

1994

Marita W. Muir v. Michael D. Muir : Brief of Appellant

Utah Court of Appeals

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Suzanne Marelius; Esq.; Littlefield & Peterson; Attorneys for Defendant/Appellee.

Helen E. Christian; Esq.; Gustin & Christian; Attorneys for Plaintiff/Appellant.

Recommended Citation

Brief of Appellant, *Marita W. Muir v. Michael D. Muir*, No. 903928 (Utah Court of Appeals, 1994).
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SUZANNE MARELIUS, ESQ. (2081)
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435
Attorneys for Defendant/
Appellee

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the lower court failed to comply with this Court's mandate on remand to enter adequate findings to support its order.
2. Whether the evidence in the record is sufficient to support the findings which the trial court did make or whether the findings are against the clear weight of evidence, thus making them clearly erroneous.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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MARITA W. MUIR,

Plaintiff/Appellee,

v.

MICHAEL D. MUIR,

Defendant/Appellant,

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Case No. 940081-CA

Priority No. 15

District Court 11093

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BRIEF OF APPELLANT

AN APPEAL FROM ORDER ON DEFENDANT'S
PETITION FOR MODIFICATION ON REMAND
THIRD JUDICIAL DISTRICT, SALT LAKE COUNTY, UTAH,
THE HONORABLE HOMER F. WILKINSON, PRESIDING

APPELLANT'S JURISDICTIONAL STATEMENT

Jurisdiction of this Court is conferred pursuant to the provisions of Utah Code Ann. § 78-2a-3(2)(i) (Supp. 1993) This action involves the appeal of certain provisions of Findings of Fact, Conclusions of Law and Order on Defendant's Petition for Modification on Remand signed and entered in the Third Judicial District Court in and for Salt Lake County, State of Utah on January 20, 1994. A timely Notice of Appeal was filed on February 8, 1994.

DETERMINATIVE AUTHORITY

Copies of the following are found in Addendum A to this brief:

Utah Code Ann. § 30-3-5 (1993 Supp.)

Carlton v. Carlton, 756 P.2d 86 (Utah App. 1988)

Muir v. Muir, 841 P.2d 736 (Utah App. 1992)

STATEMENT OF THE CASE

This is an appeal from a final Order on Defendant's Petition for Modification on Remand entered by the lower court pursuant to this Court's remand of the case in Muir v. Muir, Case No. 900603-CA, 841 P.2d 736 (Utah App. 1992). The Defendant/Appellant Michael D. Muir filed a Petition for Modification seeking to modify the parties' Decree of Divorce entered in September 1985. Mr. Muir sought to reduce or terminate his alimony obligation on the grounds that his income had decreased since entry of the decree; that Mrs. Muir had become employed since the time of the divorce; that he had remarried and had new expenses; and that he was contributing to the support of the parties' adult children. The trial on Mr. Muir's petition was held October 11, 1990, and the lower court found that Mr. Muir's income had in fact been reduced and Mrs. Muir's income had increased, thereby establishing a significant change in circumstances to modify alimony. The trial court entered its order reducing alimony from \$1,500 per month to the amount of \$900 per month, and awarding Mrs. Muir \$3,000 towards her attorney's fees. Mrs. Muir appealed, and this Court remanded the case back to the trial court for adequate findings supported by the evidence on the issues of substantial change of circumstances, alimony and attorneys fees.

On remand, the lower court entered its Order denying Mr. Muir's Petition to Modify, thereby maintaining the original alimony award of \$1,500 per month, and ordered Mr. Muir to pay all of Mrs. Muir's attorney's fees and costs. Mr. Muir filed his Notice of Appeal dated February 8, 1994, and a Docketing Statement dated March 2, 1994.

STATEMENT OF THE FACTS

A. Background.

Plaintiff and Defendant were divorced by a Decree of Divorce entered on September 16, 1985. (R. 87-93) In August of 1989, Defendant filed a Verified Petition to Reduce and Eliminate Alimony. (R. 98-102) The petition came on for trial on October 11, 1990 in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Homer S. Wilkinson, presiding. The trial court found that there had been a substantial change of circumstances since entry of the Decree of Divorce to justify a reduction in Defendant's alimony obligation. The trial court reduced Plaintiff's award from \$1,500 to \$900 per month and ordered Defendant to pay \$3,000 of Plaintiff's attorney's fees. (R. 178-180)

At the time of trial on Defendant's Petition, these facts were presented to the Court: The parties and their respective counsel entered into a settlement stipulation on August 23, 1985, which formed the basis for their divorce. Pursuant to the stipulation incorporated into the Decree of Divorce, the "property as . . . divided adjusted for payment of the debts of the parties ... [was] an equal division of the property with each of them being awarded approximately one-half of the value of the marital estate". (R. 91) Mrs. Muir received

property valued at approximately \$416,000, including the marital residence valued at \$370,000, the Mercedes Benz valued at \$10,500, shares of water stock valued at \$10,000, a Cottonwood Country Club membership valued at \$1,000 and cash in the amount of \$25,000. Mr. Muir was awarded all of the common stock in Fairmont Bowl owned by himself and Mrs. Muir, together with other assets valued at approximately \$77,500. The parties agreed that Mrs. Muir should receive alimony in the amount of \$1,500 per month, and it was so ordered by the court.

B. Financial Circumstances of Mr. Muir and Fairmont Bowl.

Throughout the Muir marriage, Mr. Muir supported his family with income from Fairmont Bowl, Inc., a Utah Subchapter S corporation which, until recently, he had owned and managed jointly with his father, Douglas Muir. (Tr. 16, 20-21) At the time of trial, Douglas Muir no longer owned stock in Fairmont Bowl. (Tr. 59, 61) During each year of the marriage and subsequent to the divorce, Mr. Muir received compensation from Fairmont Bowl, plus a profit allocation based on his percentage ownership of the business. (Ex. 3; Tr. 20-21) By 1990, Mr. Muir was a 96.61% shareholder. (Ex. 3; Tr. 113-114) This increase in stock ownership resulted from post-divorce gifts of stock from Mr. Muir's father. (Tr. 24, 31, 59)

Fairmont Bowl operated on a fiscal year ending June 30. For tax purposes, the income of Fairmont Bowl as an S Corporation was reflected on the personal income tax returns of Mr. Muir, who was then assessed both personal and corporate taxes. Each tax return declared Mr. Muir's previous calendar year income and Fairmont Bowl's previous

fiscal year income (Tr. 8), but did not show the actual day-to-day, month-to-month matching of individual and corporate income and expenses. For example, Mr. Muir's 1989 income tax return included his January 1, 1989 to December 31, 1989 income, but Fairmont Bowl's July 1, 1988 to June 30, 1989 income.

Since Mr. Muir was the majority shareholder of Fairmont Bowl at time of trial, for purposes of accurately determining the amount of income available for payment of his alimony obligation, it was necessary to look at the combined financial positions of Fairmont Bowl and Mr. Muir. (Tr. 147) Though the corporation used fiscal accounting and Mr. Muir used calendar year accounting, for trial Mr. Muir's income was adjusted by the accountant for Fairmont Bowl, Ed Bates, to match the corporation's fiscal year finances as follows: to each relevant fiscal year of the corporation, Ed Bates added back Mr. Muir's compensation for the same twelve month time period. (Tr. 8, 19)

The financial statements of Fairmont Bowl and Mr. Muir's finances were, after calendar to fiscal year adjustment, combined and summarized by Ed Bates, a CPA and partner of the accounting firm of Coopers & Lybrand, which had been preparing federal income tax returns on behalf of Fairmont Bowl, Mr. Muir and Douglas Muir for the past 19 years prior to trial. (Exs. 1 and 3; Tr. 16) All combined income of Fairmont Bowl and Mr. Muir for the fiscal years 1983 through 1990 was reflected in Exhibits 1 and 3 submitted at trial. (Tr. 67)

In 1985, the year of the divorce, Mr. Muir's compensation was \$52,800 and his profit allocation was \$65,777, for total earnings before tax of \$118,577. (Exs. 1 and 3; Tr.

22, 214) By 1990, there had been a significant drop in Mr. Muir's total earnings, with compensation decreasing to \$48,400 and profit allocation decreasing to \$33,235, for a total earnings before tax of \$81,635. (Exs. 1 and 3; Tr. 214) During the years 1986 through 1989, Mr. Muir's total earnings before tax ranged from \$61,228 to \$70,938. (Exs. 1 and 3)

The reasons for the significant drop in Mr. Muir's earnings since 1985 were related directly to the bowling industry and climate and the age of Fairmont Bowl's facility. Since 1985, the bowling industry had declined, and there were many fewer bowlers in 1990 than there were in 1985. (Tr. 62-63) Mr. Muir and his father had forestalled a significant decrease in the gross receipts of Fairmont Bowl, despite annual inflation of 4 to 6 percent, by increasing prices to fewer bowlers. (Tr. 27, 28 and 62) To justify increasing prices. Mr. Muir had to increase services and had, by doing so, also incurred additional business expenses. (Tr. 64) In essence, the income of Fairmont Bowl, from 1986 to 1989, remained steady while its expenses increased. (Tr. 37-38)

At the time of the trial on Defendant's Petition, the Fairmont Bowl facility was old, and no major equipment had been replaced since 1958. (Tr. 65) Although Mr. Muir remained competitive by computerizing his scoring devices and making physical improvements to the center, including painting, wall coverings, new carpet, new ball racks and new bowler seating, the bowling lanes themselves were then thirty years old and worn out. The replacement cost was estimated at \$35,000 apiece. (Tr. 75-76, 65, 157) The replacement costs were to be met from gross revenues or from loans obtained by Fairmont Bowl. (Tr. 66)

As the majority shareholder of Fairmont Bowl, Mr. Muir managed the business and exercised discretion over how business funds were to be spent. The business must remain competitive to survive, however, and between 76 to 82% of the gross receipts of Fairmont Bowl between 1986 and the time of trial were used by the business to pay normal operating expenses. (Ex. 3; Tr. 215) The income remaining after payment of operating expenses was subject to the discretion of Mr. Muir. In years when Mr. Muir elected to take higher than normal compensation, the corporation suffered a loss; and Mr. Muir received a loss rather than profit allocation. (Tr. 11-12, 40, 67, 152) If Mr. Muir borrowed money from Fairmont Bowl, he was required to pay that money back.

Despite Mr. Muir's increase in percentage ownership of Fairmont Bowl, his overall earnings had gone down significantly since 1985 and the time of trial. (Tr. 23) The gross profits of Fairmont Bowl had decreased, and the net income of Fairmont Bowl before paying Mr. Muir's compensation and before deducting depreciation decreased in all but one year since 1985. (Ex. 3; Tr. 28-29)

Mr. Muir incurred attorney's fees in the amount of \$6,000 related to his Petition for Modification. (Tr. 196)

C. Mrs. Muir's Financial Circumstances.

Mrs. Muir had a college degree in commercial art. (Tr. 28) Prior to the divorce, she was employed by Fairmont Bowl. (Tr. 155) When the parties separated, her employment

with Fairmont Bowl terminated, and by the time of the divorce in 1985, Mrs. Muir was operating a business, Rocky Mountain Vacation Homes, from which she did not receive income. (Tr. 43-44, 161) At the time of trial, Mrs. Muir had been employed by American Airlines since May of 1987. (Tr. 42, 167)

At the time of the divorce, Mrs. Muir was awarded the marital residence valued at \$370,000. (R. 71, 88) The total monthly obligation on the residence was \$939, including a \$609 mortgage, \$260 in property taxes, and a \$70 insurance premium. (Ex. 26; Tr. 45)

Beginning in May, 1987 and throughout the remainder of that year, Mrs. Muir's residence was vacant. (Tr. 46) Through 1988, she rented her residence to friends for \$600 per month, but she continued to pay the utilities on the residence. (Tr. 46-47) Through 1989, Mrs. Muir rented her residence to friends for one month at \$600 rent, and the remaining 11 months at \$700 per month, and continued to pay the utilities. (Tr. 47-48) In June, 1990, the marital residence was rented pursuant to a one-year lease which ran from June 1990 through June 1991 for \$1,200 per month, and the tenants were required to pay their own utilities. (Tr. 45)

Mrs. Muir also owned a barn on which she was receiving rental income in the amount of \$220 per month at the time of trial. (Tr. 168)

Since 1986 up until trial, Mrs. Muir had received annual income from the Wetherill Trust, a trust established by her grandfather. The disbursements increased from \$1,200 per year in 1986 to \$1,961 per year in 1989. (Ex. 25; Tr. 163)

Mrs. Muir's income from employment, disbursements from Wetherill Trust and rental income on her residence, but excluding alimony, in the years 1985 through September 15, 1990 was as follows:

Year	Gross Income without Alimony
1985	0.00
1986	\$4,549.00
1987	\$12,959.00
1988	\$22,281.00
1989	\$30,870.00
1990 (thru 9/30)	16,924.00

(Ex. 25; Tr. 44, 163)

The 1990 income figure was derived by dividing Mrs. Muir's year-to-date gross income from American Airlines as of September 1990, in the amount of \$12,724.39 by 9 months for average monthly earnings of \$1,400. Her average monthly earnings were then multiplied by 12 months for 1990 annual income of approximately \$16,924.00. (Tr. 167) This figure did not include Mrs. Muir's supplemental residential income of \$1,200 per month, barn rental income of \$220.00 per month, Wetherill trust income, interest or dividend income.

Mrs. Muir's 1989 gross income as declared on her 1989 federal income tax return was \$20,600 of wages, \$1,900 of dividend income, \$262 of interest income and \$8,300 of rental income from the marital residence. (Ex. 2; Tr. 33-34)

Mrs. Muir incurred attorney's fees defending against the Petition to Modify in the approximate amount of \$16,000. (Tr. 194-195)

Mrs. Muir appealed the lower court's reduction of Mr. Muir's alimony obligation and the award of her attorney's fees. The Court of Appeals reversed and remanded the case to the lower court to enter adequate findings, supported by sufficient evidence, regarding whether the material circumstances of the parties had or had not substantially changed in ways not contemplated by the original decree. (See Muir v. Muir, 841 P.2d 736 (Utah App. 1992)). The Court of Appeals also remanded for entry of adequate findings relating to Mrs. Muir's financial need and Mr. Muir's ability to pay attorney's fees together with the reasonableness of the fees. (Id at 741.)

D. Proceedings Subsequent to Remand.

After the case was remanded to the lower court, both parties filed motions for entry of supplemental findings with the court. (R. 211-217 and R. 223-224) Defendant requested a hearing before the court on three occasions and filed an objection to Mrs. Muir's proposed findings. (R.239-243) No hearing was granted by the court to hear the parties' respective arguments in support of their motions for entry of supplemental findings on remand. The only hearing held by the court before it issued its minute entry on December 22, 1993, in which it essentially adopted the supplemental findings prepared by Plaintiff, was held in chambers, off the record, and with only counsel present. In the December minute entry, the court adopted the Findings of Fact as submitted by the Plaintiff, with a few interlineations

made by the court, and instructed Plaintiff's counsel to prepare the final Findings and Order.

(R. 281) The court concluded that it had been reversed by this Court and had erred by finding a substantial changes of circumstances and reducing Defendant's alimony obligation.

The court reinstated the full amount, ordered Defendant to pay the unpaid amounts that accrued during the pendency of the appeal in the total sum of \$23,400, and ordered Defendant to pay all of Plaintiff's attorney's fees and costs, including costs incurred on appeal, in the total unpaid amount of \$21,192.50, for a total of \$44,592.50. (R. 293-295)

Mr. Muir appeals the court's order denying his Petition to Reduce and Eliminate Alimony and ordering him to pay all of Mrs. Muir's attorney's fees and costs.

SUMMARY OF ARGUMENTS

1. The lower court failed to comply with this Court's mandate on remand. It failed to make findings on all material issues, and its failure to do so constituted reversible error.

2. The findings made by the court on remand are inadequate and against the clear weight of evidence, thus making them clearly erroneous.

3. As a result of the lower court's failure to comply with this Court's mandate on remand and its complete reversal of its prior decision based upon the same evidence, this Court should enter its own order on the motions and documents submitted by the parties on remand and adopting Mr. Muir's supplemental findings.

ARGUMENT

POINT I

THE LOWER COURT FAILED TO COMPLY WITH THE MANDATE OF THIS COURT ON REMAND TO ENTER ADEQUATE FINDINGS TO SUPPORT ITS ORDER. AS A RESULT, THE ORDER ENTERED SHOULD BE REVERSED AND ONCE AGAIN REMANDED.

When a case is remanded, a lower court has the duty to comply with the mandate of this Court, or its order should be reversed. In its previous decision in this case, this Court concluded that the lower court had failed to make adequate findings to support its decision that there had been a substantial change in circumstances sufficient to warrant a reduction in Mr. Muir's alimony obligation. In remanding the case for entry of adequate findings, this Court did so with very detailed instructions as to what findings were necessary. Specifically, the lower court was to make the findings which addressed the following evidence:

- (a) The decrease in Mr. Muir's income when his ownership in the business increased by eighteen percent;
- (b) The evidence that the company substantially reduced its liabilities in 1988;
- (c) The evidence relating to statements made by Mr. Muir as to his net worth in credit applications made since the decree; and
- (d) The testimony regarding "loans to shareholders" on the books of the business amounting to cash not included in Mr. Muir's compensation.

In addition, this Court determined that the lower court failed to make adequate findings on the issue of whether Mr. Muir benefitted beyond the salary that he earned and whether or not the need to invest significant amounts of capital into his business in the

immediate future was discretionary or whether it was necessary to maintain the business in its present condition. On these issues, the lower court was instructed to "enter adequate findings, supported by sufficient evidence, regarding whether the material circumstances of these parties have or have not substantially changed in ways not contemplated by the original decree such that modification of the decree may be warranted." (Muir v. Muir, 841 P.2d 736, 741 (Utah App. 1992).

Finally, this Court concluded that the lower court also failed to make adequate findings regarding Mrs. Muir's need for attorney's fees, Mr. Muir's ability to pay her attorney's fees, and the reasonableness of the fees incurred. (Id. at 742.)

On remand to the lower court, Mr. Muir submitted Defendant's Motion for Order in Re: Entry of Supplemental Findings of Fact, dated April 14, 1993, (R. 211-217) and after Mrs. Muir failed to respond within the time provided by Rule 4-501 of the Code of Judicial Administration, Mr. Muir subsequently filed his Notice to Submit and Request for Ruling dated April 26, 1993. (R. 218-19) Mrs. Muir's counsel filed an Objection to the Notice to Submit on April 26, 1993. (R. 222) More than three weeks later, on May 17, 1993, she filed own her Motion, Findings of Fact, Conclusions of Law and Order of Modification on Remand. (R. 223-238)

Without allowing Mr. Muir the requisite time to respond to Mrs. Muir's Motion, the lower court signed and entered Mrs. Muir's Order on May 26, 1993, only nine days after it was submitted. (R. 236-238) Mr. Muir objected to entry of the Order, (R.239-243) and the trial court recognized its premature decision and allowed the parties to schedule a hearing.

At the same time, Mr. Muir filed his Objections to Mrs. Muir's proposed findings of fact, setting forth specific evidentiary bases that her proposed findings were not supported by the evidence. (R. 244-254) He also filed a Request for Hearing on June 15, 1993 (R 262-263), a second request on July 13, 1993 (R-266-267), and a third request on September 30, 1993. (R. 272-273) At no time did Mrs. Muir file an objection to the supplemental Findings of Fact submitted by Mr. Muir.

Although purporting to grant a hearing on the respective motions, the lower court simply met with counsel in chambers, without a court reporter, to make its determinations regarding the issues to be addressed. In its Minute Entry dated August 19, 1993, the court simply stated with regard to that hearing that Mr. Muir's objections were "discussed but not resolved." (R. 268) At no time thereafter did the court grant Mr. Muir's requests for a hearing wherein counsel could argue the evidence in the record in support of their respective findings. Thereafter, by Minute Entry dated December 22, 1993, the lower court, without ever holding a hearing as requested, entered Mrs. Muir's findings with a few handwritten interlineations and modifications. (R. 281) Based on these findings and without taking any additional evidence, the lower court did a one hundred and eighty degree turn, finding no change of circumstances sufficient to warrant a reduction in Mr. Muir's alimony obligation. The court entered judgment against him for all amounts due since entry of the first order from which appeal was taken in the amount of \$23,400. In addition, the court entered judgment against Mr. Muir for all of Mrs. Muir's attorney's fees incurred in this case,

including her fees on appeal in the amount of \$21,192.50, for a total judgment of \$44,592.50. (R. 293-295)

The findings which the court made in support of its decision on remand are as follows:

6. The Defendant alleged specific changes in circumstances in that although his gross revenues from his business had remained consistent, that his expenses had increased, depreciation had decreased and his business needed capital investment.

7. Plaintiff's accountant Mr. Randall Peterson, CPA, analyzed seven years of tax returns from 1983 through 1989 filed by the Defendant. He testified that the returns showed an average "pre-divorce" income to Defendant of \$104,678 and an average "post-divorce" income of \$104,188. Accountant Peterson analyzed the Defendant's "net spendable income" from 1983 to 1989 showing his post-divorce average (excluding alimony payments), to be \$69,194 which was approximately \$5,000 more than his before divorce average of \$68,819.

8. The Defendant's accountant Mr. Ed Bates agreed with Plaintiff's accountant that the gross revenues of the Fairmont Bowl Corporation have been consistent and that it has been operated as a Subchapter S Corporation since the parties' divorce. On this point, the accountants relief on the 1985 tax return for the fiscal year ending June 30, 1985 showing gross receipts to be \$691,529 as compared with gross receipts at the end of fiscal year June 30, 1990 where gross receipts were \$645,102.

9. The Defendant has made improvements to the Fairmont Bowl facility and had just finished computerizing the facility, added new carpeting, new racks, new seating and other improvements since the divorce. Defendant testified to the need for future improvements as well. Such capital improvements are in the discretion of Defendant whose personal and business finances are intertwined.

10. Since the divorce, Defendant has prepared four separate financial statements for First Interstate Bank which show that his total assets and net worth since entry of the divorce as stated by him have increased from at least \$715,580 in assets on the statement dated January 3, 1986 to \$989,000 in assets on a statement dated September 7, 1989.

11. Both Plaintiff's and Defendant's accountants testified that due to the corporations' Subchapter S status, the Defendant had total discretion over the amount he took as compensation each year, in setting prices for his product, and in making capital expenditures.

12. The Defendant's business has paid for many personal expenses for the Defendant and his family including payments for his family car, health insurance, travel, auto and life insurance, tax deferred benefits including pension contributions. Defendant benefits from his new wife drawing a salary from the corporation.

13. Based on the foregoing evidence and Findings, the Court finds that there has not been a substantial change in the circumstances surrounding Defendant's earnings since the parties' divorce. His income has been consistent when all personal benefits are considered and given the Defendant's discretion over allocating income between personal and business uses, it is appropriate to include all such personal benefits.

14. The Court finds that the Plaintiff's only work during the marriage was at Fairmont Bowl where her wages were approximately \$1,000 per month. At the time of the modification hearing Plaintiff was working as a flight attendant for American Airlines earning \$1,400 gross monthly income. Plaintiff's employment required her to locate on the East Coast where she resided in a basement apartment in her mother's home in Connecticut for which she paid rent.

15. Plaintiff has attempted to sell the marital asset she received in the divorce consisting of the parties' marital residence in Salt Lake City valued at \$370,000 at the time of the divorce. The Plaintiff had lowered the sales price to \$280,000 and had received only one offer of \$185,000 which she rejected. She has continued to maintain the Salt Lake home as a rental property and paying the mortgage thereon.

16. At the time of Trial on October 1990, the Plaintiff's rental income to date had been \$4,200 and her mortgage costs had been \$5,478 with additional estimated taxes of \$3,000 which would result in an income loss that year.

17. Plaintiff's monthly living expenses totalled \$4,701 per month which included keeping two homes and \$907 per month on installment debt relating to legal fees connected with the original divorce and to repay her mother a \$4,000 loan.

18. Since the divorce Plaintiff has had significant periods of unemployment, higher costs of living with the necessity of maintaining two homes, and her tax returns show regular losses from business and real estate. Plaintiff has been dependent on her alimony of \$1,500 per month to meet her basis living expenses which do not include any of the luxuries or amenities she enjoyed during her marriage to Defendant such as vacations, country club memberships, or new vehicles.

19. A review of Plaintiff's tax return shows that in only one year, 1988, did her earned income exceeded her alimony income, when she earned \$20,609 in wages. However, for the year 1990 Plaintiff projected total earnings of only \$17,000 which is less than her alimony. Although Plaintiff's income may have increased from \$1,000 to \$1,400 per month it is not sufficiently large of a change to support a reduction of alimony in this case considering Plaintiff's needs.

(R. 282-292)

These findings relating to the income and financial circumstances of the parties are legally insufficient to support the court's decision on remand because they fail to address key issues identified by this Court in its decision on the prior appeal. Contrary to the express instructions by this Court, the lower court failed to make findings: a) as to why Mr. Muir's income had significantly decreased when his ownership in the business increased by eighteen percent; b) as to the reason for the reduction of the company's liabilities in 1988; c) as to the "loans to shareholders" reflected on the books of the business; and d) whether Mr. Muir's expenditures for capital improvements were discretionary or necessary to maintain the business in its present condition.

Turning next to the findings which the lower court made to support its award to Mrs. Muir of all attorney's fees incurred by her in this action, there is only one:

22. The Court finds Plaintiff has a need for attorney's fees based on her financial circumstances including the fact that her present monthly expenses exceed her monthly income. In addition Plaintiff is still paying on a significant balance for legal fees remaining from her original divorce. The Plaintiff also had a significantly more difficult task to defend against the modification brought by Defendant to uncover necessary financial information whereas Defendant had that information within his control. The Defendant has also paid off significant debts since the time of the parties' divorce, has invested in costly real estate and is building a home, and thus has the ability to assist Plaintiff in the payment of fees. Defendant should pay the full amount of Plaintiff's attorney's fees in the amount of \$15,779, less credit for the \$3,000 he was ordered to pay at the initial trial in this matter for an attorney fee award of \$12,779.

(R. 289-290)

While this finding purports to address the financial needs of Mrs. Muir and Mr. Muir's ability to pay her attorney fees, it is completely devoid of any discussion relating to the reasonableness of the fees and costs incurred. This omission is contrary to this Court's specific mandate to "make independent findings regarding the reasonableness of all fees and costs of all the attorneys Wife has employed to defend the petition to reduce and eliminate alimony, including fees incurred on appeal." (Muir, 841 P.2d. at 742.)

As outlined by this Court in Carlton v. Carlton, 756 P.2d 86 (Utah App. 1988), the failure to make findings on material issues, especially in light of this Court's specific instructions, constitutes reversible error:

The trial court must make findings on all material issues, and its failure to do so constitutes reversible error "unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.' " In addition, the

findings must be sufficiently detailed and consist of enough subsidiary facts to reveal the steps the court took to reach its conclusion on each factual issue presented.

Id. at 87. (Citations omitted.)

Applying this principle to the facts of this case, the lower court failed to make findings which it was specifically instructed to make by this Court on remand, both on the issue of a substantial change of circumstances not contemplated at the time of the decree as well as on the reasonableness of the attorney's fees. The findings mandated by this Court are material to the issues upon which the lower court ruled, and as this Court pointed out in the original appeal, the facts in the record are not so clear as to be capable of supporting only one judgment. Therefore, at the very least, the decision must be reversed and remanded once again for adequate findings amply supported by the record rather than a simple and complete reversal in the decision reached. However, in light of the lower court's complete disregard of this Court's mandate as established by the procedure which the lower court employed to reach its decision, Mr. Muir asks this Court to rule on the parties' motions on remand, together with Mr. Muir's objection to Mrs. Muir's proposed findings. The appellant believes that the Court will conclude that Mr. Muir's findings are the only findings amply supported by the evidence. Therefore, Mr. Muir requests this court remand the case with specific instructions to enter the Supplemental Findings submitted by Mr. Muir and an Order consistent therewith, in addition to an order requiring each party to pay their own attorney's fees and costs incurred by them.

POINT II

THE FINDINGS MADE BY THE TRIAL COURT ARE
INADEQUATE AND AGAINST THE CLEAR WEIGHT OF
THE EVIDENCE, THUS MAKING THEM CLEARLY
ERRONEOUS

It is the appellant's duty to "marshall all of the evidence" in support of the lower court's findings and then establish that it is insufficient to sustain the court's findings on appeal. In such circumstances, the findings are against the clear weight of the evidence and clearly erroneous, and therefore, they must be vacated. (See Oneida/SLIC v. Oneida Cold Storage and Warehouse, 336 U.A.R. 24, 872 P.2d 1051 (Utah App. 1994) and Ohline Corp. v. Granite Mill, 849 P.2d 602 (Utah App. 1993).)

In this case, the lower court's findings, even marshalling all of the evidence in the record to support them, are inadequate and cannot stand. To begin first with Finding no. 19 that Mrs. Muir had earnings of \$1,000 per month at the time of the parties' divorce, there is simply no evidence to marshall in support of it. In fact, the evidence that she did not have any income at the time of the divorce was uncontroverted at the trial on Mr. Muir's petition to modify. Her own testimony was that she had "no real income" in 1985, the year that the parties were divorced (Tr. 43), and that in 1986, she earned between "\$3,000 and \$4,000." (Tr. 43) There was simply no evidence from which the court could find that Mrs. Muir's income at the time of the divorce was \$1,000 per month. Since the court relied on this finding to conclude that there had been no material change of circumstances in Mrs. Muir's financial condition since entry of the decree, the conclusion of law is likewise erroneous.

Mr. Muir does not challenge the court's finding that, at the time of trial, Mrs. Muir was earning \$1,400 per month as a flight attendant for American Airlines. However, much more evidence was received at trial relating to Mrs. Muir's financial condition upon which the court failed to make any findings whatsoever. Specifically, Mrs. Muir testified that she received at least \$100 per month from a family trust (Tr. 43); \$220 per month from the rental of a barn (Tr. 164); and \$1,200 per month from the rental of her Salt Lake City residence (Tr. 45). This evidence would reflect income attributable to Mrs. Muir of \$2,920 per month, not including interest and dividend income which totalled \$2,162 in 1989. (Ex. 25) This is clearly a significant increase in light of the fact that she testified she was earning nothing at the time of the entry of the decree.

The Finding which attempts to justify the court's failure to consider this additional income is Finding no. 16 which concludes that the rental on the Salt Lake residence is insufficient to pay expenses, thereby resulting in a loss. This finding is not supported by either Mrs. Muir's testimony at page 46 of the trial transcript, or Exhibit 26. To the contrary, Exhibit 26 which supports the court's Finding no. 17 that Mrs. Muir's monthly expenses are \$4,701 also includes expenses for the property being rented by her. What the court failed to recognize, thus making its Findings clearly erroneous, is that this is a form of double credit. Either the income and expenses relating to the Salt Lake residence are both included in a determination of Mrs. Muir's financial condition and an ability to meet her own financial needs OR both are excluded. The court's exclusion of the rental income for purposes of determining Mrs. Muir's monthly income while at the same time considering the

expenses she pays as a result of maintaining the property in a determination of her ability to meet her monthly obligations is insupportable.

What the court also failed to consider is whether it was reasonable for Mrs. Muir to maintain the Salt Lake residence at all. Although Finding no. 15 purports to address Mrs. Muir's failure to sell the residence, which is supported by her testimony at page 179 of the trial transcript, there is no finding by the court that Mrs. Muir's efforts at marketing the home were reasonable or that her refusal to sell for \$185,000 was reasonable. Findings on these issues are essential before the court can accept without question Mrs. Muir's claimed expenses.

Finally, although Mrs. Muir did testify in support of Finding no. 18 that she was not able to enjoy the amenities which she enjoyed during the marriage, (Tr. 156-160) this is testimony which is self-serving and must be analyzed with evidence relating to the standard of living and financial ability of Mr. Muir at the time of trial to pay for such luxuries for himself and Mrs. Muir. This ability is more specifically addressed below.

Therefore, the evidence in the record in support of the court's finding that there had been no substantial change in Mrs. Muir's financial circumstances is inadequate as a matter of law. The weight of evidence establishes that Mrs. Muir's income went from zero at the time of the decree to at least \$2920 per month at the time of trial on Mr. Muir's petition to modify. Although Mrs. Muir claimed expenses of \$4700 per month, the court failed to make findings as to whether it was reasonable to maintain two residences. From this it is clear

that the court's conclusion in Finding no. 19 that there had not been a substantial change in Mrs. Muir's financial circumstances is clearly erroneous.

Similarly, the evidence in support of the court's findings as to Mr. Muir's financial condition and his ability to pay alimony is insufficient to support them. The evidence includes the following:

1. Mrs. Muir called her financial expert, Mr. Peterson, whose testimony included the following:

a. That cash from the business would be available to Mr. Muir for distribution as additional compensation; (Tr. 120)

b. That the asset picture of Fairmont Bowl "didn't vary a lot." (Tr. 124)

c. That the "debt [of Fairmont Bowl] had been coming down." (Tr. 127);

d. That Mr. Muir's net income had increased \$5,000. (Tr. 130, 135);

e. That the gross receipts of the business had remained more or less the same (Tr. 128); and

f. That Mr. Muir's current wife's earnings came out of the "cash account" of Fairmont Bowl to support the family. (Tr. 141).

2. The financial statements referred to by the court in Finding no. 10, were admitted into evidence as Exhibits 6, 7, 8, and 9.

3. Mr. Bates, Mr. Muir's accountant, testified that cash left in the business would be accessible to Mr. Muir as a shareholder to use in his discretion. (Tr. 40)

4. Mr. Muir testified that he had some discretion over how to spend his funds, but that if he spent them "imprudently" the business would suffer. (Tr. 67)

5. Mrs. Muir testified that there had been regular upgrades made to the business during the marriage. (Tr. 58)

6. Mr. Muir testified that his vehicle expenses, as well as the premiums for automobile and health insurance were paid by the business. (Tr. 107)

7. Mr. Muir testified that since entry of the decree he had taken one three-day trip and one four-day trip to San Diego (Tr. 95), and spent a weekend in Jackson Hole. He also testified that he had been in Hong Kong and Thailand in January of 1987 (Tr. 96), and took a one-week trip to Europe in November of 1988. (Tr. 97)

This evidence is insufficient to support the court's findings, especially in light of the evidence before the court to the contrary. To begin first with the improvements that had been made to Fairmont Bowl, Mr. Muir testified that they were more or less cosmetic in nature. (Tr. 65) In fact, Mr. Muir's accountant, Mr. Bates, testified that the fact that depreciation was going down indicated that assets were wearing out and not being replaced. (Tr. 25, Tr. 29) The depreciation in 1985 was \$81,000; in 1990, it had been reduced to only \$33,000. (Tr. 64) Mr. Muir testified that the physical facility itself was more than thirty years old, and that he had done lots of painting, and "some modernizing" as to seating and carpets. (Tr. 65) He testified, however, that there had not been any substantial replacement of equipment, either lanes, pinsetters, lighting or the roof (Tr. 65) over the last

thirty years. Mr. Muir also testified that he planned to replace the lanes in the summer, but could not afford to also replace the pinsetters. (Tr. 66)

Despite the language of Finding no. 9, Mr. Muir testified that there had been "no substantial improvements" to the facility (Tr. 75), and also testified that, as to future improvement, he would "have to do it in order to stay in business." (Tr. 78) It is clear that the improvement Mr. Muir contemplated making to the business were not discretionary, but were absolutely necessary to maintain the business as a competitive entity.

Similarly, there was limited testimony to support the finding that Mr. Muir's received substantial benefits from the business. In fact, at the time of the decree, Mr. Muir owned a Cottonwood Club membership that had been paid for by the business, at the time of the trial on his Petition, he was a member of the Ft. Douglas Country Club at his own personal expense. (Tr. 68-69, Tr. 95). At the time of the decree, Mr. Muir's expenses for a Porsche 911 SC were paid by the business (Tr. 67), as were his vehicle and health insurance premiums. (Tr. 107). By the time of the hearing on his Petition, his expenses for his Chevy Blazer were paid by the business, as were his vehicle and health insurance premiums. (Tr. 107) Mr. Muir no longer owned either an airplane or a boat, as he had at the time of the decree (Tr. 68), and testified that he would characterize his lifestyle at the time of trial as "substantially less" than it had been at the time of the decree of divorce. (Tr. 70)

As with Mrs. Muir, many of the benefits Mr. Muir enjoyed at the time the parties were divorced had been significantly reduced or eliminated altogether, and that was the evidence before the court at trial. This was due to the fact that the net income of the

business, before compensation to Mr. Muir and before depreciation costs, had gone down significantly according to Mr. Bates, the accountant for the business.

Just as in the court's analysis of the evidence relating to Mrs. Muir's financial condition, the findings relating to Mr. Muir's financial condition and ability to pay alimony are not supported by the evidence. Its conclusion that there had not been a substantial change of circumstances in Mr. Muir's financial condition is clearly erroneous and must be vacated.

Instead, the evidence establishes that there was a material change of circumstances to support the lower court's first decision in this case. Specifically, Mr. Muir's income at the time of the divorce was \$118,577, and this is the income on which his alimony obligation was established. His income at the time of the Petition had been reduced to \$81,635. The net profits of the business, before his compensation, had decreased by approximately 7%, due to the increased expenses while gross receipts remained the same. It was necessary and not discretionary for Mr. Muir to make substantial improvements to the business to maintain it in a competitive condition. Finally, it was clear that neither party was able to maintain the standard of living they had enjoyed during the marriage. As a result, the lower court's reversal of its earlier decision must be vacated, and at the very least, remanded with specific instructions to enter Mr. Muir's supplemental findings and an appropriate order consistent therewith.

Likewise, the evidence in the record is inadequate to support Finding no. 22 and its conclusion that Mr. Muir had the ability to assist Mrs. Muir in the payment of attorney's

fees. Specifically, the weight of the evidence as to Mrs. Muir's financial needs, her earnings, and Mr. Muir's ability to pay is contrary to this finding. It is therefore grossly erroneous and must be vacated and remanded with specific instructions to enter an order requiring each party to pay their own attorney's fees.

CONCLUSION

The lower court's findings and order in this case are fatally defective for two major reasons. First, the court failed to make findings mandated by this Court on remand. Second, the findings which were made by the court are against the clear weight of the evidence. Instead, the record suggests that the lower court interpreted this Court's order on remand as an order to simply reverse its earlier decision, rather than make additional findings in support of it. Given the lower court's eagerness to enter Mrs. Muir's proposed findings and order, and its failure to comply with this Court's mandate on remand, this Court should vacate the lower court's decision and enter its own order after consideration of both parties' motions submitted after remand and Mr. Muir's objections to Mrs. Muir's proposed findings. Then, this case should be once again remanded, but only for the sole purpose of requiring the lower court to enter Mr. Muir's supplemental findings and an appropriate order.

RESPECTFULLY SUBMITTED this 13th day of July, 1994.

GUSTIN & CHRISTIAN

A handwritten signature in black ink, appearing to read 'Helen E. Christian', written over a horizontal line.


HELEN E. CHRISTIAN
Attorneys for Defendant/Appellant.

CERTIFICATE OF DELIVERY

I hereby certify that two true and correct copies of the above and foregoing BRIEF
OF APPELLANT were duly hand delivered, addressed to:

Suzanne Marelius, Esq.
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, UT 84102

DATED this 13th day of July, 1994.



HELEN E. CHRISTIAN

ADDENDUM

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

Repeals. — Laws 1990, ch. 230, § 4 repeals these sections, as last amended by L. 1989, ch. 104, §§ 2 to 5, providing for the appointment, authority, duties, and jurisdiction of court commissioners, effective April 23, 1990.

30-3-5. Disposition of property — Maintenance and health care of parties and children — Division of debts — Court to have continuing jurisdiction — Custody and visitation — Termination of alimony — Nonmeritorious petition for modification — Meritorious petition for modification [Effective until January 1, 1994].

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

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

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

(c) pursuant to Section 15-4-6.5:

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

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

(iii) provisions for the enforcement of these orders.

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

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

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

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

the party paying alimony is made a party to the action of annulment and his rights are determined.

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

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

(8) If a petition alleges substantial noncompliance with a visitation order by a parent, a grandparent, or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation.

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

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

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

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

(c) pursuant to Section 15-4-6.5:

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

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

(iii) provisions for the enforcement of these orders;

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

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

income withholding in accordance with Title 62A, Chapter 11, Parts 4 and 5.

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

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

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

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

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

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

(8) If a petition alleges substantial noncompliance with a visitation order by a parent, a grandparent, or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation.

History: R.S. 1898 & C.L. 1907, § 1212; L. 1909, ch. 109, § 4; C.L. 1917, § 3000; R.S. 1933 & C. 1943, 40-3-5; L. 1969, ch. 72, § 3; 1975, ch. 81, § 1; 1979, ch. 110, § 1; 1984, ch. 13, § 1; 1985, ch. 72, § 1; 1985, ch. 100, § 1; 1991, ch. 257, § 4; 1993, ch. 152, § 1; 1993, ch. 261, § 1.

Amended effective January 1, 1994. — Laws 1993, ch. 261, § 1 amends this section effective January 1, 1994. See the amendment note below.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, inserted "debts

or obligations" in the introductory paragraph of Subsection (1), added Subsection (1)(c), and inserted "and obligations for debts" near the end of Subsection (3).

The 1993 amendment by ch. 152, effective May 3, 1993, substituted "members of the immediate family" for "relatives" and "best interest" for "welfare" in Subsection (4); substituted "shall" for "may" and inserted "or defended against" in Subsection (7); added Subsection (8); and made stylistic changes.

The 1993 amendment by ch. 261, effective January 1, 1994, inserted "or becomes" in Sub-

Compensation Act is to provide financial security to the injured employee during the period of disability. *State Tax Comm'n v. Industrial Comm'n*, 685 P.2d 1051, 1053 (Utah 1984); *Wilstead v. Industrial Comm'n*, 17 Utah 2d 214, 407 P.2d 692, 693 (Utah 1965); *Crosland v. Board of Review*, 828 P.2d 528, 530 (Utah App. 1992). This purpose has no application in the case of inmates, because their financial security does not change with the occurrence of a disability. An inmate's earning capacity is already diminished by virtue of his or her incarceration. Further, the inmate does not depend on his or her ability to work to provide food, shelter, or medical care. These are provided by the prison system regardless of ability to work.

Workers' compensation is centered on the relationship between employer and employee. The "essence of a workers' compensation system is that it is a mutual arrangement of reciprocal rights between an employer and employee whereby both parties give up and gain certain advantages." *Bingham v. Lagoon Corp.*, 707 P.2d 678, 679 (Utah 1985). Although prisoners may participate in various types of prison work programs, this participation does not create the same "mutual arrangement of reciprocal rights" upon which the workers' compensation system is based. The primary purpose of the association between the prison system and the inmate is incarceration, not employment. *Franks*, 7 F.3d at 972.

In light of these purposes, we hold that inmates were not afforded employee status under the Workers' Compensation Act previous to the amendment. Thus the amendment excluding inmates from the statutory definition of "employee" is a clarification, not a change, and should be applied retroactively. Accordingly, Kofoed is not entitled to workers' compensation benefits and we affirm the decision of the Industrial Commission.

Norman H. Jackson, Judge

I CONCUR:

Pamela T. Greenwood, Judge

I CONCUR IN THE RESULT:

Gregory K. Orme, Judge

Cite as

236 Utah Adv. Rep. 24

IN THE
UTAH COURT OF APPEALS

ONEIDA/SLIC, an Arizona partnership,
Plaintiff and Appellant,

v.

ONEIDA COLD STORAGE AND
WAREHOUSE, INC., a Colorado
corporation,

Defendant, Third-party Plaintiff, and
Appellant,

v.

Metalclad Insulation Corporation of
California, a California corporation,

Third-party Defendant,

Fourth-party Plaintiff,

and Appellee.

No. 920434-CA

FILED: April 1, 1994

Third District, Salt Lake County

The Honorable J. Dennis Frederick

ATTORNEYS:

Robert G. Gilchrist, Salt Lake City; Kermit
A. Brashear, II, Craig A. Knickrehm, and
Donald J. Straka, Omaha, Nebraska, for
Appellant

Jeffrey E. Nelson, Salt Lake City, for
Appellee

Before Judges Davis, Jackson, and Garff.¹

This opinion is subject to revision before
publication in the Pacific Reporter.

JACKSON, Judge:

Oneida Cold Storage and Warehouse, Inc. (Oneida) challenges the trial court's dismissal of breach of contract, breach of warranty, and negligence claims against Metalclad Insulation Corporation (Metalclad). Oneida specifically disputes the findings of fact upon which the trial court based its dismissal. Because Oneida has failed to marshal all the evidence in support of those findings, we refuse to consider its challenge and summarily affirm the trial court's dismissal.

BACKGROUND²

In 1981 Roth Company (Roth) contracted to design and build the shell of a cold storage warehouse in Salt Lake City, Utah for Oneida/SLIC (SLIC). In connection with the development of the warehouse, SLIC entered into a lease agreement with Oneida, under which Oneida agreed to lease approximately 65,000 square feet of warehouse space. As part of the lease agreement, Oneida agreed to supply all insulation and vapor barrier materials necessary

for construction of the warehouse's insulated areas.

To fulfill its lease obligation, Oneida entered into two separate contracts with Metalclad, under which Metalclad agreed to supply the insulation materials to be used for the warehouse and to supervise the installation of those materials.

Oneida filed a third-party complaint against Metalclad to recover damages resulting from defects in the warehouse's insulated concrete floor slab system.³ The concrete floor cracked, buckled, and broke up, both during and after construction. Oneida claimed that Metalclad had breached express and implied warranties relating to the floor insulation that Metalclad had supplied.

The trial court found that Oneida failed to prove Metalclad had breached either of the contracts or had breached express and implied warranties relating to the insulation products. The trial court also found that Oneida failed to prove Metalclad was involved in designing the floor slab system. Finally, the trial court found that Oneida failed to prove Metalclad negligently caused or contributed to the damages which Oneida sustained. Accordingly, the trial court dismissed all of Oneida's claims against Metalclad. Oneida now appeals that dismissal.

APPELLANT'S FAILURE TO MARSHAL THE EVIDENCE

Oneida presents six issues in its brief, four of which are indisputably issues of fact and two of which Oneida characterizes as issues of law. The first issue that Oneida characterizes as one of law challenges the trial court's denial of damages resulting from alleged breaches of contract and warranties. The trial court's denial of Oneida's claim for damages, however, simply followed its finding that Metalclad did not breach its contracts or warranties. The second issue that Oneida characterizes as one of law challenges the trial court's ruling that Metalclad was not jointly liable with Roth. The trial court's determination that Metalclad was not jointly liable, once again, simply followed its finding that Metalclad was not negligent. In other words, the trial court's dismissal of Metalclad's damages and liability claims resulted from the trial court's findings of fact and not from its application, interpretation, or choice of law. Thus despite Oneida's characterization, all the issues presented on appeal dispute the trial court's findings of fact.

Utah appellate courts do not take trial courts' factual findings lightly. We repeatedly have set forth the heavy burden appellants must bear when challenging factual findings. To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. "[Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. In order to properly discharge the [marshaling] duty . . . , the challenger must present, in comprehensive

and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991); *accord In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989); *State v. Walker*, 743 P.2d 191, 193 (Utah 1987); *Commercial Union Assocs. v. Clayton*, 863 P.2d 29, 36 (Utah App. 1993); *Ohline Corp. v. Granite Mill*, 849 P.2d 602, 604 (Utah App. 1993). Once appellants have established every pillar supporting their adversary's position, they then "must ferret out a fatal flaw in the evidence" and show why those pillars fail to support the trial court's findings. *West Valley City*, 818 P.2d at 1314. They must show the trial court's findings are "so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" *Bartell*, 776 P.2d at 886 (quoting *Walker*, 743 P.2d at 193).

This rigorous standard reflects the doctrine that appellate courts "do not sit to retry cases submitted on disputed facts." *Bartell*, 776 P.2d at 886. Accordingly, "[w]hen the duty to marshal is not properly discharged, we refuse to consider the merits of challenges to the findings and accept the findings as valid." *Mountain States Broadcasting Co. v. Neale*, 783 P.2d 551, 553 (Utah App. 1989).

Oneida has failed to marshal the evidence in support of the trial court's factual findings. Rather than bearing its marshaling burden, Oneida has merely presented carefully selected facts and excerpts of trial testimony in support of its position. Such selective citation to the record does not begin to marshal the evidence; it is nothing more than an attempt to reargue the case before this court--a tactic that we reject. *Commercial Union*, 863 P.2d at 36; *Ohline*, 849 P.2d at 604. Because Oneida has failed to marshal the evidence supporting the trial court's findings, we hold that those findings are accurate and affirm the trial court's dismissal based on those findings.

As we decline to consider the merits of Oneida's appeal, we take the occasion to further articulate our rationale behind the marshaling requirement. We recognize that requiring appellants who challenge trial courts' factual findings first to marshal all the evidence in support of those findings and second to demonstrate why that evidence remains insufficient to support those findings is a rigorous standard. Nonetheless, this strict requirement both grows from and nurtures two interrelated court objectives: efficiency and fairness.

The deference we afford to trial courts' findings is based on and fosters the principle that traditional fact finders, whether judges or juries, are better equipped to consider, weigh, and assess the evidence that litigants bring before the courts. Efficient resolution of disputes demands that, unless the facts found by the trial court are clearly erroneous, they will be upheld

on appeal. In short, "[w]e do not sit to retry the facts." *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 800 (Utah 1991). Successful challenges to findings of fact thus must demonstrate to appellate courts first how the trial court found the facts from the evidence and second why such findings contradict the weight of the evidence. These demonstrations in appellants' briefs not only avoid retrying the facts but also assist us in our decision-making and opinion-writing, thus increasing our efficiency.

Additionally, the deference we afford to trial courts' factual findings is based on and fosters the principle that appellants rather than appellees bear the greater burden on appeal. When appellants do not marshal the evidence in support of disputed findings, they place appellees or respondents in a precarious position. Prudent appellees likely will not rely solely on an assertion that the appellant has failed to marshal the evidence; rather, appellees are compelled to perform the marshaling process to protect their position. In short, appellees are constrained to do the appellant's work, usually at considerable time and expense.⁴ When appellants challenge findings of fact, fairness requires that they bear the costs of demonstrating how the trial court found those facts from the evidence and why those findings contradict the weight of the evidence. The marshaling requirement, therefore, enhances both fairness and efficiency as appellate courts hear appeals of trial court rulings.

CONCLUSION

Because Oneida has failed to marshal the evidence in support of the factual findings which it disputes, we decline to reach the merits of its appeal. We hold that the trial court's findings of fact are accurate, and accordingly we affirm the trial court's dismissal of Oneida's claims against Metalclad.

Norman H. Jackson, Judge

WE CONCUR:

James Z. Davis, Judge

Regnal W. Garff, Judge

1. Senior Judge Regnal W. Garff, acting pursuant to appointment under Utah Code Ann. §78-3-24(10) (1992).

2. The parties do not dispute the following statement of the case.

3. SLIC filed the original complaint against Roth for breach of contract, negligence, and breach of warranties. At trial the court entered a judgment against Roth for \$1,909,401.57 plus interest and costs. Roth does not appeal that judgment.

4. In the instant case, Metalclad's attorneys admirably marshalled the evidence to protect their client on appeal. That evidence supports the trial court's findings.

Cite as

236 Utah Adv. Rep. 26

IN THE UTAH COURT OF APPEALS

Roy B. MOORE,
Plaintiff, Appellee,
and Cross-Appellant,

v.

Lorna B. MOORE,
Defendant, Appellant,
and Cross-Appellee.

No. 910174-CA

FILED: April 6, 1994

Third District, Salt Lake County
The Honorable Scott Daniels

ATTORNEYS:

John Walsh, Salt Lake City, for Appellant
Clark W. Sessions, Salt Lake City, for
Appellee

Before Judges Bench, Billings, and Davis.

**This opinion is subject to revision before
publication in the Pacific Reporter.**

BILLINGS, Presiding Judge:

Lorna B. Moore appeals from the trial court's order granting Roy B. Moore's petition to modify the parties' divorce decree. Principally, Mrs. Moore complains that the trial court erred in finding a substantial change in her material circumstances and in reducing her alimony award from \$1050 per month to one dollar per month three years after the filing of the present action. Mr. Moore has filed a cross-appeal claiming the court erred in continuing alimony at \$1050 per month for three years. We reverse and remand for reinstatement of the original alimony award.

FACTS

The parties were married in Elko, Nevada, on March 25, 1964, and had three children during the course of their sixteen-year marriage. All three children have reached majority. In 1980, the parties entered into a stipulation and property settlement agreement, which became the basis for a divorce decree entered on December 23, 1980. At the time of the divorce, the parties had an adjusted gross income of \$40,996, the majority of which was Mr. Moore's income as Mrs. Moore was employed part-time for five dollars an hour. At the time the decree was entered, the parties had discussed Mrs. Moore's plan to recertify as a school teacher or to obtain a master's degree in sociology.

Pursuant to the decree, Mr. Moore was required to pay \$1150 per month in alimony

ing, the Utah Supreme Court observed that "[e]very parent has the duty to support the children he has brought into the world. This duty is inalienable and he cannot rid himself of it by purporting to transfer it to someone else, by contract or otherwise." ⁴ *Id.* at 128-29. Sentry relies on this statement, and the *Gulley* court's further observation that

the just and logical consequence of the duty of parents to support their children is that if they are left in need and a third party provides them necessities, he is subrogated to the child's right and may obtain reimbursement therefor.

Id.

Sentry's reliance on *Gulley* is, however, misguided because in *Gulley*, the court clearly reasoned that recovery against the father for necessities provided to his children by a third party was permissible because the father's failure to pay on-going child support as specified in the divorce decree left the children "in need." See *Gulley*, 570 P.2d at 129. See also *id.* (Wilkins, J., dissenting) (pointing out that state's theory was that father had failed to pay child support "as ordered in the decree"). Moreover, the ex-husband's liability was limited to the amount of monthly child support which was specified in the decree. See 570 P.2d at 129. *Gulley*, then, has no application to cases involving a non-custodial parent's obligation to pay for necessities provided to his children, except as to parents who have not paid their child support as ordered.

In this case, Sentry never even addressed the extent of defendant's child support obligation. Nor does Sentry make any contention that defendant's child support obligation has not been fulfilled in accordance with the divorce decree. Thus, the principles enunciated in *Gulley* have no application to the present case.

4. In *Gulley*, the children's mother and father divorced, and the decree of divorce awarded custody of the parties' four children to their mother, together with \$50 per month support for each child and \$50 per month for alimony. After several years of making regular support

CONCLUSION

For the foregoing reasons, the judgment appealed from is affirmed.

BENCH and BILLINGS, JJ., concur.



Marita MUIR, Plaintiff and Appellant,

v.

Michael D. MUIR, Defendant
and Appellee.

No. 900603-CA.

Court of Appeals of Utah.

Nov. 12, 1992.

Former husband brought motion to modify alimony he was required to pay former wife. The Third District Court, Salt Lake County, Homer F. Wilkinson, J., entered order modifying parties' decree of divorce and reducing amount husband was required to pay from \$1,500 to \$900 a month and ordered husband to pay \$3,000 of wife's attorney fees. Wife appealed. The Court of Appeals, Garff, J., held that: (1) remand was required to enable trial court to make specific findings in regards to husband's income from closely held corporation, and (2) trial court abused its discretion in reducing attorney's fees payable to wife from a sum of more than \$15,000 to \$3,000 without a finding that the reduction was warranted, requiring remand.

Remanded.

1. Divorce ¶164

Trial court has discretion to modify divorce decree after it has determined that

payments, the father entered into an agreement with the mother whereby he agreed to pay her \$10,000, which was to be prepayment of all of his obligations under the decree, in return for release of those obligations. See *Gulley*, 570 P.2d at 128.

there has been substantial change of material circumstances subsequent to the decree, not contemplated at time of decree.

2. Divorce ⇨239

When a spouse owns a closely held corporation, including a professional corporation, trial court must do more than rely only on spouse's stated income when determining the spouse's ability to pay alimony.

3. Divorce ⇨245(2)

Temporary increase or decrease in payor's income does not necessarily constitute substantial change in circumstances, for purposes of modification of divorce decree.

4. Divorce ⇨245(2)

Finding that assets of marriage had been divided equally upon divorce was relevant on motion to modify alimony payable under divorce decree to extent it established baseline from which court could determine whether substantial change had occurred.

5. Divorce ⇨245(2)

Finding of increase in wife's income and decrease in husband's income, without more specificity, does not necessarily support conclusion of substantial change in circumstances, for purposes of petition to modify alimony payable under divorce decree.

6. Divorce ⇨287

Remand was required to enable trial court to make adequate findings, supported by sufficient evidence, regarding whether material circumstances of parties had substantially changed in ways not contemplated by original divorce decree such that modification of decree could be warranted, where court had not made sufficient intermediary findings before making a bottom line finding regarding husband's income, in that husband was involved in closely held corporation and court did not explain why husband's income significantly decreased when his ownership in business increased, and court did not consider evidence that corporation substantially reduced its liabilities, or whether husband benefitted beyond salary earned from corporation.

7. Divorce ⇨223

District court has discretion to order either party to pay other party's attorney fees in divorce action, including fees incurred in modification proceedings and in appeals. U.C.A.1953, 30-3-3.

8. Divorce ⇨224

In order to award attorney fees in divorce action, trial court must find requesting party is in need of financial assistance, requested fees are reasonable, and other spouse has ability to pay. U.C.A.1953, 30-3-3.

9. Divorce ⇨227(1), 287

Trial court abused its discretion in reducing attorney's fees payable to wife from a sum of more than \$15,000 to \$3,000 without a finding that the reduction was warranted, requiring remand. U.C.A.1953, 30-3-3.

Suzanne Marelus (argued), Littlefield & Peterson, Salt Lake City, for plaintiff and appellant.

Duane H. Gillman, Leslie J. Randolph (argued), McDowell & Gillman, P.C., Mary J. Woodhead, Watkiss & Saperstein, Salt Lake City, for defendant and appellee.

Before GARFF, JACKSON and
RUSSON, JJ.

OPINION

GARFF, Judge:

Appellant Marita Muir (Wife) appeals an order modifying the parties' decree of divorce. The modification reduced appellee Michael D. Muir's (Husband) obligation to pay alimony from \$1,500 to \$900 a month. The modification also ordered Husband to pay \$3,000 of Wife's attorney fees, which amounted to approximately \$15,000. We reverse and remand.

FACTS

The parties were married for more than twenty years before their divorce on September 16, 1985. At the time of the modifi-

cation hearing, five years later, all three of the parties' children had attained majority.

At the time of the divorce, the court found, pursuant to the parties' stipulation, that each party had received an equal property distribution. The distribution provided that Husband would receive all the common stock owned by the parties in Fairmont Bowl and that Wife would receive the parties' residence. The court ordered Husband to assume liability for loans incurred by Fairmont Bowl and it ordered Wife to assume the mortgage debt on the residence.

The court ordered Husband to pay Wife alimony of \$1,500 per month "until [Husband's] obligation ... is terminated because of the death of one of the parties, the remarriage or cohabitation by [Wife] or because of further order of the court based on some other valid and lawful reason to terminate alimony pursuant to the laws of the state of Utah." The court ordered each party to pay his or her attorney fees and costs "resulting from and incident to this action."

During most of the parties' marriage, and at the time of the divorce, Husband derived all of his income from his majority ownership of Fairmont Bowl. At the time of the divorce, he owned 78% of the company's stock, with the remainder held by his father. Since the divorce, Husband's ownership increased to 96.61%, as a result of gifts of stock from his father. The parties' children own the remaining stock.

In August 1989, five years after the divorce, Husband petitioned for modification of the alimony order, claiming a substantial change in material circumstances since entry of the decree. He sought a reduction in alimony for one year, followed by complete termination.

Husband based his petition for modification on a claim that, since the divorce, his income had decreased and Wife's income had increased. Specifically, Husband claimed that while gross revenues of his business had remained consistent, expenses had increased, depreciation had decreased, and his business needed extensive capital investment.

Husband also claimed Wife's income had substantially increased since the time of the divorce. He presented evidence showing that her income from her seasonal job as a flight attendant averaged \$1,400 gross per month in the first nine months of 1990.

At trial, Husband's accountant testified that Husband had total discretion over the amount of money he took as compensation each year. Wife's accountant testified that Husband's calculations were misleading. Wife's accountant also testified that Husband received benefits in addition to his stated salary including automobile expenses, travel expenses, health insurance, auto insurance, costs, country club costs, and tax deferred benefits including pension contributions. Husband also benefitted from the fact that his new wife drew a salary from the corporation.

At trial, the court permitted Wife's attorney to proffer testimony regarding the amount and reasonableness of attorney fees. Husband's attorney did not object. The proffer included itemizations and affidavits of Wife's former attorneys. Wife's attorney proffered that total fees and costs incurred in defending the petition for modification were \$13,179, along with estimated trial fees of \$2,600. She then concluded her proffer: "I have been a practicing attorney for ten years in this area. And that the rate I am charging is commensurate with my experience and expertise in the field." Again, Husband's attorney did not object nor did he cross-examine Wife's attorney. Wife's attorney requested leave to supplement the record with a final itemization of the trial fees. Husband's attorney proffered fees of \$6,000 for the modification action.

In October 1990, the trial court concluded there had been a substantial change in material circumstances justifying modification of the original alimony award. The court based its conclusion on the following findings: (1) the assets of the marriage had been divided equally; (2) Wife's annual income had increased from \$12,000 to \$17,000; (3) Husband's annual income had decreased from \$118,600 to \$81,600; and (4)

Husband needed to reinvest in the business:

... [Husband] in the near future is going to have to put some big—well, some money into his business in order to stay up with the competition.

The court then found:

[Wife] has incurred substantial legal fees approximating \$15,000 for her representation in these proceedings. [Husband] has incurred legal fees for representation in these proceeding of \$6,000.

.... The Court further concludes that [Husband] should be required to pay his own attorney's fees in these proceedings and that he should also be required to pay to [Wife] for the use and benefit of her counsel in the matter the sum of \$3,000.

Wife appeals, claiming the court erred in determining there had been a substantial change in material circumstances because the underlying findings were inadequate and erroneous. She also claims the court abused its discretion in awarding a substantially smaller attorney fee than that requested. We reverse and remand.

MODIFICATION OF ALIMONY

[1] A trial court has discretion to modify a divorce decree after it has determined that there has been a substantial change of material circumstances subsequent to the decree, not contemplated at the time of the decree. *Jense v. Jense*, 784 P.2d 1249, 1251 (Utah App.1989), cert. dismissed, 795 P.2d 1139 (Utah 1990); *Woodward v. Woodward*, 709 P.2d 393, 394 (Utah 1985) (per curiam).

We first consider whether the findings adequately support the determination that there has been a substantial change in material circumstances. In this regard, "the trial court must make findings on all material issues, and its failure to delineate what circumstances have changed and why these changes support the modification made in the prior divorce decree constitutes reversible error unless the facts in the record are clear, uncontroverted and only support the judgment." *Whitehouse v. Whitehouse*, 790 P.2d 57, 61 (Utah App.1990); accord

Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987); *Throckmorton v. Throckmorton*, 767 P.2d 121, 124 (Utah App.1988); Utah R.Civ.P. 52(a). Further, findings "should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Acton*, 737 P.2d at 999; accord, *Gardner v. Gardner*, 748 P.2d 1076, 1078 (Utah 1988) (quoting *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979)); *Whitehouse*, 790 P.2d at 61.

CLOSELY-HELD CORPORATIONS

Determining Husband's income is complex because he derives his income from a closely-held corporation.

[2] This court and the supreme court have held that when a spouse owns a closely-held corporation, including a professional corporation, a trial court must do more than rely only on the spouse's stated income. See, e.g., *Jones v. Jones*, 700 P.2d 1072, 1076 (Utah 1985); *Christiansen v. Christiansen*, 667 P.2d 592, 594 (Utah 1983).

In order to determine whether the court's findings were adequate, we consider what constitutes "all material issues." Obviously, all material issues must relate to "a substantial change of circumstances subsequent to the decree, that was not originally contemplated within the decree itself," *Jense v. Jense*, 784 P.2d 1249, 1251 (Utah App.1989) (citing *Woodward v. Woodward*, 709 P.2d 393, 394 (Utah 1985) (per curiam)), and "must relate to the basis upon which the original award was made by the trial court." *Id.* at 1251-52.

Because of the nature of alimony, the substantial change goes to financial and property interests and circumstances of the parties. *Montoya v. Montoya*, 696 P.2d 1193, 1194-95 (Utah 1985).

[3] A temporary increase or decrease in the payor's income does not necessarily constitute a substantial change. *English v. English*, 565 P.2d 409, 412 (Utah 1977) (substantial change does not occur when party "experiences unusual prosperity dur-

ing one year"). Nor does a temporary change in the payee's income necessarily constitute a substantial change. *Ring v. Ring*, 29 Utah 2d 436, 511 P.2d 155, 159 (Utah 1973); *Felt v. Felt*, 27 Utah 2d 103, 493 P.2d 620, 624 (1972).

For example, in *Jones*, the supreme court held the trial court erred in considering only the husband's stated income. 700 P.2d at 1076. The trial court should have considered that the husband "had control over the entire profit, but chose to take only half of it as personal income and to set the rest aside for reinvestment in the business." *Id.* The court noted the proper balance between the need to reinvest in the business and the need to pay alimony:

If these capital needs [of the business] are a result of discretionary decisions of the husband to expand and improve the business, rather than to maintain it in its present condition, then to permit him to divert income into the business at the expense of his ex-spouse's support needs would be to permit him to enrich himself at her expense.

Id. In *Christiansen*, the court held that "where an ex-husband has a wholly-owned corporation, a trial court may consider both his individual income and the corporation's income in considering a petition by the divorced wife for modification of alimony and child support." 667 P.2d at 594. The *Christiansen* court affirmed a finding that the payor benefitted more than his stated corporate salary indicated. *Id.* The court affirmed a finding that the payor benefitted personally from expenditures of the business for an employee benefit program and auto allowance. *Id.* at 593-94; see also, *Naylor v. Naylor*, 700 P.2d 707, 709 (Utah 1985) (trial court correctly considered benefits to payor such as bonuses, pension contributions, and profit-sharing accounts); *Hinckley v. Hinckley*, 815 P.2d 1352, 1354 (Utah App.1991) (court "not bound by [business owner's] allocation of business income in determining whether he is still able to pay alimony.").

Trial courts may consider many factors when evaluating a business owner's income, see, e.g., *Sorensen v. Sorensen*, 839

P.2d 774, 777 (Utah 1992) (accounts receivables may be used to pay alimony); *Naylor*, 700 P.2d at 709 (may consider corporate benefits such as bonuses, pension contributions, and profit-sharing accounts); *English*, 565 P.2d at 412 (may consider business owner's historical earning ability to determine income); *Rasband v. Rasband*, 752 P.2d 1331, 1333 (Utah App.1988) (may upwardly adjust husband's stated income because of "his ability to expense some personal use items through his business.").

Here, the court made four findings to support its conclusion that there had been a substantial change in material circumstances: (1) the assets of the marriage had been divided equally; (2) Wife's income had increased; (3) Husband's income had decreased; and (4) Husband needed to reinvest in the business.

[4] The first finding does not relate directly to a substantial change. However, it is relevant to the extent it establishes a baseline from which the court can determine whether a substantial change has occurred. See, e.g., *Higley v. Higley*, 676 P.2d 379, 382 n. 1 (Utah 1983).

[5] The next two findings relate directly to a substantial change in circumstances. But these findings, of an increase in Wife's income and a decrease in Husband's income, without more specificity, do not necessarily support a conclusion of a substantial change in circumstances. See, e.g., *Ring*, 511 P.2d at 159; *Felt*, 493 P.2d at 624.

[6] In a case such as this, where Husband's finances and the finances of the business are intertwined, a bottom line finding regarding Husband's income does not "include enough subsidiary facts to disclose the steps by which the court's ultimate conclusions were reached." *Whitehouse v. Whitehouse*, 790 P.2d 57, 61 (Utah App.1990). For example, some important subsidiary facts the court should have considered include: why Husband's income significantly decreased when his ownership in the business increased by eighteen percent; evidence that the company substan-

tially reduced its liabilities in 1988; evidence of Husband's net worth statements in credit applications made since the decree; and, testimony regarding "loans to shareholders" on the books of the business amounting to cash not included in Husband's compensation.

The trial court also failed to find whether Husband benefitted beyond the salary earned from the closely-held corporation. The record indicates that Husband received travel and auto allowances, auto and life insurance, tax deferred benefits including pension contributions, and that his new wife drew a salary from the corporation. *See Naylor*, 700 P.2d at 709. As in *Christiansen*, any such expenses paid by the corporation should be added to the stated salary.¹ *Christiansen*, 667 P.2d at 593. Obviously, all of these "business expenses" contributed to the bowling alley's decreased profitability since the divorce.

The finding that Husband would soon need to reinvest in the business is problematic because the court failed to find whether the reinvestment constituted a "discretionary decision . . . to expand and improve" or whether the reinvestment was to "maintain it in its present condition." *Jones*, 700 P.2d at 1076.

Accordingly, we remand for the trial court to enter adequate findings, supported by sufficient evidence, regarding whether the material circumstances of these parties have or have not substantially changed in ways not contemplated by the original decree such that modification of the decree may be warranted.²

ATTORNEY FEES

Wife claims the court abused its discretion in awarding only \$3,000 in attorney fees when the amount proffered was much greater.

1. We do not suggest that the new wife's income should be added to Husband's stated salary. However, the new wife's income most likely relieves Husband of a portion of his stated expenses.

2. In the event the trial court on remand determines there has been a substantial change in material circumstances not contemplated by the decree, the court must then make specific and

[7] The district court has discretion to order either party to pay the other party's attorney fees in a divorce action. Utah Code Ann. § 30-3-3 (1989); *Maughan v. Maughan*, 770 P.2d 156, 162 (Utah App. 1989). Section 30-3-3 includes attorney fees incurred in modification proceedings and in appeals. *See Maughan*, 770 P.2d at 162.

[8] In order to award attorney fees, the trial court must find (1) the requesting party is in need of financial assistance; (2) the requested fees are reasonable; and (3) the other spouse has the ability to pay. *Crouse v. Crouse*, 817 P.2d 836, 840 (Utah App.1991); *Haumont v. Haumont*, 793 P.2d 421, 425 (Utah App.1990); *Riche v. Riche*, 784 P.2d 465, 470 (Utah App.1989).

In determining the reasonableness of attorney fees, the court may consider

the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved.

Rasband v. Rasband, 752 P.2d 1331, 1336 (Utah App.1988) (quoting *Cabrera v. Cottrell*, 694 P.2d 622, 625 (Utah 1985)).

[9] Where "the evidence supporting the reasonableness of requested attorney fees is both adequate and entirely undisputed, . . . the court abuses its discretion in awarding less than the amount requested unless the reduction is warranted" by one or more of the established factors. *Martindale v. Adams*, 777 P.2d 514, 517-18 (Utah App.1989).

adequate findings reflecting the *English* factors to support a modification of the alimony award. That is the court must make findings regarding (1) Wife's ability to provide for herself the standard of living contemplated in the decree; (2) Husband's ability to pay the full alimony amount; and (3) Wife's needs. *English*, 565 P.2d at 411-12.

Here, the court permitted Wife's attorney to proffer testimony regarding the amount and reasonableness of attorney fees. Husband's attorney did not object. The court then found that Wife incurred legal fees amounting to approximately \$15,000. It ordered Husband to pay only \$3,000 of those fees, offering no explanation for the reduction.

Other than its previous finding relating to an increase in Wife's income, the court failed to find whether Wife needed financial assistance. In addition, while the court made general findings regarding Husband's income, it made no findings regarding Husband's ability to pay Wife's attorney fees. Moreover, despite evidence proffered by Wife's attorney, the court failed to make findings regarding the reasonableness of the fees.

Because the proffered evidence of Wife's attorney fees was adequate and entirely undisputed, the court abused its discretion in reducing the requested amount from a sum of more than \$15,000 to \$3,000 without a finding that the reduction was warranted by one of the established factors.

In addition, our remand of the alimony issue may have an effect on the award of attorney fees. *See, e.g., Rudman v. Rudman*, 812 P.2d 73, 77 (Utah App.1991).

We therefore remand the issue of attorney fees for the court to make specific findings regarding Wife's financial need and Husband's ability to pay. In the event the court finds both need and ability to pay, it must then make independent findings regarding the reasonableness of all fees and costs of all the attorneys Wife has employed to defend the petition to reduce and eliminate alimony, including fees incurred on appeal.

CONCLUSION

We remand the issue of alimony for the court to make specific findings, supported by sufficient evidence, regarding whether the material circumstances of these parties have or have not substantially changed in ways not contemplated by the original decree such that modification of the decree may be warranted. We also remand the

issue of attorney fees for the court to make specific findings regarding Wife's financial need, Husband's ability to pay, and regarding the reasonableness of the fees requested, both for the modification hearing and this appeal.

JACKSON and RUSSON, JJ., concur.



Anna Lee ANDERSON, Plaintiff
and Appellant,

v.

DEAN WITTER REYNOLDS, INC.,
Ralph Pahnke, and John Does 1
Through 25, Defendants and Appellees.

No. 920228-CA.

Court of Appeals of Utah.

Nov. 13, 1992.

Beneficiary of express trust sued stockbroker and brokerage firm alleging improper distribution of trust assets. The Third District Court, Salt Lake County, J. Dennis Frederick, J., dismissed complaint on ground that beneficiary did not have standing to sue. Beneficiary appealed. The Court of Appeals, Jackson, J., held that beneficiary could prove facts showing she had standing to bring suit for the improper distribution of the stock sufficient to withstand motion to dismiss for failure to state a claim.

Reversed and remanded.

1. Appeal and Error ¶863, 919

When reviewing motion to dismiss based on failure to state a claim, appellate court must accept material allegations that the complaint is true, and the trial court's ruling should be affirmed only if it clearly appears the complainant can prove no set

59(a) (1987) (applicable to criminal proceedings by virtue of Rule 81(e)). Thus, if jurors were to agree that a verdict would be based on a "divine sign," a Ouija board answer, or some fortuitous event, such a verdict, in my judgment, would constitute a denial of due process and the right to trial by jury.

The trial judge ruled that Rule 606(b) of the Utah Rules of Evidence (1987) prohibited him from considering the allegations in the affidavit submitted by defendant.¹ Rule 606(b) governs the admissibility of juror testimony and affidavits for purposes of impeaching a jury verdict. The majority sustains that ruling, holding that "prayer and supposed responses to prayer are not included within the meaning of the words 'outside influence'" as used in Rule 606(b).

I believe the majority fails to draw a critical distinction between the legitimacy of jurors' seeking divine assistance in accurately and dispassionately weighing the evidence and the illegitimacy of jurors' abdicating their sworn duty to decide the case on the evidence and instead relying on some supposedly divine sign. Although "[a] juror is fit to serve if he or she can impartially weigh the evidence and apply the law to the facts as he or she finds them," as the majority observes, the fact appears to be that the juror in question did not impartially weigh the evidence and apply the law to the facts, but disregarded the evidence and the law and ruled on the basis of an "outside influence." Accordingly, the trial court could have relied on the affidavit under Rule 606(b) for the purpose of deciding that a hearing on the allegations should have been held. It is of particular significance that the juror in question is alleged to have been "one of the leaders" during the jury deliberations.

1. Rule 606(b) of the Utah Rules of Evidence (1987) states:

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental pro-

In my view, a verdict based on chance, like a verdict based on a supposed divine sign, falls within the meaning of the terms "extraneous prejudicial information" and "outside influence," as those terms are used in Rule 606(b) of the Rules of Evidence. If, therefore, the allegations of the affidavit are true, defendant would be entitled to a new trial under Rule 24 of the Utah Rules of Criminal Procedure.

I would remand the case to the trial court for an evidentiary hearing to determine whether the jurors decided the case on the evidence or whether there was reliance on factors outside the record.



**Verlora CARLTON, Plaintiff
and Respondent,**

v.

**Frank Hayden CARLTON, Defendant
and Appellant.**

No. 860247-CA.

Court of Appeals of Utah.

June 3, 1988.

Husband appealed from order of the Third District Court, Salt Lake County, Jay E. Banks, J., distributing property in divorce proceeding. The Court of Appeals, Greenwood, J., held that trial court's failure to make finding as to value of parties' assets in making distribution constituted

cesses in connection therewith, *except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.* Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

(Emphasis added.)

reversible error requiring remand for entry of additional findings.

Vacated and remanded.

Jackson, J., dissented and filed an opinion.

Divorce \S 253(4), 286(9), 287

In divorce proceeding, trial court's failure to make findings as to value of parties' assets in making equitable distribution of property constituted reversible error requiring remand for entry of additional findings; trial court on remand was required to make findings as to value of parties' various assets, if trial court were to award wife any of husband's premarital property, trial court would be required to enter findings explaining circumstances justifying such an award, and trial court was required to indicate whether it was valuing parties' assets as of time of divorce or as of time of separation.

B.L. Dart (argued), John D. Parken, Salt Lake City, for defendant and appellant.

Paul H. Liapis, John C. Green (argued), Gustin, Adams, Kasting & Liapis, Salt Lake City, for plaintiff and respondent.

Before DAVIDSON, JACKSON and GREENWOOD, JJ.

OPINION

GREENWOOD, Judge:

Defendant, Frank Hayden Carlton, appeals the trial court's property distribution in a divorce proceeding, claiming that the trial court did not enter sufficient findings of fact and inequitably awarded property. We vacate the property award and remand.

Plaintiff, Verlora Carlton, and defendant were married on June 18, 1979, separated in December 1984 and divorced in August 1986. At the time of trial, plaintiff was forty-nine and defendant was sixty-four. Throughout the marriage, defendant worked as a certified public accountant and earned over \$100,000 gross annual income during most of the marriage. Plaintiff did not work during the marriage, but before

the marriage she had operated a cosmetology shop and earned approximately \$1,100 gross income per month. At the time of trial, plaintiff's gross income was \$800 per month.

Defendant testified at trial that his premarital assets totalled \$761,925 while plaintiff testified that she had \$24,935 in assets at the time of the marriage. Both parties presented exhibits regarding the values of their assets. Defendant claimed to have gained only about \$75,000 in additional assets during the course of the marriage. However, plaintiff claimed that she was entitled to assets totaling \$201,591.85 in value as her share of the parties' marital estate. Without placing a value on the items constituting the parties' assets, the court found that "the marital appreciation in the assets which the parties acquired during the marriage and/or maintained during the marriage, totals \$255,327.00." The court then subtracted plaintiff's premarital assets of \$27,228 from that amount and awarded plaintiff one-half of the adjusted marital estate of \$228,099 plus the value of her premarital assets, for a total of \$144,277.

On appeal, defendant claims the trial court erred in failing to make sufficient findings of fact as to the value of the parties' assets and that the property distribution is inequitable because it distributes a substantial portion of defendant's premarital assets to plaintiff.

In divorce proceedings, the trial court is given considerable discretion in fashioning an equitable property distribution, *Jones v. Jones*, 700 P.2d 1072, 1074 (Utah 1985); *Sampinos v. Sampinos*, 750 P.2d 615, 618 (Utah Ct.App.1988), and its findings will not be disturbed absent an abuse of discretion. *Boyle v. Boyle*, 735 P.2d 669, 670 (Utah Ct.App.1987). The trial court must make findings on all material issues, and its failure to do so constitutes reversible error "unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.'" *Acton v. J.B. Deliran*, 737 P.2d 996, 999 (Utah 1987) (quoting *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983)). In

addition, the findings must be sufficiently detailed and consist of enough subsidiary facts to reveal the steps the court took to reach its conclusion on each factual issue presented. *Acton*, 737 P.2d at 999; *Lee v. Lee*, 744 P.2d 1378, 1380 (Utah Ct.App. 1987). Finally, the trial court's failure to include property valuations in divorce actions may constitute an abuse of discretion sufficient to require remand for determination. *Jones*, 700 P.2d at 1074; *Boyle*, 735 P.2d at 671.

This divorce proceeding involved numerous different assets including at least thirty different stocks and bonds, six savings accounts, four checking accounts, several bronze statutes, the parties' residence, IRAs and a Keogh plan. Defendant's exhibits valued the assets at the time of the marriage and at the time of the separation, which was a year and a half before the divorce decree was entered. Defendant's exhibits also separately itemized the securities acquired during the marriage. Plaintiff's proposed property distribution listed only a portion of the parties' assets apparently valued as of the trial in December 1985.

The testimony at trial and the exhibits clearly indicate that the parties hotly contested the values of many of the assets. For example, the parties' exhibits differ on the value of the E.F. Hutton Investment account. Plaintiff's exhibit values the E.F. Hutton Investment account at \$113,000, while defendant's exhibit indicates that the account decreased \$62,400 in value during the parties' marriage and was worth only \$29,217 at the time of the separation. Defendant conceded, however, that the E.F. Hutton Investment account increased in value from \$29,217 at the time of the separation to \$113,000 at the time of the trial but testified that he believed the estate should be valued as of the date the parties separated. The trial court found that the parties acquired "stocks and bonds in an investment account with E.F. Hutton Investment Company" during the marriage but did not place a value on the account. In addition, the findings do not state whether the court valued the E.F. Hutton Investment account as of the time of the

separation or as of the time of the divorce. The values of many other assets were also controverted.

Based on the trial court's findings, we cannot determine how the court arrived at its conclusion that the marital assets had appreciated by \$255,327 during the marriage. The trial court did not clearly state which assets were marital or premarital nor did it value all of the individual assets. The general rule is that:

Premarital property ... may be viewed as separate property, and in appropriate circumstances, equity will require that each party retain the separate property brought to the marriage. However, the rule is not invariable. In fashioning an equitable property division, trial courts need consider all of the pertinent circumstances.

Burke v. Burke, 733 P.2d 133, 135 (Utah 1987).

Because we cannot determine how the court arrived at the amount of appreciation of the marital estate during the parties' seven year marriage, we are also unable to determine whether the court allowed each party to retain all or some portion of his or her separate property. Although the findings indicate that the parties were awarded most of what was claimed as premarital property, the findings do not specify whether some of the assets, such as the savings and checking accounts, were premarital property. For example, the court found that the parties had acquired "numerous bank accounts" during the marriage, but did not specify if all of the bank accounts distributed in the divorce were acquired during the marriage. In the event the court awarded plaintiff some of defendant's premarital property, the court must follow *Burke* and make findings which explain the circumstances warranting an award of defendant's premarital property to plaintiff.

In addition, we cannot determine from the court's findings if the parties' assets were valued at the time of the divorce decree or at the time of the separation. Generally, assets are valued at the time of

the divorce decree. *Berger v. Berger*, 713 P.2d 695, 697 (Utah 1985); *Peck v. Peck*, 738 P.2d 1050, 1052 (Utah Ct.App.1987). "However, where one party has dissipated an asset, hidden its value, or otherwise acted obstructively, the trial court may, under its broad discretion, value the property at an earlier date, i.e., separation." *Id.* The findings in this case do not indicate whether the court valued the assets at the time of the divorce or the time of the separation. However, it appears from the evidence received by the court that some of the assets were only valued as of the time of the parties' separation.

Further, the facts in the record are not "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." *Acton*, 737 P.2d at 999. The dissent urges application of the methodology utilized in *Olson v. Olson*, 704 P.2d 564 (Utah 1985). In *Olson*, the court failed to make a finding of the wife's financial needs in determining an alimony award. The Utah Supreme Court, nevertheless, affirmed the alimony award, finding it was appropriate if the court assumed the wife's claimed financial need, which the husband disputed, was true.

The *Olson* approach is not applicable in this case where the parties disputed many values, and we would have to speculate on the trial court's view as to the value of each asset. Unlike *Olson*, we cannot simply assume as true one disputed value. Instead, we must speculate on numerous disputed facts. In addition, the *Olson* Court found that if it added a finding of financial need in the amount claimed by the wife, the Court would not disturb the alimony award. This case differs because we cannot determine if the property distribution was fair and equitable without a valuation of each asset and a designation as to which property was premarital and marital. Furthermore, the difficulty in applying *Olson* is compounded by the court's failure to distinguish between separation and time of trial valuations.

Therefore, we hold that the trial court's failure to make findings as to the value of the parties' assets constitutes reversible er-

ror requiring this Court to remand for entry of additional findings. On remand, the court must make findings as to the value of the parties' various assets, and, if the court awards plaintiff any of defendant's premarital property, the court must enter findings which explain the circumstances justifying such award. See *Burke*, 733 P.2d at 135. In addition, the court's findings must indicate whether the court is valuing the parties' assets as of the time of the divorce or as of the time of the separation.

Judgment vacated as to the property award and remanded for further proceedings consistent with this opinion.

DAVIDSON, J., concurs.

JACKSON, Judge (dissenting):

I depart from the majority at two points. First, I am concerned that remand of this case will impose an unnecessary burden on the judicial system and the parties. The remand will require a new trial unless the judge who originally heard this matter, former District Court Judge Jay E. Banks, can be recalled from the ranks of the retired. Another trial judge will find it impossible to dredge from the depths of the record all the specific findings ordered by the majority.

Secondly, we need not impose any burden upon Judge Banks or one of his colleagues in this case. The law is clear in Utah that, in order to permit appellate review, a trial court's distribution of marital assets whose values are contested by the parties should be based upon specific written findings as to what those values are. *Jones v. Jones*, 700 P.2d 1072, 1074 (Utah 1985). In *Jones*, the Court concluded that the remedy of remand was appropriate because "[i]f the trial court accepted one set of values, the [appellant] wife was clearly awarded too little; if another set was adopted, it is possible that the trial court did not abuse its discretion." *Id.*

Four months after *Jones*, the Utah Supreme Court decided *Olson v. Olson*, 704 P.2d 564 (Utah 1985), in which the appellant ex-wife challenged the amount of alimony awarded her. She claimed that the

trial court had failed to consider her financial condition and needs, one of three factors that must be considered by the trial court in fixing the amount of alimony. *Id.* at 566. The unanimous Court agreed that the trial court's findings on this factor were inadequate, but it did not end its analysis there and remand to the district court. Instead, it accepted her evidence on these issues as true and reached her substantive claim, ultimately affirming the amount of the trial court alimony award:

Turning to the record in the absence of sufficient findings, we find conflicting evidence on some factual issues material to a determination of the wife's financial condition and needs. Nevertheless, even accepting as true, for purposes of review, the [appellant] wife's evidence on these issues, we find no abuse of discretion in the amount of alimony awarded.

Id. at 567. This approach to the disposition of the appeal makes sense. The trial court's findings must be supported by the evidence. Accordingly, the best an appellant could do—if adequate findings were made at trial or on remand—is to have the court accept his or her evidence on the disputed point. If even that version of the facts does not justify disturbing the trial court's judgment, then there is no reason for the appellate court to send the case back for more specific findings that will not ultimately change the outcome of the case.

The Utah Supreme Court applied this commonsense approach again in *Claus v. Claus*, 727 P.2d 184 (Utah 1986). As in the case before us, the appellant husband in *Claus* challenged the trial court's distribution of marital property. He complained that the trial court had failed to make findings as to the values of each party's premarital assets and the increase of those values during the marriage. The trial court had totalled the equities of all the parties' properties and then awarded nearly half of the total to each. *Id.* at 185. In its per curiam opinion, the Utah Supreme Court did not automatically remand for specific findings on the disputed values of individual assets. It looked to the entire record and affirmed the trial court's prop-

erty distribution, concluding that it was "eminently fair" to the appellant. *Id.*

Subsequent to *Olson* and *Claus*, the Utah Supreme Court explicitly held that the failure to make findings on all material issues is reversible error unless the facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment. *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987). In applying the *Acton* standard in appeals challenging the property distribution in a divorce decree, the Court has not indicated that the sensible appellate practice used in *Olson* is to be thrown out the window, resulting in meaningless and burdensome remands to the district courts.

In *Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988), for example, the appellant wife challenged the trial court's complete failure to assign values to, and to distribute as marital property, the husband's retirement account and medical assets where the parties' figures varied considerably. The Court remanded *Gardner* for the entry of specific findings, concluding that it could not perform its reviewing function and determine whether the parties' property was equitably distributed without more detailed findings regarding the valuation of assets. *Id.* at 1080. Just as it had in *Jones*, the Court pointed out that the award to respondent Mr. Gardner of all his retirement funds and medical assets *might* ultimately turn out to be proper and equitable if the trial court adopted his evidence as to their value. *Id.* But the appellate court might, presumably, agree with appellant Mrs. Gardner that the trial court's property award was inequitable if the trial court findings adopted her evidence of their values.

No such problem is presented by this case. Even if we accept appellant's version of what the value of the marital estate and the individual asset valuations should have been, the overall marital property distribution is eminently equitable to him. Therefore, additional findings are not needed to support affirmance of the trial court's award.

CARLTON v. CARLTON

Cite as 756 P.2d 86 (Utah App. 1988)

Utah 91

The majority unfortunately elevates form over substance by slavishly and, I believe, misguidedly applying *Acton*, without regard for appellant's only substantive issue on appeal, namely, whether the trial court's apportionment of the marital property "was clearly unjust or a clear abuse of discretion." *Gardner*, 748 P.2d at 1078. The majority insists on having additional and more specific findings in order to understand the trial court's ultimate total of \$228,099 in marital property, one-half of which was awarded to each party. All they really want are some intermediate mathematical calculations.¹ To justify their remand, my colleagues have clothed this case in the raiment of complexity. "[E]ven Solomon in all his glory was not arrayed like one of these." *Matthew* 6:29. But we need not undress the entire record to expose the equity of the trial court's ultimate marital property finding.

Judge Banks's findings contain an orderly, step-by-step route of factual conclusions that leads to the ultimate disposition without detour. Finding 6 identifies Mrs. Carlton's premarital property, which the court awarded to her. Finding 13 valued her property at \$27,228. Finding 7 identifies Mr. Carlton's premarital property, which the court awarded to him; no value was fixed. Findings 8 through 12 identify the properties which the parties acquired during the course of their marriage and make some specific offsetting awards, leaving an adjusted marital estate of \$228,099.² A

total of \$144,277 was awarded to Mrs. Carlton, i.e., \$114,049 (one-half the adjusted marital estate) plus her premarital property of \$27,228. In Finding 14, the court subtracted from this figure \$12,041 in assets she took at the time of separation, leaving her a balance of \$129,236. The remaining marital assets are identified as specific bank and investment accounts with fixed values from which Mrs. Carlton received the balance of her marital property award, including \$99,124.29 from their E.F. Hutton account.³

Viewed in light of the values assigned by Mr. Carlton, the trial court's property distribution is patently equitable. Appellant elected to use values calculated as of the date of the parties' separation, although assets are generally valued as of the time of the divorce decree. *See Berger v. Berger*, 713 P.2d 695, 697 (Utah 1985). Mr. Carlton's values were submitted via Exhibit 35D, consisting of underlying itemized schedules summarized onto a front sheet. His summary valued his premarital property at \$761,925 at the time of marriage, increasing to \$837,732 at separation, for a total \$75,807 increase during the marriage. But, assigning his specified values to the assets the court awarded him yields a total value of \$889,000.⁴ Thus computed, he received \$127,000 more than his premarital value. This compares favorably with the court's award to him of \$114,049, one-half of the adjusted marital estate.

1. The majority states, "we cannot determine how the court arrived at its conclusion that the marital assets had appreciated by \$255,327 during the marriage." The trial court valued Mrs. Carlton's premarital property at \$27,228 and awarded it to her. The majority has included her premarital property in the "appreciation." The trial court, in finding 13, found a marital estate of \$228,099 and awarded Mrs. Carlton one-half, i.e., \$114,048.

2. The values used by Judge Banks in reaching this total are contained in Mrs. Carlton's Exhibit 14P, her itemization of the "assets of parties" and her asserted values for each asset, totalling \$403,000. She excluded her premarital property and his premarital Bear Lake home. Judge Banks subtracted \$175,000 from her total, comprised of the following items: \$38,000 (for the K Street home awarded to him as premarital property); \$10,000 (for the Saratoga, Wyoming lot

awarded to her); \$14,000 (for the 1985 Lincoln awarded to him); and \$113,000 (for the value at trial of the E.F. Hutton account created from his premarital savings). The \$228,000 balance (\$403,000 minus \$175,000) divided equally between the parties represents the value of all the remaining marital assets, including a one-half interest in land in Carbon County, numerous liquid asset accounts, and several bronzes and sculptures.

3. As acknowledged by the majority, Mr. Carlton testified that the E.F. Hutton account balance was \$113,000 at time at trial. Mrs. Carlton's evidence fixed the same value.

4. This figure gave Mr. Carlton the benefit of a claimed \$100,000 loss of value on his Bear Lake home, i.e., from \$300,000 to \$200,000 during the marriage.

Acceptance of Mr. Carlton's own values reveals no serious inequity or abuse of discretion in the property distribution as far as he is concerned. Although Mrs. Carlton might have some reason to complain, she has not cross-appealed to challenge the trial court's award.⁵ The findings show that the trial court considered each item of property. The premarital property was delineated and awarded respectively to each party. Hers was assigned a total value; his was not. Individual valuations of their premarital assets were not material since the ultimate issue was the equitable division of marital property, not premarital property.

Where the asset values claimed by appellant at trial show he received an equitable share of the marital property and no clear abuse of discretion is otherwise proven, we ought to defer to the trial court's property distribution. The judgment of the trial court should be affirmed.



STATE of Utah, Plaintiff and
Respondent,

v.

Jon C. VASILACOPULOS, Defendant
and Appellant.

Nos. 870291-CA; 870507-CA.

Court of Appeals of Utah.

June 3, 1988.

Rehearing Denied July 19, 1988.

Defendant appealed from order of the
Third District Court, Salt Lake County, Ho-

mer F. Wilkinson, J., denying his motion to withdraw guilty plea. The Court of Appeals, Bench, J., held that record did not establish that defendant understood possibility of consecutive sentences when he entered plea of guilty.

Reversed, convictions vacated, and matter remanded.

1. Criminal Law ⇐1149

Denial of motion to withdraw guilty plea will be reversed only when it clearly appears that the trial court has abused its discretion. U.C.A.1953, 77-13-6.

2. Criminal Law ⇐273.1(4)

Trial court may not rely on defense counsel or executed affidavits to satisfy specific requirements of admonishing defendant before accepting plea of guilty. U.C.A.1953, 77-35-11(e).

3. Courts ⇐100(1)

Where defendant entered his guilty plea prior to date of Supreme Court decision requiring strict compliance with admonition requirements, the strict compliance standard did not apply and test for reviewing efficacy of plea hearing was whether the record as a whole affirmatively established that defendant entered his plea with knowledge and understanding of its consequences. U.C.A.1953, 77-35-11(e).

4. Criminal Law ⇐273.1(4)

Defendant's statement that he had gone over affidavit with his attorney and understood the contents of that guilty plea affidavit and that he understood that he was waiving his right to trial, to confront witnesses, and to appeal to a higher court did not establish that defendant understood

5. The property distribution is also eminently fair when reviewed on the basis of marital income. The majority identifies a seven-year marriage and acknowledges that Mr. Carlton "earned over \$100,000.00 gross annual income during most of the marriage." Their tax returns show that his adjusted gross income ranged from a high of \$117,000 to a low of \$88,000. The parties maintained a frugal lifestyle, except for regular business trips that were expensed through his CPA business. Most of the approxi-

mately \$700,000 of income earned during the marriage was invested in liquid assets. The court found an accumulation of only \$228,000. I find it inconceivable that the remaining \$472,000 of income was spent by these two people for consumables during their short marriage. Mrs. Carlton was awarded no alimony. Her \$114,000 property award, about which she has not complained, appears fair, equitable and even generous to Mr. Carlton's side of the ledger.

The Board denied appellant parole and set the next parole hearing date for August 1992.

On October 16, 1991, appellant filed a Complaint for Extraordinary Writ seeking habeas corpus relief. The district court granted the State's motion to dismiss the complaint.

ISSUE

Did the Board of Pardons' procedures and regulations deny appellant's right to state and federal due process at the July 1991 parole hearing?

STANDARD OF REVIEW

When reviewing an appeal from a dismissal of a habeas corpus petition, "we survey the record in the light most favorable to the *findings and judgment*; and we will not reverse if there is a reasonable basis therein to support the trial court's refusal to be convinced that the writ should be granted." *Medina v. Cook*, 779 P.2d 658, 658 (Utah 1989) (emphasis added).

ANALYSIS

[1, 2] For appellant to succeed on his due process claim under the United States Constitution, he must first show he was denied a constitutionally protected liberty interest. See *Gray v. Department of Emp. Sec.*, 681 P.2d 807, 816 (Utah 1984). The presence of a parole system does not, by itself, "give rise to a constitutionally protected liberty interest in parole release." *Board of Pardons v. Allen*, 482 U.S. 369, 373, 107 S.Ct. 2415, 2418, 96 L.Ed.2d 303 (1987). For a liberty interest to arise, there must first be statutory language limiting the parole board's discretion. *Hatch v. DeLand*, 790 P.2d 49, 50-51 (Utah App.1990). Utah's parole statute contains no such limitations. *Id.* at 51; Utah Code Ann. § 77-27-9(1) (Supp.1992).

[3] Under the Utah Constitution, the due process clause of article I, section 7 is "comprehensive in its application to all activities of state government." *Foote v. Utah Bd. of Pardons*, 808 P.2d 734, 735 (Utah 1991). What process is due in any

given circumstance may vary, "but assuredly, the parole board is not outside the constitutional mandate that the actions of government must afford due process of law." *Id.* (footnote omitted). The process due at a board of pardons hearing can only be determined "after the facts concerning the procedures followed by the board are flushed [sic] out." *Foote*, 808 P.2d at 735.

[4] The record consists only of a complaint for habeas corpus relief and memoranda in support of and in opposition to a motion to dismiss. There is nothing in the record showing what transpired at appellant's hearings before the parole board or the trial court. Moreover, the trial court summarily dismissed his petition without entering any findings or stating the legal basis for its judgment. The record does not reveal any basis for a habeas corpus determination. "[I]n the absence of an adequate record, this court is unable to conduct a meaningful review of the board's actions or of [appellant's] due process claims." *Id.*

Accordingly, we remand to the district court for a hearing to develop the record and for entry of findings in support of its determination.

GREENWOOD and RUSSON, JJ.,
concur.



**OHLINE CORPORATION, a California
Corporation, Plaintiff and
Appellant,**

v.

**GRANITE MILL, a Utah Corporation,
Defendant and Appellee.**

No. 920215-CA.

Court of Appeals of Utah.

March 9, 1993.

Seller brought action against buyer, seeking to recover unpaid amount under

sales contract. The District Court, Salt Lake County, Timothy R. Hanson, J., entered judgment in favor of buyer, and seller appealed. The Court of Appeals, Billings, P.J., held that even if overtime charges incurred by buyer as result of seller's late delivery of shutters were consequential, rather than incidental damages, buyer was entitled to recover offset for those charges.

Affirmed.

1. Appeal and Error ⇐757(3)

On appeal from judgment entered in action for breach of sales contract, seller failed to marshal the evidence, as required to challenge trial court's findings of fact on appeal, where seller merely selected facts from trial that were most favorable to its position, then reargued those facts on appeal.

2. Sales ⇐418(16.1)

Even if overtime charges incurred by buyer as result of seller's late delivery of shutters were consequential, rather than incidental damages, buyer was entitled to recover offset for those charges, where seller was aware that buyer was working under deadline at time it entered into contract. U.C.A.1953, 70A-2-715, 70A-2-715(2), 70A-2-717.

Gerald M. Conder, Salt Lake City, for plaintiff and appellant.

Bruce T. Jones and Paul M. Simmons, Salt Lake City, for defendant and appellee.

Before BILLINGS, GREENWOOD and RUSSON, JJ.

OPINION

BILLINGS, Presiding Judge:

Plaintiff Ohline Corporation filed this action to collect the balance of \$9405 due for window shutters delivered to Granite Mill. Granite Mill acknowledged it received the shutters but claimed it was entitled to an offset equal to the \$9405 unpaid purchase price because Ohline had breached the parties' contract by delivering the shutters

late. The trial court, after a trial on the merits, awarded Granite Mill the offset. We affirm.

FACTS

We recite the facts in a light most favorable to the trial court's findings. *State v. Moosman*, 794 P.2d 474, 476 (Utah 1990). In April 1989, Granite Mill entered into a contract with the Las Vegas Hilton Corporation to remodel suites in the Las Vegas Hilton Hotel. The contract required the work be completed on or before August 4, 1989. If Granite Mill did not complete work by the contract date, Granite Mill was required to pay the rental value of the suites until they were available.

Granite Mill contracted with Ohline to manufacture window shutters for the remodeling project. Granite Mill repeatedly communicated to Ohline the strict August 4, 1989 completion deadline and the parties structured the contract accordingly. On May 5, 1989, Granite Mill sent Ohline a purchase order for 288 shutters. Due to disagreement on payment terms, Ohline cancelled the May 5th order five days later. After agreeing on credit and payment terms, the purchase order was reinstated and a sales contract was finalized. The final contract specified the shutters would be delivered to Granite Mill "by the third week in July—Hopefully Mid-Month." The trial court interpreted this to mean the shutters would be finished and ready for shipment to Granite Mill no later than July 22, 1989, the last day of the third week of July.

On June 6, 1989, Granite Mill faxed Ohline the final shutter measurements, and Ohline began work. On Saturday, July 22, 1989, Ohline delivered eighty-six or eighty-seven shutters, approximately one-third of the order. The balance of the order was shipped via commercial carrier in two separate shipments. Thirty-three shutter units were shipped on July 25, and the balance was shipped on July 26. Granite Mill did not receive all of the shutters until the afternoon of July 28, 1989, six days late.

As a result of the late shipments by Ohline, Granite Mill was forced to work 435 hours of overtime so the shutters could be installed by the August 4th deadline. The 435 overtime hours equated to \$9405 of pay above Granite Mill's regular hourly rates. Ohline invoiced Granite Mill \$45,328.62 for the shutters. Granite Mill timely paid all of the invoice minus the \$9405 which it claimed as an offset for damages caused by the late delivery.

Ohline subsequently filed suit against Granite Mill seeking recovery of the \$9405. The trial court concluded Ohline had breached its agreement to deliver the shutters by July 22, 1989 and Ohline's breach had damaged Granite Mill in the amount of \$9405. Thus, the court entered judgment in favor of Granite Mill.

On appeal, Ohline claims the trial court erred in allowing Granite Mill to offset the \$9405 arguing the trial court's findings of fact were in error. It further claims Granite Mill was not entitled to an offset because the court erred in considering the overtime wages as incidental damages under Utah Code Ann. § 70A-2-715 (1990).¹

I. FAILURE TO MARSHAL EVIDENCE

[1] As a threshold issue, Ohline challenges findings of fact made by the trial court. Ohline claims the trial court erred in finding that: (1) Ohline was aware of Granite Mill's August 4, 1989 completion deadline at the time they entered the contract; (2) Ohline agreed to have the shutters ready for shipment no later than July 22, 1989; (3) Ohline failed to have the materials ready for shipment on or before July 22, 1989; (4) Granite Mill was injured in the amount of the overtime wages by the late delivery; and, (5) Granite Mill made reasonable efforts to mitigate its damages.

1. Ohline also asserts the late delivery was excused because Granite Mill contributed to the delay. Ohline, however, raises this issue for the first time on appeal.

To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits. "Issues not raised in the trial court in

Utah's appellate courts have been clear on the burden an appellant must meet when challenging a trial court's findings of fact. To successfully challenge a trial court's findings of fact on appeal, "[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989) (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)). "If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case." *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991).

Ohline has failed to marshal the evidence. Instead, Ohline has merely selected facts from trial that are most favorable to its position, and then reargued those facts to this court on appeal. Such a tactic ignores "the rules designed to give stability to jury verdicts." *Hodges v. Gibson Prods. Co.*, 811 P.2d 151, 156 (Utah 1991). Therefore, we accept the following dispositive facts: (1) Ohline understood Granite Mill had a strict August 4, 1989 deadline; (2) both Ohline and Granite Mill understood and agreed the shutters Ohline was furnishing were to be finished and ready for shipment no later than July 22, 1989; (3) Ohline did not have the shutters ready for shipment by July 22, 1989; (4) Granite Mill was damaged in the amount of \$9405 for overtime pay to install the late shutters; and, (5) Granite Mill was diligent and made reasonable efforts to mitigate its damages.

timely fashion are deemed waived, precluding [the appellate court] from considering their merits on appeal."

LeBaron & Assoc., Inc. v. Rebel Enter., 823 P.2d 479, 482-83 (Utah App.1991) (citations omitted) (quoting *Salt Lake County v. Carlston*, 776 P.2d 653, 655 (Utah App.1989)). We therefore refuse to consider the issue of excused delay for the first time on appeal.

II. OFFSET

[2] Ohline next argues that even if we accept the trial court's factual findings, the trial court incorrectly applied Utah Code Ann. § 70A-2-717 (1990)² in concluding Granite should receive an offset because of Ohline's late delivery. Ohline argues the overtime damages are not recoverable as either incidental or consequential damages as defined in Utah Code Ann. § 70A-2-715 (1990).

This court reviews a trial court's conclusions of law for correction of error. In short, "we accord conclusions of law no particular deference, but review them for correctness." *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985). A trial court's interpretation and application of a statute, as in the instant case, presents a question of law. *State ex rel. Division of Consumer Protection v. Rio Vista Oil, Ltd.*, 786 P.2d 1343, 1347 (Utah 1990); *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1038 (Utah 1989). Accordingly, we review for correctness the trial court's determination that Granite Mill's overtime damages were incidental damages under section 70A-2-715, and thus were properly offset pursuant to section 70A-2-717.

Whether Granite Mill's overtime damages are labeled as incidental or consequential is not important under the facts of this case. Section 70A-2-715 provides:

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

2. That section provides: "The buyer on notifying the seller of his intentions to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract." Utah Code Ann. § 70A-2-717 (1990).

Ohline does not challenge the trial court's application of section 70A-2-717, but rather limits its appeal to whether the damages were properly labeled incidental under Utah Code

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

Utah Code Ann. § 70A-2-715 (1990). Under this statute, to recover incidental damages, a buyer must show the damages (1) were incurred because of the breach, and (2) were reasonable. *James J. White & Robert S. Summers, Uniform Commercial Code* § 6-5, at 266 (3d ed. 1988) (White & Summers). In contrast, to recover consequential damages, the buyer must establish: (1) causation, (2) foreseeability, (3) reasonable certainty as to amount, and (4) the buyer is not barred by mitigation doctrines. *See* Utah Code Ann. § 70A-2-715(2); White & Summers § 6-5, at 266.

Ohline does not challenge Granite Mill's right to an offset if the damages are properly characterized as incidental. The plain language of section 70A-2-715, includes overtime wages as "any other reasonable expense incident to the delay or other breach." Utah Code Ann. § 70A-2-715 (1990). Furthermore, although the caselaw is limited, there is precedent for labeling overtime damages as incidental. *See Jay V. Zimmerman Co. v. General Mills, Inc.*, 327 F.Supp. 1198, 1205 (E.D.Mo.1971) (holding overtime damages incidental under U.C.C. § 2-715); *Bockman Printing & Services v. Baldwin-Gregg, Inc.*, 213 Ill. App.3d 516, 527, 157 Ill.Dec. 630, 638, 572 N.E.2d 1094, 1102 (1991) (concluding overtime damages may be either incidental or consequential).³

Ann. § 70A-2-715 (1990). Accordingly, whether Granite Mill properly notified Ohline of its intention to deduct damages from the purchase price as required by section 70A-2-717 is not at issue.

3. *But see Kabco Equip. Specialists v. Budgetel*, 2 Ohio App.3d 58, 440 N.E.2d 611, 614 (1981) (finding overtime conceivably recoverable as consequential damages); *Consolidated Aluminum Corp. v. Krieger*, 710 S.W.2d 869 (Ky.App.

Even if we were to accept Ohline's characterization of the overtime damages as consequential, the result is no different. Ohline contends the facts do not satisfy the statute's foreseeability requirement for consequential damages, because Ohline had no reason to know of the August 4, 1989 deadline. This argument fails because the trial court found Ohline was fully aware of the deadline when they contracted with Granite Mill, a finding we uphold. Therefore, even if Ohline is correct that Granite Mill's overtime damages are consequential rather than incidental, Granite Mill is still entitled to the offset.

CONCLUSION

Because Ohline failed to satisfy its burden to marshal the evidence, we accept the trial court's findings of fact. Furthermore, Granite Mill was entitled to damages, and therefore an offset, regardless of whether the overtime damages are considered incidental or consequential under section 70A-2-715. Accordingly, we affirm the judgment.

GREENWOOD and RUSSON, JJ.,
concur.



J. Lamar RICHARDS, Plaintiff
and Appellee,

v.

SECURITY PACIFIC NATIONAL BANK,
Debra L. Youngman; Deborah Diamanti; Ameristar Financial Corporation; Associates Financial Services Company, Inc.; First Boston Mortgage Securities Corp., Defendants and Appellants.

No. 920679-CA.

Court of Appeals of Utah.

March 9, 1993.

After property owner refinanced, holder of mechanics' lien brought suit contend-

1986) (recognizing trial court's award of overtime wages as consequential damages even

ing that it had priority over new mortgage holder. The Third District Court, Salt Lake County, Pat B. Brian, J., found that mechanics' lien had priority, and appeal was taken. The Court of Appeals, Billings, P.J., held that under Utah's mechanics' lien statutes, subsequent lender had constructive notice of intervening mechanics' liens so that subsequent lender was not entitled to use doctrine of equitable subrogation to defeat mechanics' lien.

Affirmed and remanded.

1. Judgment ⇌181(2, 3)

Summary judgment is appropriate if there are no genuine issues of material fact and moving party is entitled to judgment as matter of law.

2. Appeal and Error ⇌842(2), 863

Trial court's grant of summary judgment is reviewed for correctness, according no deference to trial court's legal conclusions whether issue presented on summary judgment is one of law or equity.

3. Subrogation ⇌1

Individual's access to equitable subrogation as remedy depends on principles of justice, equity, and benevolence to be applied to facts of particular case.

4. Subrogation ⇌31(4)

"Equitable subrogation" allows creditor, who satisfies prior creditor's lien, to acquire lien priority of prior creditor under particular circumstances, although application of doctrine may be defeated by intervening rights which would be prejudiced; equitable nature of doctrine prevents articulation of unwaivering rule that applies in all cases.

See publication Words and Phrases for other judicial constructions and definitions.

5. Subrogation ⇌31(4)

For purposes of determining whether doctrine of equitable subrogation applies to though labeling not challenged on appeal).

7/31/96

HELEN E. CHRISTIAN (2247)
GUSTIN & CHRISTIAN
Attorney for Defendant
Suite 722 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 531-7444

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

MARITA W. MUIR,
Plaintiff,
v.
MICHAEL D. MUIR,
Defendant.

:
: DEFENDANT'S MOTION
: FOR ORDER IN RE:
: ENTRY OF SUPPLEMENTAL
: FINDINGS OF FACT
:
: Case No. 844903928
: Appeal No. 900603-CA
:

Judge Wilkerson

Defendant, MICHAEL DOUGLAS MUIR, by and through his attorney, Helen E. Christian, hereby moves this Court to enter the following Findings of Fact to supplement the findings previously entered by the Court subsequent to the trial held in this matter on October 11, 1990. This motion is made pursuant to the direction of the Utah Court of Appeals in its remand of the above-captioned matter to this Court, as specifically set forth in the case of Muir v. Muir, 841 P.2d 736 (Utah App. 1992).

Defendant submits the following Findings of Fact for the Court's consideration and approval:

FINDINGS OF FACT

SUBSTANTIAL CHANGE OF CIRCUMSTANCES

I. Decrease in Defendant's Earnings

1. Defendant's gross earnings for the twelve-month period ending June 30, 1985, were \$118,577, and his gross earnings for the twelve-month period ending June 30, 1990, were \$81,635. This decrease is due to several factors related to the operation of Defendant's business as more specifically set forth in these findings.

2. Defendant's ownership in the business known as Fairmont Bowl was 71% in 1985, at the time of the parties' divorce, and had increased to 96% by the time of the trial on Defendant's Petition for Modification.

3. Defendant's increased stock ownership is due to gifts of stock received by him from his father, with whom he has operated the business for nearly thirty years.

4. Despite Defendant's increased stock ownership, Defendant's earnings from the business have decreased due to the following factors:

(a) Gross receipts from the business have decreased, and the net income to the business, before compensation to the Defendant, as reflected on Exhibit 3, went from \$226,000 in 1985 to \$115,260 in 1990, a decrease of approximately 51%.

(b) Depreciation taken on assets in 1985 was \$81,000, which decreased to \$33,000 in 1990 due to the fact that the assets had been depreciated out and no capital purchases had been made for the business.

(c) The bowling industry has been in a slump for the last few years, not only in the state of Utah, but nationally, and Defendant's ability to maintain the gross receipts of the business at approximately the same level since 1985 is primarily due to increased prices for his regular customers.

(d) The gross receipts of Fairmont Bowl decreased by \$45,000 from 1985 to 1990, and Defendant has had to increase the services he provides to maintain his clientele and to justify the increased prices he has had to charge.

5. Defendant sold a home in 1988 and used some of the proceeds from that sale to prepay an SBA loan of approximately \$15,000 owing by the business in order to save the business the ten percent (10%) interest charges.

6. Defendant has taken loans from the business, and has also given loans to the business, and these loans were made with the intent that they be repaid by the borrower. The amounts owing by Defendant to Fairmont Bowl are debts to be repaid, and not part of his compensation from the business.

7. Defendant submitted financial statements to banking institutions for the purchase of obtaining credit and represented

on those statements that his net worth had increased from a net worth of \$479,000 in 1986 to \$542,000 in 1989, which increase is attributable to Defendant's increased ownership in the business.

8. Defendant receives certain benefits in addition to his monetary compensation from the business, including the use and operation of a Chevrolet Blazer, a credit card for the purchase of gasoline, membership at the Fort Douglas Country Club, and automobile and medical insurance coverage. Although Defendant received similar benefits from the business at the time of entry of the Decree, the value of the benefits he receives have been reduced from what they were at the time of the parties' divorce.

9. Defendant's current wife also works in the business and she receives a salary of \$600.00 per month, and has occasionally earned as much as \$1,000 per month. If she were unable to work in the business, Defendant would need to hire an employee to assume those duties.

10. These factors are evidence that Defendant's earnings have decreased since the Decree of Divorce, and constitute a substantial and material change of circumstances sufficient to warrant a reduction of his alimony obligation.

**II. Defendant's need to make capital improvements
to maintain business in present condition**

11. The physical plant of the business was built in 1958.

12. Defendant has painted the facility, modernized the seating and replaced carpets, seating and ball racks, but has not

made any substantial replacement of equipment, such as lanes, pinsetters, or lighting for several years.

13. The thirty two (32) lanes at Fairmont Bowl are approximately thirty (30) years old, and need to be replaced, and the cost of replacement for each lane is \$35,000.

14. Defendant needs to replace the lanes at Fairmont Bowl by the summer of 1991 in order to stay in business.

15. Defendant needs to make other substantial "big money" investments into the business in order to remain competitive in the bowling industry.

16. Defendant's anticipated investments in the business are neither discretionary nor with the intention of expanding the business; rather, these anticipated investments are necessary to maintain the present operation of the business and the viability of Fairmont Bowl as a bowling center.

17. These necessary expenditures will reduce the amount of income available to the Defendant from the business.

18. These factors are evidence that Defendant's earnings from the business will not increase in the near future to a level that he was earning at the time of entry of the Decree of Divorce, and, as such, constitute a substantial and material change of circumstances sufficient to warrant a modification of Defendant's alimony obligation.

III. Attorney's Fees

19. Plaintiff has gross earnings of \$17,000 per year from her employment, and also earns additional rental income from the home.

20. Plaintiff has had to retain counsel to defend against Defendant's Petition, and incurred attorney's fees in the amount of \$13,179 while she was represented by Matthew P. McNulty, and an additional amount of approximately \$2,600 while she was represented by her present counsel.

21. Defendant has incurred attorney's fees of approximately \$6,000.

22. The attorney's fees incurred by Plaintiff for representation by her present counsel are reasonable, in light of her counsel's expertise and experience ⁱⁿ the field. The court makes no finding as to the reasonableness of the fees incurred by Plaintiff for representation by her previous counsel.

23. Defendant has prevailed in part on his Petition and has the ability to contribute towards the payment of Plaintiff's fees.

DATED this 14th day of April, 1993.

GUSTIN & CHRISTIAN

A handwritten signature in black ink, appearing to read 'Helen E. Christian', is written over a horizontal line.

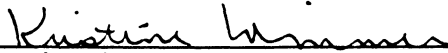
HELEN E. CHRISTIAN
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand-delivered a true and correct copy of the foregoing DEFENDANT'S MOTION FOR ORDER IN RE: ENTRY OF SUPPLEMENTAL FINDINGS OF FACT this 14 day of April, 1993, addressed to:

SUZANNE MARELIUS
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, UT 84102

JAMES P. COWLEY
VAN COTT, BAGLEY, CORNWALL & MCCARTHY
50 South Main Street, Suite 1600
Salt Lake City, UT 84144



Kristine Wimmer

muir.fof

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S...
BY: ... CLERK

SUZANNE MARELIUS - 2081
Attorney for Plaintiff
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

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

-----oo0oo-----

MARITA W. MUIR,	:	
	:	PLAINTIFF'S MOTION FOR ORDER
Plaintiff,	:	IN RE: FOR ENTRY OF FINDINGS OF
	:	FACT AND CONCLUSIONS OF LAW
v.	:	AND ORDER OF MODIFICATION
	:	ON REMAND
MICHAEL D. MUIR,	:	
	:	
Defendant.	:	Case No. 844903928 DA
	:	Judge Homer F. Wilkinson


-----oo0oo-----

The Plaintiff above-named by and through counsel Suzanne Marelius hereby moves the above Court to enter the Findings of Fact, Conclusions of Law and Order on Defendant's Petition for Modification on Remand which are supplemental to the original Findings and Decree entered by the Court on October 26, 1990. Plaintiff has prepared and filed the supplemental Findings, and Order pursuant to the instructions of the Utah Court of Appeals in an opinion dated November 12, 1992, and asks that the Court review and enter those, forthwith.

WHEREFORE, Plaintiff prays the above-entitled Court to review and enter the "Findings of Fact, Conclusions of Law and Order on Defendant's Petition for Modification on Remand" in the above-entitled matter.

DATED this 17 day of May, 1993.

LITTLEFIELD & PETERSON


SUZANNE MARELIUS
Attorney for Plaintiff

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be hand delivered, a true and correct copy of the foregoing, PLAINTIFF'S MOTION FOR ORDER IN RE: FOR ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER OF MODIFICATION ON REMAND, this 17 day of May, 1993, to:

Ms. Helen E. Christian, Esq.
GUSTIN & CHRISTIAN
Suite 722, Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
Attorney for Defendant



s5\12485.mtn

THIRD JUDICIAL DISTRICT COURT
Third Judicial District

MAY 26 1993

SALT LAKE COUNTY

By: _____
Deputy Clerk

SUZANNE MARELIUS - 2081
Attorney for Plaintiff
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

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

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MARITA W. MUIR,	:	
	:	FINDINGS OF FACT AND
Plaintiff,	:	CONCLUSIONS OF LAW AFTER
	:	REMAND
v.	:	
	:	
MICHAEL D. MUIR,	:	
	:	
Defendant.	:	Case No. 844903928 DA
	:	Judge Homer F. Wilkinson

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The Utah Court of Appeals reversed and remanded the above-referenced case to the Third District Court on November 12, 1992 with instructions that the Court make specific findings, supported by sufficient evidence regarding the issues of alimony, substantial change in circumstances, and attorney's fees. Having reviewed the Court records and transcript herein, the Court issues the following Findings of Fact and Conclusions of Law on remand to supplement the previous Findings entered in this case. The Court enters the following Findings of Fact as follows:

FINDINGS OF FACT

1. The parties were married for more than twenty years prior to their divorce on September 16, 1985. The Defendant filed a Petition to Modify alimony five years after the divorce on which a trial was held October 11, 1990.

2. The initial divorce was resolved by joint stipulation of the parties and each party received an equal property distribution which provided in relevant part that the husband receive all common stock owned by the parties in the business known as Fairmont Bowl and that the wife receive the parties' residence. The husband was ordered to assume the liability for business loans incurred by Fairmont Bowl and the wife was ordered to assume the mortgage debt on the residence.

3. The Defendant was ordered to pay the Plaintiff alimony of \$1,500 per month until her remarriage, cohabitation, the death of one of the parties, or further order of the Court.

4. During the majority of the parties' marriage and at the time of the divorce, the Defendant derived all of his income from his ownership of Fairmont Bowl and at the time of divorce owned 78% of the stock in the entity. At the time of the modification hearing his stock ownership had increased to 91.3%, with the parties' children owned the remainder of the stock.

5. In August, 1989, five years after the divorce the Defendant petitioned for modification of alimony claiming a substantial change in material circumstance and he sought a reduction of alimony for one year, followed by complete termination. The Defendant based his petition on a claim that his income had decreased and that the Plaintiff's income had increased.

A. Findings on Changes in Circumstances Regarding Defendant's Earnings.

6. The Defendant alleged specific changes in circumstances in that although his gross revenues from his business had remained consistent, that his expenses had increased, depreciation had decreased and his business needed capital investment. Defendant also alleged that the wife's income had substantially increased by her earning \$1,400 gross per month as a flight attendant in the first nine months of 1990, as opposed to \$1,000 a month at the time of divorce.

7. Plaintiff's accountant Mr. Randall Peterson, CPA, analyzed seven years of tax returns from 1983 through 1989 filed by the Defendant. He testified that the returns showed an average "pre-divorce" income of to Defendant \$104,678 and an average "post-divorce" income of \$104,188. Accountant Peterson analyzed the Defendant's "net spendable income" from 1983 to 1989 showing his post-divorce average (excluding alimony payments), to be \$69,194

which was approximately \$5,000 more than his before divorce average of \$64,819.

8. The Defendant's accountant Mr. Ed Bates agreed with Plaintiff's accountant that the gross revenues of the Fairmont Bowl Corporation have been consistent and that it has been operated as a Subchapter S Corporation since the parties' divorce. On this point, the accountants relied on the 1985 tax return for the fiscal year ending June 30, 1985 showing gross receipts to be \$691,529 as compared with gross receipts at the end of fiscal year June 30, 1990 where gross receipts were \$645,102.

9. The Defendant has made regular, annual improvements to the Fairmont Bowl facility and had just finished computerizing the facility, making it one of the most highly competitive in the Salt Lake Market place and had also added new carpeting, new racks, new seating and other improvements on a regular basis since the divorce. Defendant testified to the need for future improvements as well. Such capital improvements are in the discretion of Defendant whose personal and business finances are intertwined.

10. Since the divorce, Defendant has prepared four separate financial statements for First Interstate Bank which show that his total assets and net worth since entry of the divorce as stated by him have increased from at least \$715,580 in assets on

the statement dated January 3, 1986 to \$989,000 in assets on a statement dated September 7, 1989.

11. Both Plaintiff's and Defendant's accountants agreed that due to the corporation's Subchapter S status, the Defendant had total discretion over the amount he took as compensation each year, in setting prices for his product, and in making capital expenditures.

12. The Defendant's business has paid for many personal expenses for the Defendant and his family including operating expenses and payments for his family car, health insurance, travel, auto and life insurance, tax deferred benefits including pension contributions, and benefits from his new wife drawing a salary from the corporation. The Defendant also receives the benefit of loans to shareholders from corporate revenues.

13. Based on the foregoing evidence, the Court does not find that there has been a substantial change in the circumstances surrounding Defendant's earnings since the parties divorce. His income has been consistent when all personal benefits are considered and given the Defendant's discretion over allocating income between personal and business uses, it is appropriate to include all such personal benefits.

B. Findings on Changes in Circumstances Regarding Plaintiff's Income.

14. The Plaintiff's lifestyle has substantially deteriorated since her marriage to the Defendant which consisted of a luxurious lifestyle and no financial worries. During the marriage the parties resided in a large home they built themselves worth \$370,000 at the time of the divorce. The parties owned an airplane, a boat and took regular trips abroad to various parts of the world.

15. It was undisputed that the Plaintiff's only work during the marriage was at Fairmont Bowl where her wages were approximately \$1,000 per month. Since the divorce, Plaintiff had difficulty obtaining new employment as she did not have current marketable skills and no recent work experience outside of the family business. At the time of the modification hearing Plaintiff was working as a flight attendant for American Airlines earning \$1,400 gross monthly income. Plaintiff's employment required her to locate on the East Coast and at the time of the modification hearing, she resided in a basement apartment in her mother's home in Connecticut for which she paid rent.

16. Since the divorce the Plaintiff has attempted to sell the marital asset she received in the divorce consisting of the parties' marital residence in Salt Lake City valued at \$370,000

at the time of the divorce. The Plaintiff had lowered the sales price to \$280,000 and had received only one offer of \$185,000 which she rejected. She has continued to maintain the Salt Lake home as a rental property and paying mortgage thereon while she resided on the East Coast which resulted in very high housing costs.

17. Although Plaintiff had rented her Salt Lake home since the divorce the income therefrom did not pay for the mortgage and taxes and she has had consistent losses as shown on her tax returns for the maintenance and rental of that property. At the time of trial in October, 1990 her rental income thus far in the year had been \$4,200 and her mortgage costs had been \$5,478 with additional estimated taxes of \$3,000 which would result in an income loss that year.

18. Plaintiff's monthly living expenses totalled \$4,701 per month which included keeping tow homes and \$907 per month on installment debt relating to legal fees connected with the original divorce and to repay her mother a \$4,000 loan. Plaintiff had depleted all assets awarded to her property settlement other than the real property in Salt Lake City.

19. Since the divorce Plaintiff has had significant periods of unemployment, higher costs of living with the necessity of maintaining two homes, and her tax returns show regular losses from business and real estate. Plaintiff has been dependent on her

alimony of \$1,500 per month to meet her basic living expenses which do not include any of the luxuries or amenities she enjoyed during her marriage to Defendant such as vacations, country club memberships, or new vehicles.

20. A review of Plaintiff's tax return shows that in only one year, 1988, did her earned income exceeded her alimony income, when she earned \$20,609 in wages. However, for the year 1990 Plaintiff projected total earnings of only \$17,000 which is less than her alimony.

21. A comparison of the parties' lifestyles at the time of the divorce modification in October, 1990 shows that Plaintiff's lifestyle has substantially decreased since the time of her marriage and the lifestyle of the Defendant has remained unchanged and continues to be a luxurious, very comfortable lifestyle.

22. The Plaintiff is unable to meet her reasonable monthly expenses through earnings alone and requires alimony to assist in meeting her needs. Plaintiff's expenses are not lavish and are unusually high based on the need to maintain two homes and to repay loans she has incurred to meet basic expenses since the divorce. Although Plaintiff's income may have increased from \$1,000 to \$1,400 per month it is not sufficiently large of a change to support a reduction of alimony in this case considering Plaintiff's needs.

C. Findings on Attorney's Fees.

23. The Plaintiff requested that she be reimbursed her attorney's fees in defending the modification petition. At the time of the modification hearing, Plaintiff was still paying the legal costs of the initial divorce and owed her divorce attorney \$16,000 which she was paying at \$100 a month.

24. Plaintiff incurred \$16,000 in legal fees for defending the modification proceeding and Defendant had incurred \$6,000 in bringing the modification petition. Plaintiff's counsel proffered the reasonableness and amount of fees without objection by Defendant's counsel.

25. The Court finds Plaintiff has a need for attorney's fees, since her monthly expenses exceed her monthly income and it would be a clear hardship for her to pay her fees unassisted. In addition Plaintiff is still paying on a significant balance remaining from her original divorce. The Plaintiff also had a significantly more difficult task to defend against the modification brought by Defendant to uncover necessary financial information whereas Defendant had that information within his control. The Defendant has also paid off significant debts since the time of the parties' divorce, has invested in costly real estate and is building a home, has many luxuries in his budget and thus has the ability to assist Plaintiff in the payment of fees.

Defendant should pay the full amount of Plaintiff's attorney's fees in the amount of \$16,000.

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

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties to the action and over the subject matter of this action.

2. The parties are entitled to an order on Defendant's Petition for Modification, the same to become final and effective upon being signed by the Court which should be in conformance with the foregoing Findings of Fact.

DATED this 26 day of May, 1993.

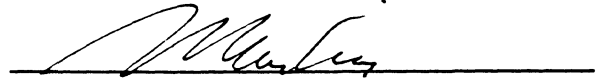
BY THE COURT:


HONORABLE HOMER F. WILKINSON
District Court Judge

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be hand delivered, a true and correct copy of the foregoing, FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER REMAND, this 17 day of May, 1993, to:

Ms. Helen E. Christian, Esq.
GUSTIN & CHRISTIAN
Suite 722, Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
Attorney for Defendant



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MAY 26 1993

By Deputy Clerk

SUZANNE MARELIUS - 2081
Attorney for Plaintiff
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

JUDGEMENT

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

-----oo0oo-----

MARITA W. MUIR,	:	
	:	ORDER ON DEFENDANT'S PETITION
Plaintiff,	:	FOR MODIFICATION ON REMAND
	:	
v.	:	# 2002393
	:	
MICHAEL D. MUIR,	:	
	:	
Defendant.	:	Case No. 844903928 DA
	:	Judge Homer F. Wilkinson

-----oo0oo-----

The Utah Court of Appeals reversed and remanded the above-referenced case to the Third District Court on November 12, 1992 with instructions that the Court make specific findings, supported by sufficient evidence regarding the issues of alimony, substantial change in circumstances, and attorney's fees. Having reviewed the Court record and transcript herein, and having issued its Findings of Fact and Conclusions of Law on Remand, and good cause appearing therefore,

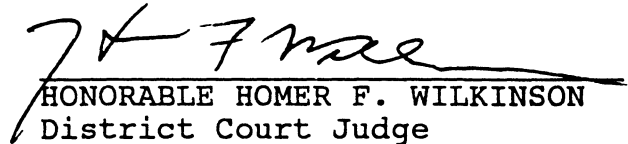
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Petition for Reduction and Termination of Alimony is denied as there are no substantial, material changes in circumstances of the parties since the divorce to warrant modification.

2. The Defendant is ordered to pay all of Plaintiff's costs and attorney's fees incurred in defending the Petition for Modification in the amount of \$16,000.

DATED this 26 day of May, 1993.

BY THE COURT:


HONORABLE HOMER F. WILKINSON
District Court Judge

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be hand delivered, a true and correct copy of the foregoing, ORDER OF MODIFICATION ON REMAND, this 17 day of May, 1993, to:

Ms. Helen E. Christian, Esq.
GUSTIN & CHRISTIAN
Suite 722, Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
Attorney for Defendant



55\12485.dod

HELEN E. CHRISTIAN (2247)
GUSTIN & CHRISTIAN
Attorney for Defendant
Suite 722 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 531-7444

FILED
DISTRICT COURT
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CLERK

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

-----oo0oo-----

MARITA W. MUIR,	:	
	:	DEFENDANT'S OBJECTIONS
Plaintiff,	:	TO PLAINTIFF'S PROPOSED
	:	FINDINGS OF FACT
v.	:	
	:	
MICHAEL D. MUIR,	:	Case No. 844903928
	:	Appeal No. 900603-CA
Defendant.	:	

-----oo0oo-----

Defendant, MICHAEL MUIR, by and through his counsel of record,
Helen E. Christian, hereby files these objections to the Findings
of Fact as proposed by Plaintiff:

I. SUBSTANTIAL CHANGE OF CIRCUMSTANCES AS TO
DEFENDANT'S INCOME

Plaintiff would have the Court believe that there has been no
decrease in Defendant's income since entry of the Decree of Divorce
that would justify a modification of his alimony obligation to the
Plaintiff. That is simply not the case and is unsupported by the
evidence presented at trial.

Plaintiff's proposed Finding No. 6 claims that Plaintiff's
income was \$1,000 at the time of the divorce, but the evidence at

trial established otherwise. Specifically, Plaintiff testified at trial that she had "no real income" in 1985 (T.43) when the parties were divorced, and that in 1986 she earned between \$3,000 and \$4,000 (T.43). At the time of the trial on Defendant's Petition for Modification, Plaintiff was employed as a flight attendant and was earning approximately \$1,400 per month (T.164). In addition, and not included in Plaintiff's proposed Finding No. 6 as to her income, Plaintiff received the following amounts:

- (a) \$100 per month from a family trust (T. 163)
- (b) \$220 per month from rental of a barn (T. 164) and
- (c) \$1,200 per month from rental of the Salt Lake City residence.

While Plaintiff claimed a loss from her rental of the Salt Lake City residence, after payment of property taxes, mortgage interest and insurance (Defendant's Exhibit 2), evidence at trial established that Plaintiff would still generate income of several hundred dollars each month from her rental of the property.

The bottom line is that Plaintiff's proposed Findings as to her earnings are inaccurate and that she should properly claim these additional amounts, giving her income of at least \$2,000 per month. Inasmuch as the alimony awarded at the time of the divorce was based on the fact that Plaintiff had no real source of income, it was appropriate for the Court to find that her income had increased sufficiently and decrease Defendant's alimony obligation.

Plaintiff's proposed Findings Nos. 7 and 8 are inaccurate and do not reflect the evidence presented at trial. The fact that the gross receipts of the business had declined nearly \$50,000 (T.26) fails to address the primary reason that Defendant's earnings had decreased, i.e., the substantial increase in the expenses of operating Fairmont Bowl. Ed Bates, Defendant's accountant, testified at trial that, as Defendant's ownership percentage in the business increased, his income actually decreased. (T. 24) In fact, Mr. Bates also testified that despite the fact that the business had had less depreciation, and the actual income of the business should have increased, the income had still decreased since the time of the parties' divorce. Defendant's Exhibit 3 admitted at trial illustrated that the gross receipts for Fairmont Bowl had been decreasing since 1985 (T. 26).

The evidence at trial established that the net income of the corporation for fiscal year ending June 1990, before Defendant's compensation and before any depreciation deduction was taken, was fifty-one percent (51%) less than it was in 1985. Specifically, the net income of the corporation for fiscal year ending June 1985 was \$226,517, compared with \$115,000 for fiscal year ending June 1990. As Defendant testified at trial, these decreases are a direct result of the need to increase services to maintain clientele to justify the prices charged for the services (T. 64)

and the fact that there are fewer participants in the sport. [See Defendant's proposed Findings Nos. 4(a), 4(b), 4(c) and 4(d).]

Plaintiff's proposed Finding No. 9 misrepresents the evidence presented at trial in the following particulars: Defendant testified that the "computerized" facility is actually a series of scoring devices that are computerized (T. 75). Defendant also testified that he had made other physical improvements, none of them "substantial ones," except as to "dollars" (T.75), as follows: carpet, new ball racks, new seating, and bowler seating. [See Defendant's proposed Finding No. 12.]

Plaintiff's proposed Finding No. 9 also mischaracterizes Defendant's testimony as to the necessity of future improvements that he must make to the physical facility in order to maintain the viability of Fairmont Bowl as a bowling center. Specifically, Defendant needs to replace the thirty-two lanes, which are approximately thirty (30) years old, and the cost to replace each lane is \$35,000. (T.65).

Finally, Plaintiff's proposed Finding No. 9 mistakenly states that the capital improvements that Defendant must make to the business are "discretionary," rather than absolutely necessary to maintain the present operation of the business. These necessary expenditures, Defendant testified, will reduce the cash available to him for earnings.(T. 66) [See Defendant's proposed Findings Nos. 13, 14, 15, 16 and 17.]

Plaintiff's proposed Finding No. 10 as to financial statements prepared by the Defendant for the purpose of obtaining credit misrepresents the evidence presented at trial. Defendant testified that his net worth, as he made an "educated guess" on the financial statements, was \$479,000 in 1986 (Exhibit 6) and \$542,000 in 1989 (Exhibit 9), or an increase in net worth of only \$62,000. (T. 112-113) Defendant also testified that the increase in his net worth was attributable to his increased stock ownership in Fairmont Bowl. (T. 113)

Plaintiff's proposed Finding No. 11 misstates the evidence presented at trial in that it fails to include the primary "disadvantage" of a Subchapter "S" corporation, i.e., the fact that Defendant must claim any earnings on his personal tax return whether he takes the money out of the corporation or leaves it in the corporation to pay off loans or use for operating expenses.

Plaintiff's proposed Finding No. 12 as to Defendant's personal expenses and benefits that are paid from the business is incorrect for these reasons:

(a) Plaintiff testified at trial that she, similarly to Defendant's current spouse, worked in the business during the marriage, earning approximately \$1,000 per month (T.155);

(b) Defendant testified at trial that his current spouse works in the business and her earnings are based on the actual time she puts into the business (T.108);

(c) Defendant testified at trial that his present lifestyle, compared with the lifestyle he and the Plaintiff had enjoyed during their marriage, was "substantially" reduced (T. 70), specifically testifying that he had sold the boat prior to the parties' divorce in 1985 (T. 107), that he had "about \$20,000 " in a plane that he had purchased shortly after the divorce (.. 106), and that the business paid for his health and auto insurance (T. 106). Defendant also testified that the business had always paid these expenses, despite the fact that the accounting treatment of the expenses had been modified.

Plaintiff's proposed Finding No. 13 simply ignores the testimony at trial and the actual findings of the Court when it rendered its decision in this case. Specifically, the Court stated:

The Court is also persuaded that the Defendant in the near future is going to have to put some big --- well, some money into his business in order to stay up with the competition. And that, of course any time you are in business for yourself, you have got to keep it up to date or you go behind fast.

(T. 214-215)

There has been a substantial change of circumstances since entry of the Decree of Divorce in that (1) Plaintiff's earnings went from virtually zero in 1985 to at least \$17,000 per year (T. 214); (2) Defendant's earnings decreased from \$118,600 to \$81,600 per year (T.214); and Defendant needs to make some large capital

improvements to his business in order to maintain it in its present condition. Thus, Defendant met his burden of establishing a material and substantial change of circumstances and the Court's original ruling, supplemented by Defendant's proposed additional Findings of Fact, should be affirmed.

II. SUBSTANTIAL CHANGE OF CIRCUMSTANCES AS TO PLAINTIFF'S INCOME

Plaintiff claims that the evidence at trial supports her proposed Findings Nos. 14, 15, 16, 17 and 18, which is simply not the case. The most credible evidence, the evidence which the Court believed at trial, was that both parties had experienced a decrease in the standard of the lifestyle they enjoyed during their marriage. Defendant testified that he had taken very few trips, mostly just weekend trips to visit friends (T. 95-96) and that he had sold his plane and his boat shortly before or after the divorce (T.106-107).

There was simply no evidence, other than Plaintiff's inconsistent testimony, regarding her "very high housing costs," presented at trial. Plaintiff testified that she lived with her mother (T.165), but also testified that she paid rent to live in her mother's home (T.170). There was no evidence presented at trial regarding whether she actually is required to pay rent to her mother and this finding should not be accepted by the Court.

Plaintiff's losses on the rental of the Salt Lake City home were due in part to her decision to rent the home to friends at a substantially reduced rental rate and to continue to pay the utilities on that property during the period of their occupancy. Defendant should not be penalized for Plaintiff's decision to discount the rental rate on the property.

Plaintiff's proposed Findings Nos. 19, 20, 21 and 22 should not be accepted by the Court for the reason that they do not comport to the findings made by the Court after the trial. Further, they do not take into consideration all sources of Plaintiff's income, as testified to at trial, including her wages, rental income, both from the Salt Lake City residence and the barn, and the money she receives from the family trust.

The Court concluded that there had been a substantial change of circumstances in this case, but not one of "lifestyle" but rather in the "income of the parties." (T. 213)

III. FINDINGS ON ATTORNEY'S FEES

Plaintiff's proposed Finding No. 24 includes fees that Plaintiff incurred from the law firm of Van Cott, Bagley in the amount of \$13,179, as well as fees and costs as proffered by Plaintiff's counsel at trial, estimated at \$2,600. There was no testimony as to the reasonableness of the fees offered by Plaintiff's counsel as to the VanCott, Bagley amount, and the Court had no record of the Affidavit allegedly submitted by Plaintiff's

prior counsel, Mr. McNulty, as to the reasonableness of those fees.
(T. 194)

Plaintiff's proposed Finding No. 25 takes great liberties with the Court's ruling and makes findings that the Court did not make at trial. Specifically, the Court did not find that Plaintiff's expenses exceeded her monthly income, and did not find that it would be a "hardship" for Plaintiff to pay her own fees unassisted by Defendant. The Court did express concern about the \$22,000 in attorney's fees incurred by the parties in this case, however, and concluded that Plaintiff did need to "meet" the petition filed by the Defendant. (T. 215)

The Court did not determine, nor can it be implied from the Court's ruling, that Defendant should pay all of Plaintiff's attorney's fees of \$16,000, as Plaintiff has claimed in her proposed Findings. The Court awarded Plaintiff \$3,000 in attorney's fees. The Utah Court of Appeals on remand directed this Court to enter its Findings as to (1) Plaintiff's need for attorney's fees; (2) Defendant's ability to assist Plaintiff in paying her fees; and (3) the reasonableness of the fees charged. [See Defendant's proposed Findings 19-23.]

WHEREFORE, Defendant respectfully asks this Court for the following relief:

1. For its Order denying Plaintiff's Motion for Order in Re: Entry of Findings of Fact and Conclusions of Law and Order of Modification on Remand;

2. For its Order granting Defendant's Motion for Order in Re: Entry of Supplemental Findings of Fact;

3. For its Order affirming its decision made at the time of trial, specifically as follows:

(a) Reducing Defendant's alimony obligation to Plaintiff to the amount of \$900 per month;

(b) Ordering Defendant to pay \$3,000 of Plaintiff's attorney's fees and costs;

4. Awarding such other and further relief as the Court deems fair and equitable in the premises.

DATED this 1st day of June, 1993.

GUSTIN & CHRISTIAN


A handwritten signature in dark ink, appearing to read 'Helen E. Christian', written over a horizontal line.

HELEN E. CHRISTIAN
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid,
a true and correct copy of the foregoing DEFENDANT'S OBJECTIONS TO
PLAINTIFF'S PROPOSED FINDINGS OF FACT this 1 day of June, 1993,
addressed to:

SUZANNE MARELIUS
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, UT 84102



Kristine Wimmer

muir.ob2

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

MUIR, MARITA W	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 844903928 DA
	:	DATE 08/19/93
VS	:	HONORABLE HOMER F WILKINSON
	:	COURT REPORTER
MUIR, MICHAEL DOUGLAS	:	COURT CLERK DAG
DEFENDANT	:	

TYPE OF HEARING: HEARING
PRESENT:

P. ATTY. MARELIUS, SUZANNE
D. ATTY. CHRISTIAN, HELEN E

OBJECTION TO FINDINGS OF FACT & CONCLUSIONS OF LAW ARE
DISCUSSED, BUT NOT RESOLVED.

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

MUIR, MARITA W	:	MINUTE ENTRY
	:	
PLAINTIFF	:	CASE NUMBER 844903928 DA
	:	DATE 12/22/93
VS	:	HONORABLE HOMER F WILKINSON
	:	COURT REPORTER
MUIR, MICHAEL DOUGLAS	:	COURT CLERK DAG
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY.
D. ATTY.

THE COURT HAVING REVIEWED THE PLEADINGS, TRANSCRIPT OF TRIAL AND DECISION OF THE COURT OF APPEALS FOUND IS PERSUADED THAT THE COURT OF APPEALS FOUND THAT ERROR WAS COMMITTED AND HAS REVERSED THE DECISION OF THE TRIAL COURT. THEREFORE, THE COURT ADOPTS PLAINTIFF'S FINDINGS OF FACT & CONCLUSIONS OF LAW AFTER REMAND AND ORDER ON DEFENDANT'S PETITION FOR MODIFICATION ON REMAND AS MODIFIED BY THE COURT. PLAINTIFF IS ALSO AWARDED ATTORNEY FEES OF \$4,507.50 AND COSTS OF \$906.00 EXPENDED ON THE APPEAL. PLAINTIFF SHALL PREPARE NEW PLEADINGS.

CC: SUZANNE MARELIUS
HELEN CHRISTIAN

FILED DISTRICT COURT
Third Judicial District

JAN 20 1994

By D. Kane
SALT LAKE COUNTY
Deputy Clerk

SUZANNE MARELIUS - 2081
Attorney for Plaintiff
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

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

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MARITA W. MUIR,	:	
	:	FINDINGS OF FACT AND
Plaintiff,	:	CONCLUSIONS OF LAW AFTER
	:	REMAND
v.	:	
	:	
MICHAEL D. MUIR,	:	
	:	
Defendant.	:	Case No. 844903928 DA
	:	Judge Homer F. Wilkinson

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The Utah Court of Appeals reversed and remanded the above-referenced case to the Third District Court on November 12, 1992 with instructions that the Court make specific findings, supported by sufficient evidence regarding the issues of alimony, substantial change in circumstances, and attorney's fees. Both Plaintiff and Defendant submitted to the Court proposed Findings of Fact, Conclusions of Law and Order after Remand. The Court held a hearing with counsel on August 17, 1993, at 8:00 a.m. and heard argument on the matter. The Court took the matter under advisement and issued a written Minute Entry on December 22, 1993, adopting

the Plaintiff's proposed Findings of Fact, Conclusions of Law, and Order on Remand, with certain modifications. The Court further awarded the Plaintiff her costs and attorneys fees related to the Appeal.

Having reviewed the Court records and transcript herein, the parties Motions and proposed Findings and Order, the Court issues the following Findings of Fact and Conclusions of Law on remand to supplement the previous Findings entered in this case arising from the Modification Trial held on October 11, 1990. The Court enters the following Findings of Fact on Remand as follows:

FINDINGS OF FACT

1. The parties were married for more than twenty years prior to their divorce on September 16, 1985.

2. The initial divorce was resolved by joint stipulation of the parties and each party received an equal property distribution which provided in relevant part that the husband receive all common stock owned by the parties in the business known as Fairmont Bowl and that the wife receive the parties' residence. The husband was ordered to assume the liability for business loans incurred by Fairmont Bowl and the wife was ordered to assume the mortgage debt on the residence.

3. The Defendant was ordered to pay the Plaintiff alimony of \$1,500 per month until her remarriage, cohabitation, the death of one of the parties, or further order of the Court.

4. During the majority of the parties' marriage and at the time of the divorce, the Defendant derived all of his income from his ownership of Fairmont Bowl and at the time of divorce owned 78% of the stock in the entity. At the time of the modification hearing his stock ownership had increased to 91.3%, with the parties' children owned the remainder of the stock.

5. In August, 1989, five years after the divorce the Defendant petitioned for modification of alimony claiming a substantial change in material circumstance and he sought a reduction of alimony for one year, followed by complete termination. The Defendant based his petition on a claim that his income had decreased and that the Plaintiff's income had increased. A trial was held on the Defendant's Petition on October 11, 1990, at which both parties testified along with accounting expert witnesses.

A. Findings on Changes in Circumstances Regarding Defendant's Earnings.

6. The Defendant alleged specific changes in circumstances in that although his gross revenues from his business had remained consistent, that his expenses had increased,

depreciation had decreased and his business needed capital investment.

7. Plaintiff's accountant Mr. Randall Peterson, CPA, analyzed seven years of tax returns from 1983 through 1989 filed by the Defendant. He testified that the returns showed an average "pre-divorce" income of to Defendant \$104,678 and an average "post-divorce" income of \$104,188. Accountant Peterson analyzed the Defendant's "net spendable income" from 1983 to 1989 showing his post-divorce average (excluding alimony payments), to be \$69,194 which was approximately \$5,000 more than his before divorce average of \$64,819.

8. The Defendant's accountant Mr. Ed Bates agreed with Plaintiff's accountant that the gross revenues of the Fairmont Bowl Corporation have been consistent and that it has been operated as a Subchapter S Corporation since the parties' divorce. On this point, the accountants relied on the 1985 tax return for the fiscal year ending June 30, 1985 showing gross receipts to be \$691,529 as compared with gross receipts at the end of fiscal year June 30, 1990 where gross receipts were \$645,102.

9. The Defendant has made improvements to the Fairmont Bowl facility and had just finished computerizing the facility, added new carpeting, new racks, new seating and other improvements since the divorce. Defendant testified to the need for future

improvements as well. Such capital improvements are in the discretion of Defendant whose personal and business finances are intertwined.

10. Since the divorce, Defendant has prepared four separate financial statements for First Interstate Bank which show that his total assets and net worth since entry of the divorce as stated by him have increased from at least \$715,580 in assets on the statement dated January 3, 1986 to \$989,000 in assets on a statement dated September 7, 1989.

11. Both Plaintiff's and Defendant's accountants testified that due to the corporation's Subchapter S status, the Defendant had total discretion over the amount he took as compensation each year, in setting prices for his product, and in making capital expenditures.

12. The Defendant's business has paid for many personal expenses for the Defendant and his family including payments for his family car, health insurance, travel, auto and life insurance, tax deferred benefits including pension contributions. Defendant benefits from his new wife drawing a salary from the corporation.

13. Based on the foregoing evidence and Findings, the Court finds that there has not been a substantial change in the circumstances surrounding Defendant's earnings since the parties divorce. His income has been consistent when all personal benefits

are considered and given the Defendant's discretion over allocating income between personal and business uses, it is appropriate to include all such personal benefits.

B. Findings on Changes in Circumstances Regarding Plaintiff's Income.

14. The Court finds that the Plaintiff's only work during the marriage was at Fairmont Bowl where her wages were approximately \$1,000 per month. At the time of the modification hearing Plaintiff was working as a flight attendant for American Airlines earning \$1,400 gross monthly income. Plaintiff's employment required her to locate on the East Coast where she resided in a basement apartment in her mother's home in Connecticut for which she paid rent.

15. Plaintiff has attempted to sell the marital asset she received in the divorce consisting of the parties' marital residence in Salt Lake City valued at \$370,000 at the time of the divorce. The Plaintiff had lowered the sales price to \$280,000 and had received only one offer of \$185,000 which she rejected. She has continued to maintain the Salt Lake home as a rental property and paying mortgage thereon.

16. At the time of Trial on October 1990, the Plaintiff's rental income to date had been \$4,200 and her mortgage

costs had been \$5,478 with additional estimated taxes of \$3,000 which would result in an income loss that year.

17. Plaintiff's monthly living expenses totalled \$4,701 per month which included keeping two homes and \$907 per month on installment debt relating to legal fees connected with the original divorce and to repay her mother a \$4,000 loan.

18. Since the divorce Plaintiff has had significant periods of unemployment, higher costs of living with the necessity of maintaining two homes, and her tax returns show regular losses from business and real estate. Plaintiff has been dependent on her alimony of \$1,500 per month to meet her basic living expenses which do not include any of the luxuries or amenities she enjoyed during her marriage to Defendant such as vacations, country club memberships, or new vehicles.

19. A review of Plaintiff's tax return shows that in only one year, 1988, did her earned income exceed her alimony income, when she earned \$20,609 in wages. However, for the year 1990 Plaintiff projected total earnings of only \$17,000 which is less than her alimony. Although Plaintiff's income may have increased from \$1,000 to \$1,400 per month it is not sufficiently large of a change to support a reduction of alimony in this case considering Plaintiff's needs.

C. Findings on Attorney's Fees.

20. The Plaintiff requested that she be reimbursed her attorney's fees in defending the modification petition. At the time of the modification hearing, Plaintiff was still paying the legal costs of the initial divorce and owed her divorce attorney \$16,000 which she was paying at \$100 a month.

21. Plaintiff incurred \$13,179 to the law firm of VanCott Bagley and \$2600 to present counsel in legal fees for defending the modification proceeding and Defendant had incurred \$6,000 in bringing the modification petition. Plaintiff's counsel proffered the reasonableness and amount of fees without objection by Defendant's counsel.

22. The Court finds Plaintiff has a need for attorney's fees, based on her financial circumstances including the fact that her present monthly expenses exceed her monthly income. In addition Plaintiff is still paying on a significant balance for legal fees remaining from her original divorce. The Plaintiff also had a significantly more difficult task to defend against the modification brought by Defendant to uncover necessary financial information whereas Defendant had that information within his control. The Defendant has also paid off significant debts since the time of the parties' divorce, has invested in costly real estate and is building a home, and thus has the ability to assist

Plaintiff in the payment of fees. Defendant should pay the full amount of Plaintiff's attorney's fees in the amount of \$15,779, less credit for the \$3,000 he was ordered to pay at the initial trial in this matter for an attorney fee award of \$12,779.

D. FINDINGS ON ATTORNEYS FEES FOR APPEAL

23. The Court finds that the Plaintiff substantially prevailed on the Trial issues heard on October 11, 1990, and has a need for an award of attorneys fees and has been awarded her fees arising from that trial. The Defendant filed an Appeal to the Court of Appeals and Plaintiff has filed an Affidavit of Attorneys Fees on Appeal which has not been objected to. The Court finds Plaintiff's fees on Appeal to be reasonable and awards Plaintiff and judgment against Defendant in the amount of \$4,505.50. The Plaintiff is also awarded her costs relating to the Appeal in the amount of \$906.00 for a total amount of fees and costs arising from the Appeal of \$5,413.50.

E. FINDINGS ON ALIMONY UNDERPAYMENT DURING PENDENCY OF APPEAL

24. The Trial Court initially ruled that Defendant could decrease his alimony payment of \$1,500 per month to \$900 per month and this Order took effect commencing with the month of October 1990. The Trial Court has not reinstated Plaintiff's alimony at the level of \$1,500 per month effective with the month of January, 1994. The Court finds Plaintiff has been underpaid alimony by the

Defendant in the amount of \$600 per month for a period of thirty-nine (39) months and is awarded a judgment against Defendant for that arrearage in the amount of \$23,400. The Defendant is ordered to reinstate Plaintiff's alimony at the level of \$1,500 per month effective with the month of January, 1994.

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

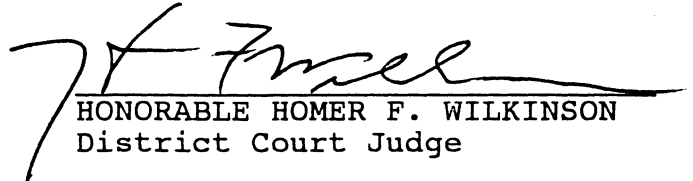
CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties to the action and over the subject matter of this action.

2. The parties are entitled to an order on Defendant's Petition for Modification, the same to become final and effective upon being signed by the Court which should be in conformance with the foregoing Findings of Fact.

DATED this 20 day of Jan., ¹⁹⁹⁴~~1993~~.


BY THE COURT:


HONORABLE HOMER F. WILKINSON
District Court Judge

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be hand delivered, a true and correct copy of the foregoing, FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER REMAND, this 11th day of January, 1997,
to:

Ms. Helen E. Christian, Esq.
GUSTIN & CHRISTIAN
Suite 722, Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
Attorney for Defendant



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THIRD DISTRICT COURT
Third Judicial District

JAN 20 1994

By D. [Signature]
Deputy Clerk

SUZANNE MARELIUS - 2081
Attorney for Plaintiff
LITTLEFIELD & PETERSON
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----oo0oo----- 2189320

MARITA W. MUIR,
Plaintiff,

v.

MICHAEL D. MUIR,
Defendant.

:
:
: ORDER ON DEFENDANT'S
: PETITION FOR MODIFICATION
: ON REMAND

:
:
:
: Case No. 844903928 DA
: Judge Homer F. Wilkinson

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The Utah Court of Appeals reversed and remanded the above-referenced case to the Third District Court on November 12, 1992 with instructions that the Court make specific findings, supported by sufficient evidence regarding the issues of alimony, substantial change in circumstances, and attorney's fees. The Court has entered its Findings of Fact, Conclusions of Law on Remand pursuant to those instructions, and good cause appearing therefore, enters the following Order:

IT IS HEREBY ORDERED ADJUDGED AND DECREED that:

1. The Petition for reduction and termination of alimony filed by Defendant is denied and the Court finds there has been no substantial material change in circumstances of the parties since the divorce to warrant a modification of alimony.

2. The Defendant is ordered to pay all of Plaintiff's costs and attorneys fees incurred in defending the Petition for Modification which total \$15,779, less credit for \$3,000 of fees ordered in the initial trial, and Plaintiff is awarded a judgment of \$12,779.

3. Plaintiff is awarded her attorneys fees arising from having to Appeal the decision in this matter and is awarded the amount of \$4,507.50 and costs of \$906.00 for a total amount of \$5,413.50 arising from the Appeal in this matter and Plaintiff is awarded a judgment therefore.

4. During the pendency of the Appeal the Defendant has underpaid alimony to the Plaintiff in the amount of \$600 per month for a period of thirty-nine (39) months. Plaintiff is thus awarded a judgment for this alimony arrears in the amount of \$23,400.


5. Defendant's alimony obligation to Plaintiff is reinstated at the level of \$1,500 per month effective with the month of January, 1994, and continuing thereafter.

6. All judgments awarded to Plaintiff in this matter are to bear interest at the legal rate of 5.72 percent until paid

and are to include after accruing costs of collection including reasonable attorneys fees.

DATED this 2^o day of Jan -, 1994.

BY THE COURT:


HONORABLE HOMER F. WILKINSON
District Court Judge

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be hand delivered, a true and correct copy of the foregoing, ORDER ON DEFENDANT'S PETITION FOR MODIFICATION ON REMAND, this 11 day of January, 199⁴, to:

Ms. Helen E. Christian, Esq.
GUSTIN & CHRISTIAN
Suite 722, Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
Attorney for Defendant



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