

1993

# Mary Coelho v. Alcides J. Coelho : Brief of Respondent

Utah Court of Appeals

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APPEALS

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DOCKET NO.

930350

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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MARY COELHO,

Plaintiff/Appellant,

v.

ALCIDES J. COELHO,

Defendant/Respondent

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:  
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:  
:  
:  
:

Case No. 930350-CA

Priority No. 15

District Court No. 11093

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BRIEF OF RESPONDENT

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AN APPEAL FROM A JUDGMENT AND DECREE OF DIVORCE OF THE  
THIRD JUDICIAL DISTRICT, SUMMIT COUNTY, UTAH,  
THE HONORABLE DAVID S. YOUNG, PRESIDING

---

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**FILED**  
Utah Court of Appeals

JAN 11 1994

*Mary T. Noonan*  
Mary T. Noonan

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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MARY COELHO,	:	
	:	
Plaintiff/Appellant,	:	Case No. 930350-CA
	:	
v.	:	Priority No. 15
	:	
ALCIDES J. COELHO,	:	District Court No. 11093
	:	
Defendant/Respondent	:	
	:	

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BRIEF OF RESPONDENT

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**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

- 1) May Appellant claim reversible error in connection with the proceedings below when she:
  - a) consented to and utilized the procedure about which she now complains;
  - b) failed to timely object to the use of that procedure; and
  - c) failed to accept the trial court's invitation for further hearing regarding her complaints before she filed this appeal?
- 2) Did the trial court act fairly and within the broad discretion afforded it in the manner it:
  - a) imputed income to the parties;
  - b) determined what would be an appropriate award of alimony;
  - c) allocated marital debts; and
  - d) awarded attorney's fees?
- 3) Are the trial court's Findings of Fact and Conclusions of Law sufficient and supported by adequate evidence?

IN THE UTAH COURT OF APPEALS

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MARY COELHO,	:	
	:	
Plaintiff/Appellant,	:	Case No. 930350-CA
	:	
v.	:	Priority No. 15
	:	
ALCIDES J. COELHO,	:	District Court No. 11093
	:	
Defendant/Respondent	:	
	:	

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BRIEF OF RESPONDENT

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RESPONDENT'S JURISDICTIONAL STATEMENT

Respondent agrees with the Appellant's Jurisdiction Statement which appears on page one of her Brief.

DETERMINATIVE AUTHORITY

Copies of the following are found in the Addendum to this Brief.

§30-3-5 Utah Code Ann. (1953)

§30-3-3 Utah Code Ann. (1953).

Rule 103 Utah Rules of Evidence

STATEMENT OF THE CASE

This is a divorce case. The wife filed a complaint seeking, among other things, custody of the parties' three minor children,



child support, alimony, an equitable distribution of marital property and debts, and an award of attorney's fees.

The husband answered and counter-claimed requesting mediation as it related to custody of the children, an equitable property and debt distribution, no award of alimony, and an order requiring each party to bear their own fees.

Both sides conducted discovery, including interrogatories and depositions, and the matter was ultimately tried before the Honorable David Young on February 11, 1993. Each side testified either directly or by way of proffer, called witnesses and presented documentary evidence. The trial court ruled from the bench. The husband's counsel submitted proposed Findings of Fact, Conclusions of Law and a Decree of Divorce on April 12, 1993. The wife's counsel filed Objections to those proposed Findings and Conclusions on April 19, 1993. The husband's counsel submitted a timely Reply to those objections. On April 29, 1993, the trial court denied the wife's objections and entered Findings of Fact, Conclusions of Law and a Decree of Divorce as submitted by the husband's counsel. In addition, it issued a Minute Entry addressing the objections of the wife and inviting either party to file a Motion for a New Trial, should either have had any problems with the procedure utilized during the trial proceedings. Neither side accepted that invitation to file a Motion for New Trial.

The wife filed her Notice of Appeal on May 26, 1993.

### RELIEF SOUGHT ON APPEAL

Mr. Coelho seeks the following relief in connection with this appeal:

- 1) For an Order affirming the actions of the trial court in all respects.
- 2) For an Order affirming the Findings of Fact and Conclusions of Law in all respects.
- 3) For an Order granting such other relief as may be fair and equitable to Mr. Coelho.

### STATEMENT OF FACTS

Because Mrs. Coelho has omitted certain important facts, has overemphasized some while under emphasizing others, Mr. Coelho must necessarily supplement and clarify her Statement of Facts. Mr. Coelho believes that the following Statement of Facts more accurately and completely sets forth what transpired in connection with the proceedings below:

#### Marital and Income History

At the time of trial, Mrs. Coelho was 40 years old. (R-486) The parties married in 1977. Mrs. Coelho had gone to college for 3 years and had majored in art. (R-464) She stopped her college education three years before the marriage and did not again attend college until after this action for divorce was filed. (R-487) At that time, she decided she wanted to be a nurse (R-92) and enrolled in a nursing program. (R-489)

In 1983 she trained and became a licensed real estate agent and began working for Coleman Land in Park City, Utah. (R-487)

She quickly became successful and during her full time employment averaged approximately \$35,000.00 per year in net income after her business expenses had been deducted. (R-488) She began working part time for the company during 1990 and 1991. (R-466; Ex P-1)

She then decided to become a full time ski instructor at Park City. At the time of trial she testified she was making about \$250.00 per week as an instructor. (R-489) She also said she worked about 10 hours per week at Chrysalis, at a public service agency. (R-490) She was making \$5.50 per hour at that job. (R-490) Mrs. Coelho stated that during the marriage her average monthly income was \$1,500.00 and that her average annual income from 1983-1991 was approximately \$18,000.00 per year. (Exhibit P-11) The trial court found her monthly income earning capacity to be \$1,500.00. (R-341)

She said her time in real estate was "just a job" not a career, (R-461) and felt it would take her 5 years to get back into that business. (R-477) Exhibit P-11 reflects that in 1983, the year she became licensed and started work, she quite quickly began earning significant income from selling real estate. She was a very successful real estate person and often times said that she could make more money than her husband. (R-518)

She also testified that she liked to spend no less than 15-20 minutes a day (in the evening) helping Tony, the parties' second child, with his school work. (R-459) Tony has an attention deficit disorder but is at a normal grade level. (R-459)

Even though Mr. Coelho had no construction jobs or income at the time of trial, Mrs. Coelho felt that monthly income of \$9,256.00 should be imputed to him. (R-481) She testified that she thought his average monthly income for 1989-1992 should be \$6,597.00, (R-482) even though thirteen days earlier she had suggested in her Financial Declaration filed with the Court, that \$5,000.00 per month income should be imputed to Mr. Coelho. (R-291)

She also introduced Exhibit P-17 in support of her position that her husband's income historically had been \$6,597.00 per month. However, that exhibit contained W-2 income for Mr. Coelho not related to his construction business but paid to him for wages from employment he was required to take in 1989 and 1990 in Georgia. Eliminating that income from the Exhibit results in an average monthly income over the 4 year period of \$3,718.00.

She also acknowledged that when Mr. Coelho was building, they lived from one month to the next not knowing how much money they would have. (R-470)

At the time of trial, Mr. Coelho had no ongoing jobs or expectancy of jobs in his construction business. (R-517) He considered himself to be a small businessman and worked as hard as he could. He didn't have sufficient funds to begin any "spec" homes and was required to build on a contract by contract basis. In 1992 he was able to secure a large contract at the first of the year. During the last half of 1992 he earnestly tried to secure other contracts but was unable to do so. He was continuously

contacting possible business leads and prepared and circulated a flier advertizing his company. He listed his company as a qualified company with Gump and Ayers in the Park City Area. (R-517-518)

The tax returns, (Ex. P-2-10) received into evidence reflect the following income figures for Mr. Coelho's construction business.

Year	Gross Receipts	Gross Income	Net Profit
1983	\$101,803	\$ 63,198	\$ 22,690
1984	82,041	64,041	33,519
1985	65,169	59,955	3,104
1986	95,566	74,228	25,462
1987	89,869	55,414	3,842
1988	119,037	84,225	36,015
1989	34,057	30,942	4,610
1990	83,530	69,032	42,163
1991	183,474	<u>76,954</u>	<u>45,062</u>
	<b>TOTAL</b>	<b>\$578,494</b>	<b>\$216,467</b>
	<b>MONTHLY AVERAGE</b>	<b>\$ 5,356</b>	<b>\$ 2,004</b>

He estimated that his average net monthly income would be \$5,000.00 and agreed to have that monthly sum imputed to him for support purposes even though at the time of trial he had no income (R-416). In 1992, he had a good year as a result of the one large contract but with the money he had made he serviced the parties' line of credit, paid some of the taxes, paid his temporary support and in so doing was left with much less for him to live on than he was entitled to use under the temporary order. (R-518) He estimated his monthly expenses with one child living with him to be \$3,900.00 (Ex D-25) and acknowledged that given the parties'

present income situation, he would have to try and substantially reduce those expenses. (R-518-519)

Both parties testified that they had incurred attorney's fees in connection with this matter. (R-483, 520) Mrs. Coelho requested reimbursement of all of her fees (R-483) and Mr. Coelho said he was in no better position than she when it came to being able to pay his fees. (R-520)

The only real asset the parties had was the marital residence valued at \$300,000.00 to \$370,000.00. (R-408) It had a \$137,013.00 first trust deed obligation and a \$34,391.00 line of credit against it. (Exhibit D-24) The parties agreed this home should be sold as soon as possible in the hopes that each would receive significant cash from which each could find substitute housing and meet their respective financial obligations. Mrs. Coelho was given an option to purchase Mr. Coelho's interest based upon the possibility that Mrs. Coelho's parents may be a source of those funds. (R-410) Mrs. Coelho agreed that Mr. Coelho could receive his construction company (R-443) and that it had a value of \$2,697.00. (Ex. D-24)

The parties personal and business accountants testified that the cash flow from Mr. Coelho's business was erratic at best, (R-493, 514) and that in 1988 and 1989 Mr. Coelho's income was higher because he had worked for a company in Georgia and received W-2 income. (R-495)

### Trial Proceedings

The record reveals that at the beginning of the trial the trial court asked the parties what matters could be stipulated to and the first portion of the proceedings dealt with the parties reaching an agreement on various issues which either were not in dispute or resolved during those discussions. (R-396-444)

The trial court then suggested certain items might be dealt with by proffer and that approach was consented to by Mr. Coelho and not objected to by Mrs. Coelho. (R-445)

The trial court then asked the parties to identify the remaining disputed issues and the parties agreed that those were as follows:

- 1) What the income of the parties was?
- 2) What income should be imputed to each party?
- 3) What amount of alimony, if any, should be awarded?
- 4) The amount of attorney's fees, if any, that should be awarded? (R-445)
- 5) Allocation of responsibility for unpaid taxes (R-446) and a portion of the line of credit on the marital residence? (R-415)
- 6) Allocation of uncovered health care expenses for Sara and Emily? (R-447)

The trial court then took its first recess and upon reconvening was advised that the parties had reached further stipulations which were then presented to the court. (R-446-451)

It was then that the trial judge mentioned he had another appointment at noon. (R-452) Nowhere in the record is there any reference that the trial could not continue after the judge had fulfilled his other commitments.

Mrs. Coelho was then asked to go forward with her case and she did. She testified, and presented documentary evidence in support of her position. (R-452-465). At the conclusion of her direct testimony, her counsel addressed the issue of attorney's fees and stated:

*Ms. Saunders: Okay, I think we can probably proffer this part... and the last exhibit I have is regarding my attorney's fees and I can either proffer 'em your honor or I can have her discuss 'em.*

*Mr. Dart: Proffer is fine.*

*Court: Okay.* (R-483)

Then Mr. Coelho's counsel conducted a brief cross examination of Mrs. Coelho. (R-486-489) Mrs. Coelho's counsel had no re-direct and the following exchange occurred:

*Judge Young: Thank you. Do you have any other witnesses Ms. Saunders?*

*Ms. Saunders: No.* (R-491)

Mr. Coelho then began the presentation of his case and called two accountants who had done accounting work and tax returns for the parties during the marriage. Both were cross-examined by Mrs. Coelho's counsel. (R-498-501; 510-516) Exhibits were received



related to the historical income of the parties and Mr. Coelho's construction company. (Ex. D-21, 22 & 23)

The trial court then asked Mr. Dart to proffer the testimony of Mr. Coelho. (R-517, 518) Mrs. Coelho's counsel did not object to using this procedure. At the conclusion, Ms. Saunders consented to the proffer, (R-518) and did not request the right to cross-examine. In fact she stated:

*Mr. Dart: . . . That would be our proffer as to his testimony.*

*Judge Young: All right. Do you have any difficulty that would be his testimony if he were called to testify?*

*Ms. Saunders: No. (R-519)*

Mr. Coelho then offered three Exhibits related to:

- a) Mr. Coelho's proposed Distribution of Assets and Liabilities;
- b) His monthly living expenses; and
- c) His proposed child support worksheet (Exhibits D-24, 25, & 26.

The trial court asked Mrs. Coelho's counsel whether she had any objections to those exhibits as being illustrative of Mr. Coelho's testimony. She said no and agreed that these would be illustrative of his testimony. (R-520). She did not ask to cross-examine and the exhibits were admitted. (R-520)

Mr. Coelho's counsel then submitted a proffer related to Mr. Coelho's attorney's fees (R-520) and again no objection or request to cross-examine was made by Mrs. Coelho.

At this point neither side had further evidence and a discussion occurred about closing argument.

*Mr. Dart: I am prepared to waive argument if counsel will. If counsel feels it necessary I would accommodate coming tomorrow.*

*Ms. Saunders: I think the Judge has a pretty good handle on what's going on and I think the paperwork will help him out. (R-521 Emphasis added)*

The trial judge then asked each side to proffer what each believed should be imputed as income and their respective basis for alimony calculations. (R-521) Each side voluntarily did so without objection (R-522, 523) and after that, the trial court indicated that it was then ready to rule on the remaining disputed issues. (R-531)

At no time during these proceedings did either side object to the procedure being used and in fact each side specifically consented to and used the proffer procedure in the presentation of their respective cases.

The first time the issues of inadequate time, inability to cross-examine, and use of the proffer procedure was raised was approximately two and an half months after trial when Mrs. Coelho filed Objections to Mr. Coelho's proposed Findings of Fact and Conclusions of Law. (R-312)

In considering those untimely objections the trial court was sensitive to insuring that each party felt they had been given sufficient time to present their case and stated in its Minute Entry of April 29, 1993:

*Further the Court states that within the plaintiff's Objections there is language expressing concern as to the "limited time" allowed for the hearing. The Defendant's response in part suggests that the Objections of the Plaintiff are designed, in part, to increase the "vulnerability" of the Court's decision on appeal. The Court states that it too felt concern as to the "time" available for trial. The day happened to be a day on which the Chief Justice called a special meeting of the Judicial Council of which the undersigned is a member. As it turned out, I was one and one-half hours late for the meeting.*

*In order to consider the magnitude of the concern, the Court invites a Motion for a New Trial to be filed and argued if that remains a concern. The court notes that there was no timely objection to the procedure on the day of the trial but nevertheless would like to consider the present concerns of the parties as to the adequacy of their presentations. Neither party should presume as to the Court's present view in considering a New Trial. The present concern of the Court is to determine if either party believes they did not have an adequate opportunity to present their case and each should state what they would request, if anything, to be further presented to the court. (R-330-331)*

Mrs. Coelho voluntarily chose not to avail herself of the opportunity afforded by the trial court to correct any such errors (See page 13, Appellant's Brief). She simply filed an appeal which urges as a major issue, irregularities in the proceedings below. (See Point I Appellant's Brief)

## SUMMARY OF ARGUMENTS

### Point I

Mrs. Coelho consented to and participated in the procedure utilized during the trial of this matter. She made proffers of proof and consented to proffers made by Mr. Coelho. Further she failed to timely object to the manner in which the trial was conducted to provide the trial court an opportunity to correct any alleged error. Finally when the trial court was first alerted to Mrs. Coelho's concern, she was invited to file a Motion for New Trial so that that concern could be addressed and she voluntarily chose not to. Point I of her Brief is without merit.

### Point II

Mrs. Coelho claims that the trial court erred in failing to admit into evidence certain building permit summaries. At trial she said she was offering the summaries to show that work was going on in the Park City area. Mr. Coelho admitted that work was going on in the area but that none of it was coming his way. The trial court is given considerable discretion in deciding what is or is not relevant evidence. The trial court was correct in ruling that the proposed evidence was not relevant.

### Point III

Mrs. Coelho's reliance on a statement by the trial court that it was not going to review certain back up documents is misplaced. Each side submitted summary exhibits which contained summaries of the financial information contained in the underlying back up documents. The accuracy of the information which served as a basis

for the summary exhibits was not challenged and as a result the trial court had a right to rely on the information contained in the summary exhibits in making its decisions on the disputed issues.

#### Point IV

A trial court has broad discretion in fashioning equitable remedies in divorce actions, and its decision will not be disturbed unless it is clearly unjust. Mrs. Coelho has failed to demonstrate that the trial court's decision related to the issues of income imputation, support, debt distribution and attorney's fees was clearly unjust. Mrs. Coelho has failed to marshall all of the evidence in support of the trial court's decision and then demonstrate that that evidence was insufficient to support the trial court's decision. There was substantial evidence in support of imputing income to both parties in the amounts determined to be fair to both parties based upon their respective skills, earning history, present earnings and earning capabilities. Since the trial court did not err in imputing income, its awards of child support and alimony were fair under the circumstances. Mrs. Coelho presented no evidence in connection with the home equity line of credit or tax obligations. Mr. Coelho did. Based on the evidence before it and the presumption that the marital estate is to be divided equally, the trial court did not err in the way it dealt with these two debts.

Finally, given the income and earning capacities of the parties, their respective obligations and the resources ultimately available to them from the property distribution, the trial court

did not err in requiring Mr. Coelho to contribute \$3,000.00 towards Mrs. Coelho's fees.

There is substantial evidence in the record to support these awards and the Findings accurately and adequately set forth that evidence.

#### POINT I

*MRS. COELHO'S CLAIM OF ERROR IN THE  
PROCEDURE UTILIZED IN THE TRIAL OF  
THIS CASE IS WITHOUT MERIT*

The thrust of Point I of Mrs. Coelho's Brief is that she 1) had inadequate time to present her case, 2) was prohibited from calling witnesses and 3) was not given the opportunity to cross examine Mr. Coelho. The record however reveals this not to be the case as has been previously illustrated in the Statement of Facts of this Brief.

#### **A.**

*MRS. COELHO CONSENTED TO AND  
PARTICIPATED IN PROFFERING OF  
EVIDENCE TO THE TRIAL COURT*

When a party to a proceeding consents to and participates in a particular manner of presenting a case to a trial court, that party should not later be allowed to claim on appeal that the procedure used at trial was erroneous and prejudicial, thereby justifying a review and reversal of any decision that may have been the outcome of any such procedure. [(See Delipsey v. Delipsey, 369 S.W.2d 828, (CCA Tex. 1963)]

In this case both parties consented to and used proffers in the presentation of their respective cases and neither should now be allowed to claim that the use of the same in some way unfairly "tainted" the result of those proceedings.

Mrs. Coelho also argues in her Brief that she was prevented from calling witnesses in connection with the presentation of her case. Nowhere in the record is there anything to support that claim. In fact, when Mrs. Coelho was finished testifying and Mrs. Coelho's counsel had proffered her testimony on attorney's fees, the trial court specifically asked if she had any other witnesses and she said "No". (R-491)

Mrs. Coelho directly and implicitly agreed to the use of proffers and should not now be allowed to argue that their use in this case, in some way restricted her abilities to adequately present her case. If she did not approve of the procedure which was used, she certainly had a duty to not participate in the procedure and to timely object to it.

**B.**

*MRS. COELHO FAILED TO TIMELY RAISE  
ANY OBJECTION TO THE TRIAL COURT  
PROCEDURE*

At no time during the trial of this matter did Mrs. Coelho raise any objection to the manner in which the trial was being conducted. The first mention of any claimed irregularities appeared in Mr. Coelho's Objections to Mr. Coelho's Proposed Findings. (R-312,313)

As was stated in Callan v. Bierman, 194 Kan. 219, 398 P.2d 355, (1965), a case cited with approval by the Utah Supreme Court in Beehive Medical Electronics v. Square D Company, 669 P.2d 859, 861 P.2d 5, (Utah 1983)

*The approved practice of dealing with trial errors is to make timely objection to them as they arise. Fairness to the court should prompt counsel to call attention to such errors seasonably, and he may be held to waive his right to relief where his conduct, expressions or silence shows acquiescence in an erroneous declaration of law or evinces a purpose to take advantage of unguarded expressions that would have been promptly corrected if pointed out. (Boucher v. Roberts, 187 Kan. 675 678, 359 P.2d 830; Browning v. Lefever, 191 Kan. 397, 400, 381 P.2d 524; Farmers Union Central Cooperative Exchange v. Tomson, 192 Kan. 274, 387 P.2d 202) [Callan, at 357]*

In this case, Mrs. Coelho did not raise timely objections and consequently she should be precluded from now raising these issues on appeal.

C.

*MRS. COELHO WAS GIVEN THE OPPORTUNITY BY THE TRIAL COURT TO HAVE A FURTHER HEARING OR NEW TRIAL BASED ON HER CLAIM OF IRREGULARITIES AND SHE CHOSE NOT TO DO SO*

Perhaps the most compelling reason not to consider the issues raised in Point I of Mrs. Coelho's brief is the fact that when the trial court was finally alerted as to the problems Mrs. Coelho claimed occurred during trial (over two months after the trial had



ended), it urged either party to file a Motion for New Trial and in its Minute Entry (R-330) stated:

. . . In order to consider the magnitude of the concern, the Court invites a Motion for a New Trial to be filed and argued if it remains a concern. The court notes that there was no timely objection to the procedure on the day of the trial but nevertheless would like to consider the present concerns of the parties as to the adequacy of their presentations. Neither party should presume as to the Court's present view in considering a New Trial. The present concern of the Court is to determine if either party believes they did not have an adequate opportunity to present their case and each should state what they would request, if anything, to be further presented to the court. (R-330, 331) *Emphasis added.*

The only response and reference to that invitation is found on page 13 of Mrs. Coelho's Brief where she states:

*In light of the hurried nature of the trial itself, Mrs. Coelho did not believe that she would gain any benefit by filing a motion for a new trial and did not pursue that course. In addition, with more than \$7,000.00 in attorney's fees and costs that the court ordered her to bear, it was economically prohibitive for her to consider further proceedings in the lower court. This decision was not unreasonable. I.D.*

It is not for Mrs. Coelho to unilaterally decide that her decision to not attempt to correct an error of the trial court at the trial court level was reasonable. To the contrary, it is

reasonable to try and correct such errors below and thereby avoid an appeal.

In short, in considering the arguments raised in Point I of Mrs. Coelho's Brief vis a vis what occurred at trial it is fair to conclude that:

1) Mrs. Coelho stipulated and agreed to the trial procedures;

2) By not objecting, she waived her right to now claim error in connection with the procedure; and/or

3) She is now estopped from claiming error because of her failure to move for a new trial as was suggested by the trial court.

Point I of Mrs. Coelho's brief is without merit.

## POINT II

### *THE TRIAL COURT COMMITTED NO ERROR IN THE MANNER IT DEALT WITH SUMMARIES OF BUILDING PERMITS IN THE PARK CITY AREA*

Mrs. Coelho claims reversible error because the trial court refused to admit summaries of building permits issued in the Park City area. When these were offered during the presentation of Mrs. Coelho's case, Mr. Coelho's counsel indicated he would not raise a foundational objection but would object on the grounds of relevancy. (R-485-486) The trial court sustained the objection and in the process, the following is the full text of the exchange which occurred between the court and counsel.

Ms. Saunders:...And then I believe that I have two other exhibits that I'm not sure of the status of them and they are the Park City Building permits and the Summit County Building permits.

Judge Young: Is your objection to those on relevance, Mr. Dart?

Mr. Dart: I do not object on foundation, I do object on relevance.

Ms. Saunders: And I would say . . .

Judge Young: Well, I can't even begin to believe that I would be making a decision on the basis of the building permits that are offered in Park City. There are so many variables as to whether those building permits are comparable, whether he could do that kind of work, whether he is the one that solely gets a building permit. I mean, whether there's limited industry. There are just too many variables for me to make a decision on that basis.

Ms. Saunders: Okay. My only point in showing it, irrespective of how the court rules, and this is for the record, it is to show if Mr. Coelho claims there is no work available in Summit County or Park City that there is certainly a great amount of activity that goes on, and whether he qualifies under it or not there's still work there.

Judge Young: I don't think anybody's making a claim there is no work going on in Park City, are you, Mr. Dart?

Mr. Dart: No, we're not making that claim at all.

*Judge Young: The objection on the  
basis or relevance is sustained.  
(R-485-486)*

A trial court is given considerable discretion in deciding whether or not evidence is relevant. [(See Bambrough v. Bethers, 552 P.2d 1286, 1290 (Utah 1976)]

In her Brief, Mrs. Coelho argues that her evidence related to what work was "available" in the Park City Area. At trial however, she argued that she was offering to show that there was work going on in the Park City area. Mr. Coelho did not claim that there was not work going on in the Park City area, but only that he could not seem to get any of it. There is a significant difference between the concept of work going on in a particular area and whether that work might be "available" to a particular person. The trial court correctly acknowledged and Mr. Coelho agreed that work was going on in the area, but without more which would demonstrate that some of that work was specifically available to Mr. Coelho, the trial court correctly ruled that the evidence as proffered was not relevant.

Further, Mr. Coelho even went so far as to agree that while he presently had no income coming in and was uncertain as to how much income he might expect to receive in the future, he was still willing to have \$5,000.00 per month inn income imputed to him.

Since he did not claim there was no work available, the purpose for which Mrs. Coelho was offering the evidence was eliminated thereby making the evidence irrelevant.

In addition, even if the trial court's ruling on this evidence was erroneous Mrs. Coelho cannot claim error because she

has failed to demonstrate that its exclusion affected a substantial right of hers.

Rule 103 Utah Rules of Evidence states in pertinent part:

(a) *Effect of erroneous ruling. Error may not be predicted upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and*

*(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or*

*(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. I.D.*

In this case, the trial court did not abuse its discretion in refusing to admit the summaries and gave sound and correct reasons for so doing. (R-485) The logic of the trial court in refusing to admit this evidence is well reasoned and Mrs. Coelho's claim of reversible error on this basis is without merit.

### POINT III

THE TRIAL COURT PROPERLY REVIEWED  
AND CONSIDERED THE DOCUMENTARY  
EVIDENCE PRESENTED TO IT

In Point II of her Brief, Mrs. Coelho places great weight on a statement made by the trial court that it was not "going to go through the back up documents and the checks and the tax returns and the other documents". (R-521) Perhaps such a claim would have merit if the parties had not submitted exhibits which summarized all of the income and financial information contained in those underlying documents. (See Plaintiff's Exhibits 11, 16, 17 and Defendant's Exhibits 22 and 23) In this case, those summaries were submitted and the court had the right to rely on the accuracy of the same. In the course of this trial, the court received and reviewed each of those exhibits as they were offered.

Further, a review of the record reflects that the trial court was very familiar with the financial issues and respective incomes of the parties. Even Mrs. Coelho's counsel said she felt "the judge has a pretty good handle on what's going on. . ." (R-521) Also, prior to his ruling, the trial judge engaged in an extensive interchange with Mrs. Coelho's counsel over her use of an eight year average of Mrs. Coelho's income and a four year average of Mr. Coelho's income in attempting to establish historical earnings and impute income. (R-529-531)

Parenthetically, if this were such a great concern to Mrs. Coelho, she was obligated to raise an objection at that time so that the trial court could consider her concern. She did not do so.

The record reflects a full understanding by the trial court of the financial information of the parties gathered from the

testimony of the witnesses and a review of the summary exhibits submitted by both sides. Mrs. Coelho's claim of error on this basis is likewise without merit.

#### POINT IV

IN DIVORCE PROCEEDINGS THE TRIAL COURT HAS CONSIDERABLE DISCRETION CONCERNING SUPPORT AWARDS, PROPERTY/DEBT DISTRIBUTIONS AND ATTORNEY FEE AWARDS, AND THE TRIAL COURT'S DECISION WILL NOT BE DISTURBED UNLESS IT IS CLEARLY UNJUST OR A CLEAR ABUSE OF DISCRETION

In divorce actions a trial court is vested with considerable and broad discretion in fashioning fair and equitable remedies for the parties on the issues of support, property/debt distributions and attorney's fees. Its decisions will not be changed by the appellate court unless it can be demonstrated that the decision is clearly unjust or there was a clear abuse of discretion. Walters v. Walters, 812 P.2d 64 (Utah App. 1991)

In order to meet this burden, Mrs. Coelho must first marshall all of the evidence which supports the trial court's reasoning and decision and then demonstrate that that evidence, when viewed in a light most favorable to the findings, is insufficient to support the findings or is clearly erroneous.

*To mount a successful attack on the trial court's factual findings, an appellant must marshall all the evidence in support of the trial court's findings and then demonstrate that, even viewing the evidence in the light most favorable to the findings, the evidence is*

evidence is insufficient to support the findings, Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985), or that its findings are otherwise clearly erroneous. A finding is clearly erroneous when, even though there is evidence to support it, the reviewing court is 'left with the definite and firm conviction that a mistake has been committed." State v. Walker, 743 P.2d 191, 193 (Utah 1987). This court does not consider evidence de novo, so the mere fact that we might reach a different result than the trial court on the same evidence does not justify setting aside the trial court's findings. Schindler v. Schindler, 776 P.2d 84, 88 (Utah 1989)

Mrs. Coelho's Brief and accompanying arguments fail to satisfy the "marshalling" requirements of Schindler, supra, and on this basis alone her appeal of the income, support, debt allocation and attorney's fee issues is fatally defective.

In addition, it appears that Mrs. Coelho is operating under a misconception as to what constitutes fact and what is evidence. Simply because she presented evidence to the court in support of her position, does not automatically require the court to treat that evidence as fact. In this case, the record reflects that the trial court accepted evidence from both sides, weighed that evidence and then found facts upon which to fashion remedies fair and equitable to both sides. It is not an error for a trial court to discount or not even consider evidence offered by one side or the other. In fact, it is the trial court's duty to analyze conflicting evidence in the process of determining what the ultimate facts are.



**A.**  
**FINANCIAL CIRCUMSTANCES**

The actual financial circumstances of the parties at the time of trial was bleak to say the least. Mr. Coelho had no income and no real prospects of income and Mrs. Coelho was earning \$1,200 to \$1,400.00 per month gross and \$1,100.00 per month net.

Mr. Coelho was attempting to secure construction projects and thought he would be able to average \$5,000.00 per month in earnings once he found some work. Mrs. Coelho's position as to what income should be imputed to Mr. Coelho's went from \$5,000.00 per month in her Financial Declaration, (R- 291) to \$9,256.00 per month (R-481) and \$6,500.00 per month during her testimony. (R-522)

Mrs. Coelho had in the past, consistently earned \$3,000.00 per month after expenses, as a successful real estate salesperson. (R-488) She voluntarily decided she didn't want to do that and instead elected to teach skiing at a significant reduction in pay. She said she felt \$1,300.00 per month was a fair figure to impute to her as income from what she now had elected to do with her time. (R-522)

The evidence as to what each party was actually earning or capable of earning was conflicting. Because of this, the trial court did what it was required to do in weighing conflicting evidence and then finding facts allowing it to fashion a remedy fair to both parties.

Paragraph eight of the Court's Findings entitled "Income Determination" clearly sets forth what the court considered in arriving at what income was to be imputed to both parties. (R-340)

As such, the finding is correct, supported by credible evidence and should not be subject to challenge on appeal.

**B.  
CHILD SUPPORT**

The trial court's Findings and Conclusions regarding child support must necessarily rest on what the court found the income of the parties to be or what it determined each party was capable of earning. Once that was done the determination of child support became a mathematical calculation under the Child Support Guidelines.

In this case, the parties stipulated that child support would be calculated under the Guidelines based upon the income the court determined to be attributable to each party. (R-442)

In order for Mrs. Coelho to be successful in challenging the adequacy of child support, as she has attempted to argue in Point III B of her Brief, she must first demonstrate that the court erred in determining the parties respective incomes. As pointed out in Section A. above, she has failed in that attempt and therefore her argument that child support should be increased, based on what she thought should be imputed as income, is likewise without merit.

**C.  
ALIMONY**

Mrs. Coelho argues that the trial court's Findings related to the alimony issue were inadequate and that the award was insufficient as to both the amount and duration. Each of these claims is without merit.

In its Findings on alimony, (paragraph 8) the court refers to its other findings on income determination which sets forth its rationale in arriving at what would be a fair amount to award by way of alimony. (R-344) The Findings reflect that the court considered what each party was actually earning; what each party was capable of earning based on historical income figures, and what each party's respective needs and expenses were. (R-340, 341, 344)

The \$1,000.00 per month amount was the best the trial court could do given the fact that there was not enough money to meet each of the parties monthly expenses. (Exhibits P-14, D-25) It is important to note that as of the date of trial, Mr. Coelho was earning no moneys and yet the court required him to pay over \$1,600.00 per month in support. At the time of trial, Mrs. Coelho was actually earning \$1,100 to \$1,200.00 per month. The result of this award was to give Mrs. Coelho approximately \$2,700.00 per month, in actual cash, to assist in meeting her monthly expenses. On the other hand, Mr. Coelho was required to pay his monthly expenses from income which simply did not exist but which had been imputed to him. That meant that the only way he could meet his support obligations and support himself was to borrow money until his company found work and again began generating income. If anyone got the "short end" on the support issue, it was Mr. Coelho, not Mrs. Coelho. The trial court did not err in the amount of alimony it awarded.

Mrs. Coelho also claims the trial court erred by limiting the alimony award to one year. This is an incorrect characterization

of what the trial court actually did. In fact, what the court did was to award the \$1,000.00 per month with the understanding that the issue as to whether it was sufficient, and would continue and become permanent in nature to be reserved for further hearing in one year if Mrs. Coelho desired a review of the same. In so ordering, the trial court stated:

*Now, under the circumstances of the present situation with the parties the court finds that it is appropriate to award alimony and the court awards alimony at the level of \$1,000.00 per month for a period of one year. At the conclusion of that one year the alimony will be re-evaluated and the court will determine whether--and I am going to reserve the issue of whether it should be made permanent or not, until that opportunity to look at it at that time.  
(R-532, Emphasis added)*

Because the trial court found that Mrs. Coelho was voluntarily underemployed and imputed income to both parties when in fact Mr. Coelho had no regular income at the time of trial, reserving the issues of amount and duration was the only reasonable approach to take under the evidence which was presented by the parties.

This case differs from the traditional support case because of the underemployment and imputation of income issues. By fashioning this remedy with a reasonably brief review period the trial court provided each party with an opportunity to demonstrate the adequacy or inadequacy of the amount and whether or not any permanent alimony at all was appropriate.

It is important to keep in mind that Mrs. Coelho requested \$1,950.00 in alimony (R-522) and Mr. Coelho, because of Mrs.

Coelho's abilities and the amounts she had been able to earn as a real estate agent, felt no alimony should be awarded. (R-523) Given these diametrically opposed positions, the trial court acted wisely and well within its discretion to simply reserve the issue of permanence and allow revisiting of the amount within the one year period. No error on the part of the trial court was committed in the way it dealt with this issue and the evidence presented was more than sufficient to support the trial court's Finding on this issue.

**D.  
EQUITY LINE MORTGAGE AND TAX LIABILITIES**

In Point IV of Mrs. Coelho's Brief, she acknowledges that the trial court is given broad discretion in allocating marital debt and then argues that it abused that discretion by ordering the parties to equally share the obligation of the home equity line and the parties income tax liabilities for the 1992 tax year.

However, in considering that argument, it is first critical to analyze what evidence was presented on these two debts.

Mrs. Coelho presented no evidence by way of proffer or direct testimony on the line of credit other than a reference to a \$5,200.00 line of credit "withdrawal" on exhibit P-16 and a \$5,200.00 line of credit "Deposit and Payment" and exhibit P-17. On the other hand, Mr. Coelho's exhibit D-24 specifically sets forth the current balance on the line and requested that it be allocated equally between the parties. (R-520)

Likewise, Mrs. Coelho offered no evidence on the 1992 tax liability and how it should be allocated. The only evidence before

the trial court on this issue was exhibit D-24 which set forth the amount of \$15,931.00 due in taxes and his request that that debt be shared equally. (R-520)

In reaching a decision on how to fairly allocate these debts in a property distribution the trial court was required to adhere to and apply two general legal principles established by the Utah appellate courts.

First, it followed the general rule that a marital estate should be valued as of the date of trial. Berger v. Berger, 713 P.2d 695 (Utah 1985) Mrs. Coelho presented no evidence as to why any alternative valuation date would be appropriate and in fact the only evidence the trial court had before it was the current balances of the two marital obligations in question. Based on that, the trial court was correct in finding and concluding that the present balances of these debts were the balances to use in its analysis of a fair property/debt distribution.

Second, once the balances had been determined, Utah law creates a presumption that the marital estate should be divided and allocated equally between the parties. [See Dunn v. Dunn, 802 P.2d 1314, 1322 (Utah App. 1990)] Again, Mrs. Coelho presented no evidence to overcome that presumption and consequently the trial court was very correct in allocating these debts equally between the parties.

Further, the remedy fashioned by the trial court in allocating these debts equally between the parties was most fair under the circumstances of this case. Both debts were debts which each party

had derived benefit from during the marriage. The only real asset of the marriage was the marital residence which the parties agreed would be sold and the proceeds then divided equally. That sale would generate substantial monies sufficient to pay these two marital obligations and still leave enough for each party to acquire a new residence for herself/himself and the children who would be residing with each.

What the trial court did, in effect, was to make certain that all marital debts were paid from marital assets and each party was then given a "fresh start", free from debt, to establish a household on their own with the further requirement that Mr. Coelho assist Mrs. Coelho financially by way of ongoing child support and alimony.

To have required Mr. Coelho to assume these obligations and still pay support to Mrs. Coelho would have been unfair and inequitable to Mr. Coelho. To have allocated these debts equally and then not required Mr. Coelho to pay support to Mrs. Coelho would have been unfair and inequitable to Mrs. Coelho. In essence the trial court, by doing what it did, fashioned a remedy that was fair to both parties.

Mrs. Coelho's claim that the trial court erred in allocating these debts as it did is without merit because of her failure to produce any evidence as to the amount of these debts and how they should be allocated. The trial court acted well within its discretion based on the evidence which was presented to it.

**E.**  
**ATTORNEY'S FEES**

In Point V of her Brief, Mrs. Coelho again acknowledges the broad discretion of the trial court in connection with awarding attorney's fees in divorce actions. She then proceeds to argue that because the amount and reasonableness of the fees were undisputed and there was no evidence to support an award of less than all of her fees, that a fortiori the trial court erred in not awarding all of those fees. The flaw in this argument rests in the second element.

There was substantial evidence to support a finding granting Mrs. Coelho only a portion of her requested fees. She was underemployed, (R-340, 341) and capable of earning \$35,000.00 per year. (R-488) At the time of trial, Mr. Coelho was not earning anything. (R- 517, 518) The home of the parties was to be sold resulting in substantial cash coming to both parties. (R-335-337) Mr. Coelho had his own attorney's fees to pay. (R-519) Both parties' monthly expenses were similar (Exhibit P-14 and D-25)

It was apparent that once the home sold each party would have substantial monies from her/his share of the equity which was to be divided.

Based upon the circumstances of this cases, the trial court would have been well within its discretion to have required each party to pay their own fees. However, again in fashioning a remedy fair to both parties, and after considering what monies would ultimately be available to the parties, what income each party was capable of earning and what support Mr. Coelho was required to pay,



the trial court exercised its broad discretion and ordered Mr. Coelho to contribute \$3,000.00 towards Mrs. Coelho's fees. (R-344, 345)

As is required, the trial court considered the reasonableness of the fee being requested and the abilities/need of each party to pay their own fees and those considerations are clearly reflected in the Findings. [(See paragraphs 5, 8, 11 & 13 (R-335-338, 344-346)] The trial court followed the requirements set out in Bell v. Bell, 810 P.2d 494 (Utah App. 1991). Its award was based upon the evidence presented at trial related not only to the specific issue of attorney's fees but to the overall financial circumstances of the parties.

Mrs. Coelho's reliance upon Haumont v. Haumont, 793 P.2d 421 (Utah App. 1990) is misplaced in that the trial court in this case awarded fees less than the amount requested and specifically set forth in its Findings the reasons for doing so. It specifically considered the abilities of both parties to pay their own fees and the fact that Mr. Coelho was going to be required to pay his own fees. Having found that justification, the trial court acted well within its discretion in awarding less fees than Mrs. Coelho had requested.

Mrs. Coelho's claim of error regarding the trial court's award of attorney's fees is without merit. There was adequate evidence in the record to support the award and the Findings properly set forth the evidence upon which the trial court based its award.

### CONCLUSION

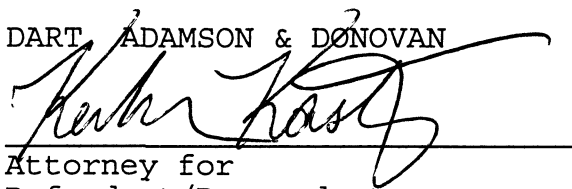
Both parties were given the opportunity for a fair trial in this matter. Mrs. Coelho's claim of irregularities in the conduct of the trial is without merit. She consented to and participated in the trial procedure, did not object to that procedure and did not take advantage of an opportunity to rectify any such claim of error prior to pursuing this appeal.

The trial court properly excluded evidence which was not relevant to the issues before the court and it committed no error in its review and consideration of documentary evidence presented by the parties.

The trial court did not abuse the wide discretion afforded it in fashioning an overall remedy fair to both parties as it related to income imputation, support, debt allocation and attorney's fees. There was more than evidence to support the trial court's Findings and the Findings properly reflect that evidence.

The decision of the trial court should be affirmed in all respects.

Respectfully submitted this 7<sup>th</sup> day of January, 1994.

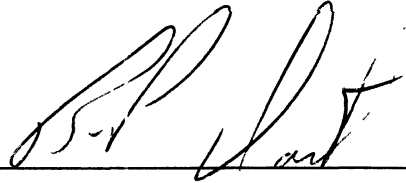
DART, ADAMSON & DONOVAN  
By:   
Attorney for  
Defendant/Respondent

CERTIFICATE OF SERVICE

The undersigned, a representative of Dart, Adamson & Donovan, hereby certifies that two (2) true and correct copies of the above and foregoing Brief of Respondent to Helen Christian Esq., dated January, 11, 1994, was hand delivered to the following counsel of record:

HELEN E. CHRISTIAN, ESQ.  
GUSTIN & CHRISTIAN  
Suite 722, Boston Building  
9 Exchange Place  
Salt Lake City, Utah 84111

By: \_\_\_\_\_

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

## ADDENDUM

	<u>PAGE</u>
1) Section 30-3-5 <u>Utah Code Ann.</u> (1953 as amended)	A-1
2) Section 30-3-3 <u>Utah Code Ann.</u> (1953 as amended)	A-2
3) Rule 103, <u>Utah Rules of Evidence</u> . . . . .	A-3
4) Trial Courts Findings of Fact and Conclusions of Law dated April 29, 1993 . . . . .	A-4
5) Trial Court's Order and Minute Entry dated April 29, 1993 re Filing Motion for New Trial . . . . .	A-5
6) Exhibit P-11 - Summary of Plaintiff's Historical Income . . . . .	A-6
7) Exhibit D-23 - Summary of Defendant's Historical Income . . . . .	A-7
8) Exhibit D-24 - Defendant's Proposed Distribution of Assets and Liabilities. . . . .	A-8

**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.

### 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 during the course of the action or in the final order or judgment.

History: C. 1953, 30-3-3, enacted by L. 1993, ch. 137, § 1.

Repeals and Reenactments. — Laws 1993, ch. 72, § 10 repeals former § 30-3-3, Utah Code Annotated 1953, allowing a court to order

either party to pay for the separate support and maintenance of the adverse party and the children, and enacts the present section, effective May 3, 1993

### **Rule 103. Rulings on evidence.**

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) **Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) **Record of offer and ruling.** The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) **Hearing of jury.** In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Plain error.** Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

**Advisory Committee Note.** — Rule 103 is the federal rule, verbatim, and is in conformity with Rules 4 and 5, Utah Rules of Evidence (1971), Rule 61, Utah Rules of Civil Procedure, and Utah case law not involving constitutional considerations. Subsection (a)(1) is in accord with Rule 4, Utah Rules of Evidence (1971) and *Stagmeyer v. Leatham Bros.*, 20 Utah 2d 421, 439 P 2d 279 (1968). See also *Bradford v. Alvey & Sons*, 621 P 2d 1240 (Utah 1980);

*Szarak v. Sandoval*, 636 P 2d 1082 (Utah 1981). Rule 103(d) is a restatement of the plain error rule. See Rule 4, Utah Rules of Evidence (1971) and *State v. Poe*, 21 Utah 2d 113, 441 P.2d 512 (1968).

**Cross-References.** — Harmless error in admission or exclusion of evidence, Rule 61, U R C P.

B. L. DART (818)  
DART, ADAMSON & DONOVAN  
Attorneys for Defendant  
310 South Main, Suite 1330  
Salt Lake City, Utah 84101  
(801) 521-6383

No. ....

FILED

APR 29 1993

Clerk of Summit County

By .....

Deputy Clerk

IN THE DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

---oooOooo---

MARY COELHO,	:	
	:	
Plaintiff,	:	FINDINGS OF FACT
	:	AND CONCLUSIONS OF LAW
v.	:	
	:	
ALCIDES J. COELHO,	:	Case No. 11093
	:	
Defendant.	:	Judge Young

---oooOooo---

The above-entitled matter came on regularly for trial on Thursday, the 11th day of February, 1993, at the hour of 9:00 a.m., plaintiff appearing in person and by her attorney Evelyn R. Saunders, and defendant appearing in person and by his attorney B. L. Dart, and plaintiff having testified and two accountants having testified and defendant's testimony having been proffered and other matters were submitted by proffer and the Court having received exhibits and the matter having been submitted and the Court being fully advised, hereby makes the following:



## FINDINGS OF FACT

1. Plaintiff and defendant were married in Park City, Utah on the 16th day of July, 1977, and since that time have been husband and wife.

2. Plaintiff and defendant are both residents of Summit County, State of Utah, and have been for more than three months immediately prior to the filing of this action for divorce.

3. Grounds. Differences have arisen between the parties which have made it impossible for them to continue with this marriage relationship. The parties have been separated since October, 1991, and the Court finds that grounds exist for entry of a Decree of Divorce on the grounds of irreconcilable differences.

4. Custody and Visitation. Three children have been born as issue of this marriage: Sara, born August 7, 1978, who is 14 years of age; Tony, born August 19, 1980, who is 12 years of age; and Emily, born September 29, 1986, who is six years of age. Pursuant to stipulation of the parties and consistent with the child custody evaluation filed in this action, plaintiff should be awarded the care, custody and control of Emily and Tony, subject to defendant's reasonable rights of visitation, which should be as follows:

a. The right to have these two younger children, each Monday evening from 5:00 p.m. to 8 p.m. for CCD and so long as they are attending CCD.

b. The right to have the two younger children each Wednesday evening from 5:00 p.m. until Thursday morning and then take them to school.

c. The right to have the two younger children each Saturday evening from 6:00 p.m. to Sunday at 6:00 p.m.

d. The right to have all three children each Christmas Day from 9:00 a.m. to 6:00 p.m.

e. All other major holidays to be alternated between the parties.

f. During the summer school vacation period, the visitation schedule should change to alternating weekends and be adjusted so that all three children are together each weekend.

g. The right to be informed of and attend all school activities, school performance and any extracurricular activities of the children, including but not limited to sporting events, to participate in parent-teacher conferences and have input into the important educational decisions of the children, and to be informed of any emergency health-care problems and the right to be informed of non-emergency medical problems within 48 hours.

h. Such other visitation upon which the parties can mutually agree.

Custody of Sara should be awarded to defendant subject to plaintiff reasonable and liberal rights of visitation as follows:

a. The right to have Sara Thursday evenings at 6:00 p.m. to Saturday evening at 6:00 p.m.

b. The right to have Sara each Christmas Eve from 5:00 p.m. to Christmas Day at 9:00 a.m.

c. Major holidays to be alternated between the parties.

d. Alternating weekends during the summer school vacation period to coordinate with the two younger children so that all three children are together each weekend.

e. The right to be informed of and attend all school activities, school performance and any extracurricular activities of the children, including but not limited to sporting events, to participate in parent-teacher conferences and have input into the important educational decisions of the children, and to be informed of any emergency health-care problems and to be informed of any emergency health-care problems and the right to be informed of non-emergency medical problems within 48 hours.

f. Such other visitation upon which the parties can mutually agree.

5. Real Property. The house and real property located at 5328 Old Ranch Road, Park City, Utah, should be listed for sale with a real estate agent mutually acceptable to the

parties, and a listing price to be arrived at between the parties in consultation with said real estate agent. Upon the sale of said house and real property, and after payment of the first mortgage obligation to Valley National Mortgage Co. which has a current balance of \$137,000, the second mortgage line-of-credit to Valley Bank which have a current balance of \$34,400, expenses of sale and any out-of-pocket expenses of either party necessary to place the home in marketable condition, and any moving expenses of plaintiff up to the amount of \$5,000, any remaining equity should be divided equally between the parties. An exception to out-of-pocket expenses would be that any painting paid for by defendant should be without reimbursement up to the amount of \$1,200.

a. Plaintiff should have an option for 30 days from the 11th day of February, 1993, to retain said house and real property upon payment to defendant of his equity in the property which payment should be made within 30 days from the time of the exercise of the option. Defendant's equity should be established as one-half of the remaining amount after deducting the first and second mortgage obligations from the sum of \$300,000, the appraised value of said house and real property. Plaintiff's option should be an exclusion from the listing of this property so that in the exercise of this option, no real estate commission will be incurred.

Plaintiff should have the further option of having the right of first refusal in the event of an offer by a third party on the home upon the same terms as said third-party offer so long as the amount received by defendant for his equity is no less than the amount he would have received if a third party offer had been accepted.

b. Until such time as said house and real property has been sold, plaintiff should have the right of exclusive occupancy and should be responsible for payment of the first mortgage obligation. The second mortgage obligation should be paid one-half by each of the parties, and in the event that either party pays more than one-half, then that party is entitled to reimbursement of such excess of the other party's share at the time of the sale of said house and real property.

c. Each party should be ordered to cooperate in any way necessary to expedite and facilitate the sale of said house and real property as the proceeds from the sale constitute the only major asset of the parties and these proceeds will be necessary to meet various liabilities of the parties for which no other funds are immediately available.

d. Plaintiff has requested that any occupancy of the house not occur until after the end of the 1991-1992 school year. While the Court finds that it is in the best interests of the children that they be allowed to stay in this home through the school year, the Court feels that if a sale of the home would

be lost by placing this as a condition of sale, that the need of the parties to sell this home should take priority and preempt any concerns which may exist for the children remaining in the home for the duration of the school year.

6. Personal Property. The personal property of the parties should be awarded as follows, with the award to either party to be free of any claim of the other:

a. Each of the parties should be awarded any items of furniture and furnishings and personal possessions currently in his or her own possession except as otherwise expressly hereinafter provided.

b. Each of the parties should make available to the other party any photographs for the purpose of allowing the other party to reproduce the photographs at his or her own expense or to keep duplicate photographs.

c. Defendant should be awarded his personal property currently located in the home occupied by plaintiff.

d. Defendant should be awarded his equipment and personal property stored in the garage and under the tarp on the property currently occupied by plaintiff.

e. Plaintiff should be awarded the smaller Fraughton statuary and the larger Fraughton statuary should be placed in the hands of an art dealer on consignment for sale and with any net proceeds of sale to be divided between the parties.

f. Defendant should be awarded the 1984 Toyota 4-runner.

g. Plaintiff should be awarded the 1983 Toyota Landcruiser.

h. Plaintiff should be awarded the horse trailer.

i. Plaintiff should be awarded the 1976 Ford truck.

j. Plaintiff should be awarded her horses and tack.

k. Plaintiff should be awarded the use of the snowblower so long as she resides in the Park City area, but it should be returned to defendant upon plaintiff moving from the Park City area. Defendant should have the right to use the snowblower to clear construction sites so long as his use does not interfere with plaintiff's need.

l. Defendant is awarded his stock in Coelho Construction Company together with any liabilities.

m. Plaintiff is awarded her premarital Kodak stock.

n. Plaintiff is awarded the Blue Cross/Blue Shield health insurance premium refund and defendant should provide whatever cooperation he can in obtaining a new replacement check.

o. Defendant is awarded the stock in New Classic Development together with any liabilities.

p. Defendant is awarded the parties' interest in Solamere Partnership, together with any liabilities.

7. Debts and obligations. The liabilities of the parties should be assumed and paid as follows:

a. The first and second mortgages on the home at 5328 Old Ranch Road, Park City, should be assumed and paid as set forth in paragraph 5 above.

b. The 1992 income tax liability of the parties should be divided equally between the parties, and the parties should cooperate with their accountant, E. J. Passey, in the preparation of income tax returns either jointly or separately which will provide the lowest total tax liability. Defendant should be responsible for and pay for the cost of this tax preparation.

c. Defendant should be responsible for any liabilities in connection with Coelho Construction Company, New Classic Development and Solamere Partnership.

d. Each party should be responsible for the payment of any liabilities which he or she has individually incurred since the separation of the parties in October, 1991.

8. Income Determination. The Court heard testimony from plaintiff concerning her income history and capacity to earn income, testimony from two accountants concerning the parties'



historical income and defendant's income for 1992, a proffer concerning defendant's current earning capacity, and copies of the parties' tax returns for the past ten years together with summaries. The Court having reviewed and considered all the evidence, finds that based upon the current circumstances defendant has an earning capacity of \$5,000 per month and plaintiff has an earning capacity of \$1,500 per month, and the Court's findings related to child support and alimony are based upon these income expectancies.

Specifically, the Court finds that defendant is a small independent contractor who has had good years and bad years. It appears that 1992 was a good year but the income related primarily to one project, and it further appears that defendant earned most of the 1992 income during the first part of the year, with very little income for the last part of the year and with no income for the first month of 1993. It is because of these circumstances that the Court finds the expectancy for 1993 of defendant's income is the amount of \$5,000 per month.

Specifically, the Court finds that plaintiff is currently working at employment as a ski instructor and working with disabled children, earning an income substantially below what she has historically earned when she was active as a real estate sales person during the 1985, 1986, 1987 and 1988 years, as reflected in plaintiff's own Exhibit 11. It is anticipated that plaintiff should be able to become more

gainfully employed and after a short period of time earn an income sufficient to meet her own needs based upon her demonstrated ability.

9. Child Support. Consistent with the Child Support Guidelines of the State of Utah, the income determinations set forth in paragraph 8, and the custody arrangement between the parties as set forth in paragraph 4 above, defendant should pay to plaintiff as child support the sum of \$619 per month, commencing with the month of February, 1993, as shown on the Child Support Worksheet attached hereto as Exhibit "A". As a further obligation of support, defendant should be responsible to maintain the children on his currently-held health and accident insurance which has a \$500 deductible and each of the parties should be responsible for one-half of all non-insured medical expenses incurred by any of the three children.

Defendant should have the further obligation to pay to plaintiff one-half of any child care costs which she incurs which are work related. Plaintiff shall provide to defendant an accounting at the end of each month of the time and cost of child care. Defendant should then pay to plaintiff one-half of said amount within ten days of receipt of the accounting.

The Court finds that Tony is currently in need of therapy, and to the extent that expenses are incurred for necessary therapy as that necessity is indicated by his therapist, the cost of this therapy should be paid 70% by

defendant and 30% by plaintiff. This proration is roughly equatable to the proration of income between the parties and, further, takes into consideration the fact that plaintiff should have some substantial responsibility for the cost of therapy as she has control of determining how often therapy is received.

The parties have stipulated that Sara should be seen by a mutually-acceptable therapist on the basis of once a month and in the event of any opinion of the therapist that more therapy is required, then as often as necessary, with each of the parties to be responsible for one-half of the therapy. The choice of a mutually-acceptable therapist for Sara should be determined by the parties in consultation with Dr. Sam Goldstein. Any therapy for Sara with Michelle Miller should be paid by defendant. The division of this cost equally between the parties is different than the division related to Tony's therapy for the reason that defendant shall be responsible for all of the costs of Michelle Miller, who is the current therapist for Sara.

Any obligation for payment of support or medical or therapy expenses shall continue so long as the children are minors and thereafter to high school graduation for any child who turns 18 prior to graduation.

10. Life Insurance. So long as he has an obligation for the payment of child support, defendant should be ordered to maintain a life insurance policy in the face amount of \$250,000 naming either the plaintiff's father, the plaintiff's mother or a

corporate fiduciary as the trustee for the benefit of the parties three children.

11. Alimony. Based upon the findings which the Court has previously set forth above and based upon the living expenses of the parties as set forth in their respective exhibits, defendant should pay to plaintiff as alimony the sum of \$1,000 a month commencing with the month of February, 1993, and continuing for a period of one year to allow plaintiff the opportunity to reestablish her income based upon her demonstrated historical earning capacity. At that time, plaintiff should have the right to petition the Court for a reevaluation to determine whether alimony should be terminated at that time or extended based upon the circumstances then existing.

12. Restoration of maiden name. Plaintiff has requested and should be restored to her previous surname of Van Siclen.

13. Attorney's fees and costs. Plaintiff proffered evidence of attorneys' fees which she had incurred with her prior attorney Mary Corporon and with her present attorney Evelyn R. Saunders and the Court having considered the reasonableness of the fees and the relative ability of the parties to meet the cost of attorney's fees and taking into consideration that defendant shall be responsible for all his own fees, finds that it is reasonable that defendant should be responsible for payment of \$3,000 to plaintiff for her attorneys' fees and costs incurred in

this action, which amount should be paid within 120 days from the 11th day of February, 1993, or upon sale of the house and real property of the parties, whichever occurs first.

14. Permanent restraining order. Each of the parties should be permanently restrained from in any way harassing, threatening or harming the other.

From the foregoing Findings of Fact, the Court now makes the following:

#### CONCLUSIONS OF LAW

1. Plaintiff is awarded a Decree of Divorce from defendant on the grounds of irreconcilable differences, which Decree shall become final upon signing and entry.

2. Custody and visitation is awarded as set forth in paragraph 4 of the Findings of Fact.

3. The real property of the parties shall be sold and divided as provided in paragraph 5 of the Findings of Fact.

4. The personal property of the parties is awarded as provided in paragraph 6 of the Findings of Fact.

5. The debts and obligations of the parties shall be assumed and paid as provided in paragraph 7 of the Findings of Fact.

6. Plaintiff is awarded child support from defendant as provided in paragraph 9 of the Findings of Fact.

7. Defendant shall maintain life insurance for the benefit of the minor children as provided in paragraph 10 of the Findings of Fact.

8. Plaintiff is awarded alimony from defendant as provided in paragraph 11 of the Findings of Fact.

9. Plaintiff is restored to her maiden name of Van Siclen.

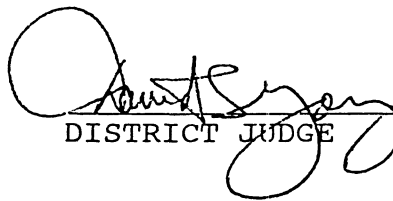
10. Plaintiff is awarded attorneys' fees and costs from defendant in the amount of \$3,000 to be paid as provided in paragraph 13 of the Findings of Fact.

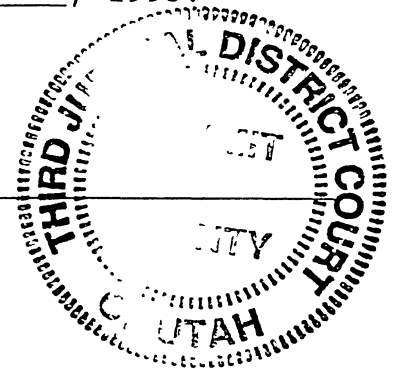
11. Each of the parties is permanently restrained from in any way harassing, threatening or harming the other.

12. Each of the parties is ordered to execute any documents and cooperate in any way necessary to effectuate the terms of the Decree of Divorce when it is entered.

DATED this 28<sup>th</sup> day of April, 1993.

BY THE COURT:

  
DISTRICT JUDGE



MAILING CERTIFICATE

I hereby certify that on the 9th day of April, 1993, I  
mailed a copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS  
OF LAW to:

Evelyn Saunders  
401 Main Street  
P. O. Box 3418  
Park City, UT 84060  
Attorney for Plaintiff.

Shannon K. Minkel

B. L. DART (818)  
 DART, ADAMSON & DONOVAN  
 Attorneys for Defendant  
 310 South Main, Suite 1330  
 Salt Lake City, Utah 84101  
 (801) 521-6383

"EXHIBIT A"

IN THE DISTRICT COURT OF SUMMIT COUNTY, STATE OF UTAH

MARY COELHO,

Plaintiff,

v.

ALCIDES J. COELHO,

Defendant.

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CHILD SUPPORT WORKSHEET  
 (SPLIT CUSTODY)

Civil No. 11093

Judge Young

BASE AWARD CALCULATION	MOTHER	FATHER	COMBINED
1. Number of Children	2	1	3
2. % Children w/each parent	.67	.33	
3a. Gross Monthly Income	1,500.00	5,000.00	/////
3b. Pre-Existing Alimony			/////
3c. Pre-Existing Support			/////
4. Adjusted Monthly Gross	1,500.00	5,000.00	6,500.00
5. Base Combined Child Support from Tables	/////	/////	1,407.00
6. Proportionate Share %	0.23	0.77	/////
7. Parent's Share Support \$	323.61	1,083.39	/////
8. Mother owes father	106.79	/////	
9. Father owes mother	/////	725.87	
10. Children's health insurance premiums paid			/////
11. Child care expense			0.00
12. NET OBLIGATIONS	106.79	725.87	/////
13. BASE SUPPORT AWARD all 12 months (father to mother)	/////	/////	619.08
14. CHILD CARE at 50%			0.00

000348



FILED

APR 29 1993

Clerk of Summit County

By ..... Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

MARY COELHO,

Plaintiff,

vs.

MINUTE ENTRY  
RULING 4-501 UCJA

ALCIDES J. COELHO,

Defendant.

CASE # 91-11093

The Court has reviewed the Objections of the plaintiff and the Reply of the Defendant. The Court denies the Objections and approves and enters this date the Findings and Decree as submitted.

Further the Court states that within the plaintiff's Objections there is language expressing concern as to the "limited time" allowed for the hearing. The Defendant's response in part suggests that the Objections of the Plaintiff are designed, in part, to increase the "vulnerability" of the Court's decision on appeal. The Court states that it too felt concern as to the "time" available for trial. The day happened to be a day on which the Chief Justice called a special meeting of the Judicial Council of which the undersigned is a member. As it turned out, I was one and one-half hours late for the meeting.

In order to consider the magnitude of the concern, the Court invites a Motion for a New Trial to be filed and argued if that remains a concern. The court notes that there was no timely objection to the procedure on the day of the trial but nevertheless would like to consider the present concerns of the parties as to the adequacy of their presentations. Neither party should presume as to the Court's present view in considering a New Trial. The present concern of the Court

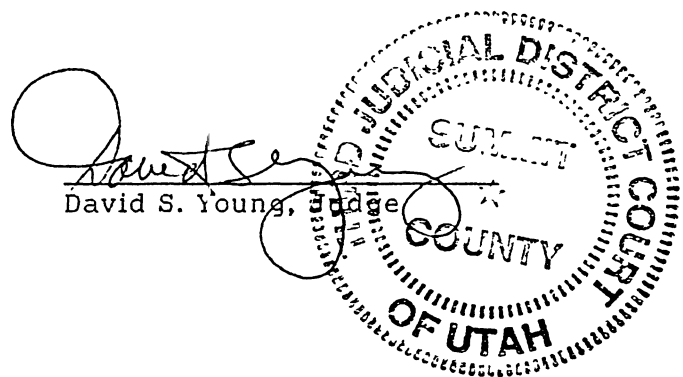
000330

is to determine if either party believes they did not have a adequate opportunity to present their case and each should state what they would request, if anything, to be further presented to the court.

Dated, April 29, 1993.

C.C. to counsel

↓  
4-30-93



COELHO vs. COELHO

SUMMARY OF PLAINTIFF'S INCOME FROM REAL ESTATE SALES  
AS SHOWN ON TAX RETURNS - FORM 1040  
1983 - 1991

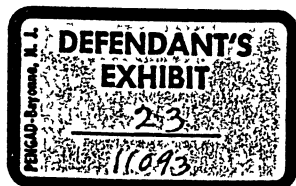
<u>TAX YEAR</u>	<u>GROSS INCOME</u>	<u>BUSINESS EXPENSES</u>	<u>NET INCOME</u>
1983	- 0 -	- 0 -	- 0 -
1984	\$15,754.13	\$ 2,892.00	\$ 12,862.00
1985	60,123.79	5,148.00	54,976.00
1986	35,419.08	10,114.00	25,305.00
1987	36,628.04	10,243.00	26,385.00
1988	41,877.73	8,154.00	33,724.00
1989	24,252.48	15,692.00	8,560.00
1990	6,103.36	5,068.00	1,035.00
1991	2,975.00	3,959.00	<u>(984.00)</u>
			\$161,863.00
AVERAGE YEARLY INCOME: (1983-1991)		\$17,984.77	
AVERAGE MONTHLY INCOME:		\$ 1,498.73	



A-6

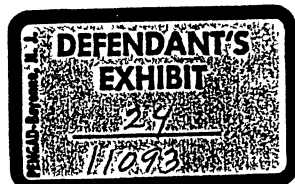
SUMMARY OF HISTORICAL INCOME OF PARTIES  
Coelho v. Coelho  
 (From tax returns)

<u>Year</u>	<u>Al</u>	<u>Mary</u>	<u>Misc.</u>	<u>AGI</u>
1983	\$22,690	\$2,625	\$(13,579)	\$11,736
1984	33,512	13,187	(3,083)	43,616
1985	3,104	67,976	(2,456)	68,624
1986	25,426	39,305	(8,597)	56,134
1987	3,842	42,385	(7,737)	38,490
1988	85,015	33,724	2,497	121,236
1989	91,610	8,560	1,566	101,736
1990	90,913	376	1,390	92,679
1991	45,062	1,603	(2,449)	44,216
	_____	_____	_____	_____
TOTALS	\$401,174	\$209,741	\$(32,448)	\$578,467



**DEFENDANT'S PROPOSED DISTRIBUTION OF ASSETS AND LIABILITIES**  
Coelho v. Coelho

	<u>Mary</u>	<u>Al</u>
<sup>1</sup> House and real property at 5328 Old Ranch Rd., Park City	1/2	1/2
<sup>2</sup> Furniture and furnishings (as divided with exceptions; see footnote)	---	---
<sup>3</sup> Two pieces Fraughton statuary	1/2	1/2
<sup>4</sup> 1984 Toyota 4-runner		4,800
<sup>5</sup> 1983 Toyota Landcruiser	4,700	
<sup>6</sup> Horse trailer	2,500	
<sup>7</sup> 1976 Ford truck	1,000	
<sup>8</sup> Two horses and tack	1,500	
<sup>9</sup> Snowblower		---
<sup>10</sup> Coelho Construction Company		2,697
<sup>11</sup> 50 shares Kodak stock	---	
Blue Cross/Blue Shield health ins. premium refund	1,183	
New Classic Development		---
<u>Liabilities:</u>		
1992 Income taxes due per joint return prepared by Foote & Passey--\$15,391	1/2	1/2
<sup>12</sup> Solamere Partnership interest		---
<b>TOTAL VALUES</b>	<b>\$10,883</b>	<b>\$7,497</b>



A-8

**Explanatory notes:**

1. The parties' home was appraised in the fall of 1992 at \$300,000. There is a first mortgage to Valley National Mortgage of \$137,013 as of 12/31/92 and a line of credit to Valley Bank with a balance of \$34,391 as of 3/31/92.

Defendant would propose that plaintiff be allowed to receive this property at the appraised value subject to the two mortgage obligations and the payment to defendant of \$64,298 by April 15, 1993.

Both of the parties have expressed the opinion that the home is worth in excess of \$300,000 and if plaintiff does not desire or cannot exercise the above option, then the home should be listed and sold and after payment of first and second mortgages and costs of sale the net proceeds should be divided between the parties.

The house should be listed for sale by a real estate agent to be mutually agreed upon between the parties and at a price recommended by that real estate agent and with date of possession on sale not to be restricted based upon current cash needs of the parties.

2. Defendant consents that plaintiff can have the furniture and furnishings located in the family home for her benefit and the benefit of the minor children. Defendant would request the following items of personal property:
  - a. Access to all photographs for purposes of reproduction and/or duplicates.
  - b. All of defendant's personal property currently located in the home.
  - c. The equipment and personal property stored in the garage and under the tarp on the property.
3. At the temporary hearing it was agreed these pieces of statuary would be sold. The pieces should be placed in the hands of an art dealer on consignment and any net proceeds should be divided between the parties.
4. Kelly Blue Book average trade-in value.
5. Kelly Blue Book average trade-in value.
6. Value from plaintiff's Financial Declaration.

7. Value from plaintiff's Financial Declaration.
8. Value from plaintiff's Financial Declaration.
9. Plaintiff may retain the use of the snowblower so long as she resides at the Ranch Road residence. The snowblower is an asset of defendant's construction company and should be returned to defendant upon plaintiff moving from the Ranch Road home.
10. Per Financial Statement 12/31/92.
11. This was plaintiff's premarital asset.
12. Defendant will accept this interest subject to any liability.