

2004

Kristen Davenport v. Robert Davenport : Brief of Appellant

Utah Court of Appeals

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KRISTEN DAVENPORT,	:	
	:	
Petitioner/Appellee	:	
	:	
	:	Case No. 20040242 - CA
	:	
vs.	:	Priority No. 15
	:	
ROBERT DAVENPORT,	:	
	:	
Respondent/Appellant	:	

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, PROVO
DEPARTMENT, UTAH COUNTY, FROM THE TRIAL COURT'S DECISION
AFTER TRIAL, BEFORE THE HONORABLE GARY D. STOTT

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UTAH APPELLATE COURTS
SEP 23 2004

IN THE UTAH COURT OF APPEALS

KRISTEN DAVENPORT,

Petitioner/Appellee

vs.

ROBERT DAVENPORT,

Respondent/Appellant

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Case No. 20040242 - CA

Priority No. 15

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, PROVO
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AFTER TRIAL, BEFORE THE HONORABLE GARY D. STOTT

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JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(h) (2001).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court erred in failing to award Appellant one-half of the proceeds from the sale of the parties' four-wheeler, but it instead awarded the entire proceeds from the sale to Appellee. STANDARD OF REVIEW:

Abuse of discretion. Dent v. Dent, 870 P.2d 280 (Utah 1994); Walters v. Walters, 812 P.2d 64 (Utah App. 1991) cert. denied 836 P.2d 1383.

2. Whether the trial court erred in holding Appellant in contempt for his sale of the parties' four-wheeler, because the parties reached a written stipulation after all parties were aware of the sale, which the Court approved by entering a Decree of Divorce consistent therewith, which only reserved the issue of offsets for sale and did not reserve any issue of contempt regarding the sale.

STANDARD OF REVIEW: Inasmuch as this issue depends on an interpretation of the legal effect on the issues reserved for trial of the Court approving the parties' stipulation and entering a Decree, it presents a question of law, which the appellate court reviews for correctness. Office of Recovery Servs. v. V.G.P., 845 P.2d 944, 946 (Utah App. 1992).

3. Whether the trial court erred in holding Appellant in contempt for his failure to make timely mortgage payments, because the parties reached a written stipulation after all parties were aware of the failure to timely make mortgage payments, which the Court approved by entering a Decree of Divorce consistent therewith, which only reserved the issue of judgment for the unpaid payments did not reserve any issue of contempt regarding the wrongful failure to timely make mortgage payments. STANDARD OF REVIEW: Inasmuch as this issue depends on an interpretation of the legal effect on the issues reserved for trial of the Court approving the parties' stipulation and entering a Decree, it presents a question of law, which the appellate court reviews for correctness. Office of Recovery Servs. v. V.G.P., 845 P.2d 944, 946 (Utah App. 1992).

4. Whether the trial court erred in requiring Appellant to pay Appellee's attorney's fees without adequate findings and because each party had as much ability to pay as the other (in context of the Court's retroactive equalization of the parties' standard of living). STANDARD OF REVIEW: Abuse of discretion. Kerr v. Kerr, 651 P.2d 1380 (Utah 1980).

5. Whether the trial court erred in entering judgment against Appellant for the proceeds of sale of the parties' four-wheeler, after Appellant had obtained a discharge in bankruptcy on this non-support debt. STANDARD OF REVIEW: Inasmuch as this issue depends on an interpretation of the effect of federal

bankruptcy law on state court divorce proceedings, it presents a question of law, which the appellate court reviews for correctness. Office of Recovery Servs. v. V.G.P., 845 P.2d 944, 946 (Utah App. 1992); See also, Durham v. Duchesne County, 893 P.2d 581, 584 (Utah 1995).

CONTROLLING STATUTES, ORDINANCES, AND RULES

The following statutes, ordinances and rules are determinative in this appeal and their entire text is set forth verbatim in the addendum.

Utah Code Ann. §§ 30-3-3(1), 30-3-5(1), 78-2a-3(2)(h), 78-31-1(5)

Title 11, United States Code §§ 524, 727(b)

STATEMENT OF THE CASE

I. Nature of the Case

This case involves the exercise of rights and obligations between spouses in a divorce case. It involves questions of the proper division of personal property between spouses, the effect of a stipulation and order on the ability of the court to hold a party in contempt for conduct that pre-dated the stipulation and order, and the effect of bankruptcy on the ability of former spouses to obtain judgments against each other for non-support debts discharged in bankruptcy.

II. Course of Proceedings and Disposition in Trial Court

In July, 2001, Kristen Davenport brought a divorce action against Robert Davenport seeking orders for property division, support, debt division and other

orders typical of divorce cases. (R 7-10). At an Order to Show Cause hearing on September 5, 2001, Mr. Davenport was ordered to temporarily pay the 1st mortgage on the parties' marital home in lieu of child support and alimony. (R. 31). Both parties were also "restrained from disposing or hiding of assets during the pendency of this action." (R. 30).

After a series of Orders to Show Cause and an unsuccessful effort to bifurcate the divorce, the Court granted a motion to bifurcate the divorce on May 16, 2002 (R. 99).

On January 7, 2003, the parties reached a written agreement which settled most of the issues in the case, but reserved the issues of (1) retroactivity of child support (R. 148), (2) ongoing alimony and retroactivity of alimony (R. 147), (3) distribution of the parties' real property (R. 147), (4) offsets for Respondent/Appellant's sale of the 4-wheeler (R. 146), (5) payment of the mortgage payment (R. 145), (6) division of the parties' time share (R. 145), (7) division of debts (R. 145), and payment of attorney fees (R. 143).

In their Stipulation, the parties did not reserve any issue of contempt for non-compliance with the Court's prior orders (R. 143-151), and, on March 21, 2003, the Court approved the parties' agreement and entered Findings of Fact and Conclusions of Law and a Decree of Divorce consistent with the parties' Stipulation (R. 162-184).

Thereafter, on January 27, 2004, a bench trial was held to settle the unresolved issues (R. 322). The Court issued a Memorandum Decision on February 6, 2004 (R. 366). Findings of Fact and Conclusions of Law Supplement to a Decree of Divorce and an Order Supplemental to a Decree of Divorce were entered on March 1, 2004 (R. 367-384).

This appeal, filed by Mr. Davenport on March 26, 2004, is from the Findings and Order Supplemental to a Decree of Divorce (R. 390).

STATEMENT OF RELEVANT FACTS

In July, 2001, Kristen Davenport sought a divorce from her husband of five (5) years, Robert Davenport. (R 7-10). At an Order to Show Cause hearing on September 5, 2001, Mr. Davenport was ordered to temporarily pay the 1st mortgage on the parties' marital home in lieu of child support and alimony. (R. 31). Both parties were also "restrained from disposing or hiding of assets during the pendency of this action." (R. 30).

In either November or December, 2001 or on April 2, 2002, Mr. Davenport sold the parties' 4-wheeler and a trailer, in violation of the Court's September 5, 2001 order. (R. 423, p. 19, line 24 through p. 20, line 8 – testimony of Kristen Davenport) (R. 423, p. 58, line 10 through p. 6, line 22 – testimony of Robert Davenport) (R. 365 and R 424, Exhibit 11 support the April 2, 2002 selling

date—that date believed by the Court in its Memorandum Decision). The selling price for the 4-wheeler and trailer was 3,500 (R. 434, p. 93).

Over a year after the wrongful sale, on January 7, 2003, the parties reached an agreement regarding the 4-wheeler. The agreement ambiguously stated: “The Petitioner is awarded the 4-wheeler and Honda which he represents has been sold. The issue of offsets for Respondent’s sale is reserved.” (R. 146). It is apparent from the foregoing language that the parties and their counsel either confused the words “Petitioner” and “Respondent” or confused the parties’ sex, as Petitioner is a “she” and Respondent is a “he”.

On March 21, 2003, the Court entered Findings of Fact and Conclusions of Law and a Decree of Divorce consistent with the parties’ Stipulation (R. 162-184). The paragraphs in the Findings and Decree regarding the 4-wheeler mirrored exactly the ambiguous language in the parties’ Stipulation and did not reserve any issue of contempt for the sale of the 4-wheeler (R. 168-169, 180).

Subsequently, the Court, after trial, ordered Mr. Davenport to pay Mrs. Davenport the entire \$3,500.00 proceeds from the sale of the 4-wheeler and trailer, without resolving the related ambiguity in the Court’s March 21, 2003 order (R. 365-366). The Court also held Mr. Davenport in contempt for the wrongful sale (R. 366).

Also in violation of the Court's September 5, 2001 order, Mr. Davenport, beginning in September, 2002, ceased to maintain the ongoing 1st mortgage payments on the parties' marital home (R. 423, p. 19, lines 8-11, p. 48, lines 12-15). As a result the home was lost in foreclosure (R. 423, p. 27, lines 4-7).

Nevertheless, on January 7, 2003, after all of the parties were aware that Mr. Davenport had violated the Court's order regarding the mortgage payments, the parties reached a written agreement regarding the mortgage payments which simply stated that the issue of distribution of the real property was reserved (R. 145) and that payment of the mortgage payment pursuant to the temporary order was reserved (R. 145). No issue of contempt was reserved.

By interlineations, the parties excised a portion of a paragraph from the Stipulation which would have required the parties to continue to be bound by the temporary order regarding payment of the mortgage payment in lieu of child support and alimony (R. 149) (The excised portion read "The parties will be bound by the temporary order of support regarding child support and alimony until the house sells and the mortgage payments made by Respondent will be considered alimony and child support"). In place of the excised requirement to pay the mortgage payment in lieu of alimony and child support, the parties set a fixed child support figure, effective beginning January 1, 2003 (R. 149) and reserved ongoing alimony for future decision by the Court (R. 147).

The intent of the parties to not require Mr. Davenport to continue payment the ongoing mortgage payments was further confirmed by the parties' additional interlineations of paragraph 12 of their Stipulation, wherein they excised the following language: "Until the home is sold, Respondent will pay the first mortgage in lieu of alimony and child support" (R. 145-146).

Despite the fact that the parties' Stipulation would effectively modify the temporary orders regarding payment of the 1st mortgage, on March 21, 2003, the Court approved the parties Stipulation and entered Findings of Fact and Conclusions of Law and a Decree of Divorce consistent therewith. (R. 162-184).

After bench trial, though, the Court held Mr. Davenport in contempt for his non-payment of the mortgage payments (R. 361).

On January 14, 2003, Mr. Davenport filed Chapter 7 bankruptcy (R. 423, p. 22, line 21 through p. 23, line 5; R 424, Exhibit 1). Despite the bankruptcy, the Court entered judgment against Mr. Davenport and in favor of Mrs. Davenport for a pre-bankruptcy debt the Court found to be owed to Mrs. Davenport representing the \$3,500 proceeds of sale of the 4-wheeler. (R. 365). The Court did not make any findings that the 4-wheeler debt owed to Mrs. Davenport was in the nature of support (R. 358-366).

Within two days of the date Mr. Davenport's attorney accepted service of the Complaint in this case, Mrs. Davenport's attorney requested temporary

alimony and child support for her client (R. 5, 16). At a hearing on the issue held shortly thereafter, Mr. Davenport was ordered to pay the 1st mortgage in lieu of child support and alimony (R. 31). That order continued until the parties reached an agreement in January, 2003, which the Court subsequently approved (R. 151, 184). The parties agreement set child support based on Utah guidelines and reserved the issue of future alimony for trial (R. 147, 148-149). At trial, the Court awarded judgment for unpaid alimony and equalized the parties' future standard of living by awarding ongoing and retroactive alimony from January, 2003 forward (R. 361, 366).

Despite the fact that the parties' incomes had been equalized since the commencement of the divorce proceedings and that, as a result, both parties presumptively had the same ability to pay attorney's fees, the Court, ordered Mr. Davenport to pay all of Mrs. Davenport's attorney's fees and costs after finding that the fees and costs were reasonable and that Mrs. Davenport did not have the means to pay her fees (R. 360). The Court did not make any finding regarding whether Mr. Davenport had the ability to assist with the payment of Mrs. Davenport's fees (R. 360).

SUMMARY OF THE ARGUMENT

The Court should have either awarded all of the proceeds of the four-wheeler and trailer to Respondent/Appellant because the parties' Stipulation and Decree of Divorce awarded the four-wheeler to Respondent/Appellant (or at least the order is ambiguous regarding that issue and the trial Court did not resolve the ambiguity). Alternatively, the proceeds from sale of the four-wheeler and trailer should have been equally divided because that is the presumptively appropriate division of marital assets such as these.

The Court erred in holding Mr. Davenport in contempt for his sale of the four-wheeler and trailer. Prior to the parties reaching an agreement, Mr. Davenport sold the four-wheeler and trailer in violation of the Court's prior order. However, an agreement subsequent to Mr. Davenport's violation of the Court's order resolved all issues except those issues which were reserved. The issue of contempt for sale of the four-wheeler was not reserved, and was therefore resolved by the parties' agreement. The Court approved the parties' agreement and entered an order consistent therewith. Once the Court entered said order, the issue of contempt for sale of the four-wheeler was no longer properly before the Court. Therefore, the Court's subsequent contempt order against Mr. Davenport was improper and erroneous.

The Court erred in holding Mr. Davenport in contempt for his failure to make the 1st mortgage payments. Prior to the parties reaching an agreement, Mr. Davenport failed to make the 1st mortgage payments ordered by the Court. However, an agreement subsequent to Mr. Davenport's violation of the Court's order resolved all issues except those issues which were reserved. The issue of contempt for non-payment of the 1st mortgage was not reserved, and therefore resolved by the parties' agreement. The Court approved the parties' agreement and entered an order consistent therewith. Once the Court entered said order, the issue of contempt for non-payment of the 1st mortgage was no longer properly before the Court. Therefore, the Court's subsequent contempt order against Mr. Davenport was improper and erroneous.

Additionally, the parties' agreement (which the Court approved and adopted in its Order) nullified any further obligation for Mr. Davenport to pay the 1st mortgage payment pursuant to the Court's temporary order. Therefore, Mr. Davenport could not be held in contempt for non-payment of the 1st mortgage after the date of the parties' agreement.

The Court erred in requiring Mr. Davenport to pay Mr. Davenport's attorney's fees and costs for two reasons. First, the Court did not make any finding that Mr. Davenport had the ability to pay Mrs. Davenport's fees. Second, the parties' presumptively had the same ability to pay their own and the other

party's attorney's fees because the Court retroactively equalized the parties' standards of living—creating a condition in which neither party had greater ability to pay fees than the other party.

The Court erred in entering judgment against Mr. Davenport for debt the Court found he owed Mrs. Davenport for the sale of the four-wheeler and trailer. The debt to Mrs. Davenport for the sale of the four-wheeler and trailer arose prior to Mr. Davenport filing bankruptcy. Therefore, it was discharged in Mr. Davenport's Chapter 7 bankruptcy. The Court's judgment against Mr. Davenport was, with regard to the four-wheeler debt, in violation of federal bankruptcy law.

ARGUMENT

POINT I

The trial court erred in failing to award Appellant one-half of the proceeds from the sale of the parties' four-wheeler, instead awarding the entire proceeds to Appellee.

Utah Code Annotated, Section 30-3-5(1) permits the Court to include in a divorce decree “equitable orders relating to the children, property, debts, or obligations, and parties.” U.C.A. § 30-3-5(1).

In determining property division, a trial court has considerable discretion, and its actions enjoy a presumption of validity. Elman v. Elman, 45 P.3d 176

Utah App. 2002); Shinkoskey v. Shinkoskey, 19 P.3d 1005 (Utah App. 2001); Parker v. Parker, 996 P.2d 565 (Utah App. 2000).

Nevertheless, the Court should presumptively award each of the parties 50% of the marital property and all of his or her separate property. Bradford v. Bradford, 993 P.2d 887 (Utah App. 1999) cert. denied 4 P.3d 1289.

In the instant case, the parties had reached an agreement regarding the division of their personal property. That stipulation, which was filed with and approved by the Court, provided, in relevant part: “The Petitioner is awarded the 4-wheeler and Honda, which he represents has been sold.” (R. 146).

Without knowing whether Mr. or Mrs. Davenport was the Petitioner, the casual reader of the foregoing paragraph would presume that Mr. Davenport was awarded the 4-wheeler. However, once the reader realizes that Mrs. Davenport was the Petitioner, the issue becomes ambiguous.

It was unclear from the plain language of the Stipulation whether the 4-wheeler was awarded to Mr. Davenport or Mrs. Davenport. The intention of the parties is unclear.

The trial court made no effort to resolve the ambiguity and determine who the parties intended would be the owner of the 4-wheeler. Instead, the Court simply required Mr. Davenport to pay the entire value of the 4-wheeler to Mrs. Davenport, and stated: “Ordinarily, Petitioner would be entitled to one-half of

such funds, however, the Court finds that such funds should have been immediately applied against the amount owing on Petitioner's Explorer vehicle." (R. 365).

Apparently, the trial court was not even considering the parties' agreement and the award in Decree of Divorce, but was simply assuming that the parties had not reached an agreement regarding the division of the 4-wheeler. Such failure is clear error by the trial court.

However, even if the parties had not reached an agreement, nevertheless, it is difficult to decipher the reasoning behind the Court's award of the entire proceeds to Appellee, especially in light of the Court's admission that Petitioner/Appellee would ordinarily be entitled to only one-half of such funds.

Perhaps the trial court was indicating that the delay in paying the funds to Appellee justified Appellee receiving all of the funds (i.e., the interest that would have been earned on the funds while Appellant had use of those funds equaled his half of the value of the asset). But no facts or findings support such a conclusion (e.g., facts or findings that the reasonable value of his use of one-half of the value of the asset equaled the value of Appellee's portion of the asset).

Because of the ambiguity in the parties' agreement and the uncertain reasoning behind the Court's Findings and Conclusions regarding the 4-wheeler, the Court of Appeals should remand this issue to the trial court for determination

of the parties' intentions in their ambiguous Stipulation regarding the division of the 4-wheeler, or should order the trial court to equally divide the proceeds from sale of the 4-wheeler.

POINT II

The trial court erred in holding Appellant in contempt for his sale of the parties' four-wheeler, because the parties reached a written stipulation after all parties were aware of the sale, which the Court approved by entering a Decree of Divorce consistent therewith, which only reserved the issue of offsets for sale and did not reserve any issue of contempt regarding the sale.

Utah Code Annotated, Section 78-32-1(5) defines the actions that constitute contempt of the authority of the court. They include, in relevant part, “[d]isobedience of any lawful judgment, order, or process of the court.” U.C.A. § 78-32-1(5).

However, despite disobedience of a court order, before a person can be found guilty of contempt for such disobedience, the Court must find that such person was able to comply with the court's order or that he intentionally deprived himself of the ability to comply with such order. Osmus v. Osmus, 198 P.2d 222 (Utah 1948).

In summary, for contempt to be found, there must be a valid and enforceable court order and the person against whom contempt is sought must be found capable of complying with such order.

As a further caveat, it would appear reasonable (although no Utah case could be found that addressed this issue) that for contempt to be found that Court should not have previously nullified or obviated the order on which contempt was based.

In this case, at an Order to Show Cause hearing on September 5, 2001, both parties were also “restrained from disposing or hiding of assets during the pendency of this action.” (R. 30).

In either November or December, 2001 or on April 2, 2002, Mr. Davenport sold the parties’ 4-wheeler and a trailer, in violation of the Court’s September 5, 2001 order. (R. 423, p. 19, line 24 through p. 20, line 8 – testimony of Kristen Davenport) (R. 423, p. 58, line 10 through p. 6, line 22 – testimony of Robert Davenport) (R. 365 and R 424, Exhibit 11 support the April 2, 2002 selling date—that date believed by the Court in its Memorandum Decision). The selling price for the 4-wheeler and trailer was 3,500 (R. 434, p. 93).

Over a year after the wrongful sale, on January 7, 2003, the parties reached an agreement regarding the 4-wheeler. The agreement ambiguously stated: “The Petitioner is awarded the 4-wheeler and Honda which he represents has been sold. The issue of offsets for Respondent’s sale is reserved.” (R. 146).

On March 21, 2003, the Court entered Findings of Fact and Conclusions of Law and a Decree of Divorce consistent with the parties’ Stipulation (R. 162-

184). The paragraphs in the Findings and Decree regarding the 4-wheeler mirrored exactly the ambiguous language in the parties' Stipulation and did not reserve any issue of contempt for the sale of the 4-wheeler (R. 168-169, 180).

By entering Findings of Fact and Conclusions of Law and a Decree of Divorce consistent with the parties' Stipulation, and which resolved all issues before the Court except those issues reserved, the Court effectively obviated all matters before it that were not reserved.

Because the Decree did not reserve any issue of contempt for sale of the 4-wheeler, once the Court entered the Decree it also eliminated, resolved, and obviated the contempt issue.

As a result, the Court was acting improperly when it resurrected the previously resolved issued of contempt at trial.

The Court's entry of an order of contempt for Appellant's sale of the 4-wheeler was therefore plainly in error and should be reversed.

POINT III

The trial court erred in holding Appellant in contempt for his failure to make timely mortgage payments, because the parties reached a written stipulation after all parties were aware of the failure to timely make mortgage payments, which the Court approved by entering a Decree of Divorce consistent therewith, which only reserved the issue of judgment for the unpaid amounts, and did not reserve any issue of contempt regarding the mortgage payments.

Utah Code Annotated, Section 78-32-1(5) defines the actions that constitute contempt of the authority of the court. They include, in relevant part, “[d]isobedience of any lawful judgment, order, or process of the court.” U.C.A. § 78-32-1(5).

However, despite disobedience of a court order, before a person can be found guilty of contempt for such disobedience, the Court must find that such person was able to comply with the court’s order or that he intentionally deprived himself of the ability to comply with such order. Osmus v. Osmus, 198 P.2d 222 (Utah 1948).

In summary, for contempt to be found, there must be a valid and enforceable court order and the person against whom contempt is sought must be found capable of complying with such order.

As a further caveat, it would appear reasonable (although no Utah case could be found that addressed this issue) that for contempt to be found that Court should not have previously nullified or obviated the order on which contempt was based.

In the instant case, at an Order to Show Cause hearing on September 5, 2001, Mr. Davenport was ordered to temporarily pay the 1st mortgage on the parties’ marital home in lieu of child support and alimony. (R. 31).

In violation of the Court's September 5, 2001 order, Mr. Davenport, beginning in September, 2002, ceased to maintain the ongoing 1st mortgage payments on the parties' marital home (R. 423, p. 19, lines 8-11, p. 48, lines 12-15). As a result the home was lost in foreclosure (R. 423, p. 27, lines 4-7).

Nevertheless, on January 7, 2003, after all of the parties were aware that Mr. Davenport had violated the Court's order regarding the mortgage payments, the parties reached a written agreement regarding the mortgage payments which simply stated that the issue of distribution of the real property was reserved (R. 145) and that payment of the mortgage payment pursuant to the temporary order was reserved (R. 145). No issue of contempt was reserved.

By interlineations, the parties excised a portion of a paragraph from the Stipulation which would have required the parties to continue to be bound by the temporary order regarding payment of the mortgage payment in lieu of child support and alimony (R. 149) (The excised portion read "The parties will be bound by the temporary order of support regarding child support and alimony until the house sells and the mortgage payments made by Respondent will be considered alimony and child support"). In place of the excised requirement to pay the mortgage payment in lieu of alimony and child support, the parties set a fixed child support figure, effective beginning January 1, 2003 (R. 149) and reserved ongoing alimony for future decision by the Court (R. 147).

The intent of the parties to not require Mr. Davenport to continue payment the ongoing mortgage payments after January 7, 2003 was further confirmed by the parties' additional interlineations of paragraph 12 of their Stipulation, wherein they excised the following language: "Until the home is sold, Respondent will pay the first mortgage in lieu of alimony and child support" (R. 145-146).

Despite the fact that the parties' Stipulation would effectively modify the temporary orders regarding payment of the 1st mortgage, on March 21, 2003, the Court approved the parties Stipulation and entered Findings of Fact and Conclusions of Law and a Decree of Divorce consistent therewith. (R. 162-184).

Despite the foregoing, after a bench trial, though, the Court held Mr. Davenport in contempt for his non-payment of the mortgage payments (R. 361).

Such contempt finding was improper for two reasons. First, any failure by Mr. Davenport to pay the mortgage payments prior to January 7, 2003 was resolved by the parties' agreement (subsequently approved by the Court) which did not reserve the issue of contempt for non-payment of the mortgage.

Second, any failure by Mr. Davenport to pay the mortgage payments after January 7, 2003 was not in violation of any court order because the parties' stipulation that day (subsequently approved by the court) modified the ongoing support order and eliminated the requirement that he pay ongoing mortgage payments.

Any other conclusion would be inconsistent with the parties' agreement from January 7, 2003. Whereas, prior to January 7, 2003, the alimony and child support obligations were not separately specified, but, rather, lumped into one payment of the 1st mortgage, after January 7, 2003 a specific child support amount was set (\$321.00 per month) and the issue of alimony from January 7, 2003 forward was reserved for trial.

Also, the interlineations which specifically removed from the parties' Stipulation any requirement of ongoing payment of the mortgage after January 7, 2003 demonstrate the parties' intentions that Mr. Davenport would not be obligated after January 7, 2003 to pay the ongoing mortgage.

For the foregoing reasons, the Court's finding of contempt against Mr. Davenport for non-payment of the 1st mortgage should be reversed.

POINT IV

The trial court erred in requiring Appellant to pay Appellee's attorney's fees and costs without adequate findings and because each party had essentially equal financial ability (in light of the Court's retroactive equalization of the parties' standard of living through support awards).

Utah Code Section 30-3-3(1) permits the Court to order a party to pay the other party's costs and attorney fees in actions to establish custody, parent-time, child support, alimony, or division of property in a domestic case. U.C.A. § 30-3-3(1).

Utah Courts have confirmed the ability of trial courts to make fee and cost awards in divorce cases. Wilde v. Wilde, 969 P.2d 438 (Utah 1998); Childs v. Childs, 967 P.2d 942 (Utah App. 1998).

However, the trial court may not merely award fees and costs without adequate reasoning and findings. Utah appellate courts have consistently held that for a trial court to award fees in a divorce case, the trial court must find (1) that the fees sought are reasonable, (2) the receiving spouse is in need of assistance in paying her attorney's fees and costs, and (3) the other spouse has the ability to pay his own fees and costs as well as the receiving spouse's fees and costs. Wells v. Wells, 871 P.2d 1036 (Utah 1994); Peterson v. Peterson, 818 P.2d 1305 (Utah 1991). The moving party has the burden of establishing all three of these elements at trial. Griffith v. Griffith, 59 P.2d 1015 (Utah App. 1998) affirmed 985 P.2d 155 (Utah 1999).

In the instant case, the Court did not make the requisite findings to justify its award of attorney fees and costs. While the trial court did find that the fees and costs incurred by Petitioner/Appellee were "reasonable and proper in representing Petitioner and that Petitioner does not have the financial means available to pay her attorney fees," it did not make any analysis of whether Appellant had the ability to pay Appellee's fees (R. 360).

Without a determination of ability pay, the trial court's award of attorney's fees and costs is improper and should be reversed and perhaps remanded for further proceedings to determine whether Appellant has the ability to pay Appellee's fees and costs.

However, remand may not be necessary, as the facts of this case establish without further review that Appellant is not capable of paying Appellee's fees and costs, and an award of attorney fees and costs in this case would be in error.

Shortly after the divorce case was commenced (two days after an Acceptance of Service was signed by Appellant's attorney on July 25, 2001), Petitioner brought an Order to Show Cause to set temporary child support and alimony (R. 16).

At the Order to Show Cause hearing, the trial court presumptively equalized the parties' standard of living by ordering Appellant to pay a monthly sum in lieu of alimony and child support (R. 33).

Throughout the proceedings, the Court provided for equalizing of the parties' standard of living through ongoing support orders or provision for retroactive income/living standard equalization at the time of trial. (R. 361-362 – Prior to January, 2003 the parties were operating under the temporary alimony/child support order of the Court. At trial the Court set alimony from

January 2003 through January 2004 at \$600.00 per month and set ongoing alimony after January 2004 at \$500 per month for the following three years).

Because Appellee was awarded support funds to equalize the parties' standard of living throughout the pendency of the divorce proceedings and for three years after the final trial, both parties had similar abilities to pay attorney fees and costs, and neither party was more capable of paying fees and costs than the other party.

As an illustration of this fact, the parties had previously stipulated that Appellant's gross monthly income was \$2,900 per month and that Appellant's gross monthly income was \$1,667.00 per month (R. 149).

After subtracting the child support obligation of \$321.00 per month (R. 14) from Appellant's gross income and adding that amount to Appellee's gross income, the difference in gross income (not net income) of the parties pursuant to their stipulation was only \$591.00 per month. Therefore, a strict equalization of gross (not net) incomes would have resulted in an alimony award of only \$295.50 per month (rather than the much larger award entered by the Court).

While strict equalization of gross income may not result in true equalization of the parties' standard of living (especially when, as here, there is a minor child involved), nevertheless it is illustrative of the relative financial abilities of each of the parties, and demonstrates the error of concluding that Appellant had

sufficiently greater financial resources than Appellee to enable him to pay his ex-spouses attorney fees and costs in addition to his own attorney fees and costs.

It is an axiom of Utah divorce law that a former wife is not entitled to attorney fees at trial when the financial abilities of the former wife and the former husband are essentially equal. Whitehead v. Whitehead, 836 P.2d 814 (Utah 1992). Such is the case here in the light of the Court's equalization of financial abilities throughout the pendency of the case and thereafter.

POINT V

The trial court erred in entering judgment against Appellant for the proceeds of sale of the parties' four-wheeler, after Appellant had obtained a discharge in bankruptcy on this non-support debt.

Section 524 of the United States Bankruptcy Code provides, in relevant part, that the discharge obtained in a bankruptcy case "operates as an injunction against the commencement or continuation of any action . . . to collect, recover, or offset any such debt [debts discharged under Section 728 of the Bankruptcy Code] as a personal liability of the debtor . . . " 11 U.S.C. § 524.

Section 727(b) states that in general a discharge in Chapter 7 bankruptcy "discharges the debtor from all debts that arose before the date of the order for relief under this chapter, . . ." 11 U.S.C. § 727(b).

On January 7, 2003, the parties reached an agreement in this case regarding the division of their 4-wheeler (R. 146). That agreement fixed the parties' relative

rights with respect to their 4-wheeler and was subsequently approved by the Court.

Thereafter, on January 14, 2003, Mr. Davenport filed Chapter 7 bankruptcy (R. 423, p. 22, line 21 through p. 23, line 5; R 424, Exhibit 1). Despite the bankruptcy, the Court entered judgment against Mr. Davenport and in favor of Mrs. Davenport for the pre-bankruptcy debt the Court found to be owed to Mrs. Davenport representing the \$3,500 proceeds of sale of the 4-wheeler. (R. 365).

The debt owed to Mrs. Davenport on the 4-wheeler accrued not later on January 7, 2003 when the parties reached their agreement regarding their relative rights in the 4-wheeler. The subsequent bankruptcy discharge received by Mr. Davenport discharged this obligation to Mrs. Davenport and operated as an injunction against the trial court and Mrs. Davenport from entering a judgment against Mr. Davenport for the value of the 4-wheeler.

In short, Mr. Davenport's debt to Mrs. Davenport was discharged in bankruptcy and should not have been reduced to judgment by the Court. The trial court's judgment in this regard should be reversed.

CONCLUSION AND PRECISE RELIEF SOUGHT

Appellant respectfully requests that the Court of Appeals set aside the trial court's judgment requiring him to pay Appellee the proceeds of sale of the 4-wheeler and

trailer. He also requests that the Court of Appeals set aside the trial court's contempt order derived from his sale of the 4-wheeler and from his non-payment of the 1st mortgage. He further requests that the Court of Appeals reverse the trial court's award of attorney's fees and costs, or, alternative, that the Court of Appeals remand for the trial court to make appropriate findings regarding Appellant's ability to pay those fees and costs.

DATED this 22 day of September, 2004.

A handwritten signature in black ink, appearing to read 'GUY L. BLACK', written over a horizontal line.

GUY L. BLACK
Attorney for Appellant

ADDENDA

- A. Utah Code, Section 30-3-3(1), 30-3-5(1), 78-32-1(5), 11 U.S.C. § 524,
727(b)
- B. Stipulation of the Parties
- C. Memorandum Decision from the Trial Court

Tab A

Section	
30-3-16.	Repealed.
30-3-16.1.	Jurisdiction of family court division — Powers.
30-3-16.2.	Petition for conciliation.
30-3-16.3.	Contents of petition.
30-3-16.4.	Procedure upon filing of petition.
30-3-16.5.	Fees.
30-3-16.6.	Information not available to public.
30-3-16.7.	Effect of petition — Pendency of action.
30-3-17.	Power and jurisdiction of judge
30-3-17.1.	Proceedings deemed confidential — Written evaluation by counselor
30-3-18.	Waiting period for hearing after filing for divorce — Exemption — Use of counseling and education services not to be construed as condonation or promotion.
30-3-19 to 30-3-31.	Repealed.
30-3-32.	Parent-time — Intent — Policy — Definitions.
30-3-33.	Advisory guidelines.
30-3-34.	Best interests — Rebuttable presumption.
30-3-35.	Minimum schedule for parent-time for children 5 to 18 years of age.
30-3-35.5.	Minimum schedule for parent-time for children under five years of age.
30-3-36.	Special circumstances.
30-3-37.	Relocation.
30-3-38.	Pilot Program for Expedited Parent-time Enforcement.

30-3-1. Procedure — Residence — Grounds.

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

(2) The court may decree a dissolution of the marriage contract between the petitioner and respondent on the grounds specified in Subsection (3) in all cases where the petitioner or respondent has been an actual and bona fide resident of this state and of the county where the action is brought, or if members of the armed forces of the United States who are not legal residents of this state, where the petitioner has been stationed in this state under military orders, for three months next prior to the commencement of the action.

(3) Grounds for divorce:

- (a) impotency of the respondent at the time of marriage;
- (b) adultery committed by the respondent subsequent to marriage;
- (c) willful desertion of the petitioner by the respondent for more than one year;
- (d) willful neglect of the respondent to provide for the petitioner the common necessities of life;
- (e) habitual drunkenness of the respondent;
- (f) conviction of the respondent for a felony;
- (g) cruel treatment of the petitioner by the respondent to the extent of causing bodily injury or great mental distress to the petitioner;
- (h) irreconcilable differences of the marriage;
- (i) incurable insanity; or
- (j) when the husband and wife have lived separately under a decree of separate maintenance of any state for three consecutive years without cohabitation.

(4) A decree of divorce granted under Subsection (3)(j) does not affect the liability of either party under any provision for separate maintenance previously granted.

(5) (a) A divorce may not be granted on the grounds of insanity unless:

(i) the respondent has been adjudged insane by the appropriate authorities of this or another state prior to the commencement of the action; and

(ii) the court finds by the testimony of competent witnesses that the insanity of the respondent is incurable.

(b) The court shall appoint for the respondent a guardian ad litem who shall protect the interests of the respondent. A copy of the summons and complaint shall be served on the respondent in person or by publication, as provided by the laws of this state in other actions for divorce, or upon his guardian ad litem, and upon the county attorney for the county where the action is prosecuted.

(c) The county attorney shall investigate the merits of the case and if the respondent resides out of this state, take depositions as necessary, attend the proceedings, and make a defense as is just to protect the rights of the respondent and the interests of the state.

(d) In all actions the court and judge have jurisdiction over the payment of alimony, the distribution of property, and the custody and maintenance of minor children, as the courts and judges possess in other actions for divorce.

(e) The petitioner or respondent may, if the respondent resides in this state, upon notice, have the respondent brought into the court at trial, or have an examination of the respondent by two or more competent physicians, to determine the mental condition of the respondent. For this purpose either party may have leave from the court to enter any asylum or institution where the respondent may be confined. The costs of court in this action shall be apportioned by the court.

1997

30-3-2. Right of husband to divorce.

The husband may in all cases obtain a divorce from his wife for the same causes and in the same manner as the wife may obtain a divorce from her husband.

1953

30-3-3. Award of costs, attorney and witness fees — Temporary alimony.

(1) In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

(2) In any action to enforce an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

(3) In any action listed in Subsection (1), the court may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.

(4) Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment.

2001

30-3-4. Pleadings — Findings — Decree — Use of affidavit — Sealing.

(1) (a) The complaint shall be in writing and signed by the petitioner or petitioner's attorney.

(b) A decree of divorce may not be granted upon default or otherwise except upon legal evidence taken in the

cause If the decree is to be entered upon the default of the respondent, evidence to support the decree may be submitted upon the affidavit of the petitioner with the approval of the court

(c) If the petitioner and the respondent have a child or children, a decree of divorce may not be granted until both parties have attended the mandatory course described in Section 30-3-11-3, and have presented a certificate of course completion to the court. The court may waive this requirement, on its own motion or on the motion of one of the parties, if it determines course attendance and completion are not necessary, appropriate, feasible, or in the best interest of the parties

(d) All hearings and trials for divorce shall be held before the court or the court commissioner as provided by Section 78-3-31 and rules of the Judicial Council. The court or the commissioner in all divorce cases shall enter the decree upon the evidence or, in the case of a decree after default of the respondent, upon the petitioner's affidavit

(2) The file, except the decree of divorce, may be sealed by order of the court upon the motion of either party. The sealed portion of the file is available to the public only upon an order of the court. The concerned parties, the attorneys of record or attorney filing a notice of appearance in the action, the Office of Recovery Services if a party to the proceedings has applied for or is receiving public assistance, or the court have full access to the entire record. This sealing does not apply to subsequent filings to enforce or amend the decree

1997

30-3-4.1 to 30-3-4.4. Repealed.

1990

30-3-5. Disposition of property — Maintenance and health care of parties and children — Division of debts — Court to have continuing jurisdiction — Custody and parent-time — Determination of alimony — Nonmeritorious petition for modification.

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

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children,

(b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children,

(c) pursuant to Section 15-4-6-5

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage,

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses, and

(iii) provisions for the enforcement of these orders, and

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the

dependent children, necessitated by the employment or training of the custodial parent

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary

(4) Child support, custody, visitation, and other matters related to children born to the mother and father after entry of the decree of divorce may be added to the decree by modification

(5) (a) In determining parent-time rights of parents and visitation rights of grandparents and other members of the immediate family, the court shall consider the best interest of the child

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a parent-time or visitation schedule a provision, among other things, authorizing any peace officer to enforce a court-ordered parent-time or visitation schedule entered under this chapter

(6) If a petition for modification of child custody or parent-time provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith

(7) If a petition alleges substantial noncompliance with a parent-time order by a parent, or a visitation order by a grandparent or other member of the immediate family pursuant to Section 78-32-12-2 where a visitation or parent-time right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation or parent-time

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

(i) the financial condition and needs of the recipient spouse,

(ii) the recipient's earning capacity or ability to produce income,

(iii) the ability of the payor spouse to provide support,

(iv) the length of the marriage,

(v) whether the recipient spouse has custody of minor children requiring support,

(vi) whether the recipient spouse worked in a business owned or operated by the payor spouse, and

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

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

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (8)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage

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

Section	
78-32-6	Duty of sheriff
78-32-7	Bail bond — Form
78-32-8	Officer's return
78-32-9	Hearing
78-32-10	Contempt — Action by court
78-32-11	Damages to party aggrieved
78-32-12	Imprisonment to compel performance
78-32-12 1	Compensatory service for violation of parent-time order or failure to pay child support
78-32-12 2	Definitions — Sanctions
78-32-12 3	Repealed
78-32-13	Procedure when party charged fails to appear
78-32-14	Excuse for nonappearance — Unnecessary restraint forbidden
78-32-15	Contempt of process of nonjudicial officer
78-32-16	Procedure
78-32-17	Noncompliance with child support order

78-32-1. Acts and omissions constituting contempt.

The following acts or omissions in respect to a court or proceedings therein are contempts of the authority of the court

- (1) Disorderly, contemptuous or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding
- (2) Breach of the peace, boisterous conduct or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding
- (3) Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, or other person appointed or elected to perform a judicial or ministerial service
- (4) Deceit, or abuse of the process or proceedings of the court, by a party to an action or special proceeding
- (5) Disobedience of any lawful judgment, order or process of the court
- (6) Assuming to be an officer, attorney or counselor of a court, and acting as such without authority
- (7) Rescuing any person or property in the custody of an officer by virtue of an order or process of such court
- (8) Unlawfully detaining a witness or party to an action while going to, remaining at, or returning from, the court where the action is on the calendar for trial
- (9) Any other unlawful interference with the process or proceedings of a court
- (10) Disobedience of a subpoena duly served, or refusing to be sworn or to answer as a witness
- (11) When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such court, or with any other person, concerning the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court
- (12) Disobedience by an inferior tribunal, magistrate or officer of the lawful judgment, order or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer

1953

78-32-2. Re-entry after eviction from real property.

Every person dispossessed of, or ejected from or out of, any real property by the judgment or process of any court of competent jurisdiction, who, not having a right so to do, re-enters into or upon, or takes possession of, any such real

property, or induces or procures any person, not having the right so to do, or aids or abets him therein, is guilty of a contempt of the court by which such judgment was rendered, or from which such process issued. Upon a conviction for such contempt the court must immediately issue an alias process, directed to the proper officer, requiring him to restore such possession to the party entitled thereto under the original judgment or process

1953

78-32-3. In immediate presence of court; summary action — Without immediate presence; procedure.

When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as prescribed in Section 78-32-10 hereof. When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officers

1953

78-32-4. Warrant of attachment or commitment order to show cause.

When the contempt is not committed in the immediate view and presence of the court or judge a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted, and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause

1953

78-32-5. Bail.

Whenever a warrant of attachment is issued pursuant to this chapter, the court or judge must direct, by an indorsement on such warrant, that the person charged may be [let] to bail for his appearance, in an amount prescribed in such indorsement

1953

78-32-6. Duty of sheriff.

Upon executing the warrant of attachment the sheriff must keep the person in custody, bring him before the court or judge and detain him until an order is made in the premises, unless the person arrested entitles himself to be discharged as provided in Section 78-32-7

1995

78-32-7. Bail bond — Form.

When a direction to let the person arrested to bail is contained in the warrant of attachment or indorsed thereon, he must be discharged from the arrest upon executing and delivering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant, and abide the order of the court or judge thereon, or that the sureties will pay as may be directed the sum specified in the warrant

1953

78-32-8. Officer's return.

The officer must return the warrant of arrest, and the undertaking, if any, received from the person arrested, by the return day specified therein

1953

78-32-9. Hearing.

When the person arrested has been brought up or has appeared the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested

Rule References: 1019(2), 2002(f), 2002(k), 4007, 7001(6), 9034

West Key No. Digests References: Bankruptcy ⇌ 3341-3388

11 USC § 524. Effect of discharge

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if—

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act [former 11 USC §§ 1 et seq.], commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2)(A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and

(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

- (8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act [former 11 USC §§ 32, 771, 876], in a case commenced within six years before the date of the filing of the petition;
 - (9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act [former 11 USC §§ 1060, 1061], in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—
 - (A) 100 percent of the allowed unsecured claims in such case; or
 - (B)(i) 70 percent of such claims; and
 - (ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or
 - (10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.
- (b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.
- (c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.
- (2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.
- (d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—
- (1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;
 - (2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of[,] or entitlement to[,] such property, or to deliver or surrender such property to the trustee; or
 - (3) the debtor committed an act specified in subsection (a)(6) of this section.
- (e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—
- (1) under subsection (d)(1) of this section[,] within one year after such discharge is granted; or
 - (2) under subsection (d)(2) or (d)(3) of this section[,] before the later of—
 - (A) one year after the granting of such discharge; and
 - (B) the date the case is closed.

Treatise References: Norton Bankruptcy Law and Practice 2d Chapter 74

Rule References: 2002(f)(6), 2002(k), 4004, 4005, 4006, 4008, 7001(4), 9024, 9034

West Key No. Digests References: Bankruptcy ☞ 3271-3322

11 USC § 728. Special tax provisions

- (a) For the purposes of any State or local law imposing a tax on or measured by income, the taxable period of a debtor that is an individual shall terminate on the date of the order

Tab B

FILED
Fourth Judicial District Court
of Utah County, State of Utah
1/8/03 [Signature] Deputy

Marilyn Moody Brown, No. 4803
MOODY BROWN & BROWN
Attorneys for Petitioner
2525 N. Canyon Rd.
Provo, Utah 84604
Telephone: (801) 356-8300

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

KRISTEN DAVENPORT,	:	STIPULATION	DIVISION# <u>8</u>
Petitioner,	:		
v.	:		
ROBERT DAVENPORT,	:	Civil No.	<u>014401643</u> 014400687
Respondent.	:	Division No.	

COME NOW the parties undersigned and represent to the Court that the following terms are fair and reasonable. The parties stipulate and agree, as follows:

1. Residency. Petitioner is a bona fide resident of Utah County, State of Utah, and has been for three months immediately prior to the filing of this action.

2. Marriage Statistics. Petitioner and Respondent were married on May 11, 1996, in Salt Lake City, Utah. The parties were divorced pursuant to a Decree of Bifurcation on May 16, 2002.

3. Child. There has been one child born as issue of this marriage. Kaiden Austin Davenport, born October 9, 1996.

4. Custody/Visitation. The parties are awarded joint legal custody which is defined as giving the parties the rights indicated in U.C.A. §30-3-33. The Mother is a fit and proper person to be awarded the permanent physical care, custody and control of the minor child of the parties, subject to the Father's right to visit with the child at reasonable times and places as the parties may agree.

a. If they cannot agree, visitation shall be in accordance with provisions in U.C.A. §30-3-35 of the Utah Code Annotated, 1953, as amended.

b. Pick up and drop off of the child will occur at Petitioner's parent's home as long as Petitioner deems it is necessary.

~~c. The parties will equally divide the summer vacation period. The Petitioner will have two three-week periods separated by 30 days.~~

d. Two weeks of the summer time will be uninterrupted for each parent and the other summer weeks will be interrupted for visitation in accordance with the statute. The uninterrupted visitation will be decided 30 days before summer vacation begins.

~~e. The summer vacation time will be determined by the school district where the child resides and start the day after school ends for the summer and continue until the week before school commences for the next school term.~~

f. The Respondent will have 3 hours of visitation on November 1st (his birthday).

g. The Petitioner will have 3 hours ^{of visitation} on August 22nd (her birthday).

h. Each parent will have telephonic visitation at reasonable times.

i. The mid-week visitation will commence at 5:00 p.m. or after school (when the child is in school) and continue until 8:00 p.m.

j. The parties will inform each other prior to any move. If a party moves out of state, the cost of visitation is reserved.

~~k. The Respondent can perform religious ordinances if the child so desires, and if he is found worthy by both parties' bishops.~~

5. Child Support. The Father's gross monthly income is ^{\$ 2900} ~~\$3,112~~ (amount of income of Father is reflected on the worksheet). The Mother's gross monthly income is \$1,667 (amount of income is reflected on the worksheet). The supporting Affidavit is attached as Exhibit A. ~~The Mother's child support obligation should be \$181 per month, and~~ The Father's child support obligation should be ^{\$ 321} ~~\$339~~ per month. ~~(The parties will be bound by the temporary order of support regarding child support and alimony until the house sells and the mortgage payments made by Respondent will be considered alimony and child support.)~~ The child support obligation of both parents should be effective ^{January 1, 2003} ~~when the home is sold~~, and continue until a month after the child becomes 18 years of age, or until the month after the child's normal and expected date of graduation

from high school, whichever occurs later. The child support worksheet is attached as Exhibit B. The child support is payable one-half on the 5th day of each and every month, and one-half on the 20th day of each month.

The issue of retroactivity of child support is reserved until the completion of the bankruptcy.

6. Child Care Expenses. In accordance with U.C.A. §78-45-7.16, each parent shall equally share the reasonable work-related and/or education-related child care expenses for the minor child.

a. If an actual expense for child care is incurred, a parent shall begin paying his share on a monthly basis immediately upon presentation of proof of the child care expense, but if the child care expense ceases to be incurred, that parent may suspend making monthly payment of that expense while it is not being incurred without obtaining a modification of the child support order.

b. A parent who incurs child care expense shall provide written verification of the cost and identity of a child care provider to the other parent upon initial engagement of a provider and thereafter on the request of the other parent.

c. The parent shall notify the other parent of any change of child care provider or the monthly expense of child care within 30 calendar days of the date of the change. A parent incurring child care expenses shall be denied the right to receive credit for the expenses or to recover the other parent's share of the expenses if the parent incurring the expenses fails to notify the other parent within said 30 days.

7. Automatic Transfer. The parties agree that rather than payment of child support to the Office of Recovery Services, the Father will cause to be made an automatic withdrawal payable to the obligee from Father's bank account to Mother's bank account, one-half on the 5th day of each month and a like amount on the 20th day of each month.

8. Income Withholding. If at any time the Respondent is in arrears by 30 days, the Mother is entitled to immediate and automatic withholding income as a means of collecting child support, pursuant to Sections 30-3-5.1 and 62A-11-101 et. seq., Utah Code Annotated, as amended. The Father will pay the processing fees.

9. Modification. This order is subject to child support modification in accordance with U.C.A. §78-45-7.2(7).

10. Alimony. ~~Until the house is sold, the house payment will be paid which will be retroactivity of alimony is reserved until the bankruptcy is concluded.~~ ^{The issue of ongoing alimony and} ~~The issue of alimony is reserved as long as Respondent is maintaining the house payment. If the Respondent fails to pay the mortgage payment, said amount is non-bankruptable since it is being paid in lieu of child support and alimony and will be treated as such in any filing for bankruptcy.~~ ^{retroactivity of alimony is reserved until the} ^{bankruptcy is concluded.} ^{LB} ^{SP} ^{MNB}

11. Real Property. During the course of the marriage, the parties acquired real property located at 774 West 425 North, Lindon, Utah. ^{The issue of distribution, etc.} ~~Said property will be immediately listed for sale at \$157,000, with a mutually agreed upon realtor, and sold at an mutually agreeable price. All remaining proceeds will be equally divided. Until the home is sold, the Respondent will pay the first~~ ^{of the real property is reserved until completion of} ^{the bankruptcy.} ^{LB} ^{SP} ^{MNB}

~~mortgage in lieu of alimony and child support and the Petitioner will pay the second mortgage.~~

~~When the home is sold, the proceeds will be used as follows:-~~

- ~~a. To pay the underlying obligations (1st and 2nd mortgages).~~
- ~~b. To pay the costs of sale.~~
- ~~c. The proceeds will be equally divided.~~
- ~~d. If there are any unpaid first mortgage payments they will be added to~~

~~Petitioner's share of the proceeds.~~

12. Personal Property. During the course of the marriage relationship, the parties have acquired personal property. Said personal property of the parties should be distributed as follows:

- a. To the Petitioner: The property as indicated in Exhibit A.
- b. To the Respondent: The property as indicated in Exhibit B.
- c. The Petitioner is awarded the 4-wheeler ^{and Honda} which he represents ^{respondents} has been sold. The issue of offsets for the sale is reserved.
- d. The 1997 Ford Explorer will be awarded to the Petitioner. The

~~Respondent will sign all documents necessary to convey said vehicle to Petitioner. The~~

~~Petitioner will refinance the vehicle as soon as Respondent has given her the \$6,000 that was~~

~~borrowed against the Explorer.~~

e. Each party is awarded their own personal property and effects and that property which is now in their individual possession or under their individual control.

13. Debts. The parties acquired debts during the marriage. ~~Each party will assume,~~
 debt is subject to the bankruptcy proceeding + is reserved, and hold the other harmless from liability on:
 The issue of

Obligation	Amount	Obligor
1 st Mortgage	Balance	Respondent (until sold, then ½ each)
Explorer (which includes a 4-wheeler)		Petitioner
2 nd mortgage (consumer debt)	\$19,000.00	Petitioner until sold, then ½ each
school loans	Balance	Respondent

a. Other Debts. Each party will be responsible to pay any other debt he or she individually incurred. The issue of payment of the mortgage payment pursuant to the temporary order is reserved.
 b. Creditors. The parties understand that this debt provision does not bind third party creditors.

14. Time Share. During the course of the marriage, the parties acquired a time share in Park City, Utah. This issue is reserved until completion of the bankruptcy. The Respondent will sell the time share and will use the time share until it is sold and then divide the proceeds. The Respondent will pay the cost of the time share until the time share is sold.

15. Medical/Dental Expenses. In accordance with U.C.A. §78-45-7.15, insurance for the medical and dental expenses of the minor child shall be provided by the party who can obtain the best coverage at the most reasonable cost. The Petitioner is currently providing said insurance.

a. Each parent shall share equally the out-of-pocket costs of the premium actually paid by a parent for the child's portion of insurance. The child's portion of the premium

is a per capita share of the premium actually paid. The premium expenses for the child shall be calculated by dividing the premium amount by the number of persons covered under the policy and multiplying the result by the number of child in the instant case.

b. Each parent shall share equally all reasonable and necessary uninsured medical, dental, orthodontia, eye care, counseling, prescriptions, deductibles, and copayments, incurred for the dependent child and actually paid by the parents.

c. The parent ordered to maintain insurance shall provide verification of coverage to the other parent upon initial enrollment of the dependent child, and thereafter on or before January 2, of each calendar year. The parent shall notify the other parent of any change of insurance carrier, premium, or benefits within 30 calendar days of the date he or she first knew or should have known of the change.

d. The parent who incurs medical and dental expenses shall provide written verification of the cost and payment of medical and dental expenses to the other parent within 30 days of payment. If neither party is able to secure said insurance at a reasonable cost, each party should be responsible for the payment of one-half of all reasonable and necessary medical and dental expenses for the minor child as indicated.

16. Life Insurance. It is fair and reasonable that each party be ordered to maintain in full force and effect a life insurance policy on his or her life in the face amount of \$30,000 until such time as the last of the parties' minor child reaches the age of eighteen. During such period, each

party should be ordered to designate a trustee as beneficiary in trust for the child on said life insurance policy.

17. Retirement. The parties have no retirement or pension accounts.

18. Dependency Exemption. It is reasonable that the Petitioner should be awarded the dependency exemption for the parties' minor child for even-numbered years and the Respondent will claim for odd-numbered years; provided, however, that he must be current on his obligations to claim the exemption.

19. Attorney's Fees and Costs. *the issue of attorney's fees is reserved.* *KD MB* Each party will pay his or her attorney's fees.

Dated this _____ day of November, 2002.

Kristen Davenport
KRISTEN DAVENPORT, Petitioner

SUBSCRIBED AND SWORN to before me this _____ day of November, 2002.

NOTARY PUBLIC

Dated this _____ day of November, 2002.

Robert Davenport
ROBERT DAVENPORT, Respondent

SUBSCRIBED AND SWORN to before me this _____ day of November, 2002.

NOTARY PUBLIC

Dated this 7 day of ^{January} ~~November~~, 2002.



MARILYN MOODY BROWN
Attorney for Petitioner

Dated this 7th day of ^{Jan} ~~November~~, 2002.



ROSEMOND BLAKELOCK
Attorney for Respondent

[illegible]

Handwritten initials: *KK* *DD* *RB*

[illegible]

EXHIBIT C

Parenting Plan

The parties are awarded joint legal custody. Joint legal custody will be defined as follows:

(1) The parties will trade favors and cooperatively build good will with each other to ensure that Kaiden wins.

(2) The Respondent will be notified of any extra-curricular activities Kaiden chooses to participate in and both parties will equally share the costs of such activities.

(3) The parties will share itineraries and emergency contact telephone numbers whenever traveling with Kaiden on a vacation. The child will call the other co-parent when they arrive at the initial destination.

wp\A-g\davenport.stp
November 26, 2002

Tab C

FILED
Fourth Judicial District Court
of Utah County, State of Utah
260418 Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

KRISTEN DAVENPORT,	Petitioner,	MEMORANDUM DECISION
vs.		CASE NO. 0144001643
ROBERT DAVENPORT,		JUDGE: GARY D STOTT
	Respondent.	CLERK: KS

MEMORANDUM DECISION

On January 27, 2004, counsel and the parties appeared for the purpose of addressing issues reserved by way of bifurcation as to the complaint for divorce. Witnesses were called and testified, evidence was introduced and argument of counsel was presented. Upon the receipt of such information the Court took the matter under advisement. The Court, being fully advised as to all of the issues, now enters the following memorandum decision.

1. DELINQUENT SUPPORT

Based upon the parties' stipulation at the time of trial the Court enters judgments for the months of September, October, November and December 2002 in favor of Petitioner against Respondent, for failure to pay the first mortgage on the property in lieu of support in the amount of \$3704.

2. DELINQUENT DENTAL EXPENSES

Based upon the evidence provided, the Court finds that Respondent has failed to pay the sum of \$296 representing his share of dental expenses not covered and paid by insurance, which were incurred by the parties. Petitioner is granted judgment for that amount.

3. IMPROPER DISPOSAL OF PERSONAL PROPERTY

Prior to the hearing on this case on January 27, 2004, the parties were under an order of the Court that neither shall dispose of any of the personal property of the parties without the other party's and the Court's approval. The evidence provided clearly indicates that Mr. Davenport on

April 2, 2002, without approval of Petitioner and without consent of the Court, sold the 2000 Polaris Scrambler 500 and the Voyager 2-place trailer used to transport the four-wheeler. The sale was in the amount of \$3500 as represented by exhibit 11. The Court finds that Respondent's conduct in selling the four-wheeler and trailer was in violation of the Court's order, placing Respondent in contempt of court for such action.

The funds used to purchase the four-wheeler were obtained by pledging the parties' Ford Explorer automobile which was awarded to Petitioner. Respondent obtained \$3500 from the sale of the four-wheeler and trailer without accounting to Petitioner for the receipt of such sums and without applying such amounts on the obligation due on the loan of the Explorer. When Petitioner sought to sell the Explorer, the outstanding obligation to secure the funds for the four-wheeler remained on that loan, and were paid by Petitioner to satisfy the loan and clear the lien.

The Court finds that Respondent used the \$3500 to pay the first mortgage on the home. Because Respondent failed to obtain approval of the Court before the selling the four-wheeler; because Petitioner's Explorer vehicle was used by the parties to purchase the four-wheeler; because Respondent failed to apply the funds of the sale of the four-wheeler and the trailer to the outstanding obligation on that loan to decrease the amount of the loan owed and secured by the Explorer; because Respondent failed to account to Petitioner for the funds obtained from the sale of the four-wheeler and trailer; and because Petitioner, when paying off the obligation against the Explorer was required to pay the balance owing, which included the loan to purchase the four-wheeler, Petitioner is granted judgment against Respondent for the total amount received by him for the sale of the four-wheeler and trailer, i.e., \$3500. Ordinarily, Petitioner would be entitled to one-half of such funds, however, the Court finds that such funds should have been immediately applied against the amount owing on Petitioner's Explorer vehicle.

4. ALIMONY

Petitioner and Respondent were married on May 11, 1996. A child was born to the parties on October 9, 1996. By way of an order to show cause hearing, Commissioner Patton entered the following order: "Petitioner is awarded temporary possession of the home. Respondent will maintain the first mortgage on the home in lieu of his child support and alimony obligations." On June 6, 2003, the parties and counsel appeared before Commissioner Patton with respect to

Petitioner's Order to Show Cause. The Court finds that prior to the time the parties' appeared with counsel and addressed the Commissioner, Mr. Davenport represented to his counsel, who in turn, conveyed such information to Petitioner's counsel, that the home had been lost in the foreclosure sale. Based upon the information provided to Petitioner, an order was entered as follows: "1. The issue of Mr. Davenport's contempt for failure to pay a monthly mortgage payments for the four months in question in 2002 was reserved for hearing before the district judge; 2. The issue concerning Petitioner's right for judgment for arrearages for child support and alimony was also reserved for trial; 3. Petitioner's motion requesting that Mr. Davenport be required to make the payments on the home is now moot, in that the home has been sold in a foreclosure sale." The Order was dated July 3, 2003, and signed by the Commissioner and this judge.

The Court finds that Petitioner had attempted on two occasions, one of which is referred to above by way of the hearing in June 2003, to obtain information from Respondent concerning the financial status of the parties' home, in order that Petitioner might take whatever action was necessary to avoid the foreclosure of the home by the lender and thereby losing possession of the home as previously awarded her by the Court. At each inquiry by Petitioner of Respondent, Mr. Davenport refused to provide the requested information to Petitioner, and in fact misrepresented the truth as to the status of the real property. Exhibit 3, a copy of a letter from the bankruptcy trustee Daniel Gillman, advised counsel for Petitioner that in February of 2003, the trustee in the bankruptcy filed a No Asset Report and abandoned any claim to the real property, thereby leaving the property to the action of the lender for the purpose of foreclosure. Also the letter indicates that Mr. Davenport had received a discharge in the bankruptcy on April 24, 2003. This information was never given to Petitioner or her attorney.

Because Mr. Davenport failed to inform Petitioner the status of his bankruptcy with respect to the real property of the parties, Petitioner lost the opportunity of saving the home from foreclosure and lost the opportunity to retain possession of the home and continue to pay for the home. From the testimony of Petitioner at the time of trial, and without evidence to the contrary, the Court finds that by reason of the wrongful actions of Respondent in allowing the home to be foreclosed upon, the parties lost approximately \$20,000 in equity. Because Petitioner was forced to move from the home when it was foreclosed upon she presently resides with her child at her

mother's residence.

The Court further finds that Respondent misrepresented in his affidavit of May 1, 2003, wherein he stated that the foreclosure had already occurred and that the stay had been lifted by the bankruptcy court to allow the foreclosure to be completed. Specifically in support of the Court's findings with respect to misrepresentation are paragraphs 3 and 4 of Respondent's affidavit which states the following: Paragraph 3. "As part of the bankruptcy process, the federal court has ordered that my home, located at 774 West 425 North in Lindon be sold at auction." Paragraph 4 states "I have had nothing to do with the sale, because it is all part of the bankruptcy court, and the federal court still maintains control and jurisdiction over the events concerned with my home." Such information was not truthful.

Inasmuch as the issue of divorce was bifurcated and the parties were divorced prior to the time of hearing of the remaining issues on January 27, 2004, the Court finds that Mr. Davenport married again on June 4, 2002. Mr. Davenport testified that because of a decrease in his income and an increase in expenses due to his new marriage in that he is now responsible to provide support for a new wife and her child. Therefore, he voluntarily terminated paying the first mortgage on the home for the months of September, October, November and December of 2002 because he did not have the money available to make the payments. Mr. Davenport's first obligation was to obey the orders of the Court, which he chose to disregard.

Petitioner has requested that she be awarded alimony retroactive to January 2003 to the date of this hearing and for a permanent order of alimony in the future. Based upon the evidence provided at trial, the Court finds from Petitioner's financial declaration, exhibit 4, that Petitioner's monthly gross income is \$1800 and her net monthly income is \$1731. Petitioner is employed by Softwise as an accountant.

Respondent did not provide the Court a financial declaration but instead provided exhibit 15, which is entitled "Respondent's Monthly Expenses"; exhibit 12, a copy of the 1999 tax return; exhibit 13, a copy of Respondent's 2000 tax return; and exhibit 14, a copy of Respondent's 2001 tax return. Respondent has relied upon prior declarations of the bankruptcy court to establish his gross income to be \$2900. Respondent is self-employed as a mortgage broker with a company named Premier Mortgage and Capital. Respondent operates his business out of his home.

Through the course of discovery, Petitioner submitted Interrogatories and Request for

Production of Documents to Respondent. In that discovery Respondent was asked to provide information regarding his gross income in 2003 and to itemize deductions claimed against his gross income. Those requests also asked him to state his net monthly pay. Respondent's Answers to Interrogatories, signed by him and dated August 20, 2003, are as follows: in Interrogatory #1, in response to the question "What is your gross income so far in 2003?" Respondent wrote "I do not have my gross income. However, money I have collected is \$21,142. Business expenses have not been deducted from this figure." When asked to "itemize your deductions from your gross pay", Respondent answered "I do not have totals. Please refer to previous year's tax returns for estimates." When asked to state his net monthly income, Respondent answered "I do not have a set net monthly income. I am self-employed, and every month is different." That information was never supplemented as requested by the rules of discovery.

In an effort to provide evidence to support Respondent's claim that his gross monthly income is approximately \$2900, copies of his tax returns were submitted. In addition, Respondent presented exhibit 5, which is a copy of Respondent's "Account Quick Report", indicating his monthly gross income for his business as a self-employed individual. Considering the evidence presented in exhibit 5 the Court finds that for the months of January 2002 to September 2002, the Respondent's average monthly gross income was \$1573.03. Furthermore, the Court finds that for the period of September 2002 to December 2002, which represents the time frame when Respondent voluntarily terminated his payment of the first mortgage, which was in lieu of his obligation of child support and alimony, for which he claims that his monthly income had decreased and his monthly expenses had increased, the average monthly gross amounts for those four months was \$4,335.74. The Court has not been provided convincing evidence to support Respondent's position as to why he quit paying the first mortgage in lieu of his support obligation. To the contrary, the Court finds that the evidence supports a conclusion that Respondent's income was significantly higher during the last four months of 2002, then for the prior eight months.

Based upon all the evidence provided, this Court finds that Respondent, without proper justification, failed to comply with the Court's order with respect to the payment of the first mortgage in lieu of his support obligation. Of that amount, approximately \$600 was attributable

to alimony support. The Court finds Respondent in contempt for failure to pay the first mortgage obligation as ordered, and further finds that Respondent's reasons for failure to pay were not reasonable, appropriate or supported by the evidence introduced at the time of trial.

In considering what amount if any Respondent should pay Petitioner for alimony for the retroactive time of January 2003 to the time of trial, and what amount, if any, should be paid by Respondent to Petitioner for alimony in the future, the Court has considered the factors set forth in § 30-3-5(8)(a)(I-vii) UCA. The Court has also considered the language set forth in § 30-3-5(8)(g)(iii)(A), (B), and sub paragraph 8(h), UCA. Considering all of the testimony provided at the time of trial, and the Court's consideration of the factors stated in the statute, the Court orders that for the time frame of January 2003 to January 2004, Respondent shall pay \$600 per month as ordered for temporary alimony. The Court finds that Respondent had the financial ability during that year's period of time to meet the obligation imposed by the Court for the payment of the first mortgage in lieu of Respondent's obligation for child support and alimony. The Court does not find that Respondent experienced a decrease in his income, justifying his voluntary termination of payment of the support obligation. As to Respondent's claim that his expenses increased because of his new marriage and his obligation to provide for his new family, the Court has considered, as allowed by the above-referenced statute, the subsequent spouse's financial ability to share in the living expenses.

When questioned at trial as to the income of his new spouse, Donna Davenport, Respondent testified that he did not know what his present wife's income was. However, after consulting with counsel, he testified he believed it to be approximately \$1000 per month. The Court finds from the testimony of Donna Davenport that her monthly income, during the time in question, was between \$1000 and \$4000 per month but didn't know for sure what it was. However, the Court finds that evidence presented by Petitioner supports a finding that Respondent's new spouse then had a gross income of approximately \$4800 per month. In fact, Donna Davenport testified that her net take home pay is approximately \$3000 per month.

The Court considers the subsequent spouse's income in determining her ability to share in the living expenses claimed by Respondent. Respondent claims that his present monthly expenses exceed \$6700 per month. This Court finds however, that Respondent's spouse has the financial ability by reason of her monthly income to assist Respondent in the payment of the shared living

expenses.

Because the parties were married for six years prior to the entry of the Decree of Divorce and based upon all the evidence provided at trial with respect to the parties' income and expenses, the Court finds that it is reasonable and proper that Respondent pay to Petitioner for alimony the sum of \$500 per month for 3 years. The Court finds that it is the desire of Petitioner that she and her child be able to find a place to reside on their own without the necessity of living with her mother. The Court believes that the award of alimony for that period of time together with Petitioner's income should be sufficient to allow her to live on her own with her child without having to live with her mother, and to make the transition to being self-supporting.

Respondent's obligation for the payment of alimony shall begin January 1, 2004, for the period of three years and shall be paid to Petitioner monthly by Respondent.

5. CONTEMPT SANCTIONS

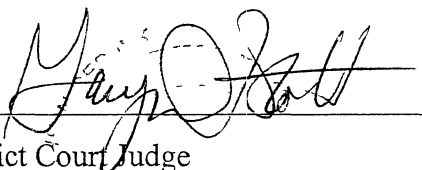
As indicated herein, the Court has found Respondent in contempt for his failure to comply with the Court's orders in this case. The Court has also granted judgments against Respondent in favor of Petitioner. As to sanctions for Respondent's failure to comply with the orders of the Court, Respondent shall serve 30 days in the Utah County Jail. He may purge himself of that contempt and avoid those sanctions by paying the full amounts of the judgments as ordered herein to Petitioner by April 30, 2004. If such judgments have not been paid in full, Petitioner may file an affidavit in support of an Order to Show Cause asking for the imposition of sanctions against Respondent.

6. ATTORNEY FEES

Commissioner Patton reserved for trial Petitioner's request for the award of attorney fees. Petitioner has also requested that an order be issued by the Court requiring Respondent to pay her attorney fees and costs. The Court finds from the affidavit of Petitioner's counsel, as to the calculation of attorney fees and costs, that such fees are reasonable and proper in representing Petitioner and that Petitioner does not have the financial means available to her to pay attorney fees. Therefore, Respondent is ordered to pay attorney fees and costs as set forth in paragraphs 8, 9, 10 in Mr. McPhie's Affidavit of Attorney Fees. If Respondent objects to the amount of costs claimed, that objection must be filed within 20 days of the date of this ruling, and the Court will reserve for hearing what amount of costs Respondent shall pay.

Counsel for Petitioner is directed to prepare the appropriate findings of facts and conclusions of law and decree consistent with this Court's decision and submit the same for this Court's signature within 30 days of the date of this decision.

DATED this 6 day of Feb, 2004.



District Court Judge

OFFICIAL

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 014401643 by the method and on the date specified.

METHOD NAME

Mail DAVID A MCPHIE
 ATTORNEY PET
 2105 E MURRAY HOLLADAY RD
 HOLLADAY, UT 84117

By Hand ROSEMOND BLAKELOCK

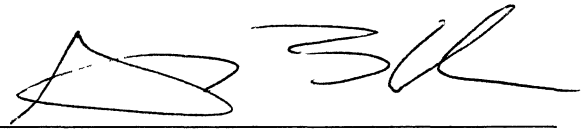
Dated this 9 day of Feb, 20 04.


Deputy Court Clerk

CERTIFICATE OF SERVICE

I certify that on the 23 day of September, 2004, I personally served a true and correct copy of the foregoing, BRIEF OF APPELLANT upon David A. McPhie, the counsel for the appellee in this matter, by hand-delivering two copies thereof at the following address:

DAVID A. McPHIE
2105 East Murray-Holladay Rd.
Holladay, Utah 84117



A handwritten signature in black ink, appearing to read 'D. McPhie', is written over a horizontal line.