

1993

Lynda Smith v. Richard Raymond Smith : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

930162 CA

LYNDA SMITH,)	
)	
Plaintiff, Appellee and)	APPELLEE'S BRIEF
Cross-Appellant,)	AND
)	CROSS-APPELLANT'S BRIEF
vs.)	
)	
RICHARD RAYMOND SMITH,)	Case No. 930162-CA
)	
Defendant, Appellant and)	Priority No. 15
Cross-Appellee.)	

APPELLEE'S BRIEF AND CROSS-APPELLANT'S BRIEF

APPEAL FROM THE DECREE OF DIVORCE
AND
RULINGS ON POST-JUDGMENT MOTIONS
ENTERED IN THE FIFTH DISTRICT COURT, IRON COUNTY
ROBERT T. BRAITHWAITE, DISTRICT JUDGE

FILED

SEP 16 1993

COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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vs.)	
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RICHARD RAYMOND SMITH,)	Case No. 930162-CA
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Defendant, Appellant and)	Priority No. 15
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APPELLEE'S BRIEF

JURISDICTIONAL AUTHORITY

Jurisdiction is vested with the Court of Appeals pursuant to Utah Code Annotated § 78-2a-3(2)(i) (1992).

ISSUES AND STANDARDS OF REVIEW

The issues presented by Defendant/Appellant for review are as follows:

1. Did the Trial Court err when it concluded that the marital residence of the parties was a marital asset after finding that the funds to purchase the residence were derived from co-mingled funds in an account accessed by the Defendant alone despite Defendant's testimony that he had kept funds separated and had made ongoing mortgage payments from a pre-marital retirement account?

.

The applicable standard of review for this issue is the "clear abuse of discretion" standard as stated in *Kerr v. Kerr*, 610 P.2d 1380, 1382 (Utah 1980).

2. Did the Trial Court err when it ordered the marital residence sold and the assets divided equally between the parties, and when it granted Plaintiff possession of the marital residence pending sale?

The applicable standard of review for this issue is the "clear abuse of discretion" standard as stated in *Kerr v. Kerr*, 610 P.2d 1380, 1382 (Utah 1980).

3. Did the Trial Court err when it ordered the 1988 Jaguar automobile sold and the proceeds divided equally between the parties despite Defendant's claim of a pre-marital interest in it?

The applicable standard of review for testing the Trial Court's factual finding is the "clearly erroneous" standard as stated in *Hagan v. Hagan*, 810 P.2d 478,481 (Utah App. 1991).

The applicable standard of review for the issue of property distribution is the "clear abuse of discretion" standard as stated in *Kerr v. Kerr*, 610 P.2d 1380, 1382 (Utah 1980).

4. Did the Trial Court err when it awarded the Porsche automobile to Plaintiff as pre-marital property despite Defendant claiming a marital interest in it due to marital funds being used to repair or refurbish it?

The applicable standard of review for testing the Trial Court's factual finding is the "clearly erroneous" standard as stated in *Hagan v. Hagan*, 810 P.2d 478,481 (Utah App. 1991).

The applicable standard of review for the issue of property distribution is the "clear abuse of discretion" standard as stated in *Kerr v. Kerr*, 610 P.2d 1380, 1382 (Utah 1980).

5. Did the Trial Court err when it affixed the value of the Defendant's retirement account (401k salaries savings plan) at the value on the date of trial and simultaneously declined to adopt California law concerning division of the asset when Defendant had not challenged Utah jurisdiction, and where Defendant had repeatedly asserted Utah residency during all stages of the proceedings.

The applicable standard of review for testing the Trial Court's factual finding is the "clearly erroneous" standard as stated in *Hagan v. Hagan*, 810 P.2d 478,481 (Utah App. 1991).

The applicable standard of review for testing the Trial Court's application of the law is the "correction of error" standard as stated in *Maxwell v. Maxwell*, 796 P.2d 403 (Utah App. 1990) giving no deference to the trial court.

6. Did the Trial Court err when it ordered the Blazer automobile sold and the proceeds divided equally between the parties despite testimony that the vehicle had decreased in value between the date of separation and trial?

The applicable standard of review for testing the Trial Court's factual finding is the "clearly erroneous" standard as stated in *Hagan v. Hagan*, 810 P.2d 478,481 (Utah App. 1991).

. . . .

. . . .

The applicable standard of review for the issue of property distribution is the "clear abuse of discretion" standard as stated in *Kerr v. Kerr*, 610 P.2d 1380, 1382 (Utah 1980).

7. Did the Trial Court err when it did not order Plaintiff to repay funds taken as salary from the marital business during the pendency of this action?

The applicable standard of review for the issue of property distribution is the "clear abuse of discretion" standard as stated in *Kerr v. Kerr*, 610 P.2d 1380, 1382 (Utah 1980).

8. Did the Trial Court err when it did not order Plaintiff to compensate Defendant for damage to his firearms despite Defendant's testimony that Plaintiff's son had caused the damage and that the firearms were in the physical possession of Plaintiff during the pendency of this action?

The applicable standard of review for the issue of property distribution is the "clear abuse of discretion" standard as stated in *Kerr v. Kerr*, 610 P.2d 1380, 1382 (Utah 1980).

9. Did the Trail Court err when it declined to designate child support arrearages from Plaintiff's prior marriage as a marital asset?

The applicable standard of review for testing the Trial Court's application of the law is the "correction of error" standard as stated in *Maxwell v. Maxwell*, 796 P.2d 403 (Utah App. 1990) giving no deference to the trial court.

. . . .

. . . .

The applicable standard of review for the issue of property distribution is the "clear abuse of discretion" standard as stated in *Kerr v. Kerr*, 610 P.2d 1380, 1382 (Utah 1980).

10. Did the Trial Court err when it did not order that credit card debt incurred by Defendant be paid from business income or from the proceeds of the sale of the business?

The applicable standard of review for the issue of property distribution is the "clear abuse of discretion" standard as stated in *Kerr v. Kerr*, 610 P.2d 1380, 1382 (Utah 1980).

11. Did the Trial Court err when it found Defendant in contempt of court.

The applicable standard of review for testing the Trial Court's factual finding is the "clearly erroneous" standard as stated in *Hagan v. Hagan*, 810 P.2d 478,481 (Utah App. 1991).

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES,
RULES, AND REGULATIONS**

Utah Code Annotated §30-3-5
Utah Code Annotated §78-2a-3(2)(i)
Utah Code Annotated §78-32-1

STATEMENT OF THE CASE

After a violent incident of spouse abuse, Plaintiff filed her complaint for divorce on May 5, 1992. (R. at 2)¹ From the outset the case has been hotly contested as evidenced by the numerous hearings to dispose of motions and enforce temporary court orders. (R. at 42, 46-48, 78-83, 128-130, 135-146). On August 12, 1992,

¹Throughout the brief the literal "R" will stand for Record of the case and the literal "T" will stand for the transcript of the trial. The numbers following the literals will indicate the page where the material referenced can be located.

the court conducted a scheduling conference. (R. at 63). Trial was conducted on December 3, 4, and 10, 1992. (R. at 268). On the final day of trial, and after the Judge had reviewed substantial personal notes of the trial, over 60 exhibits and pertinent case law, the trial court gave oral findings of fact, conclusions of law and decree of divorce from the bench. (R. at 737 et. seq.).

Each party submitted a written version of proposed findings, conclusions and decree. Defendant filed a motion for rehearing on January 13, 1993 which was denied. (R. at 283, 290). Other post-trial motions were filed which were all resolved in conformity with findings of fact, conclusions of law and the decree of divorce signed and entered February 19, 1993. (R. at 359-382). The court further disposed of any post-trial issues when, on March 31, 1993, the court signed its own Order doing so. That Order was entered on April 1, 1993. (R. at 406-411).

On March 16, 1993, Defendant filed his Notice of Appeal. (R. at 392). Later, Defendant filed a docketing statement together with an Amended Notice of Appeal seeking to challenge the court's disposition of post-trial motions as well as its findings, conclusions and decree. (R. at 474). Plaintiff timely filed her Notice of Appeal and Docketing Statement as well.

At the trial, the parties each advanced the position that the Defendant's retirement account be divided pursuant to the guidelines established in *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982), and that a Qualified Domestic Relations Order should be entered.

The Court denied Plaintiff's request for alimony. Plaintiff's total income was established as \$1,150 per month. Of that amount, \$1,000 was compensation from the business owned by the parties at the time of their separation. The court ordered that asset be sold but failed to consider the loss of income to Plaintiff which would certainly result at the time of the sale.

Evidence and testimony also established that Defendant currently earned a salary in excess of \$65,600 per year working at Lockheed over and above his airforce retirement of \$14,000 per year (T. at 663) making his total income approximately \$6,638 per month. (T. at 663; see also Exhibit 16 (1991 Form 1040 income tax return)).

The Court also denied Plaintiff's request for attorney fees. Testimony concerning attorney fees presented by way of cross-examined testimony (T. at 244- 246; 438-443) was un-rebutted. The Court failed to make any finding with regard to the reasonableness of the fee, (T. at 762), the absence of which is fatal and suggests that a remand of this case may be appropriate for additional findings and the possible award of attorney fees. *Muir v. Muir*, 841 P.2d 736, 741-742 (Utah App. 1992).

STATEMENT OF FACTS

The parties were married on August 17, 1985. (R. at 2; T. at 485). This was a second marriage for each party. (T. at 85 and 417).

Each party brought pre-marital assets to the marriage, and the parties acquired assets during the marriage. Some assets were

acquired from the proceeds of pre-marital assets. Specifically, the proceeds from the sale of each of their prior homes became the focus of much testimony at trial. Defendant's prior home was located in Mission Hills, California, and Plaintiff's prior home was located in Agua Dulce, California.

Testimony at trial was contradictory when attempts were made to trace the proceeds from the sale of each home after the marriage. Defendant maintained that the proceeds were kept separate while Plaintiff testified that the proceeds were commingled and controlled solely by Defendant.

Plaintiff's prior husband was ordered to pay child support for their minor child but failed to do so. (T. at 200). Ultimately, Plaintiff's prior husband filed bankruptcy. (T. at 535, 630). Defendant alleged that in effect Plaintiff's arrearage claim against her prior spouse would amount to \$64,250.00 and that he had in effect provided that amount in support since he had provided for the minor child throughout the marriage. (T. at 379). Defendant urged the court to consider the arrearage amount as a marital asset when making the final property distribution. The court found and ruled otherwise. (T. at 738).

The parties eventually moved to Utah. They purchased a home and a business. Testimony was contradictory as to what funds were used to make the purchases. The Trial Court found and concluded that commingled funds were used to make the purchases (T. at 750) and that the assets were marital property. The court ordered the

home and the business sold and the proceeds divided equally (T. at 749,750).

Defendant continued to work in California, returning by car at least weekly to Utah. Defendant eventually purchased an airplane to reduce his commuting time. (T. at 634).

Defendant asserted Utah residence throughout the proceedings in the court below. (T. at 738). But, at trial, Defendant asserted that California law ought to govern the distribution of his 401K salaried savings plan since he was earning his salary in California. The Trial Court rejected his legal argument. (T. at 738).

During the pendency of the proceedings, Plaintiff and Defendant received an IRS income tax refund. The check was mailed to Defendant, and although a joint refund, was cashed by Defendant alone and held by him alone. Defendant had used some portion of the refund to pay for accounting fees and hanger fees for his airplane. (T. at 594). The balance was held in his own account (T. at 651) despite the court having ordered it to be used for the expenses of the Sportsman's Lounge. Ultimately, when Defendant made a motion for rehearing and other post-trial motions, the court learned that Defendant had still not complied with the court's prior orders concerning the use of the refund and found him in contempt. (R. at 406-411).

The property division directed by the Trial Court attempted to return pre-marital property to each party, and divide the marital
. . . .

estate equally. Defendant contends that the court erred in this approach to the division with respect to a few items.

Plaintiff was unemployed during the majority of the marriage. After the parties separated, Plaintiff has been able to earn \$1,000.00 per month from her work at the marital business, and \$150 per month from another part-time job. Due to the relatively new financial condition of the business attributable to the efforts of the Plaintiff, it is uncertain whether the business will sustain an income to Plaintiff at this present level. At any rate, the business has been ordered sold, and the \$1,000.00 per month income will no longer be available to Plaintiff.

SUMMARY OF ARGUMENTS

Plaintiff argues that the judgment of the trial court as to property distribution should be affirmed. Plaintiff argues that the judgment of the trial court as to alimony and attorney fees should be reversed.

Plaintiff asserts that the marital residence was a marital asset because the trial court correctly found that the funds used for the purchase of that asset were commingled from premarital assets of each party. Likewise, the Sportsman's Lounge is a marital asset. The trial court correctly ordered these marital assets sold and the proceeds divided evenly. There is adequate testimony, evidence, and specific findings to support such a result and the court did not abuse its discretion in making the disposition.

. . . .

The other claims of Defendant are without merit and are included in this appeal simply to vex and harass Plaintiff. Plaintiff asserts the correctness of the trial court's award of other items of personal property. To wit:

(1) The 1988 Jaguar automobile which was a marital asset because it was purchased from the proceeds of commingled funds (an equity loan against the marital residence);

(2) The Porsche automobile which Plaintiff owned prior to marriage. This result is correct despite Defendant's claim that he made repairs and enhanced the value of the automobile, when testimony was presented to demonstrate that he was reimbursed for the repairs made;

(3) That Utah law should apply to distribution of the Defendant's 401K retirement plan earned during the marriage, and that the court correctly applied Utah law rather than California law;

(4) The blazer automobile was properly valued on the date of trial, it having been found to be a marital asset;

(5) The trial court acted properly when it did not require Plaintiff to repay the salary she had drawn from the business when she demonstrated a full accounting for the funds so taken, and because she single-handedly worked daily to preserve the marital asset and earn a positive cash flow. Had the court ruled otherwise, it would inequitable to take earnings from Plaintiff and award them to Defendant. It would amount to unjust enrichment;

.

(6) The evidence was so weak that Plaintiff's minor child damaged Defendant's firearms that the court did not compensate Defendant for the loss he alone claimed. Such self-serving testimony is often overlooked by the trier of fact. That is the trial court judge's determination. Plaintiff asserts that even if the trial court failed to consider the claim, it does not amount to a reversible error;

(7) The trial court correctly refused to consider unpaid child support from a prior spouse as a marital asset. The case law provides Defendant with a cause of action for recovering the substituted child support he provided. If the court is to reconsider this issue, the law is clear that the "asset" belongs to Defendant, and Plaintiff should be compensated for that advantage in the distribution of marital assets;

(8) Defendant argues that the trial court exercised its discretion. It is supposed to. The court did not award Defendant compensation for paying his airplane expenses charged on his personal bank card. The court was justified in doing so because of its broad discretion. Defendant maintained the bank card, charged on it during the separation period and the court declined to award compensation to Defendant. A claim that the trial court abused its discretion cannot be sustained under the evidence; and

(9) Because Defendant repeatedly defied court orders when he in fact was capable of compliance but simply refused to comply, was sufficient grounds to justify a contempt finding.

ARGUMENT

I. THE MARITAL RESIDENCE WAS A MARITAL ASSET HAVING BEEN PURCHASED BY COMMINGLED FUNDS

At trial, each party maintained opposing views and testimony concerning the source of funds used to purchase the home and business located in Cedar City, Utah. A marshalling of the evidence as required by *Heslop v. Bank of Utah*, 839 P.2d 828 (Utah 1992) shows that Plaintiff testified that she believed the funds for the purchase of the home came from a joint bank account (T. at 53). Plaintiff did not have a separate bank account (T. at 53).

Marjorie Young, a witness, testified that at the time she and her husband sold the residence to the Smiths, she believed that they were selling it to "Richard and Lynda together." (T. at 299-301). Exhibit 8 is the earnest money sales agreement. It bears both Richard (Defendant) and Lynda's (Plaintiff) signatures.

Defendant testified that the parties' original intention was to move to Utah and that they in fact did sign the earnest money sales agreement as husband and wife. But, owing to the bankruptcy of Plaintiff's prior spouse Plaintiff was excluded from the transaction due to her poor credit rating. (T. at 537). Defendant testified further that he had agreed with Plaintiff to

"put my house up for sale, take the profit from my house, take it to the house in Agua Dulce, fix it up. . . . Put a pool in, landscape it, sell it and move to a place that we both wanted to reside in California." (T. at 535).

Next, Defendant testified that when the Agua Dulce home sold, they realized \$101,000.00 proceeds. (T. at 586). Defendant was
. . . .

paid with one check and he deposited it in his savings account. (T. at 587).

Plaintiff's Exhibit 10 is the deposit receipt showing a \$100,542.55 balance in that account after the deposit. The court could have reasonably concluded that the \$542.55 was a pre-existing balance in as much as the amount did not coincide with Defendant's testimony.

In testifying about what happened to those funds, Defendant said:

"Lynda and I sat down, and we went over the \$100,000 that we had. We had been pretty financially strapped. I was paying for the motor home. I asked her if we could pay that off. That was a little over \$5,000. There was a couple of other things that we cleared up bill-wise that we had acquired during the time that we were financially strapped, and we paid off a few bills." (T. at 587-588).

I ultimately took \$60,000 and put that in a joint account, and I had -- I think I put \$20,000 back into my account to offset the monthly payments I had made and some other things that I had done.

Q. All right. And you say \$55,000.00 was paid down. What happened to the other \$5,000 that was put into an account?

A. We used that to open the -- the checking account for the inventory of the bar.
. . . .

Q. So what happened to the balance, then, of the funds realized upon sale of that home?

A. Over the following year, every time the Sportsmens Lounge or my wife came to me and said, "I need more money," I **would take that out of my savings account** and write her a check to be put in the Sportsmens Lounge account. (T. at 588)(emphasis added).

This testimony demonstrates that Defendant had exclusive control over the funds and that the funds were used for business

and other purposes incident to the marriage. There are no identifiable funds remaining from the proceeds of the sale of the Agua Dulce home. (T. at 588).

On cross examination the Defendant gave a more detailed accounting of the funds received from the sale of the Agua Dulce home:

A. It was issued to me in my name.

Q. And where was it deposited?

A. Initially I put it in the only savings account I had. And at Lynda's request, I put that money in a joint savings account.

Q. Did your account already have your funds in it?

A. I took everything out of that account when I initially put that money in there. The deposit slip shows \$1,100 -- or one thousand -- a hundred thousand one -- I'll get it right. \$101,000 in there. (T. at 660, 661).

Defendant's testimony was inconsistent with Exhibit 10 and Plaintiff's testimony. Continuing Defendant's testimony:

. . .

Q. You testified , I believe, that \$55,000 of that money was used for down payment on the lounge; is that correct?

A. I believe so.

Q. . . . And would you just restate the disposition of the remaining \$45,000.

A. Well, an additional \$5,000 went into the start-up of the business. An additional \$5,000 went to my wife at some point in time. \$5,000 went to VFW; \$5,000 went to pay off the motor home. . . . I had approximately \$18,000 when we started the bar, and I put that back into the bar.

Q. How much went to the motor home? . . .

A. A little over -- I think I owed like \$6,200 to pay it off. My payments were pretty steep. . . .I paid it off.

. . . Well, I think that's about everything I did with it. I put some money in my account. And the reason I did that is because I had -- I paid off all the loans I had borrowed against that house in Agua Dulce when it was quit-claimed to me.

I still had some outstanding bills, and I had been making monthly payments on those things that wasn't accounted for, and we sat down -- I went through that ledger -- I had to pay my son-in-law money. I had bought all kinds of things to refurbish that house in Agua Dulce. (T. at 661, 662).

The exhibits reveal that the earnest money sales agreement bore both signatures (Exhibit 8), but from the closing the final deed bears only Defendant's signature (Exhibit 6).

Mr. Murie testified that the bank wanted Mrs. Smith to sign a waiver (waiver of interest) form at the closing. (T. at 544). But, he could not remember if it was in fact signed or not. (T. at 544). And, if it was not signed the loan would not close. (T. at 548). He also testified that such a document would be in three places after the closing, "in the title company's office, the courthouse, and the brokerage. . ." where he used to work. (T. at 547). Further, that it would not be possible for someone to gain access to the documents after the closing to alter them. (T. at 547). It is significant to note the document was not produced at the trial despite significant efforts to locate it by both parties.

The applicable law is found in *Burt v. Burt*, 799 P.2d 1166 (Utah App. 1990). There the court stated the steps that the trial court should follow in determining an appropriate property division. First, the trial court should "properly categorize the property as part of the marital estate or as the separate property

of one or the other."² *Burt*, at 1172. Second, the court should "consider the existence of exceptional circumstances and, if any be shown, proceed to an equitable distribution in light of those circumstances. . . ." *Id.* And finally, those two steps having been done, the final step is to consider "whether, following appropriate divisions of the property, one party or the other is entitled to alimony." *Id.*

The Court of Appeals further explained that separate property could properly be considered part of the marital estate "where the parties had inextricably commingled the property with marital property so that it lost its separate character." *Burt*, at 1169 (citations omitted).

The trial court commented at the time it announced its findings that as to marital property there was a "lot of disputed testimony." (T. at 744). The court determined the marital residence to be an asset of the marital estate, and found that the funds used to purchase the asset had indeed been commingled, and that since the parties each received their premarital home proceeds during the marriage it would be inequitable to award a pre-marital interest to one party over the other when each party had contributed pre-marital assets for the acquisition. (T. at 750).³

²The Court states "Each party is presumed to be entitled to all of his or her separate property and fifty percent of the marital property." *Id.*

³The court stated: "While the defendant unilaterally placed his home -- his name, excuse me, on the Cedar City home, the Court finds that the property was purchased during the time of the marriage. Each party lived in the home. The plaintiff continuously, and the defendant on weekends. And all of the real

Then the court ordered the assets sold and the proceeds divided equally.

The Trial Court correctly followed the *Burt* requirements. Further, the trial court did not make a clearly erroneous factual finding. The court considered the weight of the evidence before it and ruled accordingly. Its finding is sufficiently supported by the evidence. The court did not commit reversible error. *Hagan v. Hagan*, 810 P.2d 478,481 (Utah App. 1991).

II. THE EQUAL DIVISION OF THE MARITAL RESIDENCE PROCEEDS FROM SALE IS AN EQUITABLE DIVISION OF THE ASSET.

As discussed in the previous section, the Trial Court was faced with the evidence that the funds used to purchase the marital residence had been commingled, that premarital proceeds came to each party during the marriage, that Defendant had exclusive control over the funds and the court concluded that the asset was a marital asset. (T. at 750, 751). Under the *Burt* analysis, the court next moved to consider the existence of exceptional

property purchased in Cedar City should be treated as marital property. To treat the plaintiff's \$100,000 home sale proceeds as commingled assets and then turn around and treat the Defendant's \$46,000 home sale proceeds as separate property may be what the defendant alone planned but would not be equitable and isn't justified under the -- under the evidence as I see it.

No signed waiver has been produced, but even -- even with the asset being just in his name, I believe both parties had -- and the Court finds each party owned a premarital home. Each party received the proceeds from their premarital home after this marriage. The plaintiff in the amount of \$100,000 in October of '90, and the defendant in the amount of \$46,000 in June of 1988. The assets were commingled. Each party shared in the use of the proceeds, and in fact the \$100,000 of hers, she testifies went in an account with only his name on it. I view that as a -- as a commingling of the assets." (T. at 750, 751).

circumstances and then, if found, proceed to make an equitable division.

In assessing whether or not there were exceptional circumstances, a marshalling of the evidence as required by *Heslop v. Bank of Utah*, 839 P.2d 828 (Utah 1992) reveals that there may indeed have been exceptional circumstances in this case. As discussed in the previous section, Plaintiff and Defendant each received premarital proceeds from the sale of their prior homes during the marriage. The funds were deposited into Defendant's account with his name alone on the account. The funds were commingled and commonly used between them. Each party used the assets during the marriage. (T. at 750, 751). The court then proceeded under *Burt* to make an equitable distribution. In so proceeding, the Court did not abuse its discretion.

III. THE 1988 JAGUAR IS RIGHTFULLY CONSIDERED A MARITAL ASSET AND WAS RIGHTFULLY ORDERED SOLD AND THE PROCEEDS DIVIDED EVENLY.

At trial, the court had testimony before it that some pre-marital funds were used for a down payment on a 1984 Corvette, that the vehicle was sold and funds from a home equity loan advance were combined with the proceeds from the Corvette sale to purchase the 1988 Jaguar, (T. at 554, 559, 560). The trial court established that the home was a marital asset, there having been commingling of funds used for its purchase. (T. at 750, 751). There is no pre-marital interest remaining in the automobile because the proceeds used for purchase were commingled from other marital assets. Any use of the home in the transaction amounts to further commingling

of assets. Property may appropriately be considered part of the marital estate where the parties have inextricably commingled the property with marital property so that it has lost its separate character. *Burt v. Burt*, 799 P.2d 1166, 1169 (Utah App. 1990).

Although the court heard testimony that the 1984 Corvette was purchased as a gift for Plaintiff (T. at 175, 400) and Defendant's daughter testified it was not a gift for Plaintiff (T. at 476) it could conclude that this testimony was irrelevant in light of the commingling. It could as well conclude that Plaintiff's testimony was the more credible testimony and could then disregard the testimony of Defendant's daughter.

The court had before it sufficient evidence to support the court's finding that the asset was a marital asset and thus its finding was not clearly erroneous. Conflicting testimony is often encountered at trial and the trial court must judge the credibility and weight each testimony would receive. *Yelderman v. Yelderman*, 669 P.2d 406, 408 (Utah 1983).

The court did not clearly abuse its discretion in ordering the vehicle sold and the proceeds divided equally between the parties when it had already determined the home to be a marital asset. Once the home achieved marital status due to commingling, the asset and proceeds thereof would maintain a marital characterization. The fact that Defendant claims to have used the asset [home used as collateral] for his own purchases, does not make the asset his sole and separate or premarital property.

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**IV. THE PORSCHE AUTOMOBILE WAS A PRE-MARITAL ASSET
RIGHTFULLY RETURNED TO PLAINTIFF IN THE PROPERTY
DIVISION. DEFENDANT IS NOT ENTITLED TO OFFSET FOR
REPAIR BILLS HE PAID.**

Testimony at trial was undisputed that the Porsche automobile was a pre-marital asset belonging to Plaintiff. (T. at 179). It was rightfully returned to her in the property division since the trial court made no findings as to any exceptional circumstances to over-ride the presumptive rule of *Burt v. Burt*, 799 P.2d 1166, 1172 (Utah App. 1990); see also *Hall v. Hall*, 219 Utah Adv. Rep. 29, 30 (Utah Ct. App. August 10, 1993).

During the marriage repairs were made which exceed the present value of the automobile. (T. at 376, 377). Plaintiff testified that Defendant reimbursed himself for any personal expenses out of her proceeds from the sale of her home in California. (T. at 670). If the court believed that a reimbursement had taken place, then the claim for marital property is lost and the vehicle was rightfully returned to Plaintiff.

The court determined that the asset was pre-marital. Its finding was not clearly erroneous. It returned the property to Plaintiff which did not amount to a clear abuse of discretion. *Burt v. Burt*, 799 P.2d 1166, 1172 (Utah App. 1990). The court could have reasonably concluded that reimbursement was taken by Defendant from Plaintiff's pre-marital funds.

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V. DEFENDANT'S 401K RETIREMENT FUND WAS PROPERLY VALUED ON THE DATE OF TRIAL, AND UTAH LAW SHOULD GOVERN THE ISSUES OF PROPERTY DIVISION AND NOT THE LAW OF CALIFORNIA.

The trial court has broad discretion in making equitable orders with respect to property division in the Decree of Divorce. Utah Code Ann. §30-3-5. And, as a general rule,

the marital estate is valued at the time of the divorce decree. *Berger v. Berger*, 713 P.2d 695, 697 (Utah 1985); accord *Fletcher v. Fletcher*, 615 P.2d 1218, 1222,23 (Utah 1980).

Moreover, any deviation from the general rule must be supported by sufficient detailed findings of fact that explain the trial court's basis for such deviation. *Morgan v. Morgan*, 795 P.2d 684, 688 (Utah App. 1990) (*Morgan I*).

Rappleye v. Rappleye, 215 Utah Adv. Rep. 45, 46 (June 15, 1993); see also *Jespersion v. Jespersen*, 610 P.2d 326, 328 (Utah 1980) (citations omitted) ("the marital estate is evaluated according to what property exists at the time the marriage is terminated."). The trial court made no findings as to any exceptional circumstances which should take this case out of the presumptive rule stated in *Burt v. Burt*, 799 P.2d 1166, 1172 (Utah App. 1990) that the marital assets should be divided equally between the parties or from the general principles illustrated by the other cases cited in this section.

The court in the instant case valued this asset on the date of the decree. There is no evidence of abuse of discretion and no error in application of the law.

Defendant argues that California law applies to the division of this asset. There is no basis for this argument. Defendant consistently asserted Utah residency during these proceedings. (T.

at 738). There is no case law to support Defendant's contention that the state law of the state in which the income is produced should in any way be considered in making a property distribution during divorce particularly when both parties submit to the law of the forum state and actively participate in proceedings there.

VI. THE BLAZER AUTOMOBILE WAS PROPERLY VALUED ON THE DATE OF THE TRIAL DESPITE A CONTENTION THAT IT HAD BEEN REDUCED IN VALUE BY A THIRD PARTY DURING THE SEPARATION OF THE PARTIES.

As a general rule,

the marital estate is valued at the time of the divorce decree. *Berger v. Berger*, 713 P.2d 695, 697 (Utah 1985); accord *Fletcher v. Fletcher*, 615 P.2d 1218, 1222, 23 (Utah 1980).

Moreover, any deviation from the general rule must be supported by sufficient detailed findings of fact that explain the trial court's basis for such deviation. *Morgan v. Morgan*, 795 P.2d 684, 688 (Utah App. 1990) (*Morgan I*).

Rappleye v. Rappleye, 215 Utah Adv. Rep. 45, 46 (June 15, 1993); see also *Jespersion v. Jespersen*, 610 P.2d 326, 328 (Utah 1980) (citations omitted) ("the marital estate is evaluated according to what property exists at the time the marriage is terminated.").

The claim that the trial court clearly abused its discretion cannot be sustained under the evidence before the court. The court followed the controlling law in this State and valued the assets on the date of the termination of the marriage. Further, any contention as to a decrease in value was heard by the court. The court is entitled to adjudicate the weight and credibility of the witnesses and evidence before it. *Yelderman v. Yelderman*, 669 P.2d 406, 408 (Utah 1983). Simply because the court declined to be

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persuaded by Defendant's testimony, ruling in favor of Plaintiff does not in and of itself constitute reversible error.

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DID NOT REQUIRE PLAINTIFF TO REPAY MONEY TAKEN AS SALARY FROM THE BUSINESS WHEN THE SOLE EFFORTS OF THE PLAINTIFF PRODUCED THE INCOME.

From the first court involvement in this matter, Plaintiff was awarded the responsibility of the business. As such, she worked full-time to sustain the business without any effort or participation by Defendant. The court heard testimony from Mr. Grimshaw, the accountant for the business, that for the first time since it opened the business was turning a modest profit. He advised Plaintiff to withdraw the salary equivalent for her personal efforts in the amount of \$1,000.00 per month.

As a matter of equity, Plaintiff should have been compensated for her efforts to single handedly run the business. The business was enhanced by the efforts of Plaintiff, not diminished in any way. In fact, for the first time, the business was operating in the black under the management of Plaintiff. (T. at 748). The court heard testimony and found that the business could not sustain a separate manager. (T. at 748). The court had discretion to determine that some compensation for significant effort was needed in this case. The claim that the trial court abused its discretion cannot be sustained under the facts and evidence of this case. Plaintiff accounted for all funds of the business at the trial, and sought competent advice from her bookkeeper before proceeding to use surplus funds.

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VIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DID NOT ORDER PLAINTIFF TO PAY DEFENDANT FOR DAMAGE TO FIREARMS WHEN SUCH DAMAGE WAS NOT THE RESPONSIBILITY OF PLAINTIFF.

The only evidence before the court to sustain the incident of damage to Defendant's guns was the testimony of Defendant himself. Plaintiff's minor son Chris testified that he used the guns (T. at 268) but, there was no independent evidence that damage resulted from the use. It was apparent from the testimony of the minor child that there were bad feelings between Defendant and himself. (T. at 263 - 268). The court was faced with the testimony before it and weighed the credibility. The court did not modify the distribution to reflect Defendant's claim, but such action by the court does not sustain the claim that there was a clear abuse of discretion.

IX. ARREARAGES FROM UNPAID CHILD SUPPORT DUE PLAINTIFF FROM A PRIOR SPOUSE ARE NOT AN ASSET OF THE MARITAL ESTATE AND WERE RIGHTFULLY ELIMINATED FROM THE MARITAL ESTATE OR SHOULD BE ASSIGNED TO DEFENDANT FOR COLLECTION WITH AN OFFSET TO PLAINTIFF.

Child support payments assessed against and unpaid by one spouse can become a debt to the person who provided support, or the child has the right personally to collect from the non-custodial parent. *Hunter v. Hunter*, 669 P.2d. 430 (Utah 1983).

Defendant married Plaintiff and took care of her and the minor child from that point forward. (T. at 379). Plaintiff's prior spouse contributed nearly nothing during that time. Plaintiff's minor child has now passed his 18th birthday, but had not done so prior to trial. Whether or not Defendant actually contributed \$800.00 per month as child support for Plaintiff's minor son was

not raised at trial, although it is undisputed that Defendant assumed the obligation to provide for the minor child during the marriage.

It seems inappropriate to consider unpaid child support obligations as an asset of a marriage. Marriage is unlike a business arrangement where ongoing debt is considered an asset. Plaintiff's former spouse declared bankruptcy. No other evidence was before the court. The court could have concluded that the possibility of collecting the arrearages was too remote and therefore did not consider it an asset at all. The claim that the trial court made an error of law simply cannot be sustained under the evidence before it.

In the alternative, if this Court determines that indeed the asset should have been considered, then perhaps the court should apportion the asset to the Defendant, who by case authority has the right to collect against the former spouse, and equalize that amount with other assets from the marital estate in favor of Plaintiff.

X. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S REQUEST TO ASSESS CREDIT CARD DEBT AGAINST THE ASSETS OF THE BUSINESS.

Defendant argues that the court did not accept his testimony as to pre-separation marital debt and should not have required Defendant to pay the debt. Even though there was no direct testimony to the contrary, "evaluation of the weight and

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credibility of testimony and evidence is a matter for the trier of fact." *Yelderman v. Yelderman*, 669 P.2d 406, 408 (Utah 1983).

Defendant misses the mark when he attempts to assign error to the trial court when the court made no findings to justify the result he seeks, and absent some special and specific finding one is left to speculate as to the reasoning of the judge. No case can be found where such speculation justifies reversible error. There is no testimony or evidence in the record to suggest that the court clearly abused its discretion. It simply exercised it.

**XI. DEFENDANT WAS PROPERLY HELD IN CONTEMPT
FOR HIS WILLFUL DISREGARD OF COURT ORDERS
AND IN LIGHT OF HIS PERSONAL MISCONDUCT
THROUGHOUT THE PROCEEDINGS IN THE COURT
BELOW.**

Defendant was found in contempt of court after his willful failure to obey an order of the court when he knew what was required, had the ability to comply and intentionally failed to do so. Accordingly, **Utah Code Annotated §78-32-1 et seq.**, and the case of *VonHake v, Thomas*, 759 P.2d 1162 (Utah 1988) supports the court in finding Defendant in contempt.

On May 21, 1993, Defendant was ordered to use the IRS tax refund to pay expenses of the business. (R. at 24). He did not raise the issue of the credit card debt at that time. Instead, he willfully failed to obey the order. He chose to withhold the refund from the control of the Plaintiff, who was in possession of the business, and paid certain debts which he alone selected. (T. at 594). He had exclusive control over the funds. When the matter came to trial on or about December 10, 1992, Defendant still had

not complied with the court's order, nor had he complied at the time of the post-trial motion hearing before the court. The court's finding of contempt was not clearly erroneous. It's finding should be affirmed.

CONCLUSION

The judgment of the trial court should be affirmed as to all aspects of the property settlement. The judgment of the trial court should be reversed as to the issues of attorney fees and alimony as more fully stated in the Brief of Cross-Appellant herein below.

BRIEF OF CROSS-APPELLANT

JURISDICTIONAL AUTHORITY

Jurisdiction is vested with the Court of Appeals pursuant to Utah Code Annotated § 78-2a-3(2)(i) (1992).

ISSUES AND STANDARDS OF REVIEW

The issues presented for review are as follows:

1. Did the Trial Court abuse its discretion when it failed to award Plaintiff alimony. The applicable standard of appellate review for resolution of this issue is the "clear abuse of discretion" standard as cited in *Kerr v. Kerr*, 610 P.2d 1380, 1382 (Utah 1980).

2. Did the Trial Court abuse its discretion when it denied Plaintiff's request that Defendant pay attorney's fees? The applicable standard of appellate review for resolution of this

issue is the "clear abuse of discretion" standard as cited in *Kerr v. Kerr*, 610 P.2d 1380, 1382 (Utah 1980).

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES,
RULES, AND REGULATIONS**

Utah Code Annotated §30-3-3

STATEMENT OF THE CASE

As presented *infra*, at page 5 and incorporated herein by this reference to avoid unnecessary repetition here.

STATEMENT OF FACTS

As presented *infra*, at page 7 and incorporated herein by this reference to avoid unnecessary repetition here.

SUMMARY OF ARGUMENTS

Plaintiff, Appellee and Cross-Appellant argues that the trial court made two errors. First, when it failed to award alimony; Second, when it failed to award attorney fees.

As to Plaintiff/Cross-Appellant's claim that the court erred when it failed to award alimony, the Court's attention is called to the great disparity of income. Plaintiff would be able to earn the maximum of \$13,800 per year (assuming she could earn the highest salary found reasonable by the trial court) and Defendant would continue to earn in excess of \$70,000 per year.

The Court's attention is further focused on the trial court's failure to make proper findings as to the elements stated in *Watson v. Watson*, 837 P.2d 1, 3 (Utah App. 1992). The trial court overlooked the effect that selling the parties marital property (the business called the Sportsman's Lounge) would have on

Plaintiff's earnings. Presently she draws \$1,000 per month from that business. However, when it is sold, Plaintiff will be unable to earn a replacement income. The trial court found that she could earn at the minimum wage rate, and that amount will simply not permit Plaintiff to maintain her needs. It will not equalize the lifestyles of the parties, and it will not provide sufficient income to prevent her from becoming a public charge.

The trial court failed to make proper findings with regard to Defendant's ability to pay. There are inadequate findings as to the needs and lifestyle of the Defendant, and most importantly, the reasonableness of the expenses stated to the court.

As to the Plaintiff/Cross-Appellant's claim that the court erred in not awarding attorney fees to Plaintiff, the Court's attention is called to the case of *Haumont v. Haumont*, 793 P.2d 421,426 (Utah App. 1990). There the Court required the trial court to make a sufficient record identifying factors it considered in not awarding the entire attorney as requested by a party at trial. The trial court here made no such record. In addition, the cases of *Bell v. Bell*, 810 P.2d 489, 493 (Utah App. 1991) and *Muir v. Muir*, 841 P.2d 736, 741-742 (Utah App 1992) acknowledge that the trial court has some discretion in awarding attorney fees. However, the cases also require that the court make particular findings with regard to the financial need of the requesting spouse, the ability of the other spouse to pay and the reasonableness of the requested fees. Here the court failed to make any finding as to the reasonableness of the fee. Plaintiff

asserts that this failure alone is sufficient for a reversal of the judgment of the trial court on this issue. But Plaintiff also asserts that the other two elements were overlooked by the trial court as well.

Plaintiff asks that the Appellate Court reverse the judgment of the trial court on the issues of alimony and attorney fees, and that the case be remanded for an entry of an equitable amount of alimony and an award of attorney fees incurred both from the action below and the costs, fees and attorney fees on this appeal.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO AWARD PLAINTIFF ALIMONY.

The trial court failed to make adequate factual findings on the material issues for determining an appropriate alimony award. The criteria to be used in determining alimony are well established in Utah. *Barnes v. Barnes*, 217 Utah Adv. Rep 26, 29 (Utah App. July 13, 1993). The criteria have been concisely stated in *Watson v. Watson*, 837 P.2d 1 (Utah App. 1992).

"In awarding alimony, appellate courts require the trial court to consider each of the following three factors: (1) the financial conditions and needs of the receiving spouse; (2) the ability of the receiving spouse to produce a sufficient income for himself or herself; and (3) the ability of the responding spouse to provide support. If these three factors have been considered, we will not disturb the trial court's alimony award unless such a serious inequity has resulted to manifest a clear abuse of discretion. The ultimate test of an alimony award is whether the party receiving alimony will be able to support him or herself 'as nearly as possible at the standard of living . . . enjoyed during the marriage.'" *Id.* at 3 (citations omitted).

"In considering these factors, the trial court is required to make adequate factual findings on all material issues, unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.'" *Barnes v. Barnes*, 217 Utah Adv. Rep 26, 29 (Utah July 13, 1993)(citations omitted).

The trial court's findings relevant to alimony (T. at 759-762) consisted of the court's attempt to follow the *Schindler v. Schindler*, 776 P.2d 84, 91 (Utah App. 1989) criteria for determining an alimony award. First, the court found that Plaintiff needed \$605 per month plus housing costs. It further found that the average mortgage expense was \$450 per month for a total need of \$1,055 per month. (T. at 759). The court failed to consider the standard of living of the parties and most importantly, it failed to consider the effect of selling the business from which Plaintiff derived the largest share of her income. The court determined that upon sale of the marital estate properties, substantial cash would be generated and that the Plaintiff would have no dependents to support.

Next, the court addressed the ability of the receiving spouse to produce a sufficient income for herself. The court found Plaintiff capable of producing \$5 to \$6 per hour outside the bar in sales or clerical employment. Even at the \$6 per hour rate, Plaintiff will only be able to earn \$1,040 per month working full-time. This would not sustain her basic needs, let alone provide
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for the same standard of living as Defendant or as she enjoyed during the marriage.

Next, the court addressed the ability of the responding spouse to provide support. The court found that Defendant produced \$5,551 per month, marital gross income. (T. at 761). Significantly, the court fails to account for the retirement income from Defendant's military benefit. But, in any event, the court found that Defendant was capable of providing alimony to Defendant in some amount. (T. at 761). Without further discussion or justification the court simply declares that despite any previous temporary award of alimony, it is not going to award alimony from this point forward. (T. at 762). The court then found the marriage to be of a short or moderate length. (7 years). (T. at 762).

The trial court failed to consider the financial effect of the property distribution on Plaintiff. Plaintiff was attributed \$1,000.00 per month income from her efforts to maintain the business of the parties. The court's decree ordered that asset sold and the proceeds divided. The record is silent as to a finding for Plaintiff's financial condition, her reasonable needs and the appropriate standard of living she could provide for herself after the business is sold pursuant to the Decree in this matter.

The Trial Court clearly abused its discretion when it summarily denied Plaintiff's request for alimony. Taking into account Plaintiff's substantial financial needs which she cannot independently satisfy and considering that Defendant has adequate

resources to provide additional support for Plaintiff, the Trial Court's failure to award alimony is inequitable.

As articulated by the Utah Supreme Court, "[t]he most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage, and to prevent the wife from becoming a public charge." *English v. English*, 565 P.2d 409, 411 (Utah 1977). An alimony award should, to the extent possible, equalize the parties' respective post-divorce living standards. *Gardner v. Gardner*, 748 P.2d 1076, 1081 (Utah 1988); *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985); *Rasband v. Rasband*, 752 P.2d 1331, 1333 (Utah Ct. App. 1988). The Utah Supreme Court has articulated three factors (hereinafter referred to as the "**Jones test**" or "**Jones factors**") that must be considered by the Trial Court in determining a reasonable alimony award:

1. The financial conditions and needs of the requesting spouse;
2. The ability of the requesting spouse to produce a sufficient income for himself or herself; and
3. The ability of the other spouse to provide support.

Gardner, 748 P.2d at 1081; *Jones*, 700 P.2d at 1075; *Rasband*, 752 P.2d at 1333.

The Trial Court's decision regarding alimony will not be overturned "absent an abuse of discretion or manifest injustice." *Watson v. Watson*, 837 P.2d 1, 3 (Utah Ct. App. 1992). A Trial Court's failure to consider the *Jones* factors constitutes an abuse of a Trial Court's discretion. *Paffel v. Paffel*, 732 P.2d 96, 101 (Utah 1986). If the *Jones* factors have been considered, an appeals

court will not disturb the trial court's award "unless serious inequity has resulted as to manifest a clear abuse of discretion." *English*, 565 P.2d at 411.

Further, the Trial Court is required to make sufficiently detailed findings on all material issues to show the steps it took to reach its conclusion on all of the factual issue presented. *Sampinos v. Sampinos*, 750 P.2d 615, 617 (Utah Ct. App. 1988). A failure to make such findings constitutes reversible error unless facts in the record are "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." *Id.* (quoting *Lee v. Lee*, 744 P.2d 1378, 1380 (Utah Ct. App. 1987)).

Based on the foregoing standards, the Trial Court's decision in the present action should be reversed and alimony set at an equitable amount per month. The Court in its Findings of Fact and Conclusions of Law ("FF") purported to make findings on each of the three required elements; but, as the evidence discussed below suggests, the Court's review was erroneous and merely perfunctory. The Court failed to adequately and accurately substantiate many of its findings on material issues and failed to equitably account for Plaintiff's actual needs, Plaintiff's ability to care for herself, and Defendant's ability to provide spousal support. The Trial Court's inequitable and unfounded decision should be reversed to prevent injustice.

The Utah Court of Appeals in *Bell v. Bell* 810 P.2d 489, 493 (Utah Ct. App. 1991) reversed and remanded the Trial Court's alimony award after concluding the award was not supported by

adequate findings. The parties in *Bell* had been married approximately 12 years and had one child at the time of the divorce. Id. at 491. The husband was ordered to pay \$450.00 per month in child support and \$250.00 in alimony for two years. The husband was also ordered to pay a portion of the wife's attorney fees. Id.

In *Bell* at the time of the trial, the wife was pursuing a masters degree in education and was making \$863.00 per month. Id. Prior to that time she had a different job where she made \$1,500.00 per month or approximately \$18,000.00 per year. The husband was a major in the Air Force and at the time of the divorce was making \$3,660.00 per month or approximately \$40,000.00 per year. Id. The wife claimed monthly expenses of \$2,493.00, while the husband claimed \$5,090.74. Id. at 493.

The wife appealed the court's decision and asserted, among other things, that the award for alimony was insufficient. In reversing the trial court's alimony award, the Court of Appeals determined that the award was not supported by adequate findings. Id. at 493. The trial court had essentially ignored the three-pronged *Jones* test by making inadequate findings regarding the needs of the husband and wife and the wife's ability to support herself. Id. In addition, the court made no findings regarding the reasonableness of claimed expenses by the husband and wife and only found that each party had roughly equivalent debts in their names. Id. Specifically, the Court there as here failed to find

that Defendant's monthly expenses were reasonable, a finding mandated by Utah law.

In *Bell* the Court of Appeals emphasized that "[w]ithout a finding on reasonable expenses, we are unable to determine the true needs of wife, or to determine husband's actual ability to pay and, therefore, to balance wife's needs against husband's ability to pay as required in *Jones*." Id. at 493. The Court also stated: "The mere conclusory statement of the trial court that husband can 'afford nothing' when he is making \$40,000.00 per year is simply not supported by the record, absent some findings as to the reasonableness of his claimed expenses." Id.

In *Howell v. Howell*, 806 P.2d 1209, 1212 (Utah App. 1991) the Court of Appeals found that the trial court erroneously relied on the parties' standards of living at the time of separation for determining the amount of alimony rather than their standard of living at the time of the trial. As a consequence, the alimony payments were inadequate to equalize the parties' standard of living at the time of the divorce. Id.

In *Howell* the wife, at the time of the trial, earned \$649.80 per month, with total monthly expenses exceeding \$5,000.00. The husband earned more than \$10,000.00 monthly and claimed \$7,960.00 in expenses. Id. at 1210. During the parties marriage of more than thirty years, the wife had spent most of the time as a homemaker and raising their one child. Id.

The Court of Appeals determined that while the trial court made findings as to the parties' gross incomes, it did not make the

required findings as to the wife's needs. Id. at 1213. The Court of Appeals, looking at the fact that the husband's gross income was \$8,200.00 and the wife's only \$2,445.00, concluded that the alimony set by court "[did] not come close to equalizing the parties' standard of living as of the time of divorce, but allows plaintiff a two to four times advantage." Id. The court found clear error and remanded the case for findings as to the parties' needs, the parties' standard of living at the time of the trial, and for adjustments to the alimony "to better equalize the parties' abilities to go forward with their respective lives." Id.

Like *Bell*, *Gardner*, *Howell*, the Court in the present action should also reverse the Trial Court's alimony award because its findings are inadequate and because injustice would otherwise result. The award fails to reasonably equalize the parties standard's of living and denies Plaintiff the ability to adequately move forward.

A great disparity of income exists between Plaintiff and Defendant. At the outset, Plaintiff's income is \$13,800 per year and Defendant's is in excess of \$70,000. A substantial disparity of income still exists between Plaintiff and Defendant following the Court's failure to award alimony.

It is obvious that the income figures are inequitable and far from equalized. As explained in *Bell*, "[w]ithout a finding on reasonable expenses, we are unable to determine the true needs of wife, or to determine husband's actual ability to pay and, therefore, to balance wife's needs against husband's ability to pay

as required in *Jones*." *Bell*, at 493. Likewise, in this case, without an accurate finding on expenses and on the parties' income levels, the Court cannot adequately balance Plaintiff's needs against Defendant's ability to pay. When the assumptions as to alimony and the parties' expenses relied upon by the Court are distorted, so must be its conclusions. That is the case in the present action.

Public policy supports a higher alimony award. In recognition of the duration of the marriage and the fact that Plaintiff was discouraged by the Defendant from working (T. at 204) the court should award permanent alimony. The Court failed to award Plaintiff an adequate amount of alimony to ensure that she can adequately care for herself.

Only during the last 10 or 12 years have the Courts come to recognize the disparity in the earning power between a husband and wife, and the post-divorce standard of living that results for both parties. In *Higley v. Higley*, 676 P.2d 379 (Utah 1983), Justice Durham, writing for the majority, noted that a U.S. Department of Labor Report indicated that, overall, women's earnings in the United States average \$.59 for every \$1.00 earned by men. As recently as 1986, women working full time still earned a median income of only \$16,230.00, which is 64% of the \$25,260.00 earned by

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men working full time. Bureau of the Census, U.S. Department of Commerce, *Money Income and Poverty Status of Families and Persons in the United States*, 1986, Current Population Reports, Series P-60, No. 157, at 2 (1987).

Men experienced a 42% improvement in their post divorce standard of living, while women experienced a 73% decline. *Id.* at 338-339.

Studies have also found that a wife's employability actually decreases with time out of the work force. *See* Beninger & Smith's, *Career Opportunity Cost: A Factor in Spousal Support Determination*, 16 Fam. L.Q. 201, 203 (1982). When a wife invests her resources jointly in the husband's "human capital" rather than the wife's, the couple creates a growing disparity in their earning potential. *See* Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. Rev. 1181, 1210-11 (1981).

In this case, Plaintiff is 40 years old. She spent substantial time and energy during the seven year marriage enhancing her husband's value in the paid labor market, but lost the opportunity to establish or increase her own earning potential. While Defendant was able to advance in his field, Plaintiff, at Defendant's request, sacrificed her employment skills and her professional abilities to stay home and care for their home, her minor child and the family business.

Presently, her chances to advance in her modelling career are minimal. She must continue to work to support herself and based on

the present economic conditions, cannot quit her job and go back to school to better herself. She will likely live near or below the poverty level. Plaintiff is entitled to and in need of an alimony award, even if it means Defendant is "not left with much money to live on." See Schindler v. Schindler, 776 P.2d 84, 91 (Utah Ct. App. 1989) (even though alimony and child support payments, together with debts that left him without means to satisfy financial obligations, left plaintiff without much money to live on, award was not inherently improper).

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO AWARD PLAINTIFF ATTORNEY FEES.

The Trial Court concluded that there would be sufficient funds generated from the property settlement for each party to pay their respective attorney fees. (T. at 762). In so concluding, the Court abused its discretion.

Utah Code Annotated §30-3-3 "affords litigants a broader award of reimbursement, if need be, for the expenses of litigation, than those reimbursements authorized in other civil cases." *Peterson v. Peterson*, 818 P.2d 1305, 1310 (Utah App. 1991)(citation omitted) quoted in *Rappleye v. Rappleye*, 215 Utah Adv. Rep. 45, 48 (Utah, June 15, 1993).

The court failed to make adequate findings regarding Plaintiff's need for reimbursement, the parties ability to pay the same, and the reasonableness of the fees in light of testimony and the requirements of *Rasband v. Rasband*, 752 P.2d 1331, 1336 (Utah App. 1988)(citation omitted). This failure constitutes abuse of discretion and reversible error.

In *Haumont v. Haumont*, 793 P.2d 421, 426 (Utah App. 1990) the court stated:

"[The] court abuses its discretion in awarding less than the amount [of attorney fees] requested unless the reduction is warranted" by one or more of the above factors. The trial court must, accordingly, identify such factors on the record and also explain its sua sponte reduction in order to permit meaningful review on appeal. (citations omitted).

The trial court failed to comply with these requirements, thereby abusing its discretion. In the absence of the appropriate findings by the trial court, meaningful review is not possible on this issue.

Plaintiff also requests attorney fees on appeal. In the event Plaintiff prevails on this issue, the court should include as part of its remand order, the directive to the trial court to consider such fees in light of the disposition of this appeal. Such a request appears consistent with the same issue stated in *Rappleye v. Rappleye*, 215 Utah Adv. Rep. 45, 49 (Utah June 15, 1993).

At trial Plaintiff's attorney offered evidence that Plaintiff's attorney fees were reasonable. (T. at 439 et. seq.). In addition, Plaintiff testified that she did not have the funds available to pay the fees. (T. at 244). The testimony was un-rebutted. The Court, in its Findings of Fact, does not comment on the reasonableness, or lack thereof, of the fees.

Pursuant to Utah Code Annotated § 30-3-3 (1989), a trial court has the power to award attorney fees in divorce proceedings. An award must be based on (1) evidence of the financial need of the receiving spouse, (2) the ability of the other spouse to pay, and

(3) the reasonableness of the requested fees. *Bell v. Bell*, 810 P.2d 489, 493 (Utah Ct. App. 1991); *Muir v. Muir*, 841 P.2d 736, 741-742 (Utah App. 1992). The decision to award fees lies primarily within the sound discretion of the trial court. *Id.*

In *Muir*, the wife's attorney proffered testimony regarding the amount and reasonableness of the attorney fee. The husband's attorney did not object. The Court then found that the wife incurred legal fees amounting to approximately \$15,000.00. It ordered the husband to pay only \$3,000.00 of those fees, offering no explanation for the reduction. The Court of Appeals noted that the Trial Court failed to find whether wife needed financial assistance and it made no findings regarding the husband's ability to pay the wife's attorney fees. Moreover, despite evidence proffered by the wife's attorney, the Court failed to make a finding regarding the reasonableness of the fees.

That is exactly what the Trial Court did in the instant case. On remand in *Muir* concerning the issue of attorney fees, the Trial Court was directed to make specific findings regarding Plaintiff's financial need and Defendant's ability to pay, and further directing the Trial Court that if it finds both need and ability to pay, it must then make independent findings regarding the reasonableness of all fees and costs, including attorney fees incurred on appeal. The *Muir* court cited with approval *Martindale v. Adams*, 777 P.2d 514, 517-18 (Utah App. 1989):

Where "the evidence supporting the reasonableness of requested fees is both adequate and entirely undisputed, . . . the court abuses its discretion in awarding less than the amount requested unless the reduction is

warranted" by one or more of the established factors. The trial court must, accordingly, identify such factors on the record and also explain its sua sponte reduction in order to permit meaningful review on appeal.

See also *Rappleye v. Rappleye*, 215 Utah Adv. Rep. 45 (Utah Ct. App. filed June 15, 1993).

In *Andersen v. Andersen*, 757 P.2d 476, 480 (Utah App. 1988) the Utah Court of Appeals held that the trial court's failure to award attorney fees was an abuse of discretion. The court focused on the great disparity in earnings between the parties. *Id.* Plaintiff's net monthly income was approximately \$200.00 and Defendant's was \$1,405.00. *Id.* Furthermore, Plaintiff testified she had no means to pay the fees and the parties stipulated that Plaintiff's attorney fees were reasonable. *Id.* The court noted that "Plaintiff's income and earning ability paled in comparison to those of Defendant. *Id.*

Like the *Andersen* court, the Trial Court here abused its discretion when it failed to award attorney fees. Plaintiff's income and earning ability pale in comparison to those of the Defendant. The facts in this case are not like the facts in *Whitehead v. Whitehead*, 836 P.2d 814, 817-18 (Utah Ct. App. 1992) and *Hoagland v. Hoagland*, 212 Utah Adv. Rep. 25, 27 (Utah Ct. App. 1993) where the Court affirmed a non-award of attorney fees after concluding the financial circumstances of the parties were essentially equal. In this case, Plaintiff's and Defendant's incomes are substantially unequal.

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Further, as evidenced under the first argument, the Court failed to correctly and adequately ascertain Plaintiff's financial need and Defendant's ability to pay. The Court, consequently, could not accurately determine that Defendant did not have the means to pay the fees. Defendant is in a much greater position to absorb the costs of the divorce than Plaintiff who has a relatively low paying job.

III. CONCLUSION

Considering the great disparity in incomes between the Plaintiff and the Defendant, the length of the marriage, the reality that the Plaintiff has sacrificed her employment opportunities for her marriage and now has only limited occupational opportunities and skills, Plaintiff is entitled to and in great need of an increased amount of alimony and the payment of attorney fees. The Trial Court's findings, and thus its conclusions, regarding alimony and attorney fees were based on faulty and incomplete reasoning that favored Defendant over Plaintiff. The Court did not accurately ascertain Plaintiff's needs and Defendant's ability to pay. As a consequence, the Trial Court inequitably and unjustly made no alimony award and also failed completely to award attorney fees. The Trial Court clearly abused its discretion, mandating a reversal of its judgment on those two issues.


THEREFORE, This Court should **REVERSE AND REMAND** this case to the trial court with direction that the trial court award Plaintiff permanent alimony of an equitable amount per month and order the

Defendant to pay Plaintiff's attorney fees. Attorney's fees incurred by Plaintiff on appeal should likewise be awarded, together with all costs related thereto.

DATED this 16th day of September, 1993.

Respectfully submitted,


CHAMBERLAIN & HIGBEE


Dale W. Sessions
Attorney for Plaintiff,
Appellee and Cross-Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of September, 1993, I caused to be mailed four (4) true and exact copies of the within and foregoing **APPELLEE'S BRIEF AND CROSS-APPELLANT'S BRIEF** to the following, first-class postage prepaid:

G. Michael Westfall, Attorney for
Defendant, Appellant and Cross-Appellee
Gallian, Westfall, Wilcox & Wright
PO Box 367
St. George, Ut 84771-0367


Dale W. Sessions
Attorney for Plaintiff,
Appellee and Cross-Appellant

ADDENDUM

any provision for separate maintenance previously granted.

(5) (a) A divorce may not be granted on the grounds of insanity unless: (i) the defendant 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 defendant is incurable.

(b) The court shall appoint for the defendant a guardian ad litem, who shall protect the interests of the defendant. A copy of the summons and complaint shall be served on the defendant 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 defendant 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 defendant 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 plaintiff or defendant may, if the defendant resides in this state, upon notice, have the defendant brought into the court at trial, or have an examination of the defendant by two or more competent physicians, to determine the mental condition of the defendant. For this purpose either party may have leave from the court to enter any asylum or institution where the defendant may be confined. The costs of court in this action shall be apportioned by the court. 1987

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, visitation, 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, visitation, 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 dur-

ing the course of the action or in the final order or judgment 1993

30-3-4. Pleadings — Findings — Decree — Sealing.

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

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

(c) If the plaintiff and the defendant have a child or children and the plaintiff has filed an action in the judicial district as defined in Section 78-1-2.1 where the pilot program shall be administered, a decree of divorce may not be granted until both parties have attended a mandatory course provided 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 make and file findings and decree upon the evidence.

(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. 1992

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 visitation — Termination of alimony — Nonmeritorious petition for modification — Meritorious petition for modification [Effective until January 1, 1994].

(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 available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children; and

(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

any provision for separate maintenance previously granted

(5) (a) A divorce may not be granted on the grounds of insanity unless (i) the defendant 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 defendant is incurable.

(b) The court shall appoint for the defendant a guardian ad litem, who shall protect the interests of the defendant. A copy of the summons and complaint shall be served on the defendant 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 defendant 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 defendant 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 plaintiff or defendant may, if the defendant resides in this state, upon notice, have the defendant brought into the court at trial or have an examination of the defendant by two or more competent physicians to determine the mental condition of the defendant. For this purpose either party may have leave from the court to enter any asylum or institution where the defendant may be confined. The costs of court in this action shall be apportioned by the court. 1987

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(1) In any action filed under Title 30 Chapter 3, 4, or 6, and in any action to establish an order of custody, visitation, 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, visitation, 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 dur-

ing the course of the action or in the final order or judgment. 1993

30-3-4 Pleadings — Findings — Decree — Sealing.

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

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

(c) If the plaintiff and the defendant have a child or children and the plaintiff has filed an action in the judicial district as defined in Section 78-1-2.1 where the pilot program shall be administered, a decree of divorce may not be granted until both parties have attended a mandatory course provided 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 make and file findings and decree upon the evidence.

(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. 1992

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 visitation — Termination of alimony — Nonmeritorious petition for modification — Meritorious petition for modification [Effective until January 1, 1994].

(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 available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children, and

(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.

(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 the day 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 support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property and obligations for debts as is reasonable and necessary.

(4) In determining visitation rights of parents, grandparents, and other members of the immediate family, the court shall consider the best interest of the child.

(5) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(6) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

(7) If a petition for modification of child custody or visitation provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorney's 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.

(8) If a petition alleges substantial noncompliance with a visitation order by a parent, a grandparent, or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation 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

1993

Disposition of property — Maintenance and health care of parties and children — Division of debts — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony — Nonmeritorious petition for modification [Effective January 1, 1994].

(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;

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Parts 4 and 5; and

(e) with regard to child support orders issued or modified on or after January 1, 1994, that are subject to income withholding, an order assessing against the obligor an additional \$7 per month check processing fee to be included in the amount withheld and paid to the Office of Recovery Services within the Department of Human Services for the purposes of income withholding in accordance with Title 62A, Chapter 11, Parts 4 and 5.

(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 the day 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 support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property and obligations for debts as is reasonable and necessary.

(4) In determining visitation rights of parents, grandparents, and other members of the immediate family, the court shall consider the best interest of the child.

(5) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(6) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

(7) If a petition for modification of child custody or visitation 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

(8) If a petition alleges substantial noncompliance with a visitation order by a parent, a grandparent, or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation 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 1993

30-3-5.1. Provision for income withholding in child support order.

Whenever a court enters an order for child support it shall include in the order a provision for withholding income as a means of collecting child support as provided in Title 62A, Chapter 11, Part 4 1993

30-3-5.2. Allegations of child abuse or child sexual abuse — Investigation

When, in any divorce proceeding or upon a request for modification of a divorce decree, an allegation of child abuse or child sexual abuse is made, implicating either party, the court shall order that an investigation be conducted by the Division of Family Services within the Department of Human Services in accordance with Title 62A, Chapter 4, Part 5. A final award of custody or visitation may not be rendered until a report on that investigation is received by the court. That investigation shall be conducted by the Division of Family Services within 30 days of the court's notice and request for an investigation. In reviewing this report, the court shall comply with Section 78-7-9 1992

30-3-5.5, 30-3-6. Repealed. 1991, 1993

30-3-7. When decree becomes absolute.

(1) The decree of divorce becomes absolute

(a) on the date it is signed by the court and entered by the clerk in the register of actions if both the parties who have a child or children and the plaintiff has filed an action in the judicial district as defined in Section 78-1-2.1 where the pilot program is administered and have completed attendance at the mandatory course provided in Section 30-3-11.3 except if the court waives the requirement, on its own motion or on the motion of one of the parties, upon determination that course attendance and completion are not necessary, appropriate, feasible, or in the best interest of the parties,

(b) at the expiration of a period of time the court may specifically designate, unless an appeal or other proceedings for review are pending, or

(c) when the court, before the decree becomes absolute, for sufficient cause otherwise orders.

(2) The court, upon application or on its own motion for good cause shown, may waive, alter, or extend a designated period of time before the decree becomes absolute, but not to exceed six months from the signing and entry of the decree. 1992

30-3-8. Remarriage — When unlawful.

Neither party to a divorce proceeding which dissolves their marriage by decree may marry any person other than the spouse from whom the divorce was granted until it becomes absolute. If an appeal is taken, the divorce is not absolute until after affirmation of the decree. 1988

30-3-9. Repealed.

1969

30-3-10. Custody of children in case of separation or divorce — Custody consideration.

(1) If a husband and wife having minor children are separated, or their marriage is declared void or dissolved, the court shall make an order for the future care and custody of the minor children as it considers appropriate. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the children and take into consideration the children's desires regarding the future custody, but the expressed desires are not controlling and the court may determine the children's custody otherwise.

(2) In awarding custody, the court shall consider, among other factors the court finds relevant, which parent is most likely to act in the best interests of the child including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate.

(3) If the court finds that one parent does not desire custody of the child, or has attempted to permanently relinquish custody to a third party, it shall take that evidence into consideration in determining whether to award custody to the other parent 1993

30-3-10.1. Joint legal custody defined.

In this chapter, "joint legal custody"

(1) means the sharing of the rights, privileges, duties, and powers of a parent by both parents where specified,

(2) may include an award of exclusive authority by the court to one parent to make specific decisions,

(3) does not affect the physical custody of the child except as specified in the order of joint legal custody,

(4) is not based on awarding equal or nearly equal periods of physical custody of and access to the child to each of the parents, as the best interest of the child often requires that a primary physical residence for the child be designated, and

(5) does not prohibit the court from specifying one parent as the primary caretaker and one home as the primary residence of the child 1988

30-3-10.2. Joint legal custody order — Factors for court determination — Public assistance.

(1) The court may order joint legal custody if it determines that joint legal custody is in the best interest of the child and

(a) both parents agree to an order of joint legal custody, or

(b) both parents appear capable of implementing joint legal custody.

(2) In determining whether the best interest of a child will be served by ordering joint custody, the court shall consider the following factors:

(a) whether the physical, psychological, and emotional needs and development of the child will benefit from joint legal custody;

(b) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest,

(c) whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent,

a successor is appointed and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation \$1,000 per annum or fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

- (a) administer the rotation and scheduling of panels;
- (b) act as liaison with the Supreme Court;
- (c) call and preside over the meetings of the Court of Appeals; and
- (d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court. 1988

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;
- (b) appeals from the district court review of:
 - (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
 - (ii) a challenge to agency action under Section 63-46a-12.1;
- (c) appeals from the juvenile courts;
- (d) appeals from the circuit courts, except those from the small claims department of a circuit court;
- (e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;
- (f) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;
- (g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(h) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons except in cases involving a first degree or capital felony;

(i) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(j) appeals from the Utah Military Court; and

(k) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings. 1992

78-2a-4. Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court. 1986

78-2a-5. Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state. 1986

CHAPTER 3

DISTRICT COURTS

Section

78-3-1 to 78-3-2. Repealed.

78-3-3. Term of judges — Vacancy.

78-3-4. Jurisdiction — Transfer of cases to circuit court — Appeals — Jurisdiction when circuit and district court merged.

78-3-5. Repealed.

78-3-6. Terms — Minimum of once quarterly.

78-3-7 to 78-3-11. Repealed.

78-3-11.5. State District Court Administrative System.

78-3-12. Repealed.

78-3-12.5. Costs of system.

78-3-13. Repealed.

78-3-13.4. Counties joining court system — Procedure — Facilities — Salaries.

78-3-13.5, 78-3-14. Repealed.

78-3-14.5. Allocation of district court fees and fines.

78-3-15 to 78-3-17. Repealed.

78-3-17.5. Application of savings accruing to counties.

78-3-18. Judicial Administration Act — Short title.

78-3-19. Purpose of act.

78-3-20. Definitions.

78-3-21. Judicial Council — Creation — Members — Terms and election — Responsibilities — Reports.

78-3-21.5. Data bases for judicial boards.

78-3-22. Presiding officer — Compensation — Duties.

78-3-23. Administrator of the courts — Appointment — Qualifications — Salary.

78-3-24. Court administrator — Powers, du-

covery, were not prepared specifically for use in and actually used in the ADR procedure.

- (4) (a) A person providing ADR as defined in this chapter is subject to the child abuse reporting requirements of Section 62A-4-503 and the criminal penalty for failure to report under Section 62A-4-511. The confidentiality provisions of Section 62A-4-513 apply to reports made under this subsection.

(b) If the ADR provider determines a participant in the procedure has made an immediate threat of physical violence against a readily identifiable victim or against the provider, communications involving the threat are not confidential.

1991

78-31b-8. Liabilities of ADR provider.

Providers of ADR procedure services under this chapter are immune from civil liability for or resulting from any act or omission done or made while engaged in the ADR unless the act or omission was made or done negligently, in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another.

1991

CHAPTER 32

CONTEMPT

Section	
78-32-1.	Acts and omissions constituting contempt.
78-32-2.	Re-entry after eviction from real property.
78-32-3.	In immediate presence of court; summary action — Without immediate presence; procedure.
78-32-4.	Warrant of attachment or commitment order to show cause.
78-32-5.	Bail.
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.	Community service for violation of visitation order or failure to pay child support.
78-32-12.2.	Definitions — Sanctions.
78-32-12.3.	Pilot program — Purpose — Evaluation of pilot program — Exceptions.
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.

78-32-1. 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) Decent, 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