

2004

Josephine M. Schovaers v. John C. Schovaers : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOSEPHINE M. SCHOVAERS,

Petitioner,

vs.

JOHN C. SCHOVAERS,

Respondent.

App. No. 20040973

BRIEF OF APPELLANT

**Appeal from the Final Order of the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Leslie A. Lewis, District Court Judge**

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JURISDICTIONAL STATEMENT

This court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(h).

ISSUES

I. Did the trial court err in awarding petitioner alimony in an amount creating a disparate standard of living and contrary to the evidence regarding petitioner's need and respondent's ability to pay? [Issue preserved in R. 343-76; 416-87; 501-31; 540-45; 546-57; 752-53; 764-65.]

Standard of Review: This Court reviews the trial court's findings of fact in an award of alimony for abuse of discretion. Bakanowski v. Bakanowski, 2003 UT App 357, ¶7, 80 P.3d 153. "Failure to consider these factors constitutes an abuse of discretion,' resulting in reversal 'unless pertinent facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor or judgment.'" Rehn v. Rehn, 1999 UT App 41, ¶6, 974 P.2d 306. With respect to a trial court's conclusions of law, this Court reviews an alimony award for correctness, according no deference to the trial court. Davis v. Davis, 2003 UT App 282, ¶7, 76 P.3d 716.

II. Was the trial court's failure to follow Utah Code Ann. § 30-3-5 in making its alimony award in error? [Issue preserved in R. 343-76; 416-87; 501-31; 540-45; 546-57; 752-53; 764-65.]

Standard of Review: With respect to a trial court's conclusions of law, this Court reviews an alimony award for correctness, according no deference to the trial court.

Davis v. Davis, 2003 UT App 282, ¶7, 76 P.3d 716.

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

- (8)(a) The court shall consider at least the following factors in determining alimony:
- (i) the financial condition and needs of the recipient spouse;
 - (ii) the recipient's earning capacity or ability to produce income;
 - (iii) the ability of the payor spouse to provide support;
 - (iv) the length of the marriage;
 - (v) whether the recipient spouse has custody of minor children requiring support;
 - (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and
 - (vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

* * *

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (8)(a). However, the court should consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. . . .

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

Utah Code Ann. § 30-3-5(8) (2003).

STATEMENT OF THE CASE

This case is on appeal from a bench trial held in August of 2003. At trial, the parties introduced evidence on the issues of alimony and property distribution. Only the trial court's ruling with respect to alimony is part of this appeal. Following trial, the parties' submitted proposed Findings of Fact and Conclusions of Law. The trial court entered a preliminary Memorandum Decision with its ruling based on the parties' submission. Thereafter, respondent filed post-trial motions for a new trial and to amend the findings. The trial court entered a subsequent written ruling, denying most of respondent's requested relief and adopting most of petitioner's proposed findings.

Ultimately, a final set of Findings of Fact and Conclusions of Law and a final Decree of Divorce were entered. From the final decree, respondent timely appealed the trial court's alimony award.

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STATEMENT OF FACTS¹

The parties were married on May 15, 1979. (Tr. at 6.) On April 18, 2001, the parties separated when petitioner decided to leave the marital home in order to move to Washington to teach. Anna was 15 years old and Andrea was 19 years old and both were living at home with the respondent. (Tr. at 26, 117.) Shortly thereafter, petitioner filed for divorce on June 25, 2001. (Tr. at 26.) At the time of trial in August, 2003, respondent was 49 (d/o/b 12/11/53) and petitioner was 50 (d/o/b 7/23/53). (Tr. at 5.) The parties had two children, Andrea, 22, (d/o/b 11/13/80), and Anna, 17, (d/o/b 1/29/86) at the time of trial. (Tr. at 5-6.) At the time the parties separated, both children still lived at home (Tr. At 117); at the time of trial, the youngest, Anna, was entering her senior year of high school and expected to graduate in June, 2004 (Tr. at 7-9). During the marriage and after moving from the parties' home, petitioner's relationship with the children deteriorated, and respondent remained with the children in the marital home.

¹Respondent challenges the trial court's alimony determination on three grounds: (1) as a matter of law, (2) as unsupported by sufficient findings, and (3) as unsupported by evidence at trial. In order to challenge the trial court's factual findings and insufficient findings, respondent must marshal the evidence at trial and the trial court's factual findings. In order to fulfill this obligation, respondent has summarized the evidence at trial that pertained to the alimony award with cites to the transcript, denoted by a cite beginning with "Tr.", whereas all cites to the record are denoted by "R." For the most part, however, respondent believes the alimony award is legal error for failure to comply with the requirements of Utah Code Ann. § 30-3-5 and case law interpreting those statutory requirements.

The parties met while working together at Schovaers Electronics in 1978. (Tr. at 11) Schovaers Electronics is family owned business which manufactures circuit boards for use in computers and electronic devices. The company was started by respondent's father in 1977. All stock is owned by members of the Schovaers family. (Tr. at 10-11.) At the time of marriage, respondent was Vice President of Schovaers Electronics and ran the manufacturing side of the business. (Tr. at 14.) At the time of trial, respondent was still Vice President. (Tr. at 16.)

Throughout much of the marriage, respondent worked from 7:00 a.m. until about 5:00 p.m. at the family business. For his work, respondent received a salary. (Tr. at 16-17.) At the time of trial, respondent had worked at Schovaers Electronics for 26 years and often worked as many as 60 to 70 hours a week. (Tr. at 17, 119.)

When the parties separated, the children remained with respondent in the marital home. Because petitioner no longer shared in the responsibilities of raising the parties' children, respondent had to decrease his hours to 40-50 per week and was required to take a pay cut because of the decreased hours. (Tr. at 119-123.) Although one child was over 18 and the youngest child would reach the age of emancipation shortly after the trial in the fall of 2003, respondent did not believe he could return to the 60-70 hour work week if he wanted to do so. Specifically, respondent testified that because of a

decrease in demand due to increased foreign competition, the family business did not have sufficient work to allow him to work 60-70 hours a week. (Tr. at 125.)

The only testimony offered indicated Schovaers Electronics' business has gone down. (Tr. at 122.) In 1999, Schovaer's Electronics lost \$14,000. (Tr. at 123, Ex. 49.) In 2000, the business lost \$23,400. (Tr. at 124; Ex. 50.) In 2001, the business lost \$20,500 (Tr. at 124; Ex. 51.) For the last half of 2002 and first 3 months of 2003, Schovaers Electronics has lost \$7,900 (Ex. 52-53; Tr. at 124.) Additionally, respondent still spends significant amounts of time raising the children since petitioner moved to Washington in August of 2002. (Tr. at 125.)

Respondent's Income as Ability to Pay:

Shortly before the parties' separation, respondent's salary from Schovaers Electronics peaked at approximately \$5700 per month gross. (Tr. at 29-31.) After separation when respondent decreased his hours in order to raise the children, his salary decreased to \$4,300 per month gross. (Tr. at 31-2, 67-68, 119-121; Ex. 41.) The testimony offered to support respondent's decrease in hours and corresponding reduction in pay was that his increased responsibilities at home were the cause, testimony which petitioner did not refute. (Tr. at 31-2, 67-68, 119-121; Ex. 41.) During the marriage, respondent

received only sporadic bonuses, with the largest bonus being received one month after the parties' marriage in 1979 for \$30,000. (Tr. at 34-35.)

In addition to the sporadic bonuses which were infrequently paid, respondent occasionally received gifts from his parents. (Tr. at 45.) The gifts to respondent were as high as \$10,000, but most were substantially lower with a few for \$5,000 (Tr. at 46) or as little as \$500 (Tr. at 46). After separation and after respondent's salary had decreased, respondent received occasional gifts from parents. (Tr. at 46.) In December, 2002, respondent received Christmas gift of \$5,000. (Tr. at 46; Ex. 43.)

During the marriage, the parties' joint gross income figures for 1998 (Ex. 36) and 1999 (Ex. 35), were \$93,056 (Tr. at 52-53) and \$98,830 (Tr. at 53); joint income for 2000 was \$93,596 (Tr. at 53). From 1998 through separation, the combined income was roughly \$94,000 per year (Tr. at 56.) Prior to that time, the parties' combined income was lower. (Tr. at 56)

In 2001, the parties filed separately and respondent's income was \$57,077. (Tr. at 54.) In 2002 (Ex. 38), respondent's income was 70,000. (Tr. at 56.) At the time of trial, respondent's salary was \$51,600, or \$4,300 gross per month with no anticipated increase (Tr. at 172); his net income after taxes was \$3,400 (Tr. at 172; Ex. 23). Respondent receives a net check of \$1,700 twice per month. (Tr. at 173; Ex. 25.)

Petitioner's Income:

Prior to the parties' marriage in 1979, petitioner worked at Schovaers Electronics as a silk screener. (Tr. at 108.) She also worked at Schmidt Signs as a silk-screener. (Tr. at 110.) About 9 months after marriage, petitioner stopped working at Schovaers Electronics by mutual agreement. (Tr. at 108-09.) Petitioner was pregnant and the parties' first child was born in November, 1980. (Tr. at 109-10.) Between 1980 and 1997, petitioner did not work and stayed at home to care for the parties' children. (Tr. at 111.)

In about 1991, petitioner decided to go back to school and she used inherited money and marital assets to pay for college. (Tr. at 112, 208.) Petitioner obtained a teaching certificate from Westminster College. (Tr. at 112.) Petitioner started working for Granite School District in January, 1998 (Tr. at 113) and then went to Jordan School District after one year at Granite (Tr. at 113, 208-9). Petitioner worked full time initially, but was offered history classes rather than the art classes she wanted to teach, so she switched to part-time at Jordan. (Tr. at 113-114, 209-11.)

With respect to the decision to teach part time, petitioner voluntarily stopped teaching history because she only wanted to teach art classes at Jordan. (Tr. at 270-274.) Shortly before the parties separated, petitioner voluntarily resigned from

teaching at Jordan. (Tr. at 274-75.) Additionally, petitioner sent a letter to the Jordan district withdrawing her name from any future teaching positions, indicating she could not accept a position in the school district because she was moving to Washington. (Tr. at 275-280.)

In Washington, petitioner works 25 hours per week at the Bon Marche' (a permanent position) and also as a substitute teacher at Everett School District. (Tr. at 214.) At the Bon Marche', petitioner receives \$11/hour and works about 25 hours a week, which equals about \$1,188 per month. (Tr. at 215, Ex. 85.) Since the beginning of 2003 through trial in August, 2003, petitioner substitute taught 7-8 times, for which she received \$1,035, or about \$130 monthly. (Tr. at 217-19; Ex. 87.) Since moving to Washington, petitioner has applied to various school districts, but has not received any teaching offers. (Tr. at 222-227.) Also, petitioner has applied for other jobs, but has received no offers. Her current salary, combining her work at the Bon Marche' and substitute teaching, is \$1,310 per month. (Tr. at 227-30.) Although petitioner has not found the teaching positions she hoped for in Washington, she is not considering moving back to Utah, even though the job prospects in Washington are bleak. (Tr. at 280-81.)

In 1999, petitioner's income was \$20,000 (Tr. at 54); and in 2000, her income was \$14,000 (Tr. at 54-55). At Jordan district, petitioner received \$24,022 in

2001 (Tr. at 220; Ex. 81); in 2002, she received \$18,525 (Tr. at 220; Ex. 82). Petitioner's income in 2002 was from both part-time teaching and working at the Bon and May stores. (Tr. at 220.)

Had petitioner remained in Utah and remained at Jordan school district she could have earned at least \$28,000 per year; the Jordan district pay scale of teachers who have been teaching for five years is \$28,000. (Tr. at 282; Ex. 99.) Although petitioner testified she did not like teaching history and was not certified to teach history, petitioner acknowledged she could accept a position teaching history as long as she took concurrent classes to get the required endorsement. (Tr. at 293-95.)

Respondent's Monthly Expenses:

With respect to respondent's monthly expenses, most of the figures were offered in the form of exhibits introduced at trial. (Tr. at 174, 185-90; Exs. 26, 91.) Exhibit 26 was the summary prepared by respondent, whereas exhibit 91 was a summary of respondent's expenses prepared by petitioner. (Tr. at 174, 185-90; Exs. 26, 91.) Ultimately, the trial court lowered several of Respondent's claimed expenses as excessive and determined his reasonable monthly expenses were \$2,187 per month. (R. at 336-337; 745-47; 807-810.)

Petitioner's Needs and Monthly Expenses:

During trial, the testimony regarding petitioner's expenses focused mainly on her standard of living after separation as compared to during the marriage. (Tr. at 259-66.) Much of this testimony, however, was inadmissible. (Tr. at 262-64.) Petitioner requested alimony to match the standard of living enjoyed during marriage, which she estimated required \$2500 per month. (Tr. at 259-66.) Similar to respondent's testimony, most of petitioner's testimony regarding her monthly expenses occurred through exhibits. (Tr. at 230, 287-90, Exs. 34, 98.) Exhibit 98 was petitioner's prepared summary of her expenses and exhibit 34 was an earlier financial declaration. (Tr. at 230, 287-290; Exs. 34, 98.) Ultimately, the trial court adopted petitioner's exhibit 98 as reflective of her reasonable monthly expenses. (R. at 805.)

Schovaers Electronics Stock:

At the time of trial, respondent owned 116 shares of Schovaers Electronics stock. (Tr. at 62.) Respondent received these shares as gifts from his parents over a ten year period (Tr. at 63; Ex. 47-48.) The stock was gifted at six different dates, with his parents fixing values to the stock at each date. (Tr. at 64, Ex. 47-48.) The first gift was for 35 shares, valued at \$16,873 per share as of March, 1985. (Tr. at 68.) On September 30, 1988, respondent received another 34 shares, valued at the time at \$584 per share. (Tr. at

69.) On December 16, 1991, respondent received another 13 shares, valued at \$1,491 per share. (Tr. at 69.) In April, 1992, respondent acquired another 13 shares, valued at \$1,503 per share. (Tr. at 69.) On October 15, 1993, respondent received 12 shares, valued at \$1,663 per share, and on December 22, 1995, he received 9 shares, valued at \$2,124 per share. (Tr. at 70.) Currently, respondent owns 116 shares (Tr. at 73) or 11.6 percent of Schovaers Electronics (Tr. at 71, 144-45).

John has five siblings (Tr. at 71-2): Bob who also owns 116 shares (Tr. at 73), Mary Jane who owns 40 shares (Tr. at 73), Susan who owns 40 shares (Tr. at 74), Judy who owns 116 shares (Tr. at 73), and Barabara who owns 48 shares (Tr. at 73). When the shares were gifted from the parents to the children, the parents made no indication that the shares were a form of compensation or tied to employment. (Tr. at 74.)

During trial, respondent objected to petitioner's attempt to fix values to the shares, which objection was sustained by the trial court. (Tr. at 68.) Specifically, petitioner attempted to elicit testimony fixing the value of respondent's 116 shares at least to \$2124 per share. Respondent objected to this attempt to value the shares and the objection was sustained. (Tr. at 79, 80) Respondent testified the shares were not a marital asset and indicated he had an expert to testify as to the value of the stock. (Tr. at 80-83.) The trial court indicated that, absent other foundation and testimony that the shares were a

marital asset, it did not need any further evidence as to value because the stock was not a marital asset which needed to be valued. (Tr. at 82-83.) Although petitioner testified that she believed the value of the stock was \$800,000 and that she owned an interest, the trial court never requested further testimony as to the present value of the shares, nor was any evidence as to present value offered. (Tr. at 68, 79-83, 239-241, 247-48.) Finally, no testimony was offered that the shares had any capacity to produce income.

SUMMARY OF ARGUMENT

The sole issue on appeal is whether the trial court erred in awarding petitioner alimony of \$2,000 per month. The trial court's award was motivated by its perception that the parties' post-separation lifestyles were skewed in respondent's favor. Accordingly, the trial court awarded alimony in an attempt to "equalize" the parties' standards of living. As the rulings and evidence indicate, however, the alimony award was excessive and not based on the evidence presented. Thus, the result was to provide petitioner far more income than she needed to meet her monthly expenses and to cause respondent to be unable to meet his expenses.

The undisputed facts indicate respondent's take home pay is \$3,400 per month. Indeed, the trial court specifically rejected petitioner's attempt to use a higher historical income figure. Nevertheless, the trial court ordered respondent to pay well over

half of his take home pay as alimony. The result is that respondent is left with \$1,400 per month to meet his living expenses, which the court lowered to \$2,187. Meanwhile, petitioner receives far more than her demonstrated need. As such, the alimony award is an abuse of discretion and should be reversed on appeal.

ARGUMENT

I. The Trial Court Erred in Awarding Petitioner Alimony of \$2000 Per Month Where the Award Is Not Supported By Adequate Findings, Is Not Supported By Evidence and Is Not Legally Correct.

A. The Trial Court Did Not Make Adequate Findings.

The trial court's findings are inconsistent with the evidence presented at trial and are insufficient to support an alimony award of \$2000 per month. The trial court made the following findings: the trial court determined respondent's gross monthly income is \$4,300 per month (R. at 333, 746, 794, ¶19); at the time of trial, petitioner's gross monthly income was \$1,380.00 per month (R. at 745, 795, ¶24) and the court imputed income to her of \$1,649.00 per month (R. at 745, 796, ¶30); the trial court lowered respondent's claimed monthly expenses to \$2,189.00 per month (R. at 807-10, ¶¶96-97), and finally, the trial court made no findings as to petitioner's reasonable monthly expenses, except to adopt by reference an exhibit with her claimed monthly expenses (R. at 791-813).

In making an alimony award, the trial court is required to make findings for each of the statutory factors set forth in Utah Code Ann. § 30-3-5; i.e., the needs of the recipient spouse; the earning capacity of the recipient spouse; the ability of the obligor spouse to provide support; and, the length of the marriage. See Rehn v. Rehn, 1999 UT App 41, ¶6, 974 P.2d 306. The failure to make these findings constitutes an abuse of discretion and is reversible error. Simply making these findings, however, is not necessarily sufficient. “[T]he trial court must make detailed findings on all material issues, i.e. the Jones²¹ factors, which ‘should . . . include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.’” Id. (quoting Stevens v. Stevens, 754 P.2d 952, 958 (Utah Ct. App. 1998)). Respondent challenges the trial court’s determinations regarding his ability to pay and petitioner’s need.

i. Respondent's Ability to Pay.

As to Respondent’s ability to pay, the trial court is required to make specific findings: “‘simply stating [the obligor’s] earnings does not amount to an adequate finding of fact as to his ability to provide support. To be sufficient, the findings should also

²¹Jones v. Jones, 700 P.2d 1072 (Utah 1985).

address [the obligor's] needs and expenditures, such as housing, payment of debts, and other living expenses.'" Rehn, 1999 UT App 41 at ¶10 (quoting Baker, 866 P.2d at 547).

The fatal flaw in the trial court's determination of respondent's ability to pay can be traced through the trial court's post-trial rulings which culminated in the final Findings of Fact and Conclusions of Law. The only issue as to respondent's income concerned his voluntary reduction in hours and corresponding decrease in pay. During the trial, respondent was questioned regarding the reduction in his hours after the parties' separation. (Tr. at pp. 17, 119-123, 125, 205-06.) Although petitioner presented evidence that respondent's hours worked and income decreased at the time of separation, the credible evidence presented justified respondent's decreased hours. Specifically, respondent's work time decreased from between 60-70 hours per week to approximately 40-50 hours per week by necessity. (Tr. at pp. 17, 119-123, 125, 205-06.) Petitioner had traditionally cared for the parties' children, but at separation, petitioner voluntarily moved out of the marital home, stopped caring for the parties' children and indicated she was moving to Washington. (Tr. at 117, 119-23, 277-81.) Consequently, respondent was forced to decrease his hours in order to provide care for the children. (Tr. at 119-23.)

Additionally, since separation, respondent offered unrefuted testimony that his family's electronic business had experienced a downturn in demand. (Tr. at 119-23,

125.) Even if respondent did not have to decrease his hours to care for the children, the evidence indicated the family electronic business did not have enough work to sustain respondent at the same workload as during the marriage. (Tr. at 119-23, 125.)

After trial, the court ordered both parties to submit proposed findings for the court's consideration. Petitioner submitted her proposed findings and included findings which indicated respondent was voluntarily underemployed. (R. at 334.) In the first post-trial Memorandum Decision dated October 31, 2003, the trial court rejected petitioner's findings which suggested respondent was underemployed. (R. at 334.) Specifically, the trial court stated:

The petitioner is to amend Finding of Fact No. 20 and delete Finding No. 21 to reflect that the respondent's pay was reduced from approximately \$6,000 per month to \$4,300 per month (gross) because of a reduction in work hours necessitated by his having to assume all of the parenting and household responsibilities. In other words, both Findings imply that the respondent was earning less than he was capable of. The testimony does not bear this out and the Court makes no such Findings.

(R. at 334, ¶1 (Emphasis Added.)) Accordingly, the trial court unequivocally found that respondent was not underemployed. Thus, the trial court's alimony award was based on respondent's current income of \$4,300 gross per month. (R. at 794, ¶19.) After taxes,

respondent's net take home pay is \$3,400 per month. Once the alimony obligation is deducted, respondent is left with only \$1,400 to meet his monthly expenses.

The second component of respondent's ability to pay requires consideration of respondent's own monthly expenses. In reviewing respondent's claimed expenses, the trial court substantially lowered respondent's claimed expenses and found his reasonable monthly expenses were \$2,189. Accordingly, after paying his alimony obligation, respondent is left with a monthly shortfall of almost \$800. In contrast, petitioner receives \$2,000 per month plus her actual earned income of \$1,380 (notwithstanding the fact that the trial court imputed income of \$1,649 per month). Thus, petitioner has \$3,380 per month to live on³, and respondent has \$1,400. The trial court's alimony award does not equalize the parties income, but rather results in a major discrepancy in petitioner's favor. As such, the trial court's alimony award was in error and an abuse of discretion.

Respondent did not decrease his hours to an unreasonably low amount, nor did his compensation decrease to unusually low level. The Utah Supreme Court has previously determined that a spouse whose hours decreased to 50 hours per week and who was still adequately compensated by the family business was not voluntarily

³Of course, the \$3,380 is a gross figure. Nevertheless, after taxes are taken out, petitioner's net take home is about double what respondent has to live on after he pays alimony.

underemployed. See Griffith v. Griffith, 1999 UT 78, ¶18, 985 P.2d 255. Additionally, this Court previously found a husband's decision to stop working in order to care for the children and because of age related issues was reasonable and not grounds for a determination of voluntary underemployment. See Endrody v. Endrody, 914 P.2d 1166, 1170 (Utah Ct. App. 1996). Moreover, the trial court found respondent's testimony credible on the reduction in pay and declined petitioner's invitation to base alimony on respondent's historic income. (R. at 334.) Absent the required findings and considering the evidence presented at trial to support respondent's decision to decrease his hours from 60-70 to 40-50 hours per week, no basis exists to conclude respondent is voluntarily underemployed or could receive more compensation for his work even if he decided to return to 60-70 hours per week.

Although respondent decreased his hours at work after the parties separated, it is undisputed respondent continues to maintain full time employment of approximately 40 to 50 hours per week. (Tr. at pp. 17, 119-123, 125, 205-06.) With the 10 to 20 hour a week decrease, respondent's income decreased from approximately \$72,000 per year to \$51,600 at the time of trial. (R. at 794-95, ¶¶19, 21.) After taxes, respondent's net take home pay is \$3,400. (Tr. at 172-73; Ex. 23, 25.) From that \$3,400, the trial court ordered respondent to pay \$2000 per month in order to "equalize" incomes. The trial court's

alimony order has the effect of leaving respondent \$1,400 per month to live on, while petitioner receives \$3,380 per month in gross income (\$2,000 + \$1,380 (actual income, not imputed income) = \$3,380). Even after taxes are figured into petitioner's income, petitioner's net monthly income is substantially higher than respondent's. After factoring in petitioner's claimed monthly expenses of \$1743 and taxes, petitioner is left with approximately \$1,000 per month in discretionary income. On the other hand, respondent is left with an \$800 shortfall.

The trial court's alimony award is based on respondent's gross take home pay of \$4,300 per month. After taxes and alimony, respondent does not have enough money to meet his basic monthly expenses. An alimony award which fails to account for respondent's ability to pay is an abuse of discretion and fails as a matter of law. Because the trial court ordered respondent to pay more than he could afford, the alimony award cannot be sustained as a matter of law.

ii. Petitioner's Need.

The trial court abused its discretion by failing to make any detailed findings as to petitioner's actual need for alimony to meet her monthly expenses. Addressing need, this Court has stated: "As to the first factor, we stated in Baker that a trial court may not 'merely restate [the recipient spouse's] testimony [regarding] her monthly

expenses” Rehn, 1999 UT App 41 at ¶7 (quoting Baker v. Baker, 866 P.2d 540, 546 (Utah Ct. App. 1993)). In other words, Rehn, Baker and Stevens require the trial court to independently assess petitioner’s stated expenses, evaluate them in light of the evidence produced, make detailed factual findings which disclose the trial court’s consideration of the evidence and the steps used to reach the findings and to set forth the findings without simply restating petitioner’s testimony. As the evidence and findings indicate, the trial court failed to meet this standard. Specifically, the trial court violated the mandate in Rehn by making no independent findings and merely adopting wholesale petitioner’s stated need.

The trial court made no specific findings as to petitioner’s actual needs. Instead, the trial court made the following observations: (1) since separation, petitioner has not been able to maintain the standard of living the parties enjoyed while married; (2) since separation, petitioner has lived a "spartan" existence; and (3) since separation, petitioner has had to cut back on her discretionary spending. (R. at 805-06, ¶¶89-93.) These general observations are not sufficient to replace the specific findings required by Utah law.

When coupled with the trial court’s erroneous determination of respondent’s ability to pay, the trial court’s deficient findings as to petitioner’s need result in an

unsupportable alimony award. In this case, the trial court made no findings as to what petitioner's actual demonstrated need is. The only finding which remotely addresses petitioner's expenses is paragraph 90, which provides: "The amounts that Ms. Schovaers current [sic] claims to be spending for basic necessary living expenses are set forth in Exhibit #98." (R. at 805, ¶90.) Exhibit #98 lists petitioner's monthly expenses as \$1,743 per month. Instead of a specific finding, the trial court made general observations that petitioner needed alimony in order to raise her standard of living to a level comparable to that of respondent's. Those findings, however, are insufficient. As Utah law indicates, the trial court needed to make an actual determination of petitioner's unmet need for purposes of calculating an appropriate award. Without this finding, the alimony award provides petitioner income well in excess of her actual need while causing the respondent at least an \$800 shortfall.

With respect to the substantial alimony award, the trial court's award appears to be premised on equalizing income and restoring petitioner to the standard of living she enjoyed while the parties were married. The trial court's early rulings were all based on the perception that respondent enjoyed a superior lifestyle and petitioner's lifestyle was meager. (R. at 336-37, 745-47.) The trial court's post trial rulings and ultimate Findings of Facts and Conclusions of Law, however, fail to articulate what

petitioner's actual expenses and/or need is for alimony. (R. at 333-339, 742-49,791-821A.)

Based on the only findings made by the trial court as to petitioner's expenses compared with her income, the petitioner's unmet need would be \$1,743 - \$1,649 (imputed income) = \$94. If petitioner's actual monthly income is used, rather than the imputed income, her unmet need is still only \$363 per month (\$1,743 - \$1,380). Either figure is a far cry from the \$2,000 alimony award made by the trial court.

It is undisputed that the parties' income since separation has decreased—by virtue of petitioner's voluntary underemployment and respondent's decrease in income as a result of caring for the parties' children and slow down in his family's business—while the parties' expenses have increased by virtue of the necessity of maintaining two residences. The testimony indicates that at its height during the marriage the parties' joint income did not exceed \$92,000.00 gross per year. (R. at 795-96, 804, ¶¶21, 27, 86.) With the alimony award and imputed income, petitioner's gross income is approximately half of the parties' highest yearly income during the marriage, which is \$46,000. (R. at 811, ¶106.) The evidence and findings demonstrate that the parties no longer earn \$92,000 per year, nor are they capable of earning that amount. In fact, not taking into account the income imputed to petitioner, the parties current joint income is \$68,160 (\$51,600 +

\$16,560 = \$68,160). Accordingly, with the alimony award, petitioner receives roughly 2/3 of the parties' combined gross income. (R. at 811.)

Notwithstanding the trial court's attempt to equalize income, the trial court made no findings as to petitioner's actual need as required by Utah Code Ann. § 30-3-5. As set forth above, the trial court only made findings as to the parties' standard of living during the marriage. This is not sufficient. Moreover, these findings are especially deficient in this case where the parties' historic income levels do not support an equalized alimony award. Equalization is typically appropriate in cases where the payor spouse's income is substantially higher than the recipient spouse's income and also substantially higher than the payor spouse's need. In that circumstance where the payor spouse has substantial discretionary income, it may be appropriate to equalize the parties' income to lessen the disparity and provide lifestyles more consistent with that during the parties' marriage.

The evidence in this case does not support an award of alimony to equalize the parties' income. Although the parties enjoyed a comfortable lifestyle during marriage, it cannot be said that the parties had substantial amounts of discretionary income. After separation, both parties' incomes decreased while the parties' combined expenses increased. Quite simply, neither party is able to enjoy the standard of living they had

during the marriage. An alimony award based on no findings as to the recipient spouse's actual need is not appropriate. Because the trial court did not make the required finding of petitioner's actual need, the alimony award is an abuse of discretion and reversible error as a matter of law.

iii. Income from Other Sources.

Finally, the trial court made no findings to support a conclusion that respondent had income from other sources which would assist in his ability to pay. (R. at 810.) The trial court made a finding which indicated that it was awarding respondent all of the stock in the family's electronics business as his separate property. (R. at 801, ¶¶56-57.) The trial court, however, made no findings as to how this stock would supplement respondent's income. (R. at 747, 800-01, 810.) Indeed, no evidence was presented to suggest the shares produced any income or dividend. (Tr. at 63-74, 80-83, 239-41, 247-284.) In fact, no evidence was presented as to the actual value of the shares. (Tr. at 79-83.) Petitioner did introduce evidence as to the value respondent's parents fixed to the shares at various points in time, but that evidence was inadmissible. (Tr. at 79-83.) Petitioner, however, offered no evidence to show a current value for the shares. (Tr. at 79-83)

On the other hand, Respondent offered testimony and argument which indicated the value of the shares was minimal. (Tr. at 79-83, 239-41, 247-48) Indeed, respondent offered to provide expert testimony regarding the value of the shares. The trial court, however, declined this invitation because she indicated she was inclined to rule the stock was not a marital asset. (Tr. at 79-83.) In the Findings of Fact, the trial court's only statement on income from the shares of stock is as follows: "Furthermore, Mr. Schovaers' ability to pay alimony of at least \$2,000 per month is bolstered by the fact that the Court is awarding Mr. Schovaers all of the Schovaers Electronics stock which is worth hundreds of thousands of dollars. Thus, Mr. Shovaers clearly has the financial ability and resources to pay alimony of a least \$2,000 per month." (R. at 810, ¶100.)

This unsupported factual finding is simply an insufficient basis upon which to determine respondent has additional income to pay alimony. The stock is issued from a closely held family business. The stock has little value to persons outside the family and is, by the terms of the gift from the parents, non-transferable. Furthermore, the stock has never paid a dividend or generated any income stream.

In addition to not generating any income, an alimony award premised on the use or sale of a non-marital asset is inappropriate. In certain circumstances, alimony may be enhanced because the obligor spouse is awarded an asset which enhances the spouse's

earning capacity. See, e.g., Sorensen v. Sorensen, 839 P.2d 774, 776 (Utah 1992) (finding husband's dental practice was not a marital asset but noting the alimony award was enhanced due to the amount husband earned as income from the practice); see also Petersen v. Petersen, 737 P.2d 237, 242 (Utah Ct. App. 1987). In those cases, however, the asset enhances the obligor spouse's income and therefore increases the spouse's ability to pay. In this case, the asset does nothing to enhance respondent's income. To the extent the alimony award contemplates he could sell the stock to pay alimony, the award is legally flawed because no Utah case has held a spouse should sell a non-marital asset in order to pay alimony, which is not otherwise sustainable based on that spouse's actual earning capacity. In effect, an alimony award premised on sale of an asset would be a property distribution rather than alimony. Since the court has determined the stock is not a marital asset, the backdoor property distribution through heightened alimony amounts to legal error.

B. Given the Lack of Findings to Support the Award and Flawed Reasoning, the Trial Court Erred When It Arrived at an Award Which Created a Disparate Standard of Living.

The trial court committed legal error when it awarded petitioner alimony of \$2000 per month when respondent has no ability to pay this amount and petitioner has no demonstrated need for this amount. In this case, the trial court appeared to simply attempt

to equalize the parties' incomes, which it ultimately failed to do. The failure of the trial court to consider the statutory factors and instead to equalize income was error. See Bakanowski v. Bakanowski, 2003 UT App 357, ¶12, 80 P.3d 153. Indeed this Court has indicated a trial court should not award a spouse more than her established need "regardless of the [payor spouse's] ability to pay" that amount, and "the spouse's demonstrated need must, under Jones, constitute the maximum permissible alimony award." Id.

For the reasons set forth above, the trial court's alimony award is legally flawed in failing to consider the required statutory factors. Additionally, assuming the statutory factors were considered and the findings sufficient, the award cannot be sustained because it legally incorrect. The alimony award creates a large discrepancy in the parties' incomes and creates a circumstance where respondent cannot meet his basic monthly expenses.

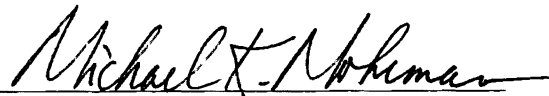
CONCLUSION

Based on the foregoing facts and authorities, respondent respectfully requests this Court reverse the trial court's alimony award and enter an Order granting such other and further relief as the Court deems appropriate. Respondent acknowledges that appropriate relief in this instance may be a remand to the trial court with instructions

to enter an appropriate alimony award based upon sufficient findings, which may require the trial court to receive new evidence.

DATED this 7 day of July, 2005

RICHARDS, BRANDT, MILLER
& NELSON


MICHAEL K. MOHRMAN
ZACHARY E. PETERSON
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, and as otherwise indicated below, on this 7 day of July, 2005, to the following:

Kim M. Luhn
SCHMID & LUHN
68 South Main, Suite 800
Salt Lake City, Utah 84101
Attorney for Petitioner/Appellee

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Electronic Facsimile

Michael T. Ahuma

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ADDENDUM

FILED DISTRICT COURT
Third Judicial District

OCT 31 2003

SALT LAKE COUNTY

By Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOSEPHINE M. SCHOVAERS,	:	MEMORANDUM DECISION
Petitioner,	:	CASE NO. 014903735
vs.	:	
JOHN C. SCHOVAERS,	:	
Respondent.	:	

This matter came before the Court for a bench trial which concluded on August 26, 2003. At the conclusion of counsels' closing arguments, the Court asked the respective counsel to submit their proposed versions of the Findings of Fact and Conclusions of Law. The Court then took the matter under advisement. The petitioner filed her proposed Findings of Fact and Conclusions of Law on approximately September 16, 2003. The respondent submitted his proposed Findings of Fact and Conclusions of Law on approximately September 30, 2003. The Court has carefully considered these proposed Findings, together with the pleadings that have been filed in this matter, the testimony that was adduced at trial, the trial exhibits that were received into evidence and counsels' arguments. Being now fully advised, the Court rules as herein stated.

LEGAL ANALYSIS

As the Court mentioned above, both sides submitted their proposed versions of the Findings of Fact and Conclusions of Law. After carefully reviewing each of these, the Court concludes that the petitioner's version more closely comports with the rulings that the Court made during the trial and the rulings that the Court will make herein. The Court generally adopts the petitioner's Findings and Conclusions, with the addition of the following rulings and amendments:

1. The petitioner is to amend Finding of Fact No. 20 and delete Finding No. 21 to reflect that the respondent's pay was reduced from approximately \$6,000 per month to \$4,300 per month (gross) because of a reduction in work hours necessitated by his having to assume all of the parenting and household responsibilities. In other words, both Findings imply that the respondent was earning less than he was capable of. The testimony does not bear this out and the Court makes no such findings.

2. The petitioner discusses the parties' house and real property at 1888 Spring Lane, Salt Lake City, Utah, in Finding Nos. 33 through 41. The petitioner is to re-draft these Findings first to simplify them and second, to incorporate paragraph 5(a) of the respondent's proposed Findings of Fact and Conclusions of Law. The Court concludes that the respondent's version in this respect is

the more accurate version of the Court's ruling on the house and the division of the proceeds upon the sale of the house. The Conclusions of Law should similarly be edited.

3. At Finding Nos. 46 to 60, the petitioner discusses the respondent's stock in Schovaers Electronics. The Court rules in favor of the respondent on the issue of whether this stock constitutes employment compensation or a gift from the respondent's family. Based on the totality of evidence before it, the Court concludes that the stock was not intended to be a marital asset, but rather a discrete gift to the respondent from his family. In reaching this decision, the Court particularly focused on the fact that all of the stock was gifted strictly to the respondent and there was no commingling of this stock with the remaining marital assets. Accordingly, the petitioner is to re-draft her proposed Findings and Conclusions to reflect this ruling.

4. At Finding Nos. 61 through 64, the petitioner discusses the division of the parties' vehicles. The Court now rules that there is to be an adjustment of value in the vehicles (i.e. between the \$11,175 value of the Jeep which the petitioner has been awarded and the \$1,500 Ford truck that the respondent has been awarded). The petitioner is to incorporate this ruling into the aforementioned Findings. The Conclusions of Law should similarly be edited.

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MEMORANDUM DECISION

5. Beginning at Finding No. 71, the petitioner sets forth the findings which provide the basis for an award of alimony. The Court adopts these Findings in full, with the addition that this is a classic case where alimony should be awarded. This is a marriage that is long in duration and wherein the parties' respective incomes are greatly disparate. Credible evidence was presented to the Court that the petitioner agreed to forego employment and educational opportunities for the purpose of staying at home to raise the parties' children and to facilitate or enable the respondent's ability to work extensive hours at his family's business. The result was that the respondent was able to dedicate himself to that business and earn a salary which provided a "high-end" lifestyle for the parties and their children. In sharp contrast to this lifestyle, the petitioner now lives in what can only be described as a meager existence. By her own account, the petitioner's standard of living has significantly diminished.

Clearly, the petitioner has unmet financial needs and the respondent has a demonstrated ability to assist her in terms of paying her alimony. In evaluating the respondent's ability, the Court particularly focused on the fact that the respondent greatly inflated his claimed expenses. Therefore, after evaluating the parties' total financial picture and taking into account their

SCHOVAERS V. SCHOVAERS

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MEMORANDUM DECISION

respective income levels in light of their reasonable expenses and the lifestyle enjoyed during the marriage, the Court determines that alimony is properly set at \$2,000 per month.

1. The petitioner is to re-draft her proposed Findings and Conclusions to reflect this ruling.

2. The petitioner is to delete Finding No. 103 because the Court does not find that the respondent has the financial ability to pay \$3,000 per month. Instead, the Court adopts the analysis of Finding No. 106, which appropriately finds that alimony in the amount of \$2,000 would raise the petitioner's standard of living to approximately what she enjoyed during the parties' marriage.

3. The Court is unclear on how the petitioner arrived at her figures in Conclusion Nos. 25 and 26. The Court's notes indicate that together with the Court, the parties' calculated that the petitioner was entitled to \$12,549.50 out of the parties' Bank and Investment Accounts. The petitioner is to correct her figures to reflect the amounts discussed at the conclusion of trial in reaching the figure of \$12,549.

Counsel for the petitioner is to submit an amended version of the Findings of Fact and Conclusions of Law and a Divorce Decree which comport with this Memorandum Decision. While the Court believes that this Memorandum Decision resolves all of the issues taken under advisement by the Court, if there remain any

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MEMORANDUM DECISION

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 31 day of October, 2003:

Frank N. Call
Attorney for Petitioner
68 S. Main, Suite 701
Salt Lake City, Utah 84101

B. L. Dart
Attorney for Respondent
370 E. South Temple, Suite 400
Salt Lake City, Utah 84111

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FILED DISTRICT COURT
Third Judicial District

APR 20 2004

SALT LAKE COUNTY
By _____ Deputy Clerk

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

JOSEPHINE M. SCHOVAERS,	:	COURT'S RULING
Petitioner,	:	CASE NO. 014903735
vs.	:	
JOHN C. SCHOVAERS,	:	
Respondent.	:	

This matter comes before the Court in connection with the respondent's dual Notices to Submit seeking rulings on (1) the respondent's Rule 52(b) Motion to Amend Findings and Rule 59(a) Motion for New Trial and Rule 59(e) Motion to Alter or Amend Judgment; (2) the petitioner's Proposed Findings of Fact and Proposed Decree of Divorce; and (3) the respondent's Objections to Petitioner's Proposed Findings of Fact and Conclusions of Law, dated January 7, 2004. The Court notes that there is also a pending Motion for Relief from Entry of Findings of Fact, Conclusions of Law and Decree of Divorce Pursuant to Rule 60(b)(6) of the Utah Rules of Civil Procedure. While this Motion has not been fully briefed, the Court will discuss the merit of the same herein. Further, the Court notes that the parties have requested oral argument on the foregoing matters. At this juncture, the

Court is not inclined to grant a hearing because the parties' written submissions adequately detail their respective positions. Therefore, the request for hearing is denied.

At the outset, the Court notes that after issuing its Memorandum Decision on October 31, 2003, the procedural posture of this matter unfortunately became increasingly convoluted, crescendoing with the recently filed Motion for Relief. In order to address both the procedural and substantive matters raised by the various pending Motions, Objections, and proposed Findings, Conclusions and Decrees, the Court again carefully reviewed the file in this matter (in its entirety), the relevant exhibits that were accepted into evidence at trial, the Court's own notes on the trial testimony and counsels' arguments and the transcript of the closing arguments, which counsel graciously provided to the Court. Having done so, the Court addresses each of the pending Motions and Objections in turn.

The Court begins with the respondent's Motion to Amend and for New Trial and to Alter or Amend Judgment. First, the respondent raises the concern that the Court issued its Memorandum Decision without having considered his Proposed Findings and Conclusions. To be clear, as the Court specifically indicated in the initial paragraph of its Memorandum Decision, both sides' proposed Findings and Conclusions were carefully considered by the Court. Further,

while there appears to be a discrepancy in the filing date of the respondent's Proposed Findings and Conclusions (i.e. September 30, 2003, rather than September 16, 2003, when they were actually submitted), the Court has no doubt that they were in fact considered.

In addition, the respondent places much emphasis on the Court's inadvertent reference to paragraph 5(a) of the respondent's Proposed Findings and Conclusions. As the respondent astutely notes, the Court was intending to incorporate paragraph 5(a) of the respondent's proposed Decree of Divorce, instead of the proposed Findings and Conclusions. However, this error should not in any way be interpreted to suggest that the Court did not have the respondent's proposed Findings and Conclusions and that she was relying only on the respondent's proposed Decree of Divorce. To reiterate, both sides' proposed Findings and Conclusions were thoroughly considered.

Having made this clarification, the Court proceeds to address the respondent's arguments that the Court erred in its analysis relating to the issue of petitioner's alimony and in setting the appropriate amount of child support. With respect to alimony, the respondent maintains that the Court should not have awarded the petitioner any alimony despite the clear indication (which the Court articulated both during the trial and in its Memorandum

Decision) that this was a "classic alimony" case. The Court concludes that the respondent's position is both legally and factually flawed.

First, the respondent takes issue with the Court's finding that the petitioner has a gross monthly income from all employment of \$1,380 per month. To clarify, the Court's alimony analysis was not based on this figure. Rather, the Court focused on the historic income information for the petitioner, found in Exhibit 89, which indicated that her average gross monthly income for the years 1998 through 2002 was \$1,649.00. Therefore, to the extent that the petitioner's proposed Findings can be construed as basing the award of alimony on the figure of \$1,380, those Findings should be edited to reflect the Court's clarification herein.

Further, the respondent has erroneously interpreted this Court's suggestion (not ruling) during the trial that the petitioner's income would be set at least at the level of what she would be earning in Salt Lake if she were still teaching here. The respondent extrapolates from this suggestion that the Court must have been adopting Exhibit 99, which would place the petitioner's income at \$2,683 per month. The respondent's child support figures are also based on this monthly income.

While the Court did not expressly state this in its Memorandum Decision, it was not persuaded that the petitioner's earning

capacity could be judged by the traditional salary schedule represented in Exhibit 99. Rather, as indicated above, the Court was relying on the historic income information provided in Exhibit 89 because it found these figures to better reflect the reality that even when she was working as a full-time teacher, the petitioner never earned more than \$22,969.00 per year.

Moreover, in awarding alimony, the Court particularly focused on the respondent's expenses. During the trial, the Court made some tentative reductions in these expenses that would bring them to a more appropriate and reasonable level. Although the respondent relies in large part on these reductions, the Court emphasizes that these were only tentative and were subject to the Court's revision after it took the matter under advisement. In fact, after doing so, the Court was able to closely examine the totality of the respondent's claimed expenditures in light of the fact that Ana would soon be emancipated. Based on this examination, the Court concluded that the petitioner's Finding of Fact 98, which further reduced the respondent's expenses to \$2,189, was accurate and should be adopted.

Finally, the respondent argues that he has no ability to pay the alimony awarded by the Court on his gross monthly income of \$4,300. Given that his reasonable expenditures are only \$2,189, the respondent does have the ability to pay the \$2,000 alimony

award. Further, the respondent's argument completely ignores the fact that the Court awarded the respondent the entirety of the Schovaers Electronics stock, which was potentially valued in the hundreds of thousands of dollars. The Court is not persuaded that simply because this stock has no defined dividend or income stream, it should be ignored entirely in assessing ability to pay. The stock and the interest it represents is a valuable asset which cannot be overlooked when considering the totality of the respondent's overall financial condition and ability to pay.

Overall, the Court remains convinced that the alimony awarded by it was neither improper nor excessive. Further, the amount of child support proposed by the respondent is based on an incorrect set of figures. The foregoing clarifications regarding the actual figures relied on by the Court should make this point clear. Therefore, the Court denies the respondent's Motion to Amend, Motion for New Trial and Motion to Alter in the entirety. (Counsel for the petitioner is to prepare an Order on the denial of these Motions which is consistent with this Court's Ruling).

That brings the Court to the current status of this case. After reviewing the file and the respondent's Motion for Relief from Entry of Findings, there appears to be a consensus among the parties and counsel that the Court's entry of the petitioner's amended Findings of Fact, Conclusions of Law and Decree of Divorce

was unanticipated. The Court concurs that the entry of these documents may have been premature, given the pendency of the Motions addressed herein and the respondent's Objections. Therefore, the Court grants the respondent's Motion for Relief and vacates the Findings, Conclusions and Decree entered by the Court on December 23, 2003. Counsel for the respondent is to prepare an Order vacating the same.

Instead, the Court would like counsel to reevaluate both the final version of the petitioner's amended Findings, Conclusions and Decree and the respondent's Objections thereto in light of the clarifying statements and the decision made herein. Counsel should confer and attempt to work out any final Objections posed by the respondent in light of this Court's Ruling. If any Objections remain, the Court requests that counsel submit (1) a copy of the **final amended** version of the petitioner's proposed Findings, Conclusions and Decree; (2) a copy of the remaining Objections to the Court's law clerk; and (3) the petitioner's response thereto, to the Court's law clerk, Alexandra C. Doctorman.

Dated this 20 day of April, 2004.

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LESLIE A. LEWIS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Court's Ruling, to the following, this 26 day of April, 2004:

Frank N. Call
Attorney for Petitioner
68 S. Main Street, Suite 701
Salt Lake City, Utah 84101

B. L. Dart
Attorney for Respondent
370 E. South Temple, Suite 400
Salt Lake City, Utah 84111

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FILED DISTRICT COURT
Third Judicial District

SALT LAKE COUNTY

By M. Smith Deputy Clerk

JOSEPHINE M. SCHOVAERS,)	FINDINGS OF FACTS
)	&
Petitioner,)	CONCLUSIONS OF LAW
)	(Amended as per Court's 4/20/04 Ruling)
vs.)	
)	Case # 014903735
JOHN C. SCHOVAERS)	
)	Judge Leslie Lewis
Respondent.)	Commissioner Casey

On August 25-26, 2003, the Court conducted a trial in the above-captioned matter. Petitioner, Josephine M. Schovaers (“Ms. Schovaers”), was present and represented by her attorney Frank N. Call. Respondent, John C. Schovaers (“Mr. Schovaers”), was present and represented by his attorney Bert L. Dart. Both Mr. Schovaers and Ms. Schovaers were called and testified as witnesses. Various exhibits were offered and admitted into evidence. On October 31, 2003, the Court issued a *Memorandum Decision* that set forth the Court’s ruling in this matter. On December 23, 2003, the Court signed and entered findings, conclusions and a decree of divorce (collectively referred to as the “Initial Findings & Decree”). However, the Court later

vacated the Initial Findings & Decree in order to address objections and motions that had been made prior to the Court's entry of those documents. Having now addressed and ruled upon those objections and motions in the *Court's Ruling* of October April 20, 2004, the Court intends these written findings of facts and conclusions of law, and decree of divorce that is to be entered pursuant to these findings and conclusions (collectively referred to as the "Final Findings & Decree") to be and set forth Court's final decision and rulings in this matter. The Court notes that, since trial and issuance of the Initial Findings & Decree, the parties have complied with the Court's instruction concerning sale of the parties' home and that the parties have stipulated to various additional matters that are noted and set forth herein.

As a final note of introduction, Anna, the parties' daughter, has become emancipated since the time of trial and issuance of the Initial Findings & Decree. Thus, pursuant to an agreement of the parties, the Final Findings & Decree have been modified from the Initial Findings & Decree so as to omit orders relating to Anna's ongoing support and/or custody as those issues are now moot. However, nothing in the Final Findings & Decree is intended to alter the Court's prior rulings and orders relating to the parties' respective obligations and rights with regard to Anna while she was a minor.

Based on the evidence, testimony and arguments presented to the Court during the trial, the Court makes and issues the following:

FINDINGS OF FACT

1. At the time of trial, Ms. Schovaers was 50 years of age and was residing in Lake Stevens, Washington.

2. At the time of trial, Mr. Schovaers was 49 years of age and was residing in Salt Lake County, Utah.

3. At the time of the filing of the *Petition for Divorce* in this case, both parties were residing in Salt Lake County, Utah, and had been doing so for more than one year.

4. Ms. Schovaers and Mr. Schovaers were married to each other in Utah on May 15, 1979.

5. At the time of trial, the parties had been married for more than 24 years.

6. After their marriage, the parties lived and resided together in Utah until the time of their separation.

7. The parties separated and began living apart from each other in about April or May of 2001.

8. Irreconcilable differences have arisen which prevent the parties from maintaining a viable marriage.

9. The parties have agreed that they should be granted a decree of divorce on the ground of irreconcilable differences.

10. The parties have had two children born as issue of their marriage: Aundrea Schovaers (D.O.B. 11/13/80) ("Aundrea"); and Anna Schovaers (D.O.B. 1/29/86) ("Anna").

11. Aundrea was an adult at the time of the filing of the *Petition for Divorce*.

12. At the time of the filing of the *Petition for Divorce*, and at the time of trial, Anna was a minor.

13. Anna has resided in Utah at all relevant times and was, at the time of trial, residing

with Mr. Schovaers.

14. Utah is Anna's home state pursuant to U.C.A. §78-45c-201.

15. There are no other cases relating to Anna pending before any court of this state, or any court of any other state.

16. The parties agreed that they should have joint legal custody of Anna while she was a minor.

17. The parties agreed that Mr. Schovaers would be awarded physical custody of Anna while she was a minor, with Ms. Schovaers to have visitation with Anna pursuant to any schedule agreed to between Ms. Schovaers and Anna. Furthermore, the parties agreed that Ms. Schovaers would be responsible for the costs of exercising visitation with Anna.

18. The parties agreed that Mr. Schovaers would encourage and facilitate Anna's visitation with Ms. Schovaers and would encourage and facilitate written and telephonic communication between Anna and Ms. Schovaers.

19. At the time of trial, Mr. Schovaers was employed full-time with Schovaers Electronics and had a gross monthly income of \$4,300.00 per month.

20. Prior to the parties' separation, Mr. Schovaers was earning approximately \$6,000.00 per month. However, after the parties' separation, Mr. Schovaers pay was reduced to \$4,300.00 per month because of the reduction in work hours necessitated by his having to assume all of the parenting and household responsibilities.

21. Historically, during the last full five years prior to trial (1998 through 2002), Mr. Schovaers had the following gross income as a result of his employment with Schovaers

Electronics¹:

<u>Year</u>	<u>Gross Annual Income</u>	<u>Gross Monthly Income</u>
1998	\$ 70,150.00	\$ 5,845.00
1999	\$ 71,400.00	\$ 5,950.00
2000	\$ 72,651.00	\$ 6,054.00
2001	\$ 57,200.00	\$ 4,767.00
2002	\$ 51,600.00	\$ 4,300.00

22. Based on the foregoing historic income information for Mr. Schovaers, Mr.

Schovaers has had an average gross annual income from employment of \$64,600.00 per year for the past five years, which equates to an average gross monthly income of \$5,383.00 per month.

23. At the time of trial, Ms. Schovaers was employed part-time as a Sales Clerk for *The Bon*, and as an "on-call" substitute teacher for various school districts in Washington.

24. At the time of trial, Ms. Schovaers had a gross monthly income from all employment of \$1,380.00 per month.

25. Mr. Schovaers asserts that Ms. Schovaers is currently voluntarily under-employed and capable of finding full-time employment.

26. Immediately prior to the parties' separation, Ms. Schovaers was working part-time as a teacher for Jordan School District.

27. Historically, during the last full five years prior to trial (1998 through 2002), Ms.

¹The listed figures were taken from the right-hand column on page 3 of Exhibit #93 which is Mr. Schovaers' Social Security Statement. The listed figures are also consistent with the testimony and income information for Mr. Schovaers as set forth in the various income tax statement that were admitted as exhibits. E.g. Exhibits #35, #36, #37, #38, & #94.

Schovaers had the following gross income from her employment²:

<u>Year</u>	<u>Gross Annual Income</u>	<u>Gross Monthly Income</u>
1998	\$ 19,358.00	\$ 1,613.00
1999	\$ 20,038.00	\$ 1,669.00
2000	\$ 13,997.00	\$ 1,166.00
2001	\$ 22,969.00	\$ 1,914.00
2002	\$ 19,796.00	\$ 1,649.00

28. Based on the foregoing historic income information for Ms. Schovaers, Ms. Schovaers has had an average gross annual income from employment of \$19,231.00 per year, which equates to an average gross monthly income of \$1,602.00 per month.

29. Ms. Schovaers has never earned a gross annual income greater than \$22,969.00 per year (\$1,914.00 per month), even when she was working full-time as a teacher.

30. Based on Ms. Schovaers' historical average gross monthly income between 1998 and 2002, it would be reasonable to impute a gross monthly income of \$1,649.00 per month to Ms. Schovaers for purposes of determining alimony, even though Ms. Schovaers' actual gross monthly income at the time of trial was \$1,380.00 per month.

31. Prior to and during the course of their marriage, the parties acquired various items of personal property that have been listed in Exhibit #21.

32. The parties agree, as to the property listed in Exhibit #21, the Court should award Ms. Schovaers the property listed in: "Exhibit A" of Exhibit #21; "Exhibit B" of Exhibit #21; and

²The listed figures were taken from the right-hand column on page 3 of Exhibit #89 which is Ms. Schovaers' Social Security Statement. The listed figures are also consistent with the testimony and income information for Ms. Schovaers as set forth in the various income tax statement that were admitted as exhibits. E.g. Exhibits #35, #36, #37, #81, & #82.

those items of property identified as "Requested by Petitioner" in Exhibit C of Exhibit #21.

33. The parties have agreed that Mr. Schovaers shall make copies of all of post-separation photographs of the parties' children in his possession and deliver copies of those photographs to Ms. Schovaers.

34. During the course of the parties' marriage, the parties purchased and acquired a home and real property located at 1888 Spring Lane, Salt Lake City, Utah 84117 (the "home").

35. During the course of the parties' marriage, the home was titled and held in the parties' joint names and was intended and held by the parties as joint marital property.

36. Later, during the pendency of this case, the Court permitted Mr. Schovaers to refinance the home in order to lower the monthly mortgage payments.

37. As part of that refinancing, Mr. Schovaers was permitted to have Ms. Schovaers' name removed from the title to the home without effecting her ownership interest in the home.

38. At the time of trial, the home was subject to a mortgage that was held by Countywide Home Loans, Inc (the "Countrywide mortgage").

39. Since the parties' separation, Mr. Schovaers has made mortgage payments on the parties' home in the amount of \$32,848.00. Ms. Schovaers' one-half share of those mortgage payments would be \$16,424.00.

40. The parties agreed that the home was martial property and that the home should be sold and the net proceeds divided between the parties.

41. After trial, the parties sold the home and used the proceeds to pay the Countrywide mortgage and pay the sales commission and closing costs associated with the sale.

42. The parties divided the net proceeds from the sale of the home equally between themselves, but made adjustments by: (1) taking \$12,549.50 from Mr. Schovaers' share and giving it to Ms. Schovaers as payment for her share of the parties' bank/investment accounts; (2) taking \$16,424.00 from Ms. Schovaers' share and giving it to Mr. Schovaers as payment for her one-half share of the mortgage payments that Mr. Schovaers made between the time of separation and trial; (3) taking \$1,798.50 from Ms. Schovaers' share and giving it to Mr. Schovaers as payment for her one-half share of the 2003 property taxes that were paid by Mr. Schovaers; (4) taking \$2,165.00 from Ms. Schovaers' share and giving it to Mr. Schovaers as payment for her one-half share of the mortgage payments that Mr. Schovaers made from the time of trial to the date the home was sold; and (5) taking \$2,585.00 from Ms. Schovaers' share and giving it to Mr. Schovaers in order to equitably divide the value of the vehicles that were awarded to the parties. A calculation of the parties' division and distribution of the proceeds from the sale of the home is attached hereto as "Exhibit A."

43. The parties' agreed division and allocation of the proceeds from the sale of the home as set forth above and in Exhibit A was reasonable, equitable and consistent with the Court's anticipated ruling in this matter.

44. To the extent, if any, that Mr. Schovaers has not already paid the various expenses relating to the parties' home, and except as otherwise dealt with by the parties in their division of the proceeds from the sale of the home, it would be reasonable and equitable to order Mr. Schovaers to be solely responsible for paying any expenses relating to the home, including but not limited to any and all utilities, repairs, insurance premiums and/or other expenses.

45. At the time of the parties' separation, the parties had at least \$34,000.00 of joint marital funds in various bank/investment accounts with such funds being held at: Paine Webber; U.S. Bank; Charles Schwab; Community 1st National; and Treasury Credit Union.³

46. Since the parties' separation, Mr. Schovaers has paid \$6,522.00 worth of property taxes on the parties' home.

47. At the time of trial, Ms. Schovaers had control over accounts having \$2,379.00 of the parties' joint marital funds (Funds held in the Treasury Credit Union account and the proceeds from the Community 1st National account.)

48. If the Court were to equally divided the funds in the parties' joint marital bank/investment accounts at the time of separation, but factoring in tax payments and those joint funds currently in Ms. Schovaers' possession, Ms. Schovaers would be entitled to \$12,549.50, with that amount being calculated as follows:

Total Joint Account holdings at separation	\$34,000.00
Property taxes paid by Mr. Schovaers between separation & trial	(\$ 6,522.00)
Funds in Ms. Schovaers possession at trial	<u>(\$ 2,379.00)</u>

Total Funds Subject to Division	\$25,099.00
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$$\$25,099.00 \div 2 = \underline{\underline{\$12,549.50}}$$

49. It would be fair and equitable to award Ms. Schovaers \$12,549.50 worth of the

³At the time of the parties' separation, the parties' joint bank/investment accounts actually had approximately \$40,760.00 of funds in them but the Court is using \$34,000.00 as the total balance of those accounts in order to account for funds that were deposited into the accounts but actually belong to the parties' children and to account for funds that Ms. Schovaers took from one of the accounts when the parties separated.

parties' bank/investment accounts.

50. During the course of the parties' marriage, Mr. Schovaers acquired ownership of 116 shares of stock in Schovaers Electronics, with the value at the time of each acquisition of the stock as indicated below:

<u>Acquisition Date</u>	<u># Shares</u>	<u>Total Value</u>	<u>Value per share</u>
3/15/85	35 shares	\$16,873.90	\$ 482.11/share
9/30/98	34 shares	\$19,886.32	\$ 584.89/share
12/16/91	13 shares	\$19,383.00	\$1,491.00/share
4/30/92	13 shares	\$19,539.00	\$1,503.00/share
10/15/93	12 shares	\$19,965.00	\$1,663.75/share
12/22/95	9 shares	\$19,116.09	\$2,214.01/share

See, Exhibits #47 & #48.

51. At the time of each acquisition, the stock was valued by Mr. Schovaers' parents, who were the owners and grantors of the stock.

52. As of December 22, 1995, the last time when Mr. Schovaers acquired shares of the Schovaers Electronic's stock, the shares had, as determined by the owners and grantors of the stock, a value of \$2,214.01 per share, making the value of the 116 shares held by Mr. Schovaers worth at least \$256,825.16. See, page 6 of Exhibit #48.

53. Over the ten year time span when the stocks were acquired by Mr. Schovaers, the shares of stock only increased in value and never declined in value during any given year.

54. On an annualized basis, from date of first acquisition (3/15/85), to date of the last acquisition (12/22/95), the stock has increased in value, as determined by the owners and grantors of the stock, at least 35.9% per year. (\$482.11/share in 1985 to \$2,214.01/share in 1995).

55. If a historic rate of appreciation of 35% per year were used to value the stock, the

shares would currently be worth about \$24,425.00 per share, or \$2,833,300.00 for all 116 shares.

56. The Court finds that the stock was given solely to Mr. Schovaers as discrete gifts from his parents, and not by way of any employment compensation.

57. Furthermore, the Court finds that Mr. Schovaers intended to keep the stock as separate property and that the stock was never co-mingled with marital property.

58. During the course of the parties' marriage, the parties acquired ownership of a Ford Truck and a 1999 Jeep Grand Cherokee, neither of which are subject to any liens or loans.

59. At the time of trial, the Ford truck had a fair market value of \$1,500.00 and the 1999 Jeep Grand Cherokee had a fair market value of \$11,175.00.

60. About 30 days prior to trial, Mr. Schovaers purchased a new 2003 Jeep Grand Cherokee that is subject to a loan in an amount that is almost equal to the full price of the Jeep.

61. The parties agree that the Ford Truck should be awarded to Mr. Schovaers as his sole property and that the 1999 Jeep be awarded to Ms. Schovaers as her sole property.

62. The parties agree that the 2003 Jeep should be awarded to Mr. Schovaers as his sole property and that he shall be solely responsible for any loans relating to that vehicle. (The parties' equity in the 2003 Jeep is virtually zero since the Jeep is subject to a does not have any markSince the 2003 Jeep was

63. The parties have agreed that Ms. Schovaers should pay \$2,585.00 from the proceeds from the sale of the home to compensate Mr. Schovaers for the differing values of the vehicles that are being awarded to the parties.

64. During the course of the parties' marriage, Mr. Schovaers obtained a limited

partnership interest in a family partnership that was established by his parents.

65. In January of 2003, Mr. Schovaers received a distribution from that family partnership in the form of a promissory note. *See Exhibit #62.*

66. Mr. Schovaers has never commingled the promissory note with marital assets and has never intended the promissory note to be converted to joint or marital property.

67. Other than the mortgage and the loan on the 2003 Jeep, the parties have no debts.

68. Each party has been able to pay for their own attorney's fees in this case and are not in need of assistance from the other party in paying those fees.

69. Ms. Schovaers' maiden name was "McEntire."

70. During the parties' marriage, Ms. Schovaers worked for Schovaers Electronics for about nine to twelve months but was not paid for that work. (Mr. Schovaers contests this fact.)

71. After about one year of marriage, the parties agreed that Ms. Schovaers would forego employment or post-high school education in order to be responsible for the day-to-day care of the parties' children and home.

72. Thereafter, Ms. Schovaers did forego any employment and/or post-high school education for several years in order to be responsible for the day-to-day care of the parties' children and home.

73. During the course of the parties' marriage, Mr. Schovaers regularly worked between 60 to 70 hours per week at Schovaers Electronics.

74. But for Ms. Schovaers' actions in foregoing employment and post-high school education and assuming responsibility for the day-to-day care of the parties' children and home,

Mr. Schovaers would not have been able to dedicate as much time and effort as he did to his employment and advancement at Schovaers Electronics.

75. Ms. Schovaers' actions in foregoing employment, foregoing post-high school education, and assuming responsibility for the day-to-day care of the parties' children and home significantly increased Mr. Schovaers' earning capability and advancement at Schovaers Electronics.

76. In 1991, while she continued to be responsible for the day-to-day care of the parties' children and home, Ms. Schovaers began going to college on a part-time basis and eventually graduated in late 1997.

77. Initially, Mr. Schovaers was opposed to Ms. Schovaers going to college and required her to pay for her college education by using non-marital funds that she had inherited.

78. Later, Mr. Schovaers contributed to some of Ms. Schovaers' tuition expenses.

79. Ms. Schovaers eventually obtained a teaching certificate and was endorsed to teach art, with a secondary endorsement in history.

80. In 1998, Ms. Schovaers began working as a full-time teacher for Granite School District.

81. Later, Ms. Schovaers left employment with Granite School District and began working for Jordan School District on a full-time basis.

82. After working for Jordan School District for a period of time, Ms. Schovaers' full-time teaching load in Art was reduced because of budget cuts. However, Ms. Schovaers was offered additional classes in other subjects but would have been required to return to college and

obtain additional training and endorsements in order to teach those additional classes on a permanent basis.

83. Rather than incur the additional time and expense of returning to college to obtain additional education and endorsements, Ms. Schovaers continued teaching part-time for Jordan School district and eventually obtained part-time employment with ZCMI and later with the May Stores in order to supplement her income.

84. Due to her extended absence from the work-force, her age, and her delayed acquisition of a post-high school education in order to care for the parties' children and home, Ms. Schovaers' lifetime earning potential has been significantly and permanently impaired.

85. During the course of the parties' marriage, and at the time of their separation, the parties enjoyed a high standard of living.

86. The parties' income tax returns for the three tax years immediately prior to their separation indicate that the parties has a joint annual income of about \$90,000 per year. *See* Exhibits #35, #36, & #37.

87. Ms. Schovaers testified that prior to and at the time of their separation, she was able to purchase whatever she wanted and had never been unable to purchase any items or services that she and/or Mr. Schovaers desired.

88. For example, testimony at trial indicated that, prior to and at the time of their separation, the parties:

(a) Had purchased and were living in a 4,200 square foot luxury home in the prestigious Cottonwood/Walker Lane residential neighborhood of Salt Lake County;

- (b) Had purchased and maintained elaborate and fitting furnishings for their home;
- (c) Regularly and frequently skied;
- (d) Traveled when they desired, vacationing in Idaho, the Northwest, and other places;
- (e) Regularly boated at Lake Powell;
- (f) Took their children to Europe for vacation;
- (g) Engaged in whatever entertainment activities they desired;
- (h) Saved significant sums of money which they invested in various stocks and bonds;
- (i) Purchased whatever clothing they desired; and
- (j) Were generally able to live and maintain an upper class lifestyle.

89. Ms. Schovaers testified that due to the parties' separation and the significant reduction in funds available to her, she has been forced to eliminate all of her discretionary expenses and has had to skimp on, and in some cases, even forego some of her most basic necessary living needs and expenses.

90. The amounts that Ms. Schovaers current claims to be spending for basic necessary living expenses are set forth in Exhibit #98.

91. For example, Ms. Schovaers testified that since the parties' separation, she has, among other things:

- (a) Been forced to live in a 600 square foot apartment in an industrial/low

income neighborhood;

(b) Has less than \$1,300.00 of earned income each month to meet her basic necessary living expenses;

(c) Has not been skiing because she cannot afford it;

(d) Has not been on any vacations since she cannot afford it;

(e) Except for hiking which is free, and basic cable television service, she has not spent any money on entertainment because she cannot afford it;

(f) Cannot afford to make gifts or donations; and

(g) Cannot afford to purchase insurance to replace the health insurance that she will lose once the parties are divorced.

92. Ms. Schovaers also testified that she had depleted almost all of her savings in order to meet her basic necessary living expenses and has been required to purchase generic brand foods and shop at second stores in order to help meet her expenses. Mr. Schovaers' counsel even acknowledged during closing arguments that Ms. Schovaers' expenses were "spartan."

93. Ms. Schovaers is clearly in need of significant financial assistance from Mr. Schovaers in order to meet even her most basic necessary living expenses.

94. Unlike Ms. Schovaers, since the parties' separation, Mr. Schovaers has been able to maintain the same lifestyle that the parties had prior to and at the time of the parties' separation. For example, Mr. Schovaers has been able to:

(a) Continue to living in the parties' luxury 4,200 square foot home;

(b) Spend in excess of \$4,137.00 per month on various expenses;

- (c) Engage in and spend significant sums on entertainment;
- (d) Engage in and spend significant sums on vacations;
- (e) Spend significant sums on gifts to friends and family;
- (f) Spend significant sums on donations to charities and other organizations;

and

- (g) Purchase of a new 2003 Jeep. *See*, Exhibit #26.

95. In fact, Mr. Schovaers' counsel acknowledged in closing arguments that some of Mr. Schovaers' claimed expenses were excessive and more than what was needed for such expenses.

96. The Court finds that many of Mr. Schovaers' claimed basic living expenses, as alleged in Exhibit #26, are excessive and inappropriate for purposes of determining his ability to pay alimony. For example:

(a) Mr. Schovaers' claimed expense of \$287.00 per month for property taxes is inappropriate to consider for purposes of determining Mr. Schovaers' ability to pay alimony because the Court is giving Mr. Schovaers' full credit for those taxes when calculating how to split the parties' bank/investment accounts. To let Mr. Schovaers claim those property tax payments again as part of his alleged monthly living expenses would allow him to claim those expenses twice.

(b) Mr. Schovaers' claimed expense of \$65.00 per month for real property insurance and \$125.00 per month for home maintenance will be eliminated by the sale of the parties' home, thereby making those expenses unnecessary and inapplicable when determining Mr.

Schovaers' ability to pay alimony.

(c) Mr. Schovaers' claimed monthly food expense of \$700.00 is unreasonable and far exceeds Mr. Schovaers' needs. First, it would be inappropriate to include the food costs for Aundrea in determining Mr. Schovaers' ability to pay alimony since Aundrea is an adult. Furthermore, it would bestow an inappropriate and significant windfall upon Mr. Schovaers to permit him to claim food expenses relating to Anna for purposes of determining his ability to pay alimony in light of Ms. Schovaers' obligation to pay child support for Anna during her minority and since Anna is/was only about six months away from emancipation at the time of trial. Thus, a more appropriate amount for Mr. Schovaers food expense would be \$250.00 per month.

(d) Mr. Schovaers' claimed utility expenses of \$432.00 per month (electric, gas, sewer, water, phone, etc) are unreasonably high for purposes of determining his ability to pay alimony since those expense are based on utilities for the parties' large 4,200 square foot home that is/was sold. Furthermore, since Anna is/was only about six months away from emancipation at the time of trial, it would bestow an inappropriate and significant windfall upon Mr. Schovaers to permit him to claim expenses relating to Anna for purposes of determining his ability to pay alimony. A more reasonable amount for Mr. Schovaers' utility expense in light of the anticipated emancipation of Anna and the sale of the home would be \$250.00 per month.

(e) Mr. Schovaers' claimed clothing expense of 325.00 per month for both he and Anna is unreasonable. It would bestow an inappropriate and significant windfall upon Mr. Schovaers to permit him to clothing expenses relating to Anna for purposes of determining his ability to pay alimony in light of Ms. Schovaers' obligation to pay child support for Anna during

her minority and since Anna is/was only about six months away from emancipation at the time of trial. Thus, a more reasonable amount for Mr. Schovaers' clothing expense would be \$150.00 per month.

(f) Mr. Schovaers' claimed expenses for Anna's schooling is inappropriate to consider for purposes of determining alimony. It would bestow an inappropriate and significant windfall upon Mr. Schovaers to permit him to claim Anna's school expenses for purposes of determining his ability to pay alimony in light of Ms. Schovaers' obligation to pay child support for Anna during her minority and since Anna is/was only about six months away from emancipation at the time of trial.

(g) Mr. Schovaers' claimed expenses of \$150.00 per month for gifts and donations are purely discretionary expenses that are not necessary basic living expenses.

(h) Mr. Schovaers' claimed expenses of \$371.00 per month for auto expenses is unreasonable under the circumstances. A more reasonable amount for this expense would be \$200.00 per month.

(i) Mr. Schovaers' claimed new expense of \$511.00 per month for his purchase of the new 2003 Jeep is unreasonable under the circumstances, particularly when Mr. Schovaers claims to have a reduced income and previously claimed to be unable to service the previous home mortgage of about \$1,600.00 per month, which the Court then permitted him to refinance to about \$620.00 per month. Although Mr. Schovaers may actually be paying \$511.00 per month for the new 2003 Jeep, it was unreasonable for Mr. Schovaers to incur such an obligation just one month before the trial in this matter. A more reasonable amount for this

expense for purposes of determining his ability to pay alimony would be \$350.00 per month.

97. For purposes of determining Mr. Schovaers' ability to pay alimony, the Court finds that Mr. Schovaers' reasonable basic living expenses are as follows:

(a)	Mortgage	\$ 619.00
(b)	Food	\$ 250.00
(c)	Utilities	\$ 250.00
(d)	Laundry & Dry Cleaning	\$ 50.00
(e)	Clothing	\$ 150.00
(f)	Medical/Dental	\$ 20.00
(g)	Insurance	\$ 25.00
(h)	Entertainment	\$ 150.00
(i)	Vacation/Travel	\$ 125.00
(j)	Auto Expense/Maintenance	\$ 200.00
(k)	Car Payment	<u>\$ 350.00</u>

Total Monthly Expenses	<u>\$2,189.00</u>
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98. In light of Mr. Schovaers' average gross monthly income of \$5,383.00 per month over the past five years, Mr. Schovaers has the ability to pay at least \$2,000.00 per month, if not more, toward alimony after paying for his basic necessary living expenses.

99. Even if Mr. Schovaers' reduced gross monthly income of \$4,300 per month were used, Mr. Schovaers would have the ability to pay at least \$2,000.00 per month, if not more, toward alimony after paying for his basic necessary living expenses.

100. Furthermore, Mr. Schoavers' ability to pay alimony of at least \$2,000.00 per month is bolstered by the fact that the Court is awarding Mr. Schovaers all of the Schovaers Electronics stock which is worth hundreds of thousands of dollars. Thus, Mr. Schovaers clearly has the financial ability and resources to pay alimony of at least \$2,000.00 per month.

101. Ms. Schovaers is not able to maintain the standard of living she enjoyed prior to

and/or at the time of the parties' separation without significant financial assistance from Mr. Schovaers.

102. Ms. Schovaers is in need of financial assistance in order to meet even her basic necessary living expenses.

103. Mr. Schovaers has the financial ability to pay at least \$2,000.00 per month of alimony to Ms. Schovaers.

104. Although Ms. Schovaers has obtained a teaching certificate and is capable of obtaining full-time employment, her earning capacity has been significantly and permanently impaired because of her age, the delay in entering the workforce, and her limited teaching experience.

105. Ms. Schovaers has never earned more than \$22,969.00 per year, even when she was working full-time.

106. Although the Court is imputing a monthly gross income of \$1,649.00 per month to Ms. Schovaers for purposes of determining alimony, even if Ms. Schovaers' highest actual annual earnings of \$22,969.00 per year (\$1,914.00 per month) were imputed to her, alimony payments of \$24,000.00 per year (\$2,000.00 per month) would give Ms. Schovaers an annual income of about \$46,900.00, which is roughly the standard of living she enjoyed prior to and at the time of the parties' separation (At the time of separation, the parties' joint income exceeded \$90,000.00; $\$90,000 \div 2 \text{ people} = \$45,000 \text{ per person}$).

107. In order to equalize the parties' respective standards of living, and in order to restore Ms. Schovaers to a semblance of the standard of living that she had prior to and at the

time of the parties' separation, Ms. Schovaers would need financial assistance from Mr.

Schovaers in the amount of at least \$24,000.00 per year (\$2,000.00 per month).

108. The Court finds that the parties' situation is a classic case where alimony should be awarded. This is a marriage that is long in duration and wherein the parties' respective incomes are greatly disparate. Credible evidence was presented to the Court that Ms. Schovaers agreed to forego employment and educational opportunities for the purpose of staying at home to raise the parties' children and to facilitate and enable Mr. Schovaers to work extensive hours at his family's business. The result was that Mr. Schovaers was able to dedicate himself to that business and earn a salary which provided a "high-end" lifestyle for the parties and their children. In sharp contrast to this lifestyle, Ms. Schovaers now lives in what can only be described as a meager existence. By her own account, Ms. Schovaers' standard of living has significantly diminished.

109. Clearly, Ms. Schovaers has unmet financial needs and Mr. Schovaers has a demonstrated ability to assist Ms. Schovaers in terms of paying alimony. In evaluating Mr. Schovaers' ability, the Court particularly focused on the fact that Mr. Schovaers greatly inflated his claimed expenses. Therefore, after evaluating the parties' total financial picture and taking into account their respective assets and property, their respective income levels in light of their reasonable expenses, and the lifestyle enjoyed during their marriage, the Court determines that it would be equitable, reasonable and proper to set alimony at \$2,000.00 per month.

110. Setting alimony at \$2,000.00 per month would raise Ms. Schovaers' standard of living to approximately what she enjoyed during the parties' marriage.

111. During the parties' marriage:

(a) Mr. Schovaers obtained and acquired an interest in retirement benefits and/or profit sharing plans provided and/or maintained by Schovaers Electronics;

(b) Mr. Schovaers obtained and acquired an interest in an Individual Retirement Account(s) with Paine Webber;

(c) Ms. Schovaers obtained and acquired an interest in retirement benefits and/or 401(k) plan maintained by Utah Retirement Systems; and

(d) Ms. Schovaers obtained and acquired an interest in an Individual Retirement Account(s) with Paine Webber.

112. The parties agree that all of their respective retirement plan benefits were acquired during the course of their marriage and that those retirement plan benefits are joint marital assets that should be equally divided between the parties and subject to a qualified domestic relations order. The parties also agree that, if possible, Ms. Schovaers' one-half share of the Schovaers Electronics profit sharing plan assets should be divided and distributed in kind so as to avoid any valuation disputes.

Based on the foregoing Findings of Fact, the Court makes and enters the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction in this matter and venue is proper.
2. The parties should be granted a divorce on the grounds of irreconcilable differences.
3. Since Anna is now emancipated, the Court need not make any further orders concerning Anna's custody, visitation and support. However, to the extent that the parties have

not already paid and satisfied their financial obligations to each other with respect to Anna while she was a minor, the parties should be entitled and ordered to do so.⁴

4. As to the issue of alimony:

(a) Ms. Schovaers' current financial condition is extremely poor and she currently has a standard of living that is drastically lower than the high standard of living that she had prior to and at the time of the parties' separation.

(b) Ms. Schovaers is in desperate need of significant financial support as she is currently living at a very low income level and is having difficulty meeting even her most basic necessary living expenses.

(c) Because of her age, the delay in entering the workforce, and her limited employment experience, Ms. Schovaers' earning capacity has been significantly impaired.

(d) Although Mr. Schovaers was awarded custody of Anna, Anna was 17½ years old at the time of trial and approximately 6 months away from emancipation. Furthermore, Ms. Schovaers was required to pay child support for Anna to Mr. Schovaers to help defray Anna's living expenses. Thus, Mr. Schovaers' custody and expenses relating to Anna did not

⁴For purposes of determining the proper level of child support, the Court used Mr. Schovaers' current gross monthly income of \$4,300.00 and impute income to Ms. Schovaers at a level of \$1,914.00 per month (\$22,969.00 per year), which is the most Ms. Schovaers has ever earned per year, even when working full-time. Based on those income levels, Ms. Schovaers was to pay Mr. Schovaers \$187.88 per month for Anna's support until the later of either: Anna's 18th birthday, or graduation from high school, whichever is later, with the payment of such amount to be made by giving Mr. Schovaers a credit of \$187.88 per month against his monthly alimony/support payments to Ms. Schovaers. To the extent those payments/credits have not already been made and/or applied, the parties should be entitled to those payments/credits.

materially impact or reduce his ability to pay alimony.

(e) Ms. Schovaers did, for about 9 to 12 months, work for Schovaers Electronics during the parties' marriage for which Ms. Schovaers claims she was not paid.

(f) But for Ms. Schovaers' actions in foregoing employment and education in order to care for the parties' children and home, Mr. Schovaers would not have been able to dedicate as much time and effort as he did to his employment and his advancement at Schovaers Electronics. Ms. Schovaers' actions of foregoing employment and education, and assuming responsibility for the day-to-day care of the parties' home and children significantly and materially increased Mr. Schovaers' earnings, earning capability and employment advancement, while simultaneously significantly impairing Ms. Schovaers own earning abilities.

(g) Currently, Mr. Schovaers is gainfully employed and enjoys an extremely high standard of living that meets and/or exceeds the standard of living that he enjoyed prior to and/or at the time of the parties' separation.

(h) Over the last five years prior to trial, Mr. Schovaers had an average gross monthly income of \$5,383.00 per month.

(i) Many of Mr. Schovaers' claimed basic necessary living expenses are excessive, inflated and inappropriate to consider for purposes of determining Mr. Schovaers' ability to pay alimony because they include:

(1) Expenses for which Mr. Schovaers is/was reimbursed by Ms. Schovaers' child support payments;

(2) Expenses for the Aundrea, the parties' adult daughter;

(3) Discretionary in nature and/or for non-essential purposes such as gifts, donations, etc.

(4) Expenses for which Mr. Schovaers will/has received full credit for in the distribution of the sale proceeds from the parties' home and/or division of the parties' bank/investment accounts (e.g. the mortgage and property tax expenditures); and

(5) Obligations and expenses for Anna which were going to be and have now been eliminated due to Anna's emancipation six months after trial.

(j) Ms. Schovaers' reasonable basic necessary living expenses amount to approximately \$2,189.00 per month.

(k) Given his current monthly income of \$4,300.00, his five year historical average monthly income of \$5,383.00, and the valuable Schovaers Electronics stock and other property being awarded to him, Mr. Schovaers has significant ability to pay at least \$2,000.00 per month toward alimony after paying for his basic necessary living expenses.

(l) It would be reasonable to impute a monthly gross income of \$1,649.00 to Ms. Schovaers for purposes of fixing alimony. However, even if Ms. Schovaers' highest actual annual earnings of \$22,969.00 per year were imputed to her, alimony payments of \$24,000.00 per year (\$2,000.00 per month) would give Ms. Schovaers an annual income of about \$46,900.00, which is roughly the standard of living she enjoyed prior to and at the time of the parties' separation.⁵ The Court reiterates that it is not basing Ms. Schovaers' need for alimony on her

⁵At the time of separation, the parties' joint income exceeded \$90,000.00; $90,000 \div 2$ people = \$45,000 per person.

actual gross monthly income of \$1,380.00, but rather on an imputed gross monthly income of \$1,914.08 per month, which is the most Ms. Schovaers ever earned while working full-time.⁶

5. Thus, the factors set forth in U.C.A. §30-3-5(8)(a) weigh heavily in favor of an order requiring Mr. Schovaers to pay alimony to Ms. Schovaers. The Court finds and concludes that the parties' situation is a classic case where alimony should be awarded. This is a marriage that was long in duration and where the parties' respective incomes are greatly disparate. Credible evidence was presented to the Court that Ms. Schovaers agreed to forego employment and educational opportunities for the purpose of staying at home to raise the parties' children and to facilitate and enable Mr. Schovaers to work extensive hours at his family's business. The result was that Mr. Schovaers was able to dedicate himself to that business and earn a salary which provided a "high-end" lifestyle for the parties and their children. In sharp contrast to this lifestyle, Ms. Schovaers now lives in what can only be described as a meager existence. By her own account, Ms. Schovaers' standard of living has significantly diminished. Clearly, Ms. Schovaers has unmet financial needs and Mr. Schovaers has a demonstrated ability to assist Ms. Schovaers in terms of paying alimony. In evaluating Mr. Schovaers' ability, the Court particularly focused on the fact that Mr. Schovaers greatly inflated his claimed expenses. Therefore, after evaluating the parties' total financial picture, taking into account their respective assets and property, the property and funds divided and awarded to them as part of this divorce, their respective income

⁶Imputing income of \$1,914.00 per month to Ms. Schovaers actually weighs in Mr. Schovaers' favor since the Court has found it would be reasonable to impute only \$1,649.00 of income per month to Ms. Schovaers for purposes of determining alimony. See ¶¶27-30, ¶106.

levels in light of their reasonable expenses, and the lifestyle enjoyed during their marriage, the Court determines that it would be equitable, reasonable and proper to set and award Ms. Schovaers alimony in the amount of \$2,000.00 per month. Setting alimony at \$2,000.00 per month would raise Ms. Schovaers' standard of living to approximately what she enjoyed during the parties' marriage without impacting Mr. Schovaers' ability to maintain that lifestyle for himself.

6. Accordingly, Mr. Schovaers should be ordered to pay Ms. Schovaers \$2,000.00 per month for 22 years (264 months) for alimony. However, pursuant to the provisions found in U.C.A. §30-3-5(8) and U.C.A. §30-3-5(9), Mr. Schovaers' obligation to pay alimony to Ms. Schovaers shall automatically terminate upon Ms. Schovaers' death, re-marriage or cohabitation with another person.

7. The parties' home was joint marital property.

8. The parties' agreed division and allocation of the proceeds from the sale of the home as set forth above in Findings #41, Finding #42 and Exhibit A was reasonable, equitable and consistent with the Court's anticipated ruling in this matter.

9. Since the parties' sale and division of those sale proceeds from the home were, reasonable, fair and equitable in light of the circumstances, the Court should issue an order affirming and approving of the parties' sale of the home and division of the sales proceeds.

10. To the extent, if any, that Mr. Schovaers has not already paid the various expenses relating to the parties' home, and except as otherwise dealt with by the parties in their division of the proceeds from the sale of the home, the Court should order Mr. Schovaers to be solely

responsible for paying any unpaid expenses relating to the home without any right of reimbursement and/or contribution from Ms. Schovaers, including but not limited to any and all utilities, repairs, insurance premiums and/or other expenses.

11. Ms. Schovaers should be awarded all of the property currently in her possession, free and clear of any claims by Mr. Schovaers.

12. As to the property listed in Exhibit #21, the Court should award Ms. Schovaers the property listed in: "Exhibit A" of Exhibit #21; "Exhibit B" of Exhibit #21; and those items of property identified as "Requested by Petitioner" in Exhibit C of Exhibit #21.

13. Mr. Schovaers should be ordered to make copies of all of the post-separation photographs of the parties' children in his possession and deliver copies of those photographs to Ms. Schovaers.

14. Mr. Schovaers should be awarded all of the other remaining household personal property in his possession free and clear of any claims by Ms. Schovaers.

15. Mr. Schovaers should be awarded the Ford truck and the 2003 Jeep as his sole and separate property, free and clear of any claims by Ms. Schovaers, with Mr. Schovaers being solely responsible for any and all loans, liens and/or expenses relating to such vehicles.

16. Ms. Schovaers should be awarded the 1999 Jeep as her sole and separate property, free and clear of any claims by Mr. Schovaers, with Ms. Schovaers being solely responsible for any and all loans, liens and/or expenses relating to such vehicle.

17. It was reasonable for the parties to fairly divide and allocate the value of the vehicles being awarded to them in the distribution of the proceeds from the sale of the parties'

home.

18. All of the parties' respective retirement accounts, pensions, profit-sharing plans, 401K plans, and/or other retirement type accounts/assets that have accrued or been acquired during the course of the parties' marriage up to the date of decree of divorce is entered in this matter, including but not limited to: the Schovaers Electronics profit sharing plan; the Utah Systems 401(k) plan; and the parties' respective IRA's should be allocated and divided equally between the parties, with each party being awarded one-half of all such retirement assets. The Court should also issue a Qualified Domestic Relations Order ordering each party's share in such retirement benefits to be allocated and equally divided between the parties, with the division to be by an in-kind division of the actual assets of the accounts where possible so as to avoid any valuation disputes.

19. The 116 shares of Schovaers Electronics stock should be awarded to Mr. Schovaers.

20. Ms. Schovaers should be awarded \$12,549.50 from Mr. Schovaers' share of the net sale proceeds of the parties' home as payment for her share of the parties' joint bank/investment accounts and it was reasonable for the parties to arrange for the payment of that amount in the distribution of the proceeds from the sale of the parties' home.

21. Mr. Schovaers should be awarded the promissory note from his parents as his sole and separate property, free and clear of any claims by Ms. Schovaers.

22. Except for the 2003 Jeep for which Mr. Schovaers is to be solely responsible and responsible, the parties appear to have no other debts. To the extent that such debts do exist,

each party should be ordered to be solely responsible for their own respective debts.

23. The parties should be ordered to be responsible for their own respective attorney's fees and court costs.

24. Ms. Schovaers should be restored to her maiden name of McEntire.

25. The Court's allocation and division of the parties' assets and debts as set forth above is fair and equitable.

26. The Court should enter a Decree of Divorce with orders consistent with the terms set forth herein, with such decree being issued *nunc pro tunc* so as to be effective as of December 23, 2003, the entry date of the December Decree which was previously vacated by the Court. However, pursuant to Rule 4(a) of the Rules of Appellate Procedure, even though the decree should be issued *nunc pro tunc*, the parties should have 30 days from the date this decree is entered in which to file any notice of appeal.

DATED: 10/28/04

BY ORDER OF THE COURT



LESLIE LEWIS

UTAH DISTRICT COURT JUDGE

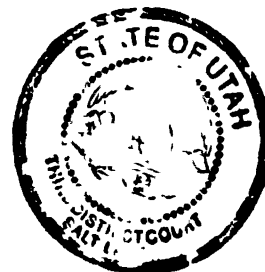


EXHIBIT A

CALCULATION & DIVISION OF PROCEEDS FROM SALE OF HOME

\$303,426.00 Net proceeds from sale after full payment of mortgage & sales commission

<u>Mr. Schovaers</u>	<u>Ms. Schovaers</u>	
\$151,713.00	\$151,713.00	Half of net sale proceeds
(12,549.50)	12,549.50	Adjustment for division of parties' bank/investment accounts.
16,424.00	(16,424.00)	Adjustment to reimburse Mr. Schovaers for Ms. Schovaers' half of pre-trial mortgage payments that were paid by Mr. Schovaers.
1,798.50	(1,798.50)	Adjustment to reimburse Mr. Schovaers for Ms. Schovaers' half of 2003 property taxes that were paid by Mr. Schovaers. ¹
2,165.00	(2,165.00)	Adjustment to reimburse Mr. Schovaers for Ms. Schovaers' half of post-trial mortgage payments that were paid by Mr. Schovaers.
2,585.00	(2,585.00)	Adjustment for allocation of differing values of the vehicles that were awarded to the parties.
<hr/>	<hr/>	
<u>\$162,136.00</u>	<u>\$141,290.00</u>	Final Share of Distribution of Home Sale Proceeds

¹Ms. Schovaers' payment for her one-half share of the property taxes that Mr. Schovaers paid from the time of separation to the time of trial was credited to Mr. Schovaers when the Court calculated the division of the parties' bank/investment accounts. See, Finding #48 & #49.

IMAGED

FILED DISTRICT COURT
Third Judicial District

Frank N. Call, (U.S.B. #6846)
68 South Main Street, Suite 701
Salt Lake City, Utah 84101
Phone Number: (801) 532-9909
Attorney for Petitioner, Josephine M. Schovaers

CCT 28 2004

By M. Snell
SALT LAKE COUNTY
Deputy Clerk

**ENTERED IN REGISTRY
OF JUDGMENTS**

DATE 11-1-04

**IN THE THIRD JUDICIAL DISTRICT COURT
IN & FOR SALT LAKE COUNTY, STATE OF UTAH**

JOSEPHINE M. SCHOVAERS,

Petitioner,

vs.

JOHN C. SCHOVAERS

Respondent.

**DECREE OF DIVORCE
(With Orders)**

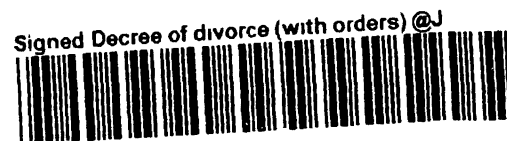
Case # 014903735

Judge Leslie Lewis
Commissioner Casey

DECREE OF DIVORCE

Based on the *Findings of Facts and Conclusions of Law (Amended as per Court's 4/20/04 Ruling)* that have been made and entered by the Court, **THE COURT HEREBY DECREEES AND ORDERS AS FOLLOWS:**

1. Josephine M. Schovaers ("Ms. Schovaers") and John C. Schovaers ("Mr. Schovaers") are granted a divorce on the grounds of irreconcilable differences.
2. Since the parties' child, Anna Schovaers, is now emancipated, the Court need not make any further orders concerning Anna's custody, visitation and support. However, to the



extent that the parties have not already paid and satisfied their financial obligations to each other with respect to Anna while she was a minor, the parties are ordered to pay and satisfy those obligations.¹

3. Mr. Schovaers is ordered to pay alimony to Ms. Schovaers in the amount of \$2,000.00 per month for the next 22 years (264 months). However, pursuant to the provisions found in U.C.A. §30-3-5(8) and U.C.A. §30-3-5(9), Mr. Schovaers' obligation to pay alimony to Ms. Schovaers shall automatically terminate upon Ms. Schovaers' death, re-marriage or cohabitation with another person. In no event shall Mr. Schovaers' alimony obligation to Ms. Schovaers last longer than 22 years (264 months) from the effective date of this Decree.

4. The Court hereby approves and affirms the parties' sale and agreed division and allocation of the proceeds from the sale of the parties' home as being reasonable, equitable and consistent with the Court's anticipated ruling in this matter. See, Findings of Fact & Conclusions of Law ¶¶41-42.

5. To the extent, if any, that Mr. Schovaers has not already paid the various expenses relating to the parties' home, and except as otherwise dealt with by the parties in their division of the proceeds from the sale of the home, Mr. Schovaers is ordered to be solely responsible for

¹Pursuant to the Decree of Divorce that was previously entered but later vacated by the Court, Ms. Schovaers was to pay Mr. Schovaers \$187.88 per month for Anna's support until the later of Anna's 18th birthday or graduation from high school, with the payment of that child support to be made by giving Mr. Schovaers a credit of \$187.88 per month against his monthly alimony/support payments to Ms. Schovaers until the later of Anna's 18th birthday or graduation from high school. To the extent that Mr. Schovaers has not already taken and applied those credits, Mr. Schovaers shall be entitled to do so.

paying any unpaid expenses relating to the home without any right of reimbursement and/or contribution from Ms. Schovaers, including but not limited to any and all unpaid utilities, repairs, insurance premiums and/or other expenses.

6. Ms. Schovaers is hereby awarded all of the property currently in her possession, free and clear of any claims by Mr. Schovaers.

7. As to the property listed in Trial Exhibit #21, Ms. Schovaers is awarded all of the property listed in: "Exhibit A" of Exhibit #21; "Exhibit B" of Exhibit #21; and those items of property identified as "Requested by Petitioner" in Exhibit C of Exhibit #21.

8. Mr. Schovaers is ordered to make copies of all of the post-separation photographs of the parties' children in his possession and deliver copies of those photographs to Ms. Schovaers within 30 days after the entry of this decree.

9. Mr. Schovaers is awarded all of the other remaining household personal property in his possession free and clear of any claims by Ms. Schovaers.

10. Mr. Schovaers is hereby awarded the Ford truck and the 2003 Jeep as his sole and separate property, free and clear of any claims by Ms. Schovaers, with Mr. Schovaers being ordered to be solely responsible for any and all loans, liens and/or expenses relating to such vehicles.

11. Ms. Schovaers is hereby awarded the 1999 Jeep as her sole and separate property, free and clear of any claims by Mr. Schovaers, with Ms. Schovaers being ordered to be solely responsible for any and all loans, liens and/or expenses relating to such vehicle.

12. All of the parties' respective retirement accounts, pensions, profit-sharing plans,

401K plans, and/or other retirement type accounts/assets that have accrued or been acquired during the course of the parties' marriage up to the effective date of this decree of divorce (December 23, 2003), including but not limited to: the Schovaers Electronics profit sharing plan; the Utah Systems 401(k) plan; and the parties' respective IRA's shall be allocated and divided equally between the parties, with each party being awarded one-half of all such retirement assets. The Court shall also issue a Qualified Domestic Relations Order(s) ordering each party's share in such retirement benefits to be allocated and equally divided between the parties, with the division to be by an in-kind division of the actual assets of the accounts where possible so as to avoid any valuation disputes.²

13. The 116 shares of Schovaers Electronics stock are hereby awarded to Mr. Schovaers free and clear of any claims by Ms. Schovaers.

14. Mr. Schovaers is awarded the promissory note from his parents as his sole and separate property, free and clear of any claims by Ms. Schovaers.

15. Except for the 2003 Jeep for which Mr. Schovaers is to be solely responsible and responsible, the parties appear to have no other debts. To the extent that such debts do exist, each party is hereby ordered to be solely responsible for their own respective debts.

16. The parties shall be responsible for their own respective attorney's fees and court

²If mutually agreed to by both parties, the parties may keep all of the retirement plans except the Schovaers Electronics profit sharing plan registered as they currently are and then pay and split their respective one-half interest in all of the plans between themselves by making an appropriate adjustment to the division of the assets in the Schovaers Electronics profit sharing plan.

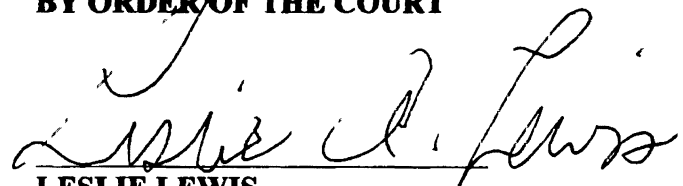
costs.

17. Ms. Schovaers is hereby restored to her maiden name of "Josephine McEntire."

18. This Decree of Divorce and the orders set forth herein are issued *nunc pro tunc* so as to be effective as of December 23, 2003, the entry date of the previously vacated findings, conclusions and decree. Pursuant to Rule 4(a) of the Utah Rules of Appellate Procedure, the parties shall have 30 days from the date this Decree of Divorce is actually entered in which to file any notice of appeal.

BY ORDER OF THE COURT

DATED: 10/28/04


LESLIE LEWIS
UTAH DISTRICT COURT JUDGE



FILED DISTRICT COURT
Third Judicial District

OCT 27 2004

SALT LAKE COUNTY
by *m. snare*
Deputy Clerk

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

JOSEPHINE M. SCHOVAERS,	:	COURT'S RULING
Petitioner,	:	CASE NO. 014903735
vs.	:	
JOHN C. SCHOVAERS,	:	
Respondent.	:	

The Court has before it a number of documents which require this Court's rulings. First, the Court notes that soon after it issued its prior Court's Ruling, on April 20, 2004, the respondent renewed his objection as to one portion of the petitioner's Proposed Findings of Fact and Conclusions of Law. (See Respondent's Objection, filed on July 8, 2004). This Objection pertains to the duration of alimony and the provision for the termination of alimony in the event of remarriage, cohabitation, etc. The petitioner responded to this Objection on July 16, 2004. The respondent filed a Reply on July 20, 2004, which incorporates alternate language for two of the paragraphs in the proposed Findings. On July 22, 2004, the petitioner filed a "Sur-Response," addressing the proposed changes and arguing that they are substantive changes of the Court's prior orders. On August 2,

2004, the respondent objected to the Court's consideration of the Sur-Response.

Unfortunately, while this matter has been submitted for decision on several different occasions, beginning with the filing of a Notice to Submit on July 16, 2004, it has only recently come to the Court's attention. The Court apologizes for the delay in ruling on this matter.

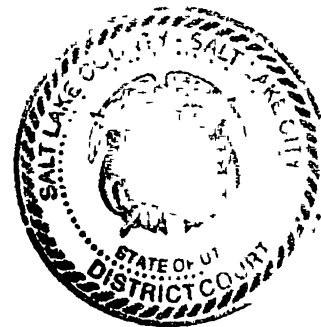
After the respondent's Objection, the petitioner's Response and the final Reply (the Court declined to consider the Sur-Response), the Court determines that the respondent's Objections are not well-taken and are therefore denied. The Court is satisfied that the petitioner's language concerning the duration of alimony is proper and should not be altered in the manner proposed by the respondent. Accordingly, the respondent's Objection is denied. The Court has entered the petitioner's proposed Findings of Facts & Conclusions of Law (Amended as per Court's 4/20/04 Ruling) and Decree of Divorce (With Orders) on a date contemporaneous with this Court's Ruling.

This Court's Ruling will stand as the Order of the Court,
denying the respondent's Objection.

Dated this 26th day of October, 2004.

A handwritten signature in cursive script, appearing to read "Leslie A. Lewis", written over a horizontal line.

LESLIE A. LEWIS
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Court's Ruling, to the following, this 27 day of October, 2004:

Frank N. Call
Attorney for Petitioner
68 S. Main Street, Suite 701
Salt Lake City, Utah 84101

B. L. Dart
Attorney for Respondent
370 E. South Temple, Suite 400
Salt Lake City, Utah 84111

M Snare

#51

B.L. DART (818)
DART ADAMSON & DONOVAN
Attorney for Respondent
370 East South Temple, Suite 400
Salt Lake City, Utah 84111
(801) 521-6383

FILED
THE DISTRICT COURT
03 NOV 13 PM 4:04
SALT LAKE DEPARTMENT
CLERK

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

---ooo000ooo---

JOSEPHINE M. SCHOVAERS,	:	RULE 52(b) MOTION TO AMEND
	:	FINDINGS AND RULE 59(a)
Petitioner,	:	MOTION FOR NEW TRIAL AND
	:	RULE 59(E) MOTION TO ALTER
v.	:	OR AMEND JUDGMENT
JOHN C. SCHOVAERS,	:	Civil No. 014903735
	:	
Respondent.	:	Judge Lewis
	:	Commissioner Casey

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COMES NOW respondent, pursuant to Rule 52(b) of the Utah Rules of Civil Procedure and moves the Court for an Order amending the Findings of Fact which it has adopted under its Memorandum Decision. Respondent further moves the Court to alter or amend the ruling of the Memorandum Decision on the issue of alimony and child support pursuant to Rule 59(e) of the Utah Rules of Civil Procedure and Rule 59(a) (6) and (7) of the Utah Rules of Civil Procedure.

From a review of the Memorandum Decision it becomes apparent that the Court did not have available to it respondent's Proposed Findings of Fact at the time it rendered its decision. There is concern that respondent's Findings of Fact may possibly have been misfiled.

The Memorandum Decision recites that petitioner filed her proposed Findings of Fact and Conclusions of Law approximately September 16, 2003, and the respondent submitted his proposed Findings of Fact and Conclusions of Law approximately September 30, 2003. In fact, respondent submitted his proposed Findings of Fact and Conclusions of Law on the 12th of September, 2003 and a copy of the cover letter to the Court and a copy of those Findings of Fact and Conclusions of Law are attached hereto as Exhibit "A". Thereafter, petitioner's attorney filed a proposed Decree of Divorce. When respondent's attorney contacted him concerning this, petitioner's attorney stated that he had had a call from the Court and that the Court was desirous of both counsel providing proposed Decrees of Divorce as well as the proposed Findings of Fact and Conclusions of Law. Respondent's attorney thereupon submitted to the Court on September 30, 2003, his proposed Decree of Divorce and a copy of the cover letter to the Court and a copy of that proposed Decree of Divorce are attached hereto as Exhibit "B".

It is apparent that the Court in making its decision was reviewing Petitioner's Proposed Findings of Fact submitted on September 16, 2003 and Respondent's Proposed Decree of Divorce submitted approximately September 30, 2003. This fact becomes obvious where the Court in paragraph 2 of its legal analysis directs petitioner's attorney to redraft the Findings as to the residence of the parties and to "incorporate paragraph 5(a) of the respondent's proposed Findings of Fact and Conclusions of Law." As can be seen from the attached exhibits, there is no paragraph 5(a) of respondent's proposed Findings of Fact. The reference is obviously to paragraph 5(a) of respondent's proposed Decree of Divorce, which relates to the house.

The problem which is created is that the Court did not have the benefit of respondent's proposed Findings of Fact which contained the rationale and support for respondent's positions, particularly as they relate to alimony.

Alimony

In reviewing the Court's analysis as to the issue of alimony, it is apparent that error has occurred.

Income

In analyzing an award of alimony it is necessary to look at the respective incomes of the parties. The income of the parties is as follows:

1. The Court in its Memorandum Decision finds that respondent's gross monthly income is \$4,300 a month.
2. The Court in its Memorandum Decision directed petitioner's attorney to incorporate his Findings of Fact which in paragraph 24 finds that petitioner has a gross monthly income from all employment of \$1,380 per month. This is contrary to the ruling which was made by the Court at the close of the evidence at the time of the closing arguments of counsel. A transcript of the closing arguments has been ordered but to this time has not been received. Accompanying this Motion, however, is a copy of the tape of the closing arguments.

The Court's statement regarding petitioner's income is found at 8/26/03, 11:06.33 a.m. The Court stated,

"I expect her income to be set at at least what she would be earning in Salt Lake if she were still teaching here as reflected on the exhibit that was received and summer income added into that at the rate of \$8.00, so we will use Utah figures."

The exhibit in question was Exhibit 99, attached hereto as Exhibit "C" and is referenced in paragraph 9 of respondent's proposed Findings of Fact, showing that petitioner's earnings had she stayed in Utah as a teacher and had she kept summer employment in Utah, would have been \$2,683 gross monthly income. This is consistent with the Child Support Worksheet prepared respondent showing a child support amount of \$258 attached to respondent's proposed Findings of Fact.

Respondent, John Schovaers, simply does not have sufficient income to pay a \$2,000 a month alimony award and, further, the \$2,000 alimony award creates a tremendous inequity between the parties.

Even if the Court were attempting to equalize the income of the parties, there can be no basis for the award of \$2,000 a month in alimony.

The equalization would be as follows:

	<u>Petitioner's income:</u>	<u>Respondent's income:</u>
	\$ 2,683	\$ 4,300
Reduction for child support expenses of Anna:	(258)	(422)
	\$ 2,425)	\$ 3,787
Alimony to equalize:	+ 681	(681)
Total:	\$ 3,106	3,106

The effect of the proposed \$2,000 a month alimony award is as follows:

	<u>Petitioner's income:</u>	<u>Respondent's income:</u>
	\$ 2,683	\$ 4,300
Reduction for expenses of Anna:	(258)	(422)
	\$ 2,425)	\$ 3,787
Alimony	+ 2,000	(2,000)
Total Available to Each Party:	\$ 4,425	1,787

Expenses

The Court in awarding alimony must also look to the expenses of the parties.

With regard to expenses, the analysis is as follows:

1. Respondent's expenses were set forth in his Exhibit 26, reflecting an amount of \$4,137 a month. The Court during trial in reviewing that exhibit made specific findings that several of those expenses were higher than the Court felt to be appropriate and the Court made the adjustments shown on respondents Proposed Findings of Fact, paragraph 7, attached, as follows:

- a. Food should be reduced from \$700 to \$400, a reduction of \$300.
- b. Clothing should be reduced from \$325 to \$200, a reduction of \$125.
- c. Automobile expenses should be reduced from \$371 to \$271, a reduction of \$100.
- d. Respondent's purchase of an automobile at a cost of \$511 a month was found to be excessive but the Court found that he was in need of an additional vehicle since the pickup truck he was driving had 191,000 miles on it and was in poor condition. The Court at that time indicated that respondent could have financed transportation at a lesser cost of \$250 a month, which would be a reduction off the amount claimed by respondent of \$261 a month.

The total of these adjustments is \$786, leaving respondent with reasonable living expenses of \$3,351 a month for him and the minor daughter, Anna.

The Court has now changed its position if it accepts petitioner's Finding of Fact 98, which would pare those expenses back to \$2,189 a month.

2. Petitioner's only statement of expenses ever filed were introduced as Exhibit 98, reflecting monthly expenses of \$1,743. Petitioner did testify that the parties did have a higher standard of living during the marriage but there was never a time that that amount was quantified by petitioner during the trial or even under petitioner's Proposed Findings of Fact 89 to establish what that standard of living was.

It is difficult to understand how the Court could find that petitioner's expenses are any more than the \$2,189 it is proposing are the reasonable expenses of respondent and the minor daughter, Anna.

The Court in its Memorandum Decision stated,

"Therefore, after evaluating the parties' total financial picture and taking into account their respective income levels and in light of their reasonable expenses and the lifestyles enjoyed during their marriage, the Court determines that alimony is properly set at \$2,000 a month."

The problem with this ruling is that even if the Court does find that the lifestyle of the parties during the marriage is higher than their current lifestyles, there was never a quantification of what that lifestyle was and, more important, there is no money to make an alimony payment. Respondent does not have a sufficient income to meet his own expenses and make an alimony payment in that amount.

It is because petitioner's ability to earn an income exceeds her current needs that respondent has taken the position that no alimony should be paid.

The Court's finding that "alimony in the amount of \$2,000 would raise the petitioner's standard of living to approximately what she enjoyed during the parties' marriage," cannot be made in a vacuum and has to be made in the context of respondent's ability to provide

support. Rehn v. Rehn, 974 P.2d 306 (1999 Court of Appeals). In this case there simply isn't \$2,000 available.

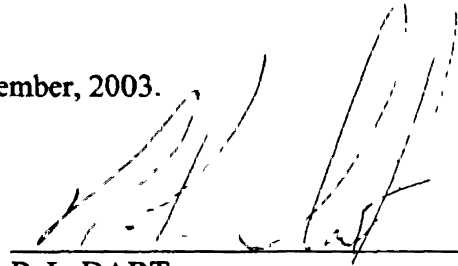
The simple fact is that neither party is going to be able to live to the lifestyle that existed during the marriage. There will need to be a belt tightening on the part of both parties.

Child Support

Based upon the amount of income which the Court has imputed to each of the parties, the appropriate amount of child support is the sum of \$258 a month as reflected on the Child Support Worksheet attached to respondent's Proposed Findings of Fact.

It is respectfully requested that the Court reconsider its rulings regarding alimony and child support based upon the foregoing.

DATED this 13th day of November, 2003.



B. L. DART

MAILING CERTIFICATE

I hereby certify that on the 13th day of November, 2003, I mailed a copy of the foregoing to:

Frank N. Call
Attorney for Petitioner
68 South Main Street, #701
Salt Lake City, UT 84101



B. L. DART, P.C.
CRAIG Q. ADAMSON, P.C.
SHARON A. DONOVAN, P.C.
JOHN D. SHEAFFER JR., P.C.
ERIC P. LEE, P.C.
LORI W. NELSON, P.C.
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OF COUNSEL
KENT M. KASTING, P.C.
KIM M. MCGREGOR, P.C.
D. RANDALL TRUEBLOOD, P.C.

September 12, 2003

The Honorable Leslie A. Lewis
District Court Judge
450 South State Street
Salt Lake City, UT 84111

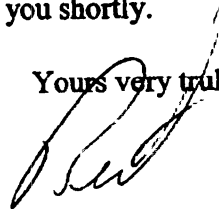
Re: Schovaers v. Schovaers; Civil No. 014903735

Dear Judge Lewis:

Pursuant to your instructions, I am enclosing our proposed Findings of Fact and Conclusions of Law in this case.

It is my understanding that Frank Call is still in the process of preparing his Findings and, hopefully, will have them to you shortly.

Yours very truly,



B. L. Dart

BLD/skm

Enclosure

cc: John Schovaers
Frank Call

B. L. DART (818)
DART, ADAMSON, & DONOVAN
370 East South Temple, Suite 400
Salt Lake City, Utah 84111
(801) 521-6383
Attorneys for Respondent

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---oooOooo---

JOSEPHINE M. SCHOVAERS,	:	RESPONDENT'S PROPOSED
	:	FINDINGS OF FACT AND
Petitioner,	:	CONCLUSIONS OF LAW

v. :

JOHN C. SCHOVAERS,	:	Case No. 014903735
--------------------	---	--------------------

Respondent.	:	Hon. Leslie Lewis
	:	Comm. T. Patrick Casey

---oooOooo---

The above-entitled matter came on regularly for trial on Monday, the 25th day of August and Tuesday, the 26th day of August, 2003, Petitioner appearing in person and by her attorney Frank N. Call, and Respondent appearing in person and by his attorney B. L. Dart, and the Court having heard testimony from witnesses and having received exhibits and various stipulations and the matter having been argued and submitted, the Court hereby makes the following:

FINDINGS OF FACT

1. Petitioner and Respondent were both residents of Salt Lake County, State of Utah, for the three month period immediately prior to the filing of this action for divorce.
2. Petitioner and Respondent were married in Salt Lake City on the 15th day of May, 1979, and since that time have been husband and wife.

3. Differences have now arisen between the parties which the Court finds are irreconcilable, and each of the parties should be awarded a decree of divorce from the other on the grounds of irreconcilable differences to become final upon signing and entry.

4. Petitioner and Respondent have two children as issue of this marriage: Aundrea, age 22, who is an adult and emancipated, and Anna, age 17, born January 29, 1986. The parties should be awarded the joint legal custody of Anna with her physical residence to be with Respondent and with Petitioner to have visitation with Anna as regularly as can be arranged without forcing Anna to engage in visitation contrary to her desires.

Respondent should encourage and facilitate a relationship between Anna and Petitioner and Petitioner should consider engaging in counseling to repair the relationship between her and Anna.

5. Petitioner filed with the Court her statement of monthly expenses, introduced as Exhibit 98, reflecting monthly expenses of \$1,743 a month. Even though the Exhibit reflects \$183 for credit card charges which were for clothing and gasoline otherwise shown on the Exhibit, the Court finds that this is not a duplication and further finds that the monthly expenses of \$1,743 for Petitioner are reasonable.

6. Petitioner testified that her living expenses during the marriage were substantially higher but failed to quantify what those expenses were on a monthly basis except to say that she feels she should have an alimony award of \$2,500. The Court finds that this claim is not supported by the evidence either as to her established need or Respondent's ability to meet an alimony award in that amount.

7. Respondent introduced Exhibit 26 setting forth his monthly expenses for himself and the minor daughter of the parties, Anna, in the amount of \$4,137 a month. The Court in

reviewing this Exhibit finds that several of these expenses are higher than the Court feels appropriate and would make the following adjustments:

- a. Food should be reduced from \$700 to \$400, a reduction of \$300.
- b. Clothing should be reduced from \$325 to \$200, a reduction of \$125.
- c. Automobile expenses should be reduced from \$371 to \$271, a reduction of \$100.

- d. Respondent within the month before the divorce trial purchased a Jeep automobile which was financed at a cost of \$511 a month which the Court finds is excessive. The Court does find that Respondent was in need of an additional vehicle to meet the needs of Respondent and Anna, particularly since the only other vehicle was a pickup truck with 191,000 miles on it and in poor condition. The Court finds that Respondent could have financed transportation at a lesser cost of \$250 a month, which would be a reduction off the amount claimed by Respondent of \$261 a month.

- e. The total of these adjustments is \$786, which when deducted from Respondent's Statement of Monthly Expenses at \$4,137 leaves \$3,351 a month in expenses which the Court finds to be reasonable for the living expenses of Respondent and the minor daughter, Anna.

8. Petitioner returned to school and obtained a bachelor's degree in 1998. She thereupon took employment in the Granite School District as a full-time teacher followed by employment in the Jordan School District as a full-time teacher. In the 1999 year, Petitioner earned income from her employment with Jordan School District of \$20,038 as reflected on her 1999 W-2 attached to the joint tax return of the parties introduced as Exhibit 35. Petitioner thereafter voluntarily reduced her employment to part-time employment, and approximately a year

following the filing of this action for divorce, Petitioner voluntarily terminated her employment with Jordan School District and moved to the State of Washington. Since she has been in the State of Washington, Petitioner has been unsuccessful in finding employment as a teacher based upon the current lack of teaching positions in Washington. Petitioner's decision to teach only part-time and her further decision to go to the State of Washington where employment as a teacher is not currently available were voluntary decisions which have created a current under-employment which cannot be the basis of establishing her income potential for alimony purposes.

9. Respondent introduced Exhibit 99 which shows that a teacher with a bachelor's level degree having taught five years in Jordan School District would be earning between \$28,065 and \$29,377 for the 9-month school year, and the Court finds that this is an amount that Petitioner could be earning as a teacher if she had not voluntarily terminated her employment and moved to Washington. The Court uses the lower figure of \$28,065. The teaching position is a 9-month position. There was further testimony that Petitioner who has experience as a department store sales clerk could earn income at \$8.00 an hour consistent with her former employment with Meier & Frank in Salt Lake City. Assuming 40 hours a week at \$8.00 an hour for the three months of the year, Petitioner could earn additional income of \$4,128 a year. When the teaching employment and sales clerk employment are added together, the Court finds that Petitioner could earn a gross annual income of \$32,193 or \$2,683 gross monthly income.

10. Respondent is currently employed at Schovaers Electronics and his income is reflected on his pay stub introduced as Exhibit 25 which shows that he earns \$2,150 per twice-monthly pay period or \$4,300 gross per month, which is \$51,600 gross per year. Respondent's current monthly take-home income after deducting federal and state taxes, FICA and Medicare is \$1,700 twice a month or \$3,400 net per month.

11. Petitioner claims that Respondent has historically earned a higher income and in fact prior to the year 2001 was receiving a gross salary of \$68,400 a year or \$5,700 a month. This salary was based upon Respondent working extensive amounts of overtime, which was made possible by petitioner taking care of the house and children. His testimony was that he worked 65-70 hours a week. Petitioner's testimony was that he was working 60 hours per week.

When Petitioner left, Respondent reduced his hours of employment to be able to cover the needs of the minor daughter of the parties and his new household responsibilities and he is currently working 50 hours a week for his current salary. The Court finds that it would not be appropriate to base either child support or alimony on Respondent's historical income at a work level so far in excess of full-time employment. The Court finds that a reasonable amount to be used for Respondent's income for child support and alimony purposes is his current income of \$51,600 a year or \$4,300 a month.

12. Attached hereto is a Child Support Worksheet based upon the parties' respective abilities to earn income. Based upon this Worksheet which assumes a gross income to Respondent of \$4,300 a month and a gross income to Petitioner of \$2,683, Petitioner should pay to Respondent child support of \$258 a month commencing with the month of September, 2003 and continuing until such time as Anna reaches the age of 18 and has graduated from high school in ordinary course, whichever occurs later.

While Petitioner has a legal obligation for child support for Anna, in view of the Court's analysis on alimony, hereinafter set forth, and in view of the present financial circumstances of the parties, and finally in view of the fact that Anna will graduate from high school within the upcoming school year, the Court finds that any obligation for child support should be abated based upon the alimony ruling hereinafter set forth.

13. In evaluating Petitioner's claim for alimony, the Court is required to look at three factors. These are Petitioner's need for alimony, Petitioner's ability to meet that need, and Respondent's ability to pay alimony to assist in meeting Petitioner's need. As to these three factors, the Court finds as follows:

a. Petitioner has established that her reasonable monthly expenses are the sum of \$1,743 as stated in paragraph 5 above. There is no other creditable evidence to establish a different figure.

b. As stated above, the Court finds that Petitioner has the capacity to earn a gross monthly income of \$2,683 a month.

c. As stated above, Respondent's gross monthly income is \$4,300 and his net monthly expendable income is \$3,400. Against this, he has reasonable monthly expenses for himself and the minor daughter of the parties which the Court finds to be \$3,351 per month as stated in paragraph 7 above.

When the foregoing analysis is made, the Court finds that Petitioner is currently capable of earning an income sufficient to meet her monthly needs. Respondent after meeting his monthly needs and the needs of the minor daughter has no income above expenses with which to make payment of alimony.

Based upon the foregoing analysis, the Court finds that Petitioner should be awarded no alimony from Respondent based upon the current financial circumstances of the parties.

14. The property of the parties should be awarded as follows with the award to each party to be free of any claim of the other:

a. **Real Estate.** The house and real property at 1888 Spring Lane, Salt Lake City, Utah, should be listed by the parties for sale within the next two weeks with an agent of their mutual choosing and at a price on which they mutually agree. If the parties are unable to agree upon a listing agent, they are each to forthwith provide the Court with the names of two real estate agents and the Court will then make a decision from the four names given or of the Court's own choosing. If the parties are unable to agree upon a listing price, then the home should be appraised immediately by Jerry Webber with each party to bear one-half the cost of the appraisal. The listing price will then be at the appraisal figure.

Upon its sale, the proceeds of the house are to be paid as follows:

- (1) To cover the then existing mortgage balance owing on the property,
- (2) To cover all the expenses related to the sale including the sales commission and any closing costs or accrued maintenance such as property taxes;
- (3) To reimburse Respondent for mortgage payments which he has made on the home since the separation of the parties at the rate of \$1,550 a month from May, 2001 through October, 2002 and \$619 a month from the month of January, 2003 to the time of actual sale.
- (4) The remaining sales proceeds should be divided equally between the parties

b. **Credits claimed by Respondent.** Respondent asserted claims for various credits in the amount of \$63,374 as set forth on his Exhibit 4. The Court finds that while these funds may have been either premarital or gifted from his parents, they nonetheless were put into a

joint account of the parties and then into the joint home of the parties, and the Court therefore finds that they have been comingled and no longer have their separate identity.

c. **Schovaers Electronics.** The Court finds that the 116 shares of stock in Schovaers Electronics was gifted to Respondent by his parents as shown in Exhibit 5, which were the letters of gift to respondent.

Petitioner asserted an interest in this stock based upon her claim that she had been working at Schovaers Electronics before her marriage to respondent and upon her marriage to respondent she continued to work but at no pay. In response to this claim, respondent produced the payroll book for the year 1979, the year in which the parties were married. This payroll book reflects that petitioner continued to be paid after the marriage of the parties in May of 1999, contrary to her recall.

Based upon the foregoing the Court finds that the stock in Schovaers Electronics should be awarded to respondent free of any claim of petitioner.

d. **Schovaers Investments.** The Court finds that this was a limited partnership created by Respondent's parents as an estate-planning device. The only asset which Respondent has received from this Investment is \$6,000 paid early in the year of 2003 and a prospective promissory note issued in 2003 providing for payments to be made in the future. The Court finds that Schovaers Investments including the \$6,000 payment and the promissory note is a gifted, non-marital asset which was not acquired through the efforts of the parties or received during the time the parties were together and should be awarded to Respondent free of any claim of Petitioner.

e. **Bank Accounts.** At the time of closing arguments, the parties reviewed the bank and investment accounts existing at the time of the parties' separation and came to the

conclusion that an equitable adjustment of these accounts would result in each of the parties being awarded their current accounts and Petitioner being awarded a property settlement from Respondent in the amount of \$11,049 which should be paid by Respondent to Petitioner at such time as the house and real property is sold out of his portion of the sales proceeds and after an adjustment for the property settlement set forth in paragraph 16 below.

f. **Retirement Accounts.** The parties have various retirement accounts including the following:

(1) Petitioner has a Utah Retirement Systems 401(k), a Utah Retirement Systems Defined Benefit Plan, and a Paine Webber IRA.

(2) Respondent has a Schovaers Electronics Profit Sharing Retirement Plan and a Paine Webber IRA.

These Plans are to be divided equally between the parties pursuant to the terms of Qualified Domestic Relations Orders and each party should receive one-half the benefit of each Plan and be responsible for any tax liability attributable to his or her respective portions.

g. **Life Insurance.** Respondent has a term life insurance policy with Jackson National Life which has no marital value and which should be awarded to Respondent.

h. **Mediation Fee.** Respondent paid the full mediation fee of the parties and should receive credit against the division of marital assets in the amount of this fee in the sum of \$680.

i. **Vehicles.**

(1) Petitioner will be awarded the 1999 Jeep Grand Cherokee Laredo which the Court finds has a marital value of \$11,175.

(2) Respondent will be awarded the 2004 Jeep Grand Cherokee which he purchased within the month prior to the divorce trial and which the Court finds has no equity.

(3) Respondent will be awarded the 1993 Ford F250 pickup truck which the Court finds has a marital value of \$1,500.

j. **Personal Property.** Based upon the stipulation of the parties the personal property if the parties will be awarded in accordance with Respondent's Exhibit 21 and the lists attached thereto as follows with no values ascribed:

(1) Petitioner will be awarded items listed on Exhibit "A" which if in the possession of Respondent will be given to Petitioner;

(2) Petitioner will be awarded items listed on Exhibit "B" which are items she took with her and are currently in her possession;

(3) Respondent will be awarded items listed on Exhibit "C" which are currently in his possession except to the extent that any of those items are listed in Petitioner's requested items on Exhibit "A".

(4) Respondent has the family photographs and Petitioner has the negatives up to the time of the parties' separation, and the parties stipulated that this was a fair division of these photographs. Respondent should be ordered to provide Petitioner with copies of photos taken of the daughters of the parties since the separation to the time of trial.

15. Based upon the foregoing awards, the division of marital property between the parties is as follows:

JOSEPHINE**JOHN****REAL ESTATE**

1888 Spring Lane, Salt Lake City, UT

House to be listed and sold and proceeds divided after payment of mortgage, sales commission and closing costs, accrued property taxes, and reimbursement to Respondent for mortgage payments made from the time of separation to the time of sale with the remainder to be divided equally

One-half

One-half

BUSINESS INTEREST

Schovaers Electronics, 116 shares

Schovaers Investments

BANK AND INVESTMENT ACCOUNTS

Treasury Credit Union #1424 (Josephine)

Bank of America #69907749 (Josephine)

US Bank, checking #153150249339 (John)

Paine Webber #FP 1481432 (Joint)

US Bank #253100058986 (Custodial account for Anna)

Schwab #4134-8210

(Custodial account for Aundrea and Anna)

RETIREMENT ACCOUNTS (Divide all by QDRO)

Utah Retirement Systems 401(k) (Josephine)

One-half

One-half

Utah Retirement Systems, Defined Benefit Plan
(Josephine)

One-half

One-half

Paine Webber IRA (Josephine)

One-half

One-half

Schovaers Electronics Profit Sharing Plan (John)

One-half

One-half

Paine Webber IRA #FP 1453332 (John)

One-half

One-half

	JOSEPHINE	JOHN
<u>LIFE INSURANCE</u>		
Jackson National Life #0017206120 (no cash value)		---
<u>PERSONAL PROPERTY AND MISCELLANEOUS</u>		
2004 Jeep Grand Cherokee (John) Financed 100%; no equity		-0-
1999 Jeep Grand Cherokee Laredo 4WD (Josephine) Value per NADA trade-in	11,175	
1993 Ford Truck F250 - Salvage value only		1,500
Furniture and furnishings (divided per Exhibit 21)	Divided	Divided
Credit for mediation fee paid to Marcie Keck		(680)
TOTALS	\$11,175	\$820
	(\$5,177)	\$5,177
NET DISTRIBUTION	\$5,998	\$5,997

16. Based upon the accounting set forth in paragraph 15 above, the Court finds that in order to equalize the property award between the parties, petitioner should pay to respondent \$5,177, which should be treated as a credit by respondent in the payment of his obligation set forth in paragraph 14(e) above on the bank account, which will reduce that obligation to the net amount of \$5,872 and paid in the manner set forth in paragraph 14(e).

17. Petitioner has requested and should be restored to her maiden name of McEntire and to be known hereafter as Josephine McEntire.

18. Based upon the facts and circumstances of this case and the evidence presented to the Court, the Court finds that each party should pay and be responsible for their own attorney's fees and costs incurred in the prosecution of this divorce action.

Based upon the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. Each of the parties is entitled to a Decree of Divorce, one from the other, on the grounds of irreconcilable differences, which Decree shall become final upon signing and entry.

2. The custody of and visitation with Anna shall be as set forth in paragraph 4 of the Findings of Fact.

3. Petitioner shall be ordered to pay child support to respondent in an amount and upon the terms set forth in paragraph 12 of the Findings of Fact.

4. No alimony shall be awarded to petitioner.

5. The property of the parties shall be awarded as set forth in paragraphs 14 and 15 of the Findings of Fact.

6. Respondent shall be awarded a property settlement from petitioner in an amount and upon the terms set forth in paragraph 16 of the Findings of Fact.

7. Petitioner shall be restored to her maiden name of Josephine McEntire.

8. Each party is ordered to execute any documents and perform any acts necessary to effectuate the terms of the Decree of Divorce to be entered hereon.

DATED this _____ day of September, 2003

BY THE COURT:

LESLIE LEWIS
District Court Judge

B. L. DARI (818)
 ART, ADAMSON DONOVAN
 Attorneys for Respondent
 370 East South Temple, Suite 400
 Salt Lake City, Utah 84111
 (801) 521-6383

IN THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

JOSEPHINE M. SCHOVAERS,

Petitioner,

v.

JOHN C SCHOVAERS,

Respondent.

**CHILD SUPPORT OBLIGATION WORKSHEET
 (SOLE CUSTODY AND PATERNITY)**

Civil No. 014903735

Hon Leslie Lewis

	MOTHER	FATHER	COMBINED
1 Enter the # of natural and adopted children of this mother and father for whom support is to be awarded.			2
2a. Enter the father's and mother's gross monthly income. Refer to Instructions for definition of income	\$2,683	\$4,300	
2b. Enter previously ordered alimony that is actually paid. (Do not enter alimony ordered for this case).			
2c. Enter previously ordered child support. (Do not enter obligations ordered for the children in Line 1).			
2d. OPTIONAL: Enter the amount from Line 12 of the Children in Present Home Worksheet for either parent.			
3. Subtract Lines 2b, 2c, and 2d from 2a This is the Adjusted Gross Income for child support purposes.	\$2,683	\$4,300	\$6,983
4. Take the COMBINED figure in Line 3 and the number of children in Line 1 to the Support Table Find the Base Combined Support Obligation. Enter it here.			\$680
5. Divide each parent's adjusted monthly gross in Line 4 by the COMBINED adjusted monthly gross in Line 3	0.38	0.62	
6. Multiply Line 4 by Line 5 for each parent to obtain each parent's share of the Base Support Obligation.	\$258	\$422	
7. BASE CHILD SUPPORT AWARD: Bring down the amount(s) from Line 6 or enter the amount(s) from the Low Income table per U C A 78-45-7.7. The parent(s) without physical custody of the child(ren) pay(s) the amount(s) all 12 months of the year.	\$258.00		

8. Which parent is the obligor? (X) Mother () Father () Both

9. Is the support award the same as guideline amount in Line 7? () Yes () No
 If NO, enter the amount ordered. \$ _____ (Father) \$ _____ (Mother) and answer Number 10.

10. What were the reasons stated by the Court for the deviation?
 () property settlement
 () excessive debts of the marriage
 () absence of need of the custodial parent
 () other _____

INCOME HISTORY AND CAPACITY OF PETITIONER

In 1999, Petitioner was a full-time teacher for 9 months at a salary of \$20,038. See Exhibit "A" attached.

If Petitioner had remained as a full-time teacher in the Jordan School District, her pay at this time would be between \$28,065 and \$29,377 - See Exhibit "B" attached

\$28,065

Petitioner has been employed in Salt Lake and now in Washington State as a sales. While working as a clerk in Salt Lake, she earned \$8.00 an hour. Assuming she worked the remaining 3 months of the year while not teaching at 40 hours per week at \$8.00 an hour, this would generate an additional income of \$4,128

4,128

TOTAL ANNUAL INCOME

\$32,193

AVERAGE MONTHLY INCOME

\$2,683

LAW OFFICES
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370 EAST SOUTH TEMPLE, SUITE 400
SALT LAKE CITY, UTAH 84111-1255

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OF COUNSEL
KENT M. KASTING, P.C.
KIM M. MCGREGOR, P.C.
D. RANDALL TRUEBLOOD, P.C.

September 30, 2003

The Honorable Leslie A. Lewis
District Court Judge
450 South State Street
Salt Lake City, UT 84111

Re: Schovaers v. Schovaers; Civil No. 014903735

Dear Judge Lewis:

I was informed by Frank Call that the Court is desirous of both counsel providing Proposed Decrees of Divorce as well as the Proposed Findings of Fact and Conclusions of Law previously submitted.

Enclosed for your consideration is our Proposed Decree of Divorce.

Yours very truly,



B. L. Dart

BLD/skm

Enclosure

cc: John Schovaers
Frank Call

B. L. DART (818)
DART, ADAMSON, & DONOVAN
370 East South Temple, Suite 400
Salt Lake City, Utah 84111
(801) 521-6383
Attorneys for Respondent

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---oooOooo---

JOSEPHINE M. SCHOVAERS,	:	RESPONDENT'S PROPOSED
	:	DECREE OF DIVORCE

Petitioner,

:

v.

:

JOHN C. SCHOVAERS,

:

Case No. 014903735

Respondent.

:

Hon. Leslie Lewis
Comm. T. Patrick Casey

---oooOooo---

The above-entitled matter came on regularly for trial on Monday, the 25th day of August and Tuesday, the 26th day of August, 2003, Petitioner appearing in person and by her attorney Frank N. Call, and Respondent appearing in person and by his attorney B. L. Dart, and the Court having heard testimony from witnesses and having received exhibits and various stipulations and the matter having been argued and submitted, and the Court having made and entered its Findings of Fact and Conclusions of Law, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Each of the parties is awarded a Decree of Divorce, one from the other, on the grounds of irreconcilable differences, which Decree shall become final upon signing and entry.

2. Petitioner and Respondent have two children as issue of this marriage: Aundrea, age 22, who is an adult and emancipated, and Anna, age 17, born January 29, 1986. The parties are awarded the joint legal custody of Anna with her physical residence to be with Respondent and with Petitioner to have visitation with Anna as regularly as can be arranged without forcing Anna to engage in visitation contrary to her desires.

Respondent shall encourage and facilitate a relationship between Anna and Petitioner and Petitioner shall consider engaging in counseling to repair the relationship between her and Anna.

3. It is ordered that any obligation petitioner has to pay child support is abated based upon the alimony ruling hereinafter set forth.

4. Petitioner is awarded no alimony from Respondent.

5. The property of the parties is awarded as follows with the award to each party to be free of any claim of the other:

a. **Real Estate.** The house and real property at 1888 Spring Lane, Salt Lake City, Utah, shall be listed by the parties for sale within the next two weeks with an agent of their mutual choosing and at a price on which they mutually agree. If the parties are unable to agree upon a listing agent, they are each to forthwith provide the Court with the names of two real estate agents and the Court will then make a decision from the four names given or of the Court's own choosing. If the parties are unable to agree upon a listing price, then the home shall be appraised immediately by Jerry Webber with each party to bear one-half the cost of the appraisal. The listing price will then be at the appraisal figure.

Upon its sale, the proceeds of the house are to be paid as follows:

- (1) To cover the then existing mortgage balance owing on the property;
- (2) To cover all the expenses related to the sale including the sales commission and any closing costs or accrued maintenance such as property taxes;
- (3) To reimburse Respondent for mortgage payments which he has made on the home since the separation of the parties at the rate of \$1,550 a month from May, 2001 through October, 2002 and \$619 a month from the month of January, 2003 to the time of actual sale.

(4) The remaining sales proceeds shall be divided equally between the parties

b. **Credits claimed by Respondent.** Respondent's claims for various credits in the amount of \$63,374 is denied as these funds have been commingled and no longer have their separate identity.

c. **Schovaers Electronics.** The stock in Schovaers Electronics is awarded to respondent free of any claim of petitioner.

d. **Schovaers Investments.** The Schovaers Investments including the \$6,000 payment and the promissory note is a gifted, non-marital asset which was not acquired through the efforts of the parties or received during the time the parties were together and is awarded to Respondent free of any claim of Petitioner.

e. **Bank Accounts.** Each of the parties is awarded their current accounts and Petitioner being awarded a property settlement from Respondent in the amount of \$11,049 which should be paid by Respondent to Petitioner at such time as the house and real property is sold out of his portion of the sales proceeds and after an adjustment for the property settlement set forth in paragraph 7 below.

f. **Retirement Accounts.** The parties have various retirement accounts including the following:

(1) Petitioner has a Utah Retirement Systems 401(k), a Utah Retirement Systems Defined Benefit Plan, and a Paine Webber IRA.

(2) Respondent has a Schovaers Electronics Profit Sharing Retirement Plan and a Paine Webber IRA.

These Plans shall be divided equally between the parties pursuant to the terms of Qualified Domestic Relations Orders and each party shall receive one-half the benefit of each Plan and be responsible for any tax liability attributable to his or her respective portions.

g. **Life Insurance.** Respondent has a term life insurance policy with Jackson National Life which has no marital value and which is awarded to Respondent.

h. **Mediation Fee.** Respondent paid the full mediation fee of the parties and shall receive credit against the division of marital assets in the amount of this fee in the sum of \$680.

i. **Vehicles.**

(1) Petitioner is awarded the 1999 Jeep Grand Cherokee Laredo which the Court finds has a marital value of \$11,175.

(2) Respondent is awarded the 2004 Jeep Grand Cherokee which he purchased within the month prior to the divorce trial and which the Court finds has no equity.

(3) Respondent is awarded the 1993 Ford F250 pickup truck at a marital value of \$1,500.

j. **Personal Property.** The personal property if the parties is awarded in accordance with Respondent's Exhibit 21 and the lists attached thereto as follows with no values ascribed:

(1) Petitioner is awarded items listed on Exhibit "A" which if in the possession of Respondent will be given to Petitioner;

(2) Petitioner is awarded items listed on Exhibit "B" which are items she took with her and are currently in her possession;

(3) Respondent is awarded items listed on Exhibit "C" which are currently in his possession except to the extent that any of those items are listed in Petitioner's requested items on Exhibit "A".

(4) Respondent has the family photographs and Petitioner has the negatives up to the time of the parties' separation, and this was a fair division of these photographs. Respondent is ordered to provide Petitioner with copies of photos taken of the daughters of the parties since the separation to the time of trial.

6. The division of marital property between the parties as set forth above is as follows:

JOSEPHINE**JOHN****REAL ESTATE**

1888 Spring Lane, Salt Lake City, UT

House to be listed and sold and proceeds divided after payment of mortgage, sales commission and closing costs, accrued property taxes, and reimbursement to Respondent for mortgage payments made from the time of separation to the time of sale with the remainder to be divided equally.

One-half

One-half

BUSINESS INTEREST

Schovaers Electronics, 116 shares

Schovaers Investments

BANK AND INVESTMENT ACCOUNTS

Treasury Credit Union #1424 (Josephine)

Bank of America #69907749 (Josephine)

US Bank, checking #153150249339 (John)

Paine Webber #FP 1481432 (Joint)

US Bank #253100058986 (Custodial account for Anna)

Schwab #4134-8210

(Custodial account for Aundrea and Anna)

RETIREMENT ACCOUNTS (Divide all by QDRO)

Utah Retirement Systems 401(k) (Josephine)

One-half

One-half

Utah Retirement Systems, Defined Benefit Plan (Josephine)

One-half

One-half

Paine Webber IRA (Josephine)

One-half

One-half

Schovaers Electronics Profit Sharing Plan (John)

One-half

One-half

Paine Webber IRA #FP 1453332 (John)

One-half

One-half

	JOSEPHINE	JOHN
<u>LIFE INSURANCE</u>		
Jackson National Life #0017206120 (no cash value)		---
<u>PERSONAL PROPERTY AND MISCELLANEOUS</u>		
2004 Jeep Grand Cherokee (John) Financed 100%; no equity		-0-
1999 Jeep Grand Cherokee Laredo 4WD (Josephine) Value per NADA trade-in	11,175	
1993 Ford Truck F250 - Salvage value only		1,500
Furniture and furnishings (divided per Exhibit 21)	Divided	Divided
Credit for mediation fee paid to Marcie Keck		(680)
TOTALS	\$11,175	\$820
	(\$5,177)	\$5,177
NET DISTRIBUTION	\$5,998	\$5,997

7. In order to equalize the property award between the parties, petitioner is ordered to pay to respondent \$5,177, which shall be treated as a credit by respondent in the payment of his obligation set forth in paragraph 5(e) above on the bank account, which will reduce that obligation to the net amount of \$5,872 and paid in the manner set forth in paragraph 5(e).

8. Petitioner is restored to her maiden name of McEntire and to be known hereafter as Josephine McEntire.

—
9. Each party is ordered to pay and be responsible for their own attorney's fees and costs incurred in the prosecution of this divorce action.

10. Each party is ordered to execute any documents and perform any acts necessary to effectuate the terms of this Decree of Divorce.

DATED this ____ day of October, 2003.

BY THE COURT:

LESLIE LEWIS
District Court Judge

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Dart, Adamson & Donovan

Frank N. Call, (U.S.B. #6846)
68 South Main Street, Suite 701
Salt Lake City, Utah 84101
Phone Number: (801) 532-9909
Attorney for Petitioner, Josephine M. Schovaers

IN THE THIRD JUDICIAL DISTRICT COURT
IN & FOR SALT LAKE COUNTY, STATE OF UTAH

JOSEPHINE M. SCHOVAERS,)	
)	Petitioner's Opposition to Respondent's
Petitioner,)	Rule 52(b) Motion to Amend Findings
)	and Rule 59(a) Motion for a New Trial
vs.)	and Rule 59(E) Motion to Alter or
)	Amend Judgment.
)	
JOHN C. SCHOVAERS)	Case # 014903735
)	Judge Leslie Lewis
Respondent.)	Commissioner Casey

Petitioner, Josephine M. Schovaers ("Ms. Schovaers"), by and through her attorney Frank N. Call, files this as her opposition to the *Rule 52(b) Motion to Amend Findings and Rule 59(a) Motion for a New Trial and Rule 59(E) Motion to Alter or Amend Judgment* (the "Motions") that has been filed by the Respondent, John C. Schovaers ("Respondent").

OPPOSITION

I. RESPONDENT'S MOTION SHOULD BE DENIED BECAUSE THERE ARE NO GROUNDS JUSTIFYING A NEW TRIAL OR THE AMENDMENT OF THE COURT'S JUDGMENT.

In his Motions, Respondent claims the Court should amended its judgment and rulings in this matter and/or grant Respondent a new trial because, when the Court issued its rulings, the

Court did not have the benefit of Respondent's proposed *Findings of Fact and Conclusions of Law* (hereinafter referred to as the "Respondent's proposed Findings & Conclusions") which contained the rationale and support for Respondent's positions, particularly as they relate to alimony. *Motions*, p.3. Respondent's assertion that the Court did not have or consider Respondent's proposed Findings & Conclusions when making its decision in this case is based solely on the fact that ¶2 of the Court's *Memorandum Decision* instructs Ms. Schovaers to amended her proposed findings and conclusions so as to incorporate "paragraph 5(a)" of Respondent's proposed Findings & Conclusions, but the findings of fact section of Respondent's proposed Findings & Conclusions does not have a paragraph numbered "5(a)," and ¶5 of findings of fact section of the Respondent's proposed Findings & Conclusions relate to matters other than the allocation and division of the parties' home or real property. *Motions*, p.2.

For the reasons set forth below, Respondent's claim and arguments are without merit and appear to be nothing more than an attempt by Respondent to reargue and contest the Court's rulings. First, and most importantly, the Court's *Memorandum Decision* clearly and expressly states that the Court received Respondent's proposed Findings & Conclusions on about September 30, 2003 and that the Court had "carefully considered" both party's respective proposed findings and conclusions before issuing its ruling on October 30, 2003. *Memorandum Decision*, p.1. Thus, Respondent's assertion that the Court did not have or consider Respondent's proposed Findings & Conclusions when making its decision is directly contrary to the Court's own express statement that the Court had in fact received and considered Respondent's proposed Findings & Conclusions before making its decision in this matter. Since

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the Court has already expressly stated that it had received and considered Respondent's proposed Findings & Conclusions before making its decision, the Court should deny the Respondent's Motions.

Next, ¶2 of the Court's *Memorandum Decision* states and reads as follows:

The petitioner discusses the parties' house and real property at 1888 Spring Lane, Salt Lake City, Utah in Findings Nos. 33 through 41. The petitioner is to re-draft these Findings first to simplify them and second, to incorporate paragraph 5(a) of the respondent's proposed Findings of Fact and Conclusions of Law. The Court concludes that the respondent's version in this respect is the more accurate version of the Court's ruling on the house and the division of the proceeds upon sale of the house. [Petitioner's] Conclusions of Law should be similarly edited. (*Emphasis added*).

Although it is true that ¶5 of the findings of fact section of Respondent's proposed Findings & Conclusions does not address the division of the parties' house or real property, ¶5 of the conclusions of law section of the Respondent's proposed Findings & Conclusions specifically address the division of the parties' house and real property as described in ¶2 of the Court's *Memorandum Decision*. Thus, it is abundantly clear that the Court's reference to "paragraph 5(a) of the respondent's proposed Findings of Fact and Conclusions of Law" is a reference to ¶5 of the conclusions of law portion of the Respondent's proposed Findings & Conclusions.

When re-drafting and editing Ms. Schovaers' proposed findings as directed by the Court, counsel for Ms. Schovaers had no difficulty linking the Court's reference to "paragraph 5(a)" of Respondent's proposed Findings & Conclusions to those provisions of Respondent's proposed Findings & Conclusions that the Court wanted to utilize in allocating and dividing the parties' house and real property.

Thus, it is abundantly clear that the Court did in fact have access to Respondent's

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proposed Findings & Conclusions when it made its decision and rulings in this matter. Moreover, ¶2 of the Court's ~~Memorandum Decision~~ show that, ~~not only did the Court have Respondent's~~ proposed Findings & Conclusions when making its decision, the Court actually used and adopted some of the provisions from Respondent's proposed Findings and Conclusions in making its decision in this matter. Since the basis for Respondent's Motions is without merit, the Court should deny Respondent's Motions.

II. THE COURT SHOULD DENY RESPONDENT'S MOTIONS BECAUSE THE COURT'S ALIMONY AWARD AND OTHER RULINGS ARE LEGAL AND SUPPORTED BY THE EVIDENCE.

In his Motions, Respondent seeks a new trial and/or the amended of the judgment pursuant to Rule 59(a)(6) and (7) of the Utah Rules of Civil Procedure. *Motions*, p.1. In essence, Respondent claims that, since he only earns \$4,300 per month, the Court's alimony award of \$2,000 per month is not adequately supported by the evidence and/or is illegal. *Motions*, p.3-7. Respondent's assertion in this regard fails to recognize and properly apply the applicable binding case law and statutory provisions that relate to alimony awards.

In Utah divorce cases, trial courts must consider three factors before awarding alimony. Those factors include: (1) the financial needs and condition of the recipient spouse; (2) the ability of the recipient spouse to provide a sufficient income for herself; and (3) the ability of the payor spouse to provide support. *E.g., Bakanowski v. Bakanowski*, 80 P.3d 153, 155 (Ut. App. 2003). Here, the Court adequately considered all of these factors in determining to award alimony of \$2,000 per month to Ms. Schovaers. Respondent now challenges the Court's alimony award and argues that the alimony award is necessarily illegal and unjustified because \$2,000 is not available

from the Respondent's monthly salary of \$4,300.00 per month. Thus, the thrust of Respondent's argument is that when looking solely at his employment income, Respondent does not have the ability to provide support to Ms. Schovaers. Respondent's analysis and argument is flawed for several reasons.

First, when determining whether a payor has the ability to pay alimony, the Court must consider, not only the payor's income from employment, but all financial resources that the payor can use to pay alimony, including the payor's separate property. *E.g.*, Sampinos v. Sampinos, 750 P.2d 615, 618-619 (Ut. App. 1988). Here, Respondent asks the Court to focus only on the fact that his monthly income is \$4,300 per month, and to completely ignore the fact that the Respondent has significant other financial resources from which he can pay alimony including: hundreds of thousands of dollars worth of the Schovaers Electronics stock; hundreds of thousands of dollars worth of retirement benefits; other property; as well as regular monetary gifts and/or payments from parents. Respondent's argument that his ability to pay alimony should be determined by considering only his \$4,300 monthly employment income is contrary to Sampinos v. Sampinos and all of the other Utah cases that instruct trial courts to consider, not only the payor's income from employment, but the payor's total financial circumstances when determining the proper amount of alimony awards. Here, it is clear that the Court properly considered the Respondent's total financial circumstances when deciding its alimony award. Thus, in light of Respondent's total financial circumstances, the alimony award is neither excessive or improper.

Next, even though the Court previously indicated that the Respondent had grossly overstated his claimed expenses, Respondent continues to wilfully overstate his expenses in

arguing that the alimony award is excessive. In particular, Anna, the parties' minor child is now 18 years old and will be fully emancipated in less than 4 months. Once Anna is fully emancipated, Respondent's claimed expenses will be significantly reduced even further. Anna's pending emancipation and the fact that Respondent's claimed expenses would soon be reduced even further was clearly considered and known to the Court both at the time of trial and when the Court determined the appropriate amount alimony. Nevertheless, Respondent's Motions fail to acknowledge or even acknowledge the fact that Respondent's claimed expenses will be significantly reduced in less than 4 months. Thus, the Respondent's analysis and argument that the alimony award is improper or excessive in light of his expenses is flawed and significantly overstated.

Next, Respondent argues that the Court's alimony award is excessive and improper because the \$2,000 monthly alimony award does not equalize the parties' respective monthly incomes, but instead puts the Respondent's net monthly income lower than Petitioner's. *Motion*, p.6. The Respondent's argument in this regard is improper and misconstrues the case law because the goal and purpose of alimony is not to equalize the parties' income. Instead, the purpose and goal of alimony is to equalize the parties' standards of living and restore the payee as close as possible to the standard of living enjoyed during the marriage. *E.g.*, Bakanowski v. Bakanowski, 80 P.3d 153, 154 (Ut. App. 2003) ("It is well within the Court's equitable powers to order alimony in an amount sufficient to equalize the parties' standards of living."); Williamson v. Williamson, 983 P.2d 1103, 1106 (Ut. App. 1999) ("The goal of alimony [is] to equalize the parties' standards of living, not just their incomes"). Here, the Court's alimony award properly equalizes the parties' standards of living rather than their respective net monthly incomes. Any assertion by the Respondent that the Court's alimony award must equalize the parties' incomes is

directly contrary to all cases dealing with the matter. *E.g., Kemp v. Kemp*, 2001 UT App 157

("We have never required [equalization] of income.")

In light of the foregoing, it is apparent that the Court considered all of the factors its was obligated to considered when deciding on the amount of alimony to award. The Court's alimony award is both proper and reasonable in amount as it fairly equalizes the parties' standards of living and returns Ms. Schovaers, as close as equitably possible, to the standard of living that she enjoyed during the course of the parties' marriage. Furthermore, the Court considered Respondent's total financial circumstances when determining his ability to pay support. Thus, the Court's alimony award is both consistent with the law and adequately supported by the evidence. Accordingly, Respondent's Motions should be denied.

Dated: 2/5/04



Frank N. Call

Attorney for Petitioner, Josephine M. Schovaers

PROOF OF SERVICE

I certify that on this 5TH day of FEBRUARY, 2004, I caused a true and accurate copy of the forgoing to be served on the persons listed below by mailing such copies by U.S. First Class mail, postage pre-paid, to:

Bert L. Dart
Dart Adamson & Donovan
Attorney for John Schovaers
370 East South Temple, Suite 400
Salt Lake City, Utah 84111

BY: _____



B.L. DART (818)
DART ADAMSON & DONOVAN
Attorney for Respondent
370 East South Temple, Suite 400
Salt Lake City, Utah 84111
(801) 521-6383

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

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JOSEPHINE M. SCHOVAERS,	:	RESPONDENT'S REPLY TO
	:	PETITIONER'S OPPOSITION TO
Petitioner,	:	RESPONDENT'S MOTION TO AMEND
	:	FINDINGS, MOTION FOR NEW TRIAL
v.	:	& MOTION TO ALTER OR AMEND
	:	JUDGMENT
JOHN C. SCHOVAERS,	:	
	:	Civil No. 014903735
Respondent.	:	
	:	Judge Leslie Lewis

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Respondent, John C. Schovaers, by his attorney, B. L. Dart, replies to petitioner's Opposition to respondent's Motion to Amend Findings, Motion for New Trial and Motion to Alter or Amend Judgment as follows:

1. The first point of petitioner's Opposition is based upon the claim that the Court must have had respondent's Findings of Fact when it made its ruling because in the Memorandum Decision it referenced respondent's Findings of Fact and Conclusions of Law. The problem is that the reference was to paragraph 5(a) of the proposed Findings of Fact and Conclusions of Law and there, in fact, is no paragraph 5(a) to those proposed Findings. The only paragraph 5(a) of respondent's pleadings is of the proposed Decree of Divorce. There is a paragraph 5 of the Findings of Fact but it relates to monthly expenses, not to property.

Petitioner then contends that the reference by the court to paragraph 5(a) was as to the property award and then goes on to say,

“Thus, it is abundantly clear that the court’s reference to ‘paragraph 5(a) of the respondent’s Proposed Findings of Fact and Conclusions of Law’ is a reference to paragraph 5 of the Conclusions of Law portion of the respondent’s Proposed Findings and Conclusions.”

This position makes no sense as the Memorandum Decision directed petitioner to “incorporate paragraph 5(a) of the respondent’s Proposed Findings of Fact and Conclusions of Law.”

Paragraph 5 of respondent’s proposed Conclusions of Law states, “The property of the parties shall be awarded set forth in paragraphs 14 and 15 of the Findings of Fact.” It is difficult to see how the Court would have asked petitioner to incorporate this language into his Findings of Fact.

The language of the court directing petitioner to incorporate paragraph 5(a) of the respondent’s Proposed Findings of Fact and Conclusions of Law only makes sense when it is applied to paragraph 5 of respondent’s Proposed Decree of Divorce and this is why it is submitted that the Court was relying upon respondent’s Proposed Decree of Divorce and not his Proposed Findings of Fact at the time it made its ruling.

It is clear the Court was looking at the respondent’s Proposed Decree of Divorce, which does not incorporate all of the bases for the various rulings and not respondent’s Proposed Findings of Fact and Conclusions of Law, which does incorporate the basis for the proposed rulings, by looking at the language from the Memorandum Decision that states,

“The petitioner filed her Proposed Findings of Fact and Conclusions of Law on approximately September 16, 2003. The respondent submitted his Proposed Findings of Fact and Conclusions of Law on approximately September 30, 2003.”

As can be seen from Exhibits "A" and "B" attached to respondent's Motion, respondent's Findings of Fact were delivered to the Court on the 12th of September, 2003. Respondent's Proposed Decree of Divorce was delivered to the Court on the 30th day of September, 2003. It is obvious the Court was looking at the Proposed Decree of Divorce.

Finally, petitioner claims that the Court must have had the respondent's Proposed Findings of Fact and Conclusions of Law when making its decision as, "The court actually used and adopted some of the provisions from respondent's Proposed Findings and Conclusions in making its decision in this matter," and references the Court to paragraph 2 of the Memorandum Decision. There is nothing in paragraph 2 of the Memorandum Decision to establish that the Court was looking at respondent's Proposed Findings as opposed to the Proposed Decree of Divorce.

2. The only cash flow available to respondent is his monthly salary which the Court found to be \$4,300 a month. Petitioner in her brief contends that in determining whether respondent had the ability to pay alimony, the Court should consider not only his income from employment but all financial resources that he could use to pay alimony, including his separate property and cites the Court to the case of Sampinos v. Sampinos, 750 P.2d 615, 618-619. The Sampinos case is not applicable to the facts of this case as in the Sampinos case the Court found that the plaintiff/wife,

"while married to defendant was forced to use her inheritance proceeds from the sale of her home for support and maintenance, a portion of which was used for defendant's benefit. We, therefore, conclude that the trial court did not abuse its discretion in awarding plaintiff alimony from the coal contract proceeds, even though the trial court determined them to be defendant's sold and separate property."

In the Sampinos case the Court found that where plaintiff's non-marital assets had been used to support defendant it was appropriate to use an income stream off of defendant's non-marital assets to assist him in paying alimony. Those are not the facts of this case. No assets of petitioner have been used to support respondent and respondent has no assets which provide an income stream. The Schovaers Electronics stock which is referred to by petitioner has never paid any dividends and does not provide any income stream to respondent.

Petitioner then claims that respondent has "hundreds of thousands of dollars worth of retirement benefits" which he can look to in paying alimony, while disregarding the fact that the retirement of the parties was divided equally between the parties and petitioner has the same amount of funds from this source as does respondent. Finally, petitioner mentions that respondent has regular monetary gifts from his parents. Respondent testified that that gifting from his parents had terminated based upon the changes of tax laws that allow larger estates to pass free of inheritance taxes. More important, respondent's attorney has never known of a case where a court has based alimony award on anticipated gifts from the payor's parents.

Petitioner then makes the argument that the goal of alimony is to equalize the parties' standard of living not just their incomes and, in so doing, cites the Court to the case of Williamson v. Williamson, 983 P.2d 1103 (Utah App. 1999). The Williamson case has no application here. The Williamson case was a case where in a modification proceeding the trial court terminated a \$425 a month alimony award under circumstances that the husband's income had been reduced from \$3,550 a month at the time of the divorce to \$2,090 a month at the time of the modification hearing. The trial court ruling was reversed for failure of the trial court to prepare sufficient Findings of Fact to support his ruling. The statement that the goal of alimony is

to equalize the parties' standard of living not just their incomes was in the context that the husband had remarried. The Court in its opinion stated,

"When considering Ms. Williamson's financial condition and earning capacity and Mr. Williamson's ability to give support, the trial court should move beyond merely considering their incomes and inquiry more fully into their financial situations including Mr. Williamson's new spouses financial ability to share living expenses with him."

In the Schovaers case it is difficult to see how the parties can have an equal standard of living if they have a disparate level of income. The Memorandum Decision of the Court unfortunately does create a disparate situation to Mrs. Schovaers's advantage and to Mr. Schovaers's disadvantage. There was nothing in this case to indicate that petitioner's expenses were higher than respondent's. In fact, the reverse is true.

Petitioner relies on the Kemp case to say that the Court has never required equalization of income. In the Kemp case the Court determined that there was a \$560 difference between the wife's earning capacity and her reasonable expenses and, therefore, awarded \$560 a month in alimony. The wife, who was the recipient of alimony, was asking the Court to equalize income under circumstances where all of her expenses had been covered under the alimony award. An equalization of income would have created a cash flow to the wife in excess of her needs.

Under all of the circumstances of this case, the Court should modify its award of alimony for the reasons set forth in respondent's Motion.

RESPECTFULLY SUBMITTED this 20th day of February, 2004.



B. L. DART

MAILING CERTIFICATE

I hereby certify that on the 20th day of February, 2004, I mailed a copy of the
foregoing to:

Frank N. Call
Attorney for Petitioner
68 South Main Street, #701
Salt Lake City, UT 84101

Shaunon K. Minkel