property she was awarded to sustain herself; whereas, defendant will be able to live in relative ease and comfort from the property he was awarded. Also if this Court allows defendant to deny that he earns a substantial amount of income from social security, interest, and rent; then defendant will be able to live

in relative ease from his substantial assets, while pleading poverty and no income when faced with the prospect of having to pay alimony. The alimony award is necessary for plaintiff to maintain her standard of living given her paucity of assets. If this Court determines that defendant has no income, then an award to plaintiff of defendant's premarital assets is the only just resolution of this issue. Without the alimony award plaintiff would leave the marriage with very few assets and no money, and without the ability to maintain her standard of living.

As the court stated in Noble, 761 P.2d at 1373, there is no per se ban on awarding one spouse a portion of the premarital assets of another... under appropriate circumstances, achieving a fair, just, and equitable result may require that the trial court exercise its discretion to award one spouse the premarital property of another. In this action plaintiff was awarded only minimal assets and the alimony award is the only means plaintiff has to maintain her standard of living. The trial court properly viewed this relationship between the property division and the award of alimony in this action.

The Utah Supreme Court in Newmeyer v. Newmeyer, 745 P.2d 1276, 1279 n.1 (Utah 1987), explained that the issues of alimony and property division are not entirely separable.

[N]either the trial court nor this Court considers the property division in a vacuum. The amount of alimony awarded and the relative earning capabilities of the parties are also relevant, because the relative abilities of the spouses to support themselves after the divorce are pertinent to an equitable determination of the division of the fixed assets of the marriage.

If this Court allows defendant to characterize his social security, interest, and rental income as premarital property, then an equitable division of his "premarital" property would be just and proper given the relative earning capabilities of the parties and the needs of the plaintiff.

The court, in Noble, was faced with a situation where the wife, Elaine, had been awarded by the trial court a substantial portion of the husband's, Glen's, premarital property because of the husband's inability to provide sufficient alimony. Glen appealed the award of the premarital property to Elaine. The court stated that, "[t]he gross inadequacy of the alimony available to provide for Elaine's needs, the paucity of her separate premarital property, and Glen's relative wealth all warranted Judge Tibb's awarding Elaine a substantial portion of Glen's premarital property. Noble, 761 P.2d at 1373.

If this Court allows defendant to classify all of his income as premarital assets, then this action presents a situation similar to that presented in Noble. Defendant would then be in a position

to claim an inability to provide alimony for plaintiff's needs; plaintiff has very few premarital assets; and defendant is in a position of relative wealth. The difference in this action is that plaintiff would only be awarded a small portion of defendant's premarital property in the form of alimony as compared to the substantial portion of premarital property awarded in Noble.

Therefore, the alimony award in this action is proper either as an award out of defendant's income, or as a just and equitable award of a small portion of defendant's premarital assets. The trial court in this action did not abuse its discretion and the award of alimony to the plaintiff should be affirmed.

POINT II

THE TRIAL COURT DID NOT ERR IN ORDERING DEFENDANT TO PAY THE INCOME TAX LIABILITY

The trial court acted within its proper discretion in ordering that defendant pay the income tax liability. R. 76 (Findings of Fact and Conclusions of Law) Plaintiff received a notice from the state tax commission stating that there were some back taxes due to the state. T. 133 This liability resulted when plaintiff amended her tax return upon defendant's request. Plaintiff had filed married separate, and defendant informed plaintiff that he would save money if plaintiff would amend her return and file jointly. T.

170 Defendant convinced plaintiff to switch her filing status, and assured her that he would pay any balance due as a result of the revision in her filing status. T. 133, 134, 170, and 216.

Plaintiff complied with her part of the agreement by amending her return. Now defendant asks the Court to allow him to back out of his part of their agreement by setting aside the trial court's order that he pay the tax liability. In Rasband, 752 P.2d at 1335, this Court stated that [t]he trial court in a divorce action has considerable discretion in equitably adjusting the financial and property interests of the parties. Argyle v. Argyle, 688 P.2d 468, 470 (Utah 1984); Lee v. Lee, 744 P.2d 1378, 1380 (Utah App. 1987). Because the court's distribution of property is endowed with a presumption of validity, Pusey v. Pusey, 728 P.2d 117, 119 (Utah 1986), we will not disturb it on appeal unless it is clearly unjust or a clear abuse of discretion. Gardner v. Gardner, 748 P.2d 1076, 1078 (Utah 1988); Smith v. Smith, 78 Utah Adv. Rep. 39 (Ct. App. 1988).

The trial court in this case has not abused its discretion, and it is clearly not unjust for the court to insist that defendant live up to his end of the agreement he made with plaintiff.

POINT III.

THE TRIAL COURT DID NOT ERR IN ORDERING DEFENDANT TO PAY ATTORNEY FEES.

A. Plaintiff was Entitled to Attorney Fees in the Divorce Action.

Utah Code Ann. § 30-3-3 (1989) gives trial courts the power to award attorney fees in divorce actions. Morgan v. Morgan, 213 Utah Adv. Rep. 22, 27 (Utah App. 1993). Both the decision to award attorney fees, and the amount of such fees, are within the sound discretion of the court. Crouse v. Crouse, 817 P.2d 836, 840 (Utah App. 1991). The award must be based on evidence of both financial need and reasonableness. Rasband, 752 P.2d at 1336 (citing Beals v. Beals, 682 P.2d 862, 864 (Utah 1984)).

Reasonable attorney fees are not measured by what an attorney actually bills, nor is the number of hours spent on the case determinative in computing fees. In determining the reasonableness of attorney fees, ... a court may consider among other factors, the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case, and the result attained, and the expertise and experience of the attorneys involved. Rasband, 752 P.2d at 1336 (quoting Cabrera v. Cottrell,

694 P.2d 622, 624-25 (Utah 1985)).

The attorney fees in this action were reasonable considering this action in light of the factors set out above. Plaintiff's attorney stated that he charges \$100.00 per hour, which he believes to be a reasonable fee. T. 172 Defendant's attorney stipulated as to the reasonableness of the \$100.00 per hour fee. T. 172 and 276 The Court, after reviewing the transcript, will clearly find that this has been a difficult action. Plaintiff's attorney has had to conduct discovery, and has had to take defendant's deposition in order to obtain evidence of defendant's financial condition. T. 172 Defendant did not furnish any of the documents requested in discovery, and could not explain where his money came from during his deposition. T. 267

As the transcript demonstrates, plaintiff's attorney has had difficulty in sifting through the facts and cashflows of the defendant. T. 263 This difficulty was caused in large part by the inability or unwillingness of defendant to cooperate in detailing his financial condition. Defendant's attorney admitted to the difficulty of the case, especially in knowing where the cash came from. T. 269

Plaintiff's attorney also stated that this action had taken 35 hours to prepare, in addition to the time of the trial and the time

to prepare the Findings. Plaintiff's attorney also spent time on discovery and taking defendant's deposition. T. 172 Defendant's attorney, after admitting to the difficulty of the case, later stated that he believed that 20 hours was a reasonable amount of time. T. 276 Defendant's attorney had already admitted that \$100 per hour was reasonable. T. 276 Thus, in the estimation of defendant's attorney a reasonable fee would be \$2000.00. This is exactly what the trial court awarded in attorney fees; therefore, defendant should not now be heard to complain about the award of \$2000.00 in attorney fees.

In fact it may be argued that the trial court's award was in error because plaintiff's attorney requested \$3500.00 in attorney fees. The trial court lowered the award of attorney fees to the amount stipulated to by defendant's attorney as reasonable, without any statement as to why it had reduced the award.

The Court has stated that "[t]he court abuses its discretion in awarding less than the amount [of attorney fees] requested unless the reduction is warranted" by one or more of the above factors. The trial court must, accordingly, identify such factors on the record and also explain its sua sponte reduction in order to permit meaningful review on appeal. Haumont, 793 P.2d at 426, (quoting Martindale v. Adams, 777 P.2d 514, 518 (Utah App. 1989)).

The trial court did not identify any factors on the record that would warrant a reduction in the attorney fees requested by plaintiff. Defendant certainly should not now be heard to question the award of \$2000.00 in attorney fees given the stipulation by defendant's attorney.

The Court has further stated that the award must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees. Rasband, 752 P.2d at 1337. The Findings of Fact and Conclusions of Law have clearly shown that plaintiff lacks the ability to pay the fees. Plaintiff is only making approximately \$400.00 per month in income. R. 73 (Findings of Fact and Conclusions of Law) If plaintiff were to bear the expense of attorney fees, it would require five months of her earnings for her to pay the fees leaving her without any funds to live on for those five months.

As to defendant's ability to pay the fees, defendant's financial condition has been clearly and exhaustively detailed in POINT I. of this argument. Defendant's income of \$350.00 per month from social security, his \$10,000.00 - \$12,000.00 per year in interest income, and his \$25,000.00 per year in rental income from the three sections of his farming property put defendant in a far

better position to bear the attorney fees in this action. T. 232, 236, and 275.

Thus in considering the reasonableness of the attorney fees, the financial need of the plaintiff, and the ability of defendant to pay, it is clear that the trial court's award was proper and within its discretion.

B. Plaintiff is Entitled to Attorney Fees on This Appeal.

The Court has stated that "[o]rdinarily, when fees in a divorce were awarded below to the party who then prevails on appeal, fees will also be awarded to that party on appeal." Bell v. Bell, 810 P.2d 489, 494 (Utah App. 1991) (quoting Burt v. Burt, 799 P.2d 1166, 1171 (Utah App. 1990)).

Thus, if the Court affirms the trial court's decision, plaintiff should be entitled to her attorney fees which she has incurred in opposing this appeal. The attorney fees incurred on this appeal should be remanded for a hearing at the trial court.

CONCLUSION


The trial court did not abuse its discretion in awarding alimony to the plaintiff. The court properly considered the financial condition and needs of the plaintiff, the ability of the plaintiff to produce an income for herself, and the ability of the defendant to provide support. The Findings of Fact and Conclusions

of Law are adequate to support the trial court's award.

The trial court's ruling in regard to the income tax liability was proper and within the proper scope of the courts discretion. The tax liability was incurred to benefit defendant, and he promised plaintiff that he would pay any tax liability that arose. Defendant should be obligated to live up to the agreement he had with the plaintiff; therefore, the trial court's ruling was proper.

Finally, the trial court did not err in awarding plaintiff attorney fees. Sufficient facts were entered with regard to plaintiff's need, defendant's ability to pay, and as to the reasonableness of the fees. Plaintiff should also be entitled to an award of the attorney fees which she was forced to incur in seeking to have the trial court's ruling upheld. Plaintiff asks this Court to remand to the trial court for an award of attorney fees on appeal. Based upon these reasons this Court should affirm the trial court's ruling, and remand for attorney fees on appeal.

RESPECTFULLY SUBMITTED this 13 day of September, 1993.

13/ 
Jeff R. Thorne
MANN, HADFIELD & THORNE
Attorneys for Appellee

CERTIFICATE OF MAILING

I hereby certify that on the 13 day of September, 1993,
I mailed a copy of the foregoing **Brief of Appellee** to John W.
Bradley, VLAHOS, SHARP, WIGHT & BRADLEY, Attorney for Appellant,
Legal Forum Building, 2447 Kiesel Avenue, Ogden, Utah 84401.

Jeff R. Shive
Secretary

FOOTNOTES

1. All references are to the pages of the original record as paginated by the Clerk of the District Court, pursuant to the Utah Rules of Appellate Procedure, Rule 25 (e). All documents in the record referred to will be found in the Appendix in the order referred to in the Brief. For purpose of clarity, the following abbreviations shall be adopted by Appellee:

"R." refers to the record with its page number and title of the document in parenthesis.

"T." refers to the transcript.

ADDENDUM A

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jeff R. Thorne of Mann, Hadfield & Thorne #3250
Attorney for Plaintiff
Zions Bank Building - 98 North Main
P. O. Box 876
Brigham City, Utah 84302-0876
Telephone: 723-3404

IN THE FIRST DISTRICT COURT, BOX ELDER COUNTY, STATE OF UTAH

KAYLENE S. SMITH,)	
Plaintiff,	)	FINDINGS OF FACT AND
vs.	)	CONCLUSIONS OF LAW
ODELL M. SMITH, JR.,	)	Civil No. 910000459DA
Defendant.	)	Judge Clint S. Judkins

The above-entitled matter came on for hearing on the 28th day of August, 1992 at the hour of 10:00 o'clock a.m. The plaintiff was personally present and was represented by her counsel of record, Jeff R. Thorne of the firm of Mann, Hadfield and Thorne. The defendant was present and was represented by his counsel, Brent E. Johns. The plaintiff introduced her evidence and testified in said matter; and the defendant introduced his evidence and testified in said matter. The court being fully familiar in the premises issues the following Findings of Fact.

FINDINGS OF FACT:

1. RELATIONSHIP PRIOR TO MARRIAGE

The parties have had a romantic relationship beginning in 1980. From 1986 and continuing up to the date the parties were married

Case No. 910000459-1

OCT 14 1992

on August 14, 1989 at Challis, Idaho the parties spent the majority of each week living together. Even though the parties had an intimate relationship, the parties did not represent themselves to be husband and wife to their friends or to their family. It was commonly recognized by plaintiff's family that they were "living together" the majority of time from 1986 to the time they were married. The parties relationship contributed to each party's divorce from their prior spouses.

DATE OF MARRIAGE

2. The plaintiff and defendant were married on August 14, 1989 at Challis, Idaho.

NO CHILDREN

3. No children have been born as issue of said marriage and none are expected.

RESIDENCE OF PARTIES

4. The plaintiff and the defendant are residents of Box Elder County, State of Utah, and have been for more than three months immediately prior to the commencement of this action.

GROUND FOR DIVORCE

5. During the course of the marriage and the months preceding the filing of the action, irreconcilable differences developed such that the very purposes of the marriage were destroyed.

DEFENDANT'S PROPERTY FROM PRIOR MARRIAGE

6. Odell Smith was divorced from his former wife, Renae Smith in March, 1986 in the State of Idaho. As part of his written settlement agreement with his first wife, Odell Smith was entitled to cash payments of \$210,000.00 and \$150,000.00. The prior divorce decree provided that the \$210,000.00 was to be paid \$30,000.00 on or before April 20, 1986, \$30,000.00 upon the closing of a loan (the terms of the loan were mentioned in the decree), \$150,000.00 payable in annual payments of \$25,000.00 per year including interest at the rate of eight percent annum from the date of March 27, 1986. Additionally, Mr. Smith was to be paid by his former wife an additional \$150,000.00 within five years from the date of the divorce. The payments were to compensate Mr. Smith for his share of the marital assets in his first marriage. Mr. Smith, also, received other assets under his prior divorce.

ASSETS IN BANKS AT TIME OF THE DIVORCE

7. At the time the divorce action was filed, there was in an account in the name of Odell M. Smith with American First Credit Union a balance of \$41,275.00 as of September 14, 1991, together with a share savings account in the amount of \$9,532.16. Mr. Smith testified at one time Kaylene's name was on his checking account, but he removed it because "she spent too much."

Odell Smith also had five different certificates of deposit with First Security Bank in Challis, Idaho. The money was deposited on March 27, 1991, each account had initial deposit of \$36,000.00 and which accrued interest at the rate of 6.83% per annum. These accounts totalled \$180,000.00 on March 17, 1992. Mr. Smith testified the money for these accounts came from payments from his first wife.

CHALLIS PROPERTY

8. Odell Smith also received a cabin and real property in Challis, Idaho, which came from his divorce settlement with his first wife.

\$249,120.93 PAYMENT RECEIVED DURING THIS MARRIAGE

9. Odell Smith received the sum of \$249,120.93 on or about March 27, 1991 from his former wife and/or son for his share of any interest in the farm properties he was awarded under his prior divorce decree. Mr. Smith was unable to articulate how the amount of money was computed. He was unable to state whether the money constituted earnings off the farm property which he held in common with his ex-wife or whether it was all principal or interest from the sale of the property.

HOME PURCHASED IMMEDIATELY PRIOR TO MARRIAGE

10. A home was purchased at 70 North 200 East, Brigham City, Utah on June 27, 1989, approximately six weeks prior to the time the parties were married. Title to the home was only in Mr.

Smith's name. The home was purchased with Mrs. Smith's consent and knowledge and was the marital home of the parties. The parties stipulated that the home had a market value of \$63,000.00, and there exists a lien against the home in the approximate amount of \$29,000.00. A \$25,000.00 down payment was made by the defendant out of his separate funds. The court determines that there is a \$9,000.00 equity in the family home.

AUTOMOBILE PURCHASED DURING MARRIAGE

11. In July, 1991 a 1991 Dodge Shadow automobile was purchased, which has a fair market value of \$7,000.00. The automobile was purchased with funds from the checking account with America First Credit Union account.

LOT AND STORAGE PURCHASED IN 1986

12. The defendant purchased a lot and storage building in 1986 in Brigham City, Utah. The lot and building has a fair market value of \$18,500.00. This real estate was titled in Mr. Smith's name.

PERSONAL PROPERTY BEFORE MARRIAGE

13. The plaintiff had a table and four chairs, a roll-top desk, a couch, a green rocker, a square end table, a bathroom bench, and a green hanging lamp, which was her property before the marriage which was taken to the cabin in Challis, Idaho after the parties were married.

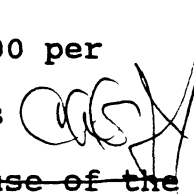
PROPERTY ACQUIRED DURING MARRIAGE

14. During the marriage, the parties purchased a three-piece white leather furniture set, two area rugs, a grandfather clock, a toaster, various wall hangings, a silk flower arrangement, and vacuum.

MEDICAL NEEDS OF PLAINTIFF

15. The plaintiff is in need of surgery pursuant to a letter of Dr. C. M. Dibble, M.D. which was admitted into evidence. Plaintiff's medical condition requiring surgery arose during this marriage.

EMPLOYMENT OF PLAINTIFF

16. Prior to the parties' marriage, the plaintiff was working and earning net income of approximately \$1,000.00 per month. Plaintiff also was earning \$1,000.00 during this marriage. The plaintiff terminated her employment ~~because of the wishes and desires of the defendant~~ and plaintiff is now only making approximately \$400.00 income per month. 

LIVING EXPENSES OF PLAINTIFF

17. The plaintiff needs income on an average monthly basis of \$1,162.00 to enable her to live similar to how she lived during the marriage and to meet her current living expenses and obligations.

SOCIAL SECURITY AVAILABILITY TO DEFENDANT

18. The defendant is eligible for social security, but has not applied for social security at the present time. The defendant states that he would be entitled to social security of approximately \$350.00 per month. The defendant has not been employed during the time the parties have been married.

DEBTS

19. The only debts are the debt existing against the home in Brigham City, Utah.

AS CONCLUSIONS OF LAW FROM THE FOREGOING FINDINGS OF FACT
THE COURT CONCLUDES:

MARRIAGE PROPERTY

1. The only joint property the parties have acquired during the time of the marriage is the equity in the home which was purchased. The court sets the equity at \$9,000.00. The defendant shall pay to the plaintiff \$4,500.00 within 60 days as and for her share of the equity.

AUTOMOBILE

2. The 1991 Dodge automobile was purchased with the defendant's separate funds. The automobile will be awarded to the defendant.

PERSONAL PROPERTY

3. The plaintiff shall be awarded the loveseat, chair and vacuum. The defendant shall receive the remainder of the items acquired during the marriage.

PERSONAL PROPERTY ACQUIRED PRIOR TO MARRIAGE

4. The plaintiff shall be entitled to the items of property which were taken to the cabin in Challis, Idaho which were hers prior to the time the parties married. Those items of property are the table and four chairs, roll-top desk, couch, green rocker, square end table, bathroom bench, and green hanging lamp. The defendant shall return those items to plaintiff within 10 days.

MISCELLANEOUS ITEMS

5. The defendant shall be awarded the Bible, the carved Bible stand, the Revere Ware, the five quart pan with lilac handles, the pressure cooker, the knife block and paring knives, as well as any of his cassette tapes which may be in plaintiff's possession. All other items of personal property which plaintiff has in her possession shall remain hers and shall be her sole and separate property.

PLAINTIFF'S UNINSURED MEDICAL EXPENSES

6. The defendant shall pay any medical expenses related to plaintiff's surgery not covered by insurance, if those expenses are incurred within the next six (6) months.

LOT AND STORAGE SHED

7. The court finds that the lot and storage shed were purchased by separate funds by the defendant and are awarded to him.

HOME

8. The home of the parties is awarded to the defendant subject to a lien in the amount of \$4,500.00 to be paid by the defendant to the plaintiff within 60 days from the date of this hearing.

INCOME TAX LIABILITY

9. The defendant shall pay the income tax liability to the State of Utah or IRS for all years during the marriage.

PLAINTIFF RESTORED TO FORMER NAME

10. The plaintiff has requested that she be restored to her former name of Koyle and the plaintiff's name shall henceforth be and she shall be known as Kathleen S. Koyle.

ATTORNEY FEES

11. The plaintiff is awarded \$2,000.00 attorney's fees and judgment shall enter against the defendant in favor of the plaintiff in said amount.

INTEREST ON SAVINGS ACCOUNT

12. The court finds that any interest earned on the \$180,000.00 at First Security Bank in Idaho was marital property, but that income was dissipated in living expenses during the time the parties were married.

EXTRA MARITAL AFFAIR

13. Even though the parties had a long-term relationship, the majority of that time was spent as an extra marital rather than a marriage relationship.

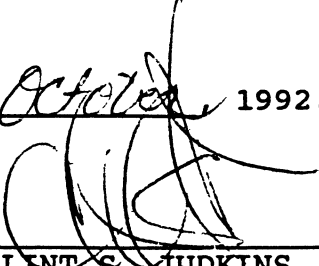
ALIMONY

14. The plaintiff has suffered an economic disadvantage as a result of the marriage in that she does not have as good as employment as she had before the marriage and during the marriage before she quit her employment at the urging of the defendant. The plaintiff is entitled to alimony for four years. Alimony is twice as long as the length of the marriage. The court will, however, give the defendant credit for one year of alimony inasmuch as they have been separated and the defendant has been paying temporary alimony since September, 1991. The defendant shall pay alimony to the plaintiff in the amount of \$643.00 beginning with the month of September, 1992 for a period of one

Smith vs Smith, #910000459
Findings & Conclusions

year, or until August of 1993. Thereafter, he shall pay alimony in the amount of \$600.00 per month for the next two years or up until August of 1995.

DATED this 14 day of October, 1992.



CLINT S. JUDKINS
DISTRICT JUDGE PRO TEM

APPROVED AS TO FORM:

Brent E. Johns
Attorney for Defendant

pj/3:smith-k.fnd

ADDENDUM B
DECREE OF DIVORCE

BRIGHAM CITY, UTAH
OCT 14 1992

Jeff R. Thorne of Mann, Hadfield & Thorne #3250
Attorney for Plaintiff
Zions Bank Building - 98 North Main
P. O. Box 876
Brigham City, Utah 84302-0876
Telephone: 723-3404

IN THE FIRST DISTRICT COURT, BOX ELDER COUNTY, STATE OF UTAH

KAYLENE S. SMITH,)
Plaintiff,) DECREE OF DIVORCE
vs.)
ODELL M. SMITH, JR.,) Civil No. 910000459DA
Defendant.) Judge Clint S. Judkins

The above-entitled matter came on for hearing on the 28th day of August, 1992 at the hour of 10:00 o'clock a.m. The plaintiff was personally present and was represented by her counsel of record, Jeff R. Thorne of the firm of Mann, Hadfield and Thorne. The defendant was present and was represented by his counsel, Brent E. Johns. The plaintiff introduced her evidence and testified in said matter; and the defendant introduced his evidence and testified in said matter. The court having entered its Findings of Fact and Conclusions of Law, it is hereby,

ORDERED, ADJUDGED AND DECREED:

1. DECREE OF DIVORCE

The plaintiff may have a decree of divorce from the defendant, the decree to become final upon signing by the court.

Case No. 910000457-12
OCT 14 1992

2. MARRIAGE PROPERTY

The only joint property the parties have acquired during the time of the marriage is the equity in the home which was purchased. The court sets the equity at \$9,000.00. The defendant shall pay to the plaintiff \$4,500.00 within 60 days as and for her share of the equity.

3 AUTOMOBILE

The 1991 Dodge automobile was purchased with the defendant's separate funds. The automobile will be awarded to the defendant.

4. PERSONAL PROPERTY

The plaintiff shall be awarded the loveseat, chair and vacuum. The defendant shall receive the remainder of the items acquired during the marriage.

5. PERSONAL PROPERTY ACQUIRED PRIOR TO MARRIAGE

The plaintiff shall be entitled to the items of property which were taken to the cabin in Challis, Idaho which were hers prior to the time the parties married. Those items of property are the table and four chairs, roll-top desk, couch, green rocker, square end table, bathroom bench, and green hanging lamp. The defendant shall return those items to plaintiff within 10 days.

6. MISCELLANEOUS ITEMS

The defendant shall be awarded the Bible, the carved Bible stand, the Revere Ware, the five quart pan with lilac handles,

the pressure cooker, the knife block and paring knives, as well as any of his cassette tapes which may be in plaintiff's possession. All other items of personal property which plaintiff has in her possession shall remain hers and shall be her sole and separate property.

7. PLAINTIFF'S UNINSURED MEDICAL EXPENSES

The defendant shall pay any medical expenses related to plaintiff's surgery not covered by insurance, if those expenses are incurred within the next six (6) months.

8. LOT AND STORAGE SHED

The court finds that the lot and storage shed were purchased by separate funds by the defendant and are awarded to him.

9. HOME

The home of the parties is awarded to the defendant subject to a lien in the amount of \$4,500.00 to be paid by the defendant to the plaintiff within 60 days from the date of this hearing.

10. INCOME TAX LIABILITY

The defendant shall pay the income tax liability to the State of Utah or IRS for all years during the marriage.

11. PLAINTIFF RESTORED TO FORMER NAME

The plaintiff has requested that she be restored to her former name of Koyle and the plaintiff's name shall henceforth be and she shall be known as Kathleen S. Koyle.

12. ATTORNEY FEES

The plaintiff is awarded \$2,000.00 attorney's fees and judgment shall enter against the defendant in favor of the plaintiff in said amount.

13. INTEREST ON SAVINGS ACCOUNT

The court finds that any interest earned on the \$180,000.00 at First Security Bank in Idaho was marital property, but that income was dissipated in living expenses during the time the parties were married.

14. EXTRA MARITAL AFFAIR

Even though the parties had a long-term relationship, the majority of that time was spent as an extra marital rather than a marriage relationship.

15. ALIMONY

The plaintiff has suffered an economic disadvantage as a result of the marriage in that she does not have as good as employment as she had before the marriage and during the marriage before she quit her employment at the urging of the defendant. The plaintiff is entitled to alimony for four years. Alimony is twice as long as the length of the marriage. The court will, however, give the defendant credit for one year of alimony inasmuch as they have been separated and the defendant has been paying temporary alimony since September, 1991. The defendant

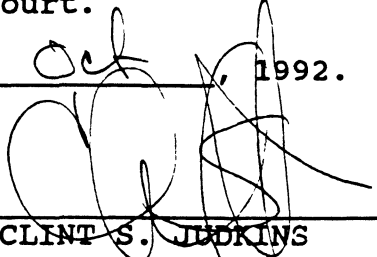
Smith vs Smith, #910000459
Decree of Divorce

shall pay alimony to the plaintiff in the amount of \$643.00 beginning with the month of September, 1992 for a period of one year, or until August of 1993. Thereafter, he shall pay alimony in the amount of \$600.00 per month for the next two years or up until August of 1995.

16. DIVORCE FINAL UPON SIGNING

Good cause appearing to the court, the divorce decree shall be final upon signing by the court.

DATED this 14 day of Oct, 1992.



CLINT S. JENKINS
DISTRICT JUDGE PRO TEM

APPROVED AS TO FORM:

Brent E. Johns
Attorney for Defendant

pj/3:smith-k.dec