

1994

## Kirk v. Kirk : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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OTIS B. KIRK,

*Plaintiff, Appellant,*

vs.

PEGGIE M. KIRK,

*Defendant, Appellee.*

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| BRIEF OF APPELLANT  
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| District Court No. 924901709  
|

| Court of Appeals No. 940067-CA  
|

| Priority Classification: 15  
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**FILED**  
Utah Court of Appeals

JUN 21 1994

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## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
JURISDICTIONAL AUTHORITY .....	1
NATURE OF THE PROCEEDINGS .....	1
STATEMENT OF THE ISSUES .....	2
DETERMINATIVE PROVISIONS, CASES, STATUTES AND RULES .....	3
STANDARD OF REVIEW .....	3
STATEMENT OF THE CASE .....	3
STATEMENT OF THE FACTS .....	4
SUMMARY OF THE ARGUMENT .....	10

### ARGUMENT:

I.	THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING ITS ALIMONY AWARD AND ERRED AS A MATTER OF LAW IN DETERMINING THE BASIS THEREOF. ....	12
A.	THE TRIAL COURT ERRED IN ASSESSING MS. KIRK'S NEED, HER ABILITY TO PRODUCE SUFFICIENT INCOME FOR HERSELF, AND MR. KIRK'S ABILITY TO PAY. ....	12
B.	THE TRIAL COURT ERRED IN BASING ITS ALIMONY AWARD TO MS. KIRK ON THE FOLLOWING:	
1.	THE INVALID THEORY THAT SHE WAS ENTITLED TO HAVE HER PRIOR ALIMONY OF \$860.00 PER MONTH FROM A PRIOR EIGHT YEAR MARRIAGE REPLACED BY MR. KIRK, AND. ....	20
2.	MR. KIRK'S PURPORTED PRE-MARITAL PROMISE THAT HE WOULD FINANCIALLY TAKE CARE OF MS. KIRK FOR THE LOSS OF HER ALIMONY FROM THE PRIOR MARRIAGE. SPECIFICALLY, THE TRIAL COURT ERRED IN THAT SUCH A BASIS FOR THE ALIMONY AWARD IS CONTRARY TO THE STATUTE OF FRAUDS, WHERE THE PARTIES NEVER REDUCED TO WRITING NOR SIGNED ANY INSTRUMENT BASED ON SUCH PURPORTED PROMISE. ....	22
C.	THE TRIAL COURT ERRED IN AWARDING ALIMONY BASED ON A COMBINED STANDARD OF LIVING IN THAT THE PARTIES NEVER ESTABLISHED NOR EXPERIENCED SUCH A STANDARD DURING THEIR SHORT ONE YEAR MARRIAGE. ....	29
D.	THE TRIAL COURT ERRED IN FAILING TO FULLY RECOGNIZE THE RELEVANCE OF THE PARTIES' VERY BRIEF MARRIAGE OF LESS THAN ONE YEAR IN MAKING ITS ALIMONY AWARD. ....	31

II.	THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING ITS AWARD OF ATTORNEY FEES AND COSTS. . . . .	34
A.	THE TRIAL COURT ERRED IN DETERMINING MS. KIRK'S NEED FOR ATTORNEY FEES . . . . .	35
B.	THE TRIAL COURT ERRED WHERE MS. KIRK FAILED TO DEMONSTRATE THE REASONABLENESS OF HER ATTORNEY FEES BASED UPON, . . . . .	35
1.	THE DIFFICULTY OF THE LITIGATION . . . . .	36
2.	THE NECESSITY AND REASONABLENESS OF THE NUMBER OF HOURS SPENT ON THE CASE . . . . .	36
3.	THE FEE CUSTOMARILY CHARGED IN THE LOCALITY FOR SIMILAR SERVICES, AND, . . . . .	36
4.	THE RESULT OBTAINED . . . . .	37
C.	THE MERE PROFFER BY MS. KIRK'S COUNSEL AS TO HER ATTORNEYS FEES AND COSTS IS INSUFFICIENT TO SUPPORT THE EVIDENCE REQUIRED ON THE FOUR ABOVE FACTORS . . . . .	39
D.	THE TRIAL COURT ERRED IN AWARDED MS. KIRK'S FEES TWICE. . . . .	39
	CONCLUSION . . . . .	41
	CERTIFICATE OF SERVICE . . . . .	42

## TABLE OF AUTHORITIES

### Cases

<i>Baker v. Baker</i> , 866 P.2d 540 (Utah App. 1993) . . . . .	3, 13, 18, 39
<i>Baldwin v. Vantage Corp.</i> , 676 P.2d 413 (Utah 1984) . . . . .	24, 25
<i>Bell v. Bell</i> , 810 P.2d 489, 492 (Ut. App. 1991) . . . . .	13, 18, 34, 36, 37
<i>Bingham v. Bingham</i> , 236 Utah Adv. Rep 29,31 (Ut. App. 1994) . . . . .	17
<i>Boyle v. Boyle</i> , 735 P.2d 669, 671 (Ut. App. 1987) . . . . .	12, 18, 32
<i>Brown v. Brown</i> , 744 P.2d 333 (Ut. App. 1987) . . . . .	26
<i>Burt v. Burt</i> , 799 P.2d 1166, 1170 (Ut. App. 1990) . . . . .	13, 19, 34
<i>Canning v. Canning</i> , 744 P.2d 325, 326 (Ut. App. 1987) . . . . .	13, 19, 22
<i>Carter v. Carter</i> , 656 S.W.2d 257 (Ky. App. 1983) . . . . .	27
<i>Chambers v. Chambers</i> , 840 P.2d 841 (Utah App. 1992) . . . . .	3, 13, 14, 19
<i>Delatore v. Delatore</i> , 680 P.2d 27 (Utah 1984) . . . . .	31
<i>Eames v. Eames</i> , 735 P.2d 395, 397 (Ut. App. 1987) . . . . .	30
<i>English v. English</i> , 565 P.2d 409, 411 (Utah, 1977) . . . . .	12, 18, 22
<i>Frank v. Frank</i> , 419 P.2d 199 (Utah 1966) . . . . .	31

<i>Gramme v. Gramme</i> , 587 P.2d 144, 147 (Utah 1979) . . . . .	21
<i>Grimes v. Grimes</i> , 472 S.W.2d 477, 478 (Ky. Ct. App. 1971) . . . . .	32
<i>Houmont v. Houmont</i> , 793 P.2d 421 (Ut. App. 1990) . . . . .	20, 21, 34, 36, 37
<i>Jones v. Jones</i> , 700 P.2d 1072 (Utah 1985) . . . . .	12, 18, 32
<i>Kerr v. Kerr</i> , 610 P.2d 1384 (Utah 1980). . . . .	3, 34, 36, 37
<i>McDonald v. McDonald</i> , 236 P.2d 1066, 1070 (Utah 1951) . . . . .	31
<i>Morgan v. Morgan</i> , 795 P.2d 684, 689 (Ut. App. 1990) . . . . .	30, 36, 37
<i>Munns v. Munns</i> , 790 P.2d 116, 121 (Ut. App. 1990) . . . . .	3, 30
<i>Oppenheimer v. Oppenheimer</i> , 526 P.2d 762, 766 (Ariz. App. 1974) . . . . .	33
<i>Paffel v. Paffel</i> , 732 P.2d 96, 100-01 (Utah 1986) . . . . .	12, 18, 30
<i>Rasband v. Rasband</i> , 752 P.2d 1331, 1334 (Ut. App. 1988) . . . . .	13, 18, 36, 37
<i>Rossiter v. Rossiter</i> , 666 P.2d 617, 621 (Hawaii 1983) . . . . .	27
<i>Rudman v. Rudman</i> , 812 P.2d 73 (Ut. App. 1991) . . . . .	12, 18, 21, 30
<i>Schindler v. Schindler</i> , 776 P.2d 84 (Ut. App. 1989) . . . . .	12, 18
<i>Sorensen v. Sorensen</i> , 769 P.2d 820, 832 (Ut. App. 1989) . . . . .	34, 36, 37, 39
<i>Throckmorton v. Throckmorton</i> , 767 P.2d 121, 124 (Ut. App. 1988) . . . .	12, 19, 30
<i>Turner v. Turner</i> , 649 P.2d 6, 8-9 (Utah 1982) . . . . .	22
<i>Wilson v. Wilson</i> , 296 P.2d 977, 979 (Utah 1956) . . . . .	31

### Statutes

Utah Code Section 25-5-4(3), *Certain agreements void unless*

<i>written and subscribed</i> , . . . . .	26, 29
---	--------

### Annotations

1 A.L.R.3d 6 §7(c) . . . . .	32, 33
------------------------------	--------

### Treatises

Corbin, <i>Corbin on Contracts</i> , (1963) in Vol. 2 at §463 . . . . .	26
Farnsworth, <i>Contracts</i> 369-73 (1982) . . . . .	25
Restatement of the Law, Second, <i>Contracts</i> , §124 and §110(1)(c) (1981) . . .	25, 28
3 Vernier, <i>American Family Laws</i> 51-64 (1935 Ed reprinted 1971) . . . . .	25

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|  
| BRIEF OF APPELLANT

|  
| District Court No. 924901709

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| Court of Appeals No. 940067-CA

|  
| Priority Classification: 15

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BRIEF OF APPELLANT

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PLAINTIFF/APPELLANT (hereinafter "appellant" or "Mr. Kirk") submits the following as his brief of Appellant herein:

JURISDICTIONAL AUTHORITY

Jurisdiction to hear the above entitled appeal is conferred upon the Utah Court of Appeals, pursuant to Utah Code Section 78-2a-3 (1953 as amended).

NATURE OF THE PROCEEDINGS

This is domestic relations appeal from a final Findings of Fact, Conclusions of Law and Decree of Divorce and denial of the Appellant's Motion for New Trial or in the Alternative, to Alter and Amend the Decree of Divorce.

The Findings of Fact, Conclusions of Law and Decree of Divorce were entered on October 18, 1993 after a trial held on March 4, 9, and 23, 1993.

The Appellant filed a Motion for new trial or in the alternative, to alter and amend Judgment on October 28, 1993 pursuant to Rule 59 of the Utah Rules of Civil Procedure.

The Trial Court denied the Appellant's Motion for new trial in an order dated January 7, 1994.

The notice of appeal was timely filed on January 27, 1994.

### STATEMENT OF THE ISSUES

A. Did the Trial Court abuse its discretion in awarding the Appellee the amount of \$1000.00 per month as permanent alimony when the marriage was one year in duration and both parties were substantially restored to their prior financial status.

B. The facts and circumstances presented to the Trial Court do not support the award of \$1000.00 per month alimony in that neither the Appellee's financial need was established nor any evidence to support the parties' standard of living during the marriage and Appellee's financial circumstances do not warrant the amount awarded.

C. The Trial Court erred in the entry of its findings and conclusions in that they do not support the material issues which govern the determination of spousal support, i. e., financial condition and needs of the receiving spouse, ability of the receiving spouse to produce sufficient income for herself and the ability of the responding spouse to provide support.

D. The Trial Court erred in determining that the purported promise of the Appellant to induce the reluctant Appellee into the marriage where the Appellant would take care of the Appellee and that she would not have to worry financially was a factor which warrants an award of alimony.

E. The Trial Court erred in ruling that the Appellant's promise which induced the Appellee to allegedly give up financial security is enforceable and therefor warrants a permanent alimony award even though the marriage was of very short duration.

F. The Trial Court abused its discretion in awarding attorney's fees to Appellee without a showing of 1) the Appellee's need for assistance in all or part of the attorney's fees incurred, 2) sufficient difficulty of the litigation, 3) the necessity and reasonableness of time expended by Appellee's attorney and para-legal staff, 4) the reasonableness given the usual hourly rate in the community, and, 5) the reasonableness of the fee based on the result obtained.

G. The Trial court erred in assessing Appellee's attorney's fees to the Appellant because of the purported unreasonable approach Appellant took to the



resolution of the case by not considering that Appellant prevailed on the major issue concerning the division of property Appellant asserted in the trial.

#### DETERMINATIVE PROVISIONS, CASES, STATUTES AND RULES

The following statutes may be determinative concerning the issues being addressed by this appeal: Utah Code Sections 25-5-4, 30-3-3, and 30-3-5. Copies of the aforesaid sections are attached hereto and incorporated herein as Exhibit "A".

#### STANDARD OF REVIEW

The standard of review in this appeal as to the issues presented on appeal is whether the Trial Court abused its discretion. *Chambers v. Chambers*, 840 P.2d 841 (Utah App. 1992), *Baker v. Baker*, 226 Utah Adv. Rep. 27, 866 P.2d 540 (Utah App. 1993), *Munns v. Munns*, 790 P.2d 116 (Utah App. 1990), *Kerr v. Kerr*, 610 P.2d 1384 (Utah 1980).

#### STATEMENT OF THE CASE

Mr. Kirk filed his Complaint for Divorce on April 2, 1992, Case No. 924901709DA. (R.O.A. 2-4) Ms. Kirk filed her Complaint for Divorce shortly thereafter, Case No. 924901796DA. All references to the record contained herein are to the Case No. filed by Mr. Kirk unless otherwise noted.

At a hearing on May 12, 1992, Mr. Kirk was granted the exclusive occupancy of his pre-marital residence located 3518 South 2000 East, Salt Lake City, Utah and Ms. Kirk was ordered to find other living accommodations after June 1, 1992. Ms. Kirk was awarded \$1,000.00 per month as temporary alimony during the pendency of this action. (R.O.A. 7-9, Case No. 924901796DA filed by Ms. Kirk)

A Motion and Stipulation to consolidate Ms. Kirk's case within Mr. Kirk's case dated July 22, 1992 was filed the same date. (R.O.A. 6) An Order granting the Motion to consolidate was entered on July 23, 1992. (R.O.A. 7)

Subsequently, discovery was pursued and obtained by both parties, including Request for Production of Documents, Interrogatories, and Depositions.

Mr. Kirk filed his certificate of Readiness of Trial on October 8, 1992. (R.O.A. 12)

Ms. Kirk filed an Answer and Counterclaim on March 3, 1993. (R.O.A. 37-39)

Trial proceedings were conducted on March 4, 9, and 23, 1993 before the Honorable Timothy R. Hanson, who took the matter under advisement at the conclusion thereof.

Judge Hanson issued his Memorandum Decision on May 4, 1993 which was entered on the same date. A copy of said Memorandum is attached hereto and incorporated herein as Exhibit "B".

On October 18, 1993, Mr. Kirk filed a Motion for New Trial or in the alternative to Alter or Amend Judgment (R.O.A. 112-113) along with a Memorandum in support thereof. (R.O.A. 106-111)

On November 19, 1993, the time for Ms. Kirk to respond having expired and not having filed any response, Mr. Kirk filed a Notice to Submit the aforesaid Motion for Decision. (R.O.A. 114-115)

On November 23, 1993, Ms. Kirk filed a Memorandum in Opposition to Mr. Kirk's Motion for New Trial. (R.O.A. 122-127)

Subsequently, Mr. Kirk filed a Motion to Strike Ms. Kirk's Memorandum as being untimely (R.O. A. 128-129) and Ms. Kirk filed a Reply thereto. (R.O.A. 130-131). A ruling denying Mr. Kirk's Motion to Strike was entered shortly thereafter (R.O.A. 132) and an Order thereon signed and entered on January 7, 1994. (R.O.A. 161)

Findings of Fact and Conclusions of Law were signed and entered on October 18, 1993 (R.O.A. 136-155) and a Decree of Divorce was signed and entered on the same date. (R.O.A. 156-160) A copy of the Findings of Fact and Conclusions of Law is attached hereto and incorporated herein as Exhibit "C". A copy of the Decree of Divorce is attached hereto and incorporated herein as Exhibit "D".

Mr. Kirk filed his Notice of Appeal on January 27, 1994 (R.O.A. 162-163) and Ms. Kirk filed her Notice of Cross Appeal on February 9, 1994. (R.O.A. 186-187)

#### STATEMENT OF THE FACTS

##### Overall Facts of the Case

Both parties had been married prior to the parties' marriage. Mr. Kirk had been previously married in 1948, which marriage lasted for more than forty-two years. (Transcript from the trial proceedings held on March 4, 1993 [hereinafter,

TV1]:17 L10-11) They had two children as issue of the marriage, both of whom have reached the age of majority. Mr. Kirk's wife from the previous marriage, Marjorie Kirk, died on September 12, 1990. (TV1:18 L2-20)

Peggy Kirk, Defendant/Appellee herein, had been previously married on five occasions. She has three children, one child as a result of her prior marriage to Wally Suberry and two children as the result of a marriage to Garth Campbell. All of her children have been emancipated. Her last marriage of eight years, to a Mr. Bob Taylor, ended in divorce in 1984. (TV1:16 L20-24) As a result of said divorce Ms. Kirk was entitled to Two Hundred Dollars (\$200.00) per week permanent alimony prior to the marriage of the parties herein, until she should die, remarry, cohabitate, or in the event of the death of Mr. Taylor. (Transcript from trial proceedings held March 9, 1993 [hereinafter, TV2]:116 L25, 117 L1-22) (Defendant's Exhibit 28)

Prior to the parties' marriage, Mr. Kirk had two years of college and was employed in the U.S. Navy for several years, and then performed carpentry and construction work for several years. (TV1:19 L1-11) Beginning in 1969, Mr. Kirk then commenced working in various positions for the Boise Cascade Company. (TV1:19 L13-21) After working twenty (20) years for said company, he retired in 1989 as the purchasing manager. (TV1:20 L6-18) All of Mr. Kirk's retirement benefits were earned prior to the parties' marriage. (TV1:21 L4-19)

Mr. Kirk's former wife, Marjorie, worked for the telephone company during their marriage for twenty-five (25) years and retired therefrom in about 1989. (TV1:21 L20-25, 22 L1-3) Mr. Kirk inherited Marjorie's retirement benefits when she died on September 12, 1990 (TV1:18 L17-20), prior to the marriage of the parties herein. (TV1:22 L4-18)

Ms. Peggy Kirk, appellee herein, was self-employed in a beauty shop while she was raising her children. She then became a director of a health club in Phoenix, Arizona. She worked as a real estate agent from 1984 to 1986 and since 1986 to the present, has been employed as a licensed security and insurance sales person.

The parties were married on June 1, 1991. (TV1:16 L18-22) The idea of becoming married was pursued mutually by both parties (TV1:26 L16-20, 154 L12-19) Mr. Kirk was 66 years old at the time of the marriage and 67 years old at the time of the divorce. (TV1:16 L14-17) Ms. Kirk was 65 years old at the time of the marriage and 66 years old at the time of the divorce. (TV2:116 L6-14) No children

were born as issue of the marriage. The parties separated from each other less than a year after becoming married.

Prior to their marriage, the parties discussed their respective financial situations with each other. (TV1:26 L21 to 28 L18) Ms. Kirk was fully aware that the alimony she was receiving from her former spouse would cease upon the parties' marriage. (TV1:28 L19-25, 29 L1-22)

Though Mr. Kirk was aware that Ms. Kirk would lose her entitlement to alimony from her former spouse upon their marriage, he did not assure her prior to the marriage that he would make up the difference after their marriage (TV1:159 L24 to 160 L3, TV2:3 L24 to 4 L8) nor that he would replace the difference in the event of divorce. (TV2:36 L18-20)

Prior to the marriage, Mr. Kirk assisted Ms. Kirk in qualifying to receive \$496.00 per month in Social Security. (TV2:42 L5-10, 119 L18-22, 132 L7-11)

In anticipation of the marriage and seeking to commence the marriage relationship on a good foundation, Mr. Kirk paid the following medical bills and creditors in Ms. Kirk's behalf at her request, or with the mutual understanding of both parties:

1. January 17, 1991	Liposuction	\$2,700.00
2. February 28, 1991	Chase Visa	3,200.00
3. March 18, 1991	Cottonwood Ctr.	1,065.00
4.	Wedding ring	<u>5,844.00</u>
Total:		\$12,890.00

Approximately two weeks following the parties' marriage, at Ms. Kirk's urging they created a trust. (TV1:30 L5-25, 31 L1-11) (Plaintiff's Exhibit 1) Ms. Kirk refused to consult with counsel regarding the creation of the trust available at no charge through the credit union at which they both had accounts. Instead, Ms. Kirk insisted they go through Lorin Martin, the attorney of her choice. The purpose of the trust was to function as an estate planning device in the event of the death of either or both of them. (TV1:35 L1-5) The provisions of the trust provided that either party could subsequently revoke at any time and remove without the other's consent, any asset they respectively placed in the trust. (TV1:35 L18-25) (Article Four on page two of the trust - Plaintiff's Exhibit 1) Only three of the parties' financial accounts were actually placed in the trust, the first two of which and the last of which, were owned respectively by Mr. and Ms. Kirk prior to their marriage:

1. Valley Bank & Trust, Account # 02-30-406-6-5
2. Franklin U. S. Government Security Funds
3. Interstate Bank, Checking Account #28-15407-7

Though the aforesaid individual accounts were placed in joint tenancy, they were never added to or expended by either party added as a joint tenant. (TV2:40 L17-23, 168 L18 to 169 L23)

Mr. Kirk's pre-marital assets including property inherited from his deceased wife, decreased in value from the marriage date to the trial date from \$384,197.54 to \$355,173.90 based on the expert testimony of a Certified Public Accountant who had previously worked for ten years as an IRS criminal investigator. (TV2:81 L8-14, 96 L16 to 97 L9) (Plaintiff's Exhibit 9, page 6)

The parties filed joint federal and state income tax returns for 1991. (TV1:92 L23 to 93 L11) (Plaintiff's Exhibit 7) As a result of their mutual tax liability, Mr. Kirk paid \$12,348 to the Internal Revenue Service and \$4,178 to the State of Utah. The aforesaid payments included the tax liability incurred by Ms. Kirk for \$9,600.00 in alimony received from her previous husband prior to and after the parties' marriage (TV1:183 L17 to 184 L5) as well as her liability for other income she received. (Plaintiff's Exhibit 7, first page, line 11) (TV1:103 L10-21) Ms. Kirk refused to pay any amount towards the tax liability attributable to her (TV2:42 L11-21), though she admitted her separate liability was nearly \$3,000.00 (TV2:61 L7-25)

Facts Specifically Related to Issues on Appeal:      Alimony, Attorneys Fees and Costs

When the parties were married, Ms. Kirk had \$5,388.37 in her checking accounts at First Interstate Bank. (TV2:170 L16-20) (Defendant's Exhibit 32) Those accounts increased to nearly \$8,000.00 shortly before trial as reflected in the ending balances shown as of February 21, 1993. (Defendant's Exhibit 31) At the conclusion of the trial she owed \$6,505.05 for attorneys fees and costs incurred.

Ms. Kirk claimed to be receiving only \$1,602.00 per month in net spendable income (Defendant's Exhibit 24) while incurring \$2,287.00 in monthly expenses (Defendant's Exhibit 25). No documentation supporting her alleged expenses was submitted. Though she satisfied such expense during the nine months the case proceeded to trial, she alleged that she did not know from where the difference of \$685.00 per month came. (TV2:164 L1-6)

In addition, she was able to pay her counsel \$4,664.92 during the nine month proceeding below, an equivalent of \$517.21 per month. (Defendant's Exhibit 34) She somehow met the \$685 and paid the \$517.21 averaging more than \$1,200 per month without disclosing how she did so. She borrowed no funds to pay for either the \$685.00 shortfall she alleged, nor the average of \$517.21 per month for counsel fees.

None of Ms. Kirk's funds were ever co-mingled with Mr. Kirk's only checking account held at Valley Bank nor did Ms. Kirk ever become involved in managing said account. (TV1:74 L7-25, 75 L1-9) Ms. Kirk also continued after the marriage to maintain and manage separate from Mr. Kirk, her bank accounts held at First Security Bank. (TV1:77 L8 to 79 L17) Ms. Kirk continued after the marriage to manage her financial affairs separate from Mr. Kirk. (TV1:81 L18-25, 82 L1-6)

During the marriage, each maintained their separate bank accounts, depositing and spending their individual income as they did prior to the date of marriage. (TV1:82 L21 to 83 L8, 185 L23 to 186 L10, 195 L11 to 196 L3, TV2:11 L6-11, 33 L8 to 34 L4, 35 L1-22, 39 L12-25, 40 L24 to 41 L22, 82 L10 to 84 L5, 95 L2 to 96 L14, 178 L22 to 179 L12, 184 L20 to 185 L16)

During the first six months that the parties cohabited after marriage, they resided in Ms. Kirk's rental apartment while Mr. Kirk's pre-marital home was in the process of re-construction. (TV1:82 L7-16, 134 L21 to 135 L6, 186 L12-21) Following completion of the re-construction, they parties resided in Mr. Kirk's pre-marital residence during the last six months prior to their separation on May 31, 1992. (TV1:82 L17-20)

Mr. Kirk's income is all derived from pre-marital assets consisting of interest, dividends and pension from his retirement funds and his deceased wife's retirement funds. Essentially, his annual income is:

1.	Social Security	\$10,186.00
2.	Dividends	11,307.00
3.	Interest	7,206.00
4.	His retirement and former deceased wife's retirement	14,212.00
		<hr/>
		\$42,911.00
	Monthly:	\$3,575.92

Mr. Kirk's monthly expenses total \$2,319.81. (TV1:85 L7 to 90 L18) (Plaintiff's Exhibit 3)

During the course of the underlying proceedings, Mr. Kirk was ordered to pay \$1,000.00 per month as temporary alimony to Ms. Kirk. (R.O.A. 7-9, Case No. 924901796DA filed by Ms. Kirk) The payment of said alimony was derived from Mr. Kirk's pre-marital funds. (TV1:101 L21 to 103 L21) Mr. Kirk's only checking account maintained at Valley Bank decreased from \$24,952.00 at the time of the marriage to a minus \$824.00 due to the payments of temporary alimony to Ms. Kirk and to meet their mutual income tax obligations. (TV1:107 L16 to 108 L15, 137 L9-10, L15-25)

Ms. Kirk's financial income was substantially unaffected by the marriage. (TV1:104 L22 to 106 L1)

Ms. Kirk maintained her employment nearly full time at Financial Services as a licensed security and insurance agent throughout the marriage as she had done for nearly a decade prior thereto. (TV1:194 L18-25, TV2:117 L23 to 118 L4)

At the conclusion of the trial Ms. Kirk's counsel made a proffer concerning her attorneys fees and costs. The Trial Court accepted the proffer on the condition that in doing so it acknowledged that Mr. Kirk disputed Ms. Kirk's need for such fees and costs and that he did not admit to the reasonableness of the same. (TV2:208 L4 to 210 L11) (Defendant's Exhibit 34)

Other than the mere proffer, no evidence was introduced addressing the reasonableness of Ms. Kirk's attorneys fees and costs. Nothing else was submitted to support fee reasonableness based on either 1) the difficulty of the litigation, 2) the necessity and reasonableness of the number of hours spent on the case, 3) the fee customarily charged in the locality for similar services, nor 4) the result obtained.

The issues decided by the Trial Court concerned the division of property, alimony, and attorney' fees. The issue concerning the division of property, consumed by far the majority of the pre-trial discovery, trial preparation, and the trial proceedings including testimony and exhibits, upon which issue Mr. Kirk prevailed.

The Trial Court awarded Ms. Kirk \$1,000 per month permanent alimony, \$6,505 in attorney fees, and \$592.47 in costs.

## SUMMARY OF THE ARGUMENT

Ms. Kirk is not entitled to alimony based on the rationale stated by the Trial Court.

The Trial Court erred in awarding alimony where the evidence is insufficient to show neither Ms. Kirk's need for alimony, her inability to support herself, nor Mr. Kirk's ability to pay. The evidence instead shows, that she has no need given her financial condition, that she is able to support herself, and Mr. Kirk's disability to pay.

The Trial Court further erred in basing alimony on 1) an invalid replacement theory, 2) a disputed oral promise, which basis is contrary to the Statute of Frauds, 3) standard of living, though the evidence shows the parties never established nor experienced a combined standard of living, and 4) inadequate consideration of the length of the marriage (one year) in unfairly granting Ms. Kirk the effect of a life-time annuity of \$1,000.00 per month as alimony.

The alimony award effectively replaced Ms. Kirk's lost alimony. Ms. Kirk is not entitled to have Mr. Kirk replace her prior alimony of approximately \$800.00 per month from a prior eight year marriage. She is not so entitled on two grounds:

First, because her prior alimony is irrelevant under Utah case law and because such replacement operates to improperly impose a penalty upon Mr. Kirk and improperly reward Ms. Kirk. Ms. Kirk entered the marriage knowing full well her alimony would be terminated and therefore, she should bear the responsibility for her loss of alimony. Second, basing the alimony award upon Mr. Kirk's purported and disputed oral promise of financially taking care of Ms. Kirk upon their marriage is contrary to and unenforceable under the Statute of Frauds. Thus, the Trial Court should not have imposed a \$1,000.00 per month award of permanent alimony upon Mr. Kirk on the grounds that Ms. Kirk lost her prior alimony by virtue of the subject marriage.

The necessary evidence for an alimony award -- evidence showing the parties experience a combined standard of living, was not established due to the fact that each party kept and maintained their separate accounts.



Ms. Kirk is not entitled to the \$1000 per month permanent alimony award when giving the necessary consideration to the brevity of the parties' marriage: less than one year. Though the Trial Court acknowledged its brevity, the Court did not take into adequate consideration its very short duration.

Each party should bear his or her own attorney's fees.

The Trial Court has discretion in awarding attorney's fees to either party. Nevertheless, in doing so, the Court should consider, a) the need or ability of either party to pay attorney's fees, and b) the reasonableness of the fee based on 1) the difficulty of the litigation, 2) the necessity and reasonableness of the number of hours spent on the case, 3) the fee customarily charged in the locality for similar services, and particularly, 4) the result obtained -- which party prevailed on the majority of the issues.

The findings on attorney fees and costs recite no supporting facts and are merely conclusory. The Trial Court made no actual findings of fact on any of the foregoing factors. Rather, they merely conclude that the fees are reasonable. The findings are thus deficient on their face. The findings concerning reasonableness, actually being conclusory only, were based solely on Ms. Kirk's counsel's proffer which was insufficient to prove reasonableness.

*Need and ability*

While Mr. Kirk's ability exceeds Ms. Kirk's ability, Ms. Kirk has the ability to fully pay her own attorney fees. Ms. Kirk's life style was not altered to any significant degree and her ability to pay her attorney's fees was unaffected by the marriage and its termination. She retains roughly \$60,000.00 equity in an \$80,000.00 condominium, and was able to meet all her expenses plus pay her counsel an average of \$517 per month during the nine month proceeding below. Ms. Kirk did not show that she had the requisite need for an award of attorney fees. Rather, the evidence shows she has the assets and income to pay her own fees.

*Reasonableness based on the four above factors*

The evidence does not support that the attorneys fees she incurred were reasonable, given the absence of difficulty in the litigation, the lack of necessity and unreasonableness of the number of hours spent on the case, the fee customarily

charged for similar services, and especially given the result she obtained for having incurred her fees.

### ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING ITS ALIMONY AWARD AND ERRED AS A MATTER OF LAW IN DETERMINING THE BASIS THEREOF.

A. THE TRIAL COURT ERRED IN ASSESSING MS. KIRK'S NEED, HER ABILITY TO PRODUCE SUFFICIENT INCOME FOR HERSELF, AND MR. KIRK'S ABILITY TO PAY.

There are three factors, among others which may be applicable such as those argued above, which must be considered by the trial court in assessing the propriety of an alimony award. Those three factors, which have been set forth in a number of Utah decisions, are as follows:

- [1] the financial conditions and needs of the spouse requesting alimony;
- [2] the ability of the requesting spouse to produce sufficient income for that spouse's needs; and
- [3] the ability of the responding spouse to provide support.

(See *Schindler v. Schindler*, 776 P.2d 84 (Ut. App. 1989), *Boyle v. Boyle*, 735 P.2d 669, 671 (Ut. App. 1987) *Paffel v. Paffel*, 732 P.2d 96 (Utah 1986), *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985), and *English v. English*, 565 P.2d 409, 411-12 (Utah 1977))

In *Rudman v. Rudman*, 812 P.2d 73, 76 (Ut. App. 1991), this Court stated,

We emphasize one again that, in considering these factors, the trial court must make adequate factual findings on all material issues unless the facts in the record are "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." (citing *Houmont*, 793 P.2d at 424.)

(See also *Throckmorton v. Throckmorton*, 767 P.2d 121, 124 (Ut. App. 1988)

Also, in *Boyle v. Boyle*, 735 P.2d 669, 671 (Ut. App. 1987):

This court concurs in the supreme Court's reflection that more detailed findings on each required factor would assist in the appellate process.

In *Bell v. Bell*, 810 P.2d 489, 492 (Ut. App. 1991) this Court noted:

[T]he trial court must make sufficiently detailed findings of fact on each factor to enable a reviewing court to ensure that the trial court's discretionary determination was rationally based upon these three factors. (citations omitted) If sufficient findings are not made, we must reverse....

This Court has further noted in *Rasband v. Rasband*, 752 P.2d 1331, 1334 (Ut. App. 1988):

The 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 v. Deliran*, 737 P.2d 996, 999 (Utah 1987) (quoting *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979).

Recently, in *Baker v. Baker*, 866 P.2d 540, 546-7 (Ut. App. 1993), this Court went further and noted that the Trial Court must do more than simply restate the requesting spouse's testimony concerning monthly expenses: "This finding is plainly insufficient because it fails to adequately address [the requesting spouse's] financial condition and needs." This Court explained that simply restating the requesting spouse's testimony regarding expenses does not justify their reasonableness nor explain how the court arrived at a certain sum as an appropriate amount of alimony.

Both in *Chambers v. Chambers*, 840 P.2d 841 843 (Ut. App. 1992) and *Canning v. Canning*, 744 P.2d 325, 326 (Ut. App. 1987) this Court stated that findings concerning the requesting spouse must include that spouse's level of education, health, and other matters concerning the spouse's immediate or eventual employability.

This court has also noted in *Burt v. Burt*, 799 P.2d 1166, 1170 (Ut. App. 1990) that "alimony may not be automatically awarded whenever there is disparity between the parties' incomes."

The Trial Court's findings do not pass the muster of the above stated requirements and that the facts are sufficiently controverted to question the findings.

Ms. Kirk's financial condition and needs.

Other than a few personal property items which she disposed of upon the parties' marriage, all of Ms. Kirk's premarital assets were restored to her by award of the Trial Court. She still owns and controls her condominium in Arizona in which she has nearly \$60,000 in equity. She was awarded all her premarital household

furniture and fixtures which had not be disposed of upon the parties' marriage. She retains her 1983 Lincoln Continental Mark VI automobile and both her checking accounts held at First Interstate Bank.

At the time the parties married, the beginning balance of Ms. Kirk's checking accounts at First Interstate Bank was \$5,388.37. (TV2:170 L16-20) (Defendant's Exhibit 32) A copy of Defendant's Exhibit 32 is attached hereto and incorporated as Exhibit "E". Ms. Kirk testified that those accounts increased to \$7,976.88 at the time of trial. (See ending balances shown as of February 21, 1993 in Defendant's Exhibit 31) A copy of Defendant's Exhibit 31 is attached hereto and incorporated as Exhibit "F". Thus, her bank balance increased by \$2,588.51.

Ms. Kirk further testified that her medical insurance coverage will increase from what it had been in the past. (TV2:197 L14 to 198 L9) When asked on cross examination, "So is it more extended coverage, or less in coverage than you had before you got married?", she replied, "It would be more...It's FHP is what it is." When asked if "It's a more extended coverage now than you had before the marriage?", she replied, "I have major medical." (TV2:198 L2-9)

Ms. Kirk's restoration to her premarital financial condition including her condominium equity and the evidence showing a substantial increase in her bank account, does not demonstrate that she has a need for a \$1,000 per month permanent alimony award.

Ms. Kirk's ability to produce sufficient income for herself.

The findings do not address Ms. Kirk's level of education and her health condition, factors required under *Chambers* concerning Ms. Kirk's employability.

Ms. Kirk has been licensed in securities and insurance and worked in that field for nearly a decade. (TV2:117 L23 to 118 L4) (TV2:187 L7-15) She testified that she worked nearly full time during the marriage, has flexible hours, and can work as many hours as she wants. (TV2:190 L7 to 192 L4) On cross examination she was asked, "Before the marriage you were working eight hours a day?", to which she answered, "Roughly." (TV2:192 L17-19)

Ms. Kirk is also receiving \$496.00 per month in Social Security benefits which she was not receiving at the time of her prior divorce. (TV2:119 L18-22) It was Mr. Kirk who assisted Ms. Kirk in obtaining the aforesaid Social Security benefit. (TV2: L7-11) Even considering the \$860.00 per month in prior alimony, lost by the

marriage, Ms. Kirk's \$496.00 Social Security results in a difference of only \$364.00 per month.

Ms. Kirk listed her purported expenses on Defendant's Exhibit 25. Said Exhibit was admitted as illustrative only of her testimony. (TV2:125 L1-5) A copy of Defendant's Exhibit 25 is attached hereto and incorporated as Exhibit "G". An inspection of Exhibit 25 alleging her expenses reveals figures which are at best rough estimates which have been rounded off to suit its purpose of supporting a high total. When asked regarding the preciseness of her Exhibit 25 figures she responded that her expenses vary, "but it's roughly that, but I can't tell you the dates that I buy things." (TV2:193 L3-7) None of the figures listed on her Statement of Monthly Expenses were supported by any documentation whatsoever.

Ms. Kirk claimed to have only \$1,602 "net expendable monthly income with alimony at \$1,000 per month" (TV2:119 L13 to 123 L7) (Defendant's Exhibit 24) and have \$2,287 in "total monthly expenses". (TV2:123 L8 to 125 L5) (Defendant's Exhibit 25) A copy of Defendant's Exhibit 24, admitted solely as illustrative of her testimony (TV2:211 L20-25), is attached hereto and incorporated as Exhibit "H". Yet while meeting the \$685 difference between her net income and expenses during the course of the proceedings, she also paid her counsel \$4,664.92, an average of \$517.21 per month. (Total of retainer and payments listed on Defendant's Exhibit 34: \$1,000.00 + \$262.65 + \$233.77 + \$1,190.05 + \$56.25 + \$412.65 + \$396.70 + \$987.85 + \$125.00) A copy of Defendant's Exhibit 34 is attached hereto and incorporated as Exhibit "I". She also increased her checking account balance \$2,588.51 as shown in the above section addressing her need.

When asked how she could possibly be meeting the \$685 difference between the \$2,287 in expenses she claimed and her \$1,602 in expendable income (TV2:162 L11 to 167 L6) she attempted to claim having to make withdrawals from her checking account balance. (TV2:166 L3 to 167 L6) Nevertheless, when asked directly, "Where does the extra \$600.00 come from?", her response was equally direct: "These are the figures. I don't know." (TV2:164 L5-6) Though being licensed and actively employed for nearly a decade in selling securities and insurance, she claimed she didn't know how she was meeting the \$685 per month shortfall in expenses she alleged. As noted above, her bank balances increased nearly \$3,000.00 while she met all her alleged expenses. She was obviously not drawing on her bank balance to meet her expenses.

Ms. Kirk never claimed to have borrowed funds to meet the purported \$685 difference nor to have borrowed funds to pay her counsel. It would have been impossible for her to have paid her counsel \$517.21 per month and meet the \$685.00 per month shortfall while only having the income she claimed, unless she seriously inflated her actual expenses and/or under reported her income. The \$685.00 in expenses she met and the \$517.21 paid to her counsel, equals \$1,202.21 in monthly payments she made from income that is unaccounted for from her income as claimed. Based thereon, Ms. Kirk must actually be receiving over \$1,200.00 per month from sources which were not disclosed to Mr. Kirk or the Court. For her income to be otherwise, her actual monthly expenses must be approximately \$1,200 less than she claimed. She cannot have it both ways.

The \$1,000.00 per month alimony award is obviously a windfall for Ms. Kirk. The \$2,600.00 bank account increase plus the \$4,600.00 paid in fees equals \$7,200.00, an average of \$800.00 per month income during the nine month proceeding in excess of her claimed expenses. At most, a \$200.00 per month award would meet her alleged, though unsubstantiated need.

The trial court failed to consider the fact that Ms. Kirk not only met all her expenses during the course of the nine month proceeding below, but had the ability to pay her counsel \$517.21 per month during the same period. The Trial Court failed to realize that Ms. Kirk must have had either a) at least an additional \$1,200 per month in undisclosed income to enable her to meet her expenses and pay such counsel fees, or b) that her unsubstantiated claim of expenses is inflated approximately \$1,200 above actuality, or c) a combination of the foregoing two aspects. The aforesaid \$1,200 per month discrepancy shows that Ms. Kirk is financially able to provide for herself without any assistance from Mr. Kirk, let alone a permanent \$1,000 per month award. Had the Trial Court considered the above facts, it would not have awarded Ms. Kirk any alimony.

Mr. Kirk's ability to pay.

Mr. Kirk received no earned income while the parties courted each other nor during the marriage. His sole source of income is derived from Social Security along with investment and retirement income earned by him and his deceased wife prior to the marriage. Approximately one-third of his income is derived from sources inherited from his deceased wife. These sources include stock or other accounts held

with AT&T, Ameritech, Bell Atlantic, Bell South NYNEX, Pactel Southwest Bell and US West as shown on Plaintiff's Exhibit 9 noted by "I PM" representing Inherited Pre-Marital property.

The alimony award is thus tantamount to an ongoing distribution of Mr. Kirk's premarital estate. The award is equivalent in value to taking the benefits accumulated over a lifetime by Mr. Kirk's deceased wife and giving the interest and dividends being paid on those benefits to Ms. Kirk for the remainder of her life. Whereas Mr. Kirk and his deceased wife planned that Mr. Kirk would be the recipient of his deceased wife's benefits, the ongoing payout thereon has now been effectively transferred to Ms. Kirk by her replacing Mr. Kirk's deceased wife during a short one year relationship.

*Summary on Ms. Kirk's need, her ability to support herself, and Mr. Kirk's ability to pay.*

The facts show that Ms. Kirk has no need of alimony. She has the ability to support herself from the \$1,200 per month along with her \$256 in earned income and the \$496 in Social Security per month. Those figures total \$1,952 per month. Her \$2,287 in claimed, though unsubstantiated expenses, less \$1,952 leaves \$335. Certainly the \$335 gap is also met considering the \$2,588.51 increase in her bank balance.

Alimony cannot be awarded in excess of Ms. Kirk's need, regardless of Mr. Kirk's ability to pay. Recently in *Bingham v. Bingham*, 236 Utah Adv. Rep 29,31 (Ut. App. 1994), this Court stated,

[T]he trial court apparently awarded plaintiff \$701.76 per month more than her projected financial requirements. \* \* \* [W]e agree with defendant that the court should not have awarded plaintiff more than her established needs required, regardless of defendant's ability to pay this excess amount. \* \* \* [T]he spouse's demonstrated need must, under *Jones*, constitute the maximum permissible alimony award.

Since the facts in this case demonstrate that Ms. Kirk has no need, no alimony is permissible. Yet the Trial court found, "defendant is in need of alimony." (Paragraph 37) The Court's findings that Ms. Kirk receives only \$690 income per month (Paragraph 38) and that she has \$2,287 per month in reasonable expenses (Paragraph 39), are clearly erroneous.

*Since the findings are clearly erroneous where the facts show Ms. Kirk's own ability to meet all her claimed need, the alimony award should be reversed and vacated in its entirety. In the alternative, the alimony award should be reversed and remanded for the following reasons:*

The evidence on the three factors of 1) Ms. Kirk's financial condition and need, 2) her ability to support herself, and 3) Mr. Kirk's ability to pay, do not support the alimony award.

The findings on the three factors enunciated in *Schindler, Boyle, Paffel, Jones, and English*, are not adequate on all the material issues as required by *Rudman and Bell*. Also, the findings are not detailed enough as required in *Boyle*. The findings do not disclose the steps by which the ultimate conclusion on each factual issue was reached as required in *Rasband*. The findings concerning Ms. Kirk's needs obviously fail to meet the sufficiency of *Baker* in that the findings simply restate her testimony concerning her monthly expenses. As noted in *Baker* a simple restatement of Ms. Kirk's testimony regarding her expenses does not justify their reasonableness.

The findings provide that Ms. Kirk's need to which she testified, is based both on the standard of living during the marriage and Ms. Kirk's standard of living prior to the marriage. (Paragraph 39) Yet, the Trial Court made no findings based on any certain dollar figures whatsoever, on either the purported standard of living during the marriage nor Ms. Kirk's premarital standard of living. This is not surprising since the parties experienced no combined standard of living during the marriage, keeping all their expenses strictly separate during their relationship. Further, there is insufficient evidence to support what Ms. Kirk's premarital standard of living may have been. The Trial Court's finding of Ms. Kirk's need based solely on her unsupported testimony of her expenses is inadequate and does not justify their reasonableness.

The trial court did not explain how it arrived at the certain sum of \$1,000 per month as an appropriate alimony award as required by *Baker*.

The findings do not address Ms. Kirk's level of education, though she is obviously well educated having a license in securities and insurance for nearly a decade. The findings do not address Ms. Kirk's health situation, though she appears to be in good health and there was no testimony supporting that she was ailing in



any way mentally or physically. The lack of findings on these two issues are contrary to both *Chambers* and *Canning*.

The trial court based its finding of reasonableness concerning her need and ability to support herself on her unsubstantiated and questionable testimony of both her claimed expenses and income. The evidence seriously contradicts the findings concerning Ms. Kirk's employability. The testimony supports that she is actively employed, working nearly full time, capable of full time employment and that nothing, including her age and health, prevents her from being actively employed on a full time basis. The Trial Court's findings to the contrary are obviously controverted and incapable of supporting only a finding in favor of the judgment as required by *Throckmorton*.

It seems the Trial court made the alimony award automatically based on what appeared to be a disparity in the parties' income. Such a basis is contrary to *Burt*.

Ms. Kirk's financial condition shows that she was substantially restored to her premarital status. The increase in her bank balance of \$2,600 to nearly \$8,000 at the time of trial belie her need. She was able to meet both, a) the \$685 per month difference between her stated income and expenses, and b) pay an average of \$517.21 per month toward her attorney fees during the nine month trial proceeding. The aforesaid bank balance increase, along with the discrepancy of more than \$1,200 per month during the nine month proceeding, provides sufficient evidence of her ability to support herself.

Mr. Kirk's only ability to provide support is based on a distribution of earnings from premarital assets, including those assets inherited from his deceased wife. The alimony award is thus tantamount to an ongoing inappropriate distribution of his premarital assets. It is unjustly equivalent to awarding Ms. Kirk the income derived from Mr. Kirk's deceased wife's accumulation of benefits acquired by forty years work.

*Given the insufficiency of the findings, the \$1,200 discrepancy, and her bank balance increase, this court should reverse the alimony award and remand with directions to enter findings as required on the factors in which the findings are silent. If remanded, the Trial Court should also be directed to address the \$1,200 discrepancy during the nine month trial proceeding, and the \$2,588.51 increase in her bank balance.*

B. THE TRIAL COURT ERRED IN BASING ITS ALIMONY AWARD TO MS. KIRK ON THE FOLLOWING:

1. THE INVALID THEORY THAT SHE WAS ENTITLED TO HAVE HER PRIOR ALIMONY OF \$860.00 PER MONTH FROM A PRIOR EIGHT YEAR MARRIAGE REPLACED BY MR. KIRK.

In its Findings of Fact, the Trial Court stated, "At the time of the instant marriage the defendant was divorced from her prior husband and was receiving permanent alimony in the sum of \$200 per week, or \$860 per month." (Findings of Fact, Para. 5, at bottom of p. 2) The Trial Court further found that Ms. Kirk asserted "that she is entitled to substantial alimony...in view of what she gave up in the form of permanent alimony by agreeing to marry the plaintiff.... (Findings of Fact, Para. 9) Last, "The Court is satisfied that she would not have entered into the marital relationship except for the promises of the plaintiff that she would be reasonably financially secure should she agree to give up her sources of income in the form of permanent alimony from a prior spouse and enter into the marital relationship with the plaintiff. (Findings of Fact, Paragraph 37)

Nevertheless, *Houmont v. Houmont*, 793 P.2d 421 (Ut. App. 1990) supports the proposition that the Trial court cannot impose an alimony award to the spouse simply on the grounds that the spouse lost alimony by virtue of the subject marriage. In *Houmont*, this Court reversed the Trial Court's award of alimony where the main justification for awarding alimony was the fact that the spouse lost alimony by remarriage. *Houmont* concerned a three and one-half year marriage with no children issuing therefrom.

In the *Houmont* case, Ms. Houmont had been receiving permanent alimony of \$510 per month from a previous husband prior to marrying Mr. Houmont. As in the instant case, Mr. Houmont was ordered to pay \$1000 per month in temporary alimony commencing shortly after the parties' separation and at the conclusion of trial the Trial Court "found that each party had premarital property and awarded each party his or her own property." *Houmont*, at 423. Mr. Houmont was also ordered to pay \$510 per month in permanent alimony. (Id.)

On appeal, Mr. Houmont argued that "the trial judge awarded alimony to her

[Ms. Houmont] on the impermissible grounds that appellee had lost \$510 per month permanent alimony when she married appellant and, thus, improperly shifted appellee's former husband's obligation to appellant." (Id.)

The *Houmont* Trial Court found that "as a result of said marriage, the Defendant lost alimony in the sum of \$510 per month," and that "alimony should be granted in favor of Defendant and against the Plaintiff in the sum of \$510 per month. (*Houmont*, at 424)

Absent the requisite findings upon which this court reiterated in *Houmont* that alimony should be based, it reversed the alimony award based on a replacement theory and remanded for entry of such findings.

More recently in *Rudman v. Rudman*, 812 P.2d 73, 75-77 (Ut. App. 1991) this Court ruled that fact of wife losing \$1100 per month in alimony by virtue of her marriage was an insufficient basis for award of alimony, her lost alimony being irrelevant, and reversed the alimony award as a matter of law:

Both parties had previously been married and divorced. At the time of the marriage, Mrs. Rudman had been receiving \$1,100 per month in permanent alimony from her former husband.

Mrs. Rudman's alimony from her former marriage terminated upon her marriage to Mr. Rudman.

The findings regarding alimony state that Mrs. Rudman lost \$1,100 per month in alimony by virtue of her marriage to Mr. rudman and that it was therefore, "reasonable and just" that temporary alimony of \$1,100 per month be paid to her until she reaches age sixty-five, at which age she would begin to receive social security benefits.

This is error in that the amount of alimony lost upon remarriage is irrelevant....

Because the court erred as a matter of law, we reverse the alimony award and remand for adequate findings on the requisite factors.

As was correctly stated by the Utah Supreme Court in *Gramme v. Gramme*, 587 P.2d 144, 147 (Utah 1979):

The purpose of alimony is to provide post-marital support; it is intended neither as a penalty to be imposed on the husband nor as a reward granted to the wife.

(See also, *Canning v. Canning*, 744 P.2d 325, 326 (Ut. App. 1987), *Turner v. Turner*, 649 P.2d 6, 8-9 (Utah 1982), and *English v. English*, 565 P.2d 409, 411 (Utah, 1977) regarding the impropriety of imposing alimony as a penalty or reward.)

Ms. Kirk's loss of prior alimony by her marriage to Mr. Kirk is no different than the loss experienced by young people who marry, move from their parent's home, and give up their parent's financial support. Mr. Kirk should not have the obligation of replacing the lost alimony any more than the financial support previously received from parents should be replaced.

The only fair and reasonable conclusion that can be reached after a review of the Trial Court's actions in connection with its award of alimony *vis-a-vis* the evidence which was presented to it, was that the Trial Court thought that some sort of penalty was appropriate because Mr. Kirk had filed for divorce.

In essence, what the Trial Court did was penalize Mr. Kirk and reward Ms. Kirk by unfairly replacing the alimony obligation of Ms. Kirk's former husband created by virtue of an eight year marriage. Such a result is patently unfair and not in accord with the cases cited above on the issue of alimony. Affirming the Trial Court's replacement theory would be contrary to established precedent.

*Ms. Kirk's lost alimony is not a basis upon which alimony may be imposed. This Court should vacate the alimony award insofar as it was entered on the basis that Ms. Kirk was entitled to have her lost alimony replaced by Mr. Kirk.*

2. THE TRIAL COURT ERRED IN AWARDING ALIMONY TO MS. KIRK BASED ON MR. KIRK'S PURPORTED PRE-MARITAL PROMISE THAT HE WOULD FINANCIALLY TAKE CARE OF MS. KIRK FOR THE LOSS OF HER ALIMONY FROM A PRIOR EIGHT YEAR MARRIAGE. SPECIFICALLY, THE TRIAL COURT ERRED IN THAT SUCH A BASIS FOR THE ALIMONY AWARD IS CONTRARY TO THE STATUTE OF FRAUDS, WHERE THE PARTIES NEVER REDUCED TO WRITING NOR SIGNED ANY INSTRUMENT BASED ON SUCH PURPORTED PROMISE.

The Trial Court's findings state: "At the time of the instant marriage the defendant was divorced from her prior husband and was receiving permanent alimony in the sum of \$200 a week, or \$860 per month." (Findings of Fact, Para. 2 at the bottom of page 2)

The findings further state: "The evidence is clear and the Court finds that when confronted with the defendant's reluctance to remarry for the reasons stated above [concerning her financial status; i.e., loss of prior awarded alimony] that plaintiff promised the defendant that she would not need to worry financially, that he would take care of her in a financial setting." (Id., middle of page 3) The findings also state: "[T]he defendant ultimately was satisfied based upon the plaintiff's [oral] representations that marriage at her stage in life under the circumstances then existing would not effect her financial stability even though she would lose her permanent alimony. Based on the foregoing, she agreed to marry the plaintiff." (Id., top of page 4)

Later, the findings note in Para. 9 that Ms. Kirk asserts, "that she is entitled to substantial alimony based upon the promises and representations of the plaintiff in view of what she gave up in the form of permanent alimony by agreeing to marry the plaintiff,...."

Ms. Kirk argued that the "Kirk Family Trust" (Plaintiff's Ex. "1"), executed by the parties a couple weeks subsequent to their marriage, should be viewed as a pre-nuptial agreement. The Trial Court rejected her view, stating in Paragraphs 20 and 21 of the findings:

20. The establishment of the Kirk Family Trust is not and cannot be construed as a pre-nuptial agreement which would purportedly govern the rights of the parties should a divorce occur.

21. The Kirk Family Trust was an estate planning device and was so contemplated by the parties.

Paragraph 37 of the findings, further provide the following:

While the Court has determined that the plaintiff's promises to the defendant are not sufficient to allow her to assert a legal claim against the plaintiff's premarital properties, the Court is satisfied that the plaintiff's promises which induced the defendant to give up financial security are enforceable. The plaintiff made promises of financial security to the defendant to induce her to enter into the marriage relationship. The Court is satisfied that she would not have entered into the marital relationship except for the promises of the plaintiff that she would be reasonable financially secure should she agree to give up her sources of income in the form of permanent alimony from a prior spouse and enter into the marital relationship with the plaintiff. The plaintiff made a promise which he acknowledges. The promise is

significant as far as the defendant was concerned, and the plaintiff ought to be held to his promise in all good conscience and in equity. \* \*  
\* This Court, therefore, determines that defendant is entitled to permanent alimony from plaintiff....

Finally, Paragraph 41 of the findings provides:

"[C]onsidering the promises made to the defendant by the plaintiff and reasonable needs of the defendant, the Court is satisfied that an ongoing alimony requirement in the sum of \$1,000 per month is necessary and reasonable, which alimony should continue until such time as defendant should remarry, cohabit or the death of either party.

The aforesaid findings imply the evidence supports that both parties acknowledged Mr. Kirk's purported promise to financially take care of Ms. Kirk and that both parties' testimony is uncontradictory with respect thereto. Nevertheless, Mr. Kirk's responses on cross examination from opposing counsel belie this view:

Q. Did you tell her that you were making about \$4,000 a month off of your various investments, and pension plan, social security, and you should be able to make it without the alimony?

A. No.

(TV1:159 L24 to 160 L3)

Q. Mr. Kirk, when you testified on direct examination yesterday, you testified that you showed your accountings of assets and income to Peggie; that she had shown you tax returns, and when she brought up the question of alimony you told her that you could make it and get by even though the alimony would be lost; is that correct?

A. No.

Q. That is not correct?

A. That's right.

(TV2:3 L24 to 4 L8)

Q. Any discussions about alimony, or payment to her if the divorce was obtained?

A. No.

(TV2:36 L18-20)

In Ms. Kirk's Trial Memorandum (R.O.A. 114-124, Case No. 924901796) on page 3, she relied on *Baldwin v. Vantage Corp.*, 676 P.2d 413 (Utah 1984) for the theory that "oral contracts are enforceable...on the basis that the parties admitted to such agreement". As shown by Mr. Kirk's testimony above, he disputes rather than admits, Ms. Kirk's claim that he would take care of her financially upon their marriage or in the event of divorce. Further, *Baldwin* was not a marital case, rather,

it dealt with a dispute over real property. Also, *Baldwin* noted that, "part performance was sufficient to remove the contract from the statute of frauds under these circumstances where the existence of the contract was admitted." *Id.*, at 417.

No conduct of the parties herein shows any performance of the alleged oral promise other than the marriage itself. Marriage alone, is not recognized as performance as is discussed below. There is no evidence that upon the marriage, Mr. Kirk made up for Ms. Kirk's lost alimony. After the marriage, they each continued to separately control their assets, income, and separately pay their individual expenses. Thus, the facts in *Baldwin* are clearly distinguishable from the facts in this matter.

Even if Mr. Kirk's had purportedly made the oral promise to Ms. Kirk stated in the findings referred to above, such an agreement would be barred as unenforceable by the Statute of Frauds. One of the oldest statutory provisions regulating marital contracts is the Statute of Frauds. The original Statute of Frauds was enacted by the Parliament of England in 1677 to prevent "fraudulent practices...upheld by perjury" and other similar abuses that occurred when informal contracts, especially oral contracts, were sought to be enforced. (See generally, Farnsworth, *Contracts* 369-73 (1982); 3 *Vernier, American Family Laws* 51-64 (1935 Ed reprinted 1971))

Section Four of the Statute of Frauds listed five categories of contracts which could not be enforced unless they were "in writing, and signed by the party to be charged therewith" or by the party's authorized agent. Included was "any agreement made upon consideration of marriage." While the Statute of Frauds did not become a part of the common law that was adopted in the United States, virtually all states have enacted their own versions of the Statute requiring agreements made upon consideration of marriage to be in writing. (See Farnsworth, *supra* at 371)

Similarly, the Restatement of the Law, Second, *Contracts*, §124 (1981) provides: "A promise for which all or part of the consideration is either marriage or a promise to marry is within the Statute of Frauds, except in the case of an agreement which consists only of mutual promises of two persons to marry each other." Another section reiterates that "a contract made upon consideration of

marriage" is unenforceable unless it is in writing or within one of the exceptions to the Statute of Frauds. (Id. at §110(1)(c))

In Utah, the requirements of the Statute of Frauds is reflected in Utah Code Section 25-5-4(3) titled, *Certain agreements void unless written and subscribed*, which provides as follows:

In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

. . .

(3) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;

A copy of the aforesaid Section is included herein under Exhibit "A".

To counsel's knowledge the only marital case in Utah applying its Statute of Frauds (§25-5-4(3)), is *Brown v. Brown*, 744 P.2d 333 (Ut. App. 1987) In *Brown*, a stipulation to a divorce decree, reached between one of the parties and both counsel, while the other party remained silent while it was discussed and read into the deposition record, was not binding. The court ruled that for such an agreement to be binding, it "must be evidenced by a signed writing which would satisfy the Statute of Frauds, or the agreement must be stated in court on the record before a judge. The facts in this case do not show such evidence. Therefore, there was no stipulation reached between the parties and there is nothing for the court to enforce." Id. at 335.

Occasionally, issues have arisen in States other than Utah concerning the validity of unwritten antenuptial contracts. These issues usually arise when there has been alleged performance or part performance of the premarital agreement. Nevertheless, Professor Corbin, in his Treatise, *Corbin on Contracts*, (1963) in Vol. 2 at §463 notes the following: "The fact that the marriage ceremony has actually taken place, so that the consideration for the promise of a settlement is executed, is generally held not to take the promise out of the statute or make the promise enforceable." In the same section, Corbin notes that such is the prevailing rule followed by the courts in America today.



In most recent cases where one party has attempted to enforce an oral antenuptial contract, the courts have been very strict and generally unreceptive to the claims. The Hawaii Intermediate Court of Appeals explained the reason for this strict judicial scrutiny in *Rossiter v. Rossiter*, 666 P.2d 617, 621 (1983) where the husband appealed from a trial court Supplemental Decree of Divorce ordering that the parties' residence was to be sold. The husband alleged that the parties had entered into an oral antenuptial agreement to the effect that the wife would never force the sale of the marital residence. The Hawaii Statute of Frauds, however, requires such antenuptial agreements to be in writing, as does Utah. Nevertheless, the husband argued that the oral agreement should be enforced because of part performance contending that the parties' marriage, their move to Hawaii, purchase of the property and his efforts constructing the house constituted sufficient part performance to take the agreement out of the Statute of Frauds. The court rejected that argument noting:

The doctrine of part performance 'takes the case out of the statute not because it furnishes proof of the contract, or because it makes the contract any stronger, but because it would be intolerable in equity for the owner of a tract of land knowingly to suffer another to invest time, labor, and money in that land, upon the faith of a contract which did not exist.' 73 Am Jur 2d, Statute of Frauds §400 (1974) . . . . Consequently, courts require the part performance to be of a character which is unequivocally referable to the alleged parol agreement and cannot admit of explanation without reference to such agreement. 73 Am Jur 2d. Statute of Frauds §§405-406 (1974). The acts constituting part performance 'must clearly appear to have been done in pursuance of the contract, and to result from the contract and not from some other relation.' 30 ALR2d at 1421-1422.

The mere act of marriage is almost universally held to be insufficient part performance and additional acts are not necessarily sufficient either. 30 ALR2d at 1420; 73 Am Jr 2d at 136.

The evidence in the instant matter indicates not even partial performance of Mr. Kirk's alleged promise. Throughout their brief one year marriage, both parties kept their financial dealings separate. Mr. Kirk did not replace Ms. Kirk's lost alimony during their marriage.

(See also, *Carter v. Carter*, 656 S.W.2d 257 (Ky. App. 1983) (Oral antenuptial agreement unenforceable after the original written antenuptial contract was torn up).

The drafters of the Restatement, Second, Contracts, at §124, comment d, support the application of a strict policy with respect to antenuptial agreements as follows:

An oral contract between prospective spouses made upon consideration of marriage does not become enforceable merely because the marriage has taken place in reliance on it, nor by virtue of subsequent action incident to the marriage relation, since the contrary rule would deprive the marriage provision of the Statute [of Frauds] of any significant effect.

Even if the purported oral promise in the case was made, Mr. Kirk made it to apply only so long as the parties remained together, and not otherwise. Typical of oral promises oftentimes made by parties upon marriage is that of remaining married "until death do us part". Enforcement of such oral promise would preclude either spouse from terminating the marriage by divorce. Such preclusion would obviously be against public policy. Enforcement of the purported oral promise in this matter would be equally contrary to public policy.

As a matter of policy analysis, it should be obvious that there are sound reasons for requiring specific formalities to be observed, such as written memoranda, acknowledgment by written signature, and so on, before antenuptial agreements will be enforced. Apart from the possibility of fraud and perjury, which exists regarding all contracts, not just antenuptial agreements, there is the fact that parties who are contemplating marriage and making agreements in consideration thereof are not prone to deal with each other as ordinary prudent business people do. Their memory of unrecorded promises will be heavily affected by their emotions.

Especially in Utah, where, a) the necessity of fault grounds for divorce, and b) heart balm causes of action, have both been abolished, it would be somewhat anomalous to allow unrecorded antenuptial agreements to be enforced as a general rule. Lest subjectivity subvert the order and reasonableness which a strictly enforced rule promotes, doubt should be resolved strictly in favor of application of the Statute of Frauds.

The evidence relating to Mr. Kirk's purported promise to financially take care of Ms. Kirk upon their marriage is in dispute as shown by Mr. Kirk's testimony cited above. Further, the evidence supports and the Trial Court found, that the parties

continued to manage their financial affairs separately during the marriage. Thus, there was not even partial performance to show the promise was made. Also, the alleged promise was never reduced to a written form signed by the parties. It would be a gross injustice to require alimony from Mr. Kirk based on the disputed oral promise. Yet, the Trial Court based a majority of its rationale in awarding alimony on this purported promise of Mr. Kirk. The Trial Court abused its discretion as a matter of law in doing so.

Prenuptial agreements are required to be written and subscribed under Utah Code Section 25-5-4(3). The Trial Court's reliance in making its alimony award on Mr. Kirk's disputed oral promise that he would financially replace Ms. Kirk's lost alimony is contrary to Section 25-5-4. Such a promise does not meet the evidentiary burden required by the Statute of Frauds and is therefore unenforceable. The Trial Court thus, abused its discretion and erred as a matter of law in making the award on such basis. *This Court should vacate the alimony award insofar as it is predicated on Mr. Kirk's purported oral promise.*

C. THE TRIAL COURT ERRED IN AWARDING ALIMONY BASED ON A COMBINED STANDARD OF LIVING IN THAT THE PARTIES NEVER ESTABLISHED NOR EXPERIENCED SUCH A STANDARD DURING THEIR SHORT ONE YEAR MARRIAGE.

The parties herein lived together from June 1, 1991 to May 31, 1992, a period of only twelve months. During their entire marriage, they kept separate control over their assets and income, and separate responsibility for their expenses.

The first six months, June to December, 1991, they lived in Ms. Kirk's rental apartment. Ms. Kirk continued to make the rental payments, utilities and paid her separate expenses and debts while Mr. Kirk paid his personal expenses.

The last six months, they lived in Mr. Kirk's residence. He continued to pay his separate expenses while Ms. Kirk continued to use her First Interstate checking account for income deposits and her personal expenditures.

Thus, the evidence as to the parties' combined standard of living was not established due to the fact that each party kept and maintained his or her own separate accounts.

A number of decisions by this court and the Utah Supreme Court indicate that a requisite condition for an alimony award include a finding concerning the parties' combined standard of living. (See *Rudman v. Rudman*, 812 P.2d 73, 76 (Ut. App. 1991), *Munns v. Munns*, 790 P.2d 116, 121 (Ut. App. 1990), *Morgan v. Morgan*, 795 P.2d 684, 689 (Ut. App. 1990), *Throckmorton v. Throckmorton*, 767 P.2d 121, 124 (Ut. App. 1988), *Eames v. Eames*, 735 P.2d 395, 397 (Ut. App. 1987), and *Paffel v. Paffel*, 732 P.2d 96, 100-01 (Utah 1986))

In the instant case, the parties did not combine their income in any way for the purpose of meeting expenses. Each party kept their income and expenses separate during their brief one year relationship. Yet, the Trial Court's Findings of Fact provide in Paragraph 37: "In considering the amount of permanent alimony that should be paid to the plaintiff [sic., should read defendant], the Court has taken into account...the life style in which the parties lived during the course of the marriage, even though it was short."

In Paragraph 39 of its findings, the Trial Court states:

The Court finds that defendant's reasonable monthly living expenses are \$2,287 as reflected in her Exhibit D-25, which the Court accepts and finds to be reasonable based upon the standard of living of the parties during their marriage and the standard of living of the defendant prior to her marriage to plaintiff.

Yet, neither the Trial Court in its findings, nor the evidence presented to it, indicate that the parties participated in any combined monetary standard of living whatsoever to which a certain monetary sum was ascribed. Neither did the Trial Court make any finding based on a dollar figure concerning Ms. Kirk's standard of living prior to the parties' marriage.

The only standard of living the parties experienced during the marriage was their separate ability to support themselves as they had done prior to their marriage. They kept their income and expenses separate during their short one year relationship. Thus, an alimony award of any amount is unjust in this case, given that the parties experienced no combined standard of living during their brief relationship. *The alimony award should be vacated in so far as it was premised upon a combined standard of living, which standard is absent in the record.*

D. THE TRIAL COURT ERRED IN FAILING TO FULLY RECOGNIZE THE RELEVANCE OF THE PARTIES' VERY BRIEF MARRIAGE OF LESS THAN ONE YEAR IN MAKING ITS ALIMONY AWARD.

In its Findings of Fact the Trial Court accurately noted, "This is a marriage of relatively short duration, approximately one year. (Findings of Fact, first sentence of Para. 5) Yet, it further found, "that defendant is entitled to permanent alimony from plaintiff even though the marriage was of short duration," and "[i]n considering the amount of permanent alimony that should be paid to the plaintiff [sic., should read defendant] the Court has taken into account...it was short." (Findings of Fact, towards the end of Paragraph 37)

A review of other cases and the literature dealing with very short marriages such as the instant matter, indicate that an award of \$1,000 per month permanent alimony was an abuse of discretion.

In *Frank v. Frank*, 419 P.2d 199 (Utah 1966) the Court dealt with a marriage of like duration as the instant matter. While Mr. Frank challenged an alimony award of \$200 per month for three years, the Court stated,

We think the trial court arrived at an equitable conclusion in case of a very short-lived marriage. The record indicates that on believable evidence, neither party was in a very much different position financially before and after the fortunate or unfortunate walk to the alter.

Neither are the parties in this matter in very much different position, either prior to or after the marriage or following their divorce.

In *Delatore v. Delatore*, 680 P.2d 27 (Utah 1984), the Court acknowledged the important relevancy of a "marriage of short duration" (3 & 1/2 years) in the determination of an equitable alimony award: \$200 per month for 24 months.

In *McDonald v. McDonald*, 236 P.2d 1066, 1070 (Utah 1951) the Court points out that "[t]he time of duration of the marriage" is a "helpful" factor in the determination of alimony.

Likewise, in *Wilson v. Wilson*, 296 P.2d 977, 979 (Utah 1956) the Court stated that in determining alimony, "it is necessary for the court to consider...the duration of the marriage...." (emphasis added)

In *Boyle v. Boyle*, 735 P.2d 669, 671 (Ut. App. 1987), the Court noted that the Trial Court's findings, "include the following language:"

That this was not a long term marriage, and the court feels that each party is being restored to the condition which existed at the time of the marriage, and therefor no alimony should be awarded. (Emphasis added)

Likewise, where the parties marriage herein lasted only a year and they were both substantially "restored to the condition which existed at the time of the marriage," no alimony should have been awarded.

After reiterating the well known factors "to be examined in determining alimony" contained in *Jones v. Jones*, 700 P.2d 1072 (Utah 1985) the *Boyle* Court further states at 671:

In *Jones* the Court examined the record for an analysis of the criteria, and considered among other things, the length of the marriage, and the recipient spouse's education and employability. The *Jones* analysis process made it clear that the three pronged criterion does not preclude considering factors such as the length of the marriage in awarding alimony. (Emphasis added)

Decision by Courts in other jurisdictions concur with and expand the above analysis in regards to the relevancy of marriage brevity in considering alimony. In *Grimes v. Grimes*, 472 S.W.2d 477, 478 (Ky. Ct. App. 1971), the Court stated,

We thoroughly agree with the argument of the appellant that the brevity of their marriage should be considered in determining the amount of the alimony. Especially is this so where the parties come under the category of mature citizens with no hope of having a family, where in many instances, the parties are lonely and searching for companionship. See 1 A.L.R.3d 6 §7(c)

In the instant matter, not only was the marriage very short, the parties are both mature citizens, with no plan of having more children, and were both searching for companionship to replace their loneliness.

The above noted A.L.R. reference in *Grimes* deals with, "Duration of marriage", and includes the following:

It has been said in a treatise on divorce: "The length of the marriage is an important element which courts take into account in awarding alimony. Obviously the longer a woman has lived with a man and performed the functions which one normally expects from a wife, the greater is her claim on him. To hold otherwise is to put the golddigger, who marries a man for his money and then divorces him as fast as she can get rid of him, on par with a woman who has spent most of her adult years looking after a husband" (emphasis added) [Quoting, Ploscowe, *The Truth About Divorce* (1955) p. 193]

The Trial Court's alimony award in this case equates Ms. Kirk to a woman who has foregone career opportunities, raised children of the marriage, and functioned solely in a domestic role for numerous years. Ms. Kirk did none of these things during the brief one year marriage. The \$1000 per month permanent alimony award is tantamount to an undeserved and unmerited life-time annuity.

Likewise, Utah's sister state, Arizona, recognized in *Oppenheimer v. Oppenheimer*, 526 P.2d 762, 766 (Ariz. App. 1974):

While the length of the marriage is an important consideration, its importance stems from two underlying considerations: The contribution of the spouse to be supported and judicial resistance to awarding spousal maintenance to a "golddigger". See Annot. 1 A.L.R.3d 6, 32 (1965) (emphasis added)

Ms. Kirk contributed nothing of the kind usually contributed by a spouse in a long term marriage. In no way did Ms. Kirk relinquish career opportunities, nor perform the long term domestic tasks normally associated with a permanent alimony award of \$1,000 per month. The Trial Court abused its discretion in its alimony award by effectively rewarding Ms. Kirk a gold mine in ending the marriage relationship.

Though the Trial Court acknowledged the brevity of the parties' one year marriage, it failed to give the short one year duration adequate consideration in awarding alimony. Such award, given the short duration of the marriage, inappropriately rewards Ms. Kirk as a "golddigger", with an undeserved gold mine. *The alimony award should be reversed and remanded with instructions to appropriately consider the limitations on alimony in view of the brevity of the marriage.*

II. THE TRIAL COURT ABUSED ITS DISCRETION IN MAKING ITS AWARD OF ATTORNEY FEES AND COSTS.

On several occasions, this Court has set forth the basis to determine whether or not an award of attorney fees is justified:

To be entitled to an award of attorney fees, the requesting spouse must make "a showing of financial need and reasonableness" of the fees incurred. *Burt v. Burt*, 799 P.2d 166, 1171 (Ut. App. 1990).

A number of other cases, mention the aforesaid criteria and further specify the following list of factors which need to be considered by the trial court in determining the *reasonableness* factor of attorneys fees:

- 1) The difficulty of the litigation,
- 2) The necessity and reasonableness of the number of hours spent on the case,
- 3) The fee customarily charged in the locality for similar services, and
- 4) The result obtained.

(See *Bell v. Bell*, 810 P.2d 489, 493-4 (Ut. App. 1991), *Morgan v. Morgan*, 795 P.2d 684, 688 (Ut. App. 1990), *Haumont v. Haumont*, 793 P.2d 421, 425-6 (Ut. App. 1990), *Sorensen v. Sorensen*, 769 P.2d 820, 832 (Ut. App. 1989), *Rasband v. Rasband*, 752 P.2d 1331, 1336 (Ut. App. 1988), and *Kerr v. Kerr*, 610 P.2d 1380, 1384-5 (Utah 1980))

In *Bell*, at 494, this Court further stated,

To permit meaningful review of the trial court's discretionary ruling, "[w]e have consistently encouraged trial court to make findings to explain the factors which they considered relevant in arriving at an attorney fee award." (citations omitted)

Also in *Bell*, at 494, this Court pointed out that a significant factor in attorney fee determination is which party prevailed on the main disputed issue in the case.

In *Houmont*, at 426, this Court noted, "If either financial need or reasonableness has not been shown, we have reversed awards of attorney fees." (emphasis added)

In *Sorensen*, at 832, this Court stated there was sufficient evidence to demonstrate Mrs. Sorensen's need, yet found "the proffered testimony insufficient to sustain the award of attorney fees, and therefore, we reverse." Mrs. Sorensen's counsel had proffered an exhibit reflecting the time spent and the rates charged.



Opposing "counsel stipulated that the proffer could be received, but expressly refused to stipulate to the "reasonableness of the fees." This Court reversed because of the lack of evidence on the four factors cited above to determine overall reasonableness.

A. THE TRIAL COURT ERRED IN DETERMINING MS. KIRK'S NEED FOR ATTORNEY FEES.

The only testimony concerning Ms. Kirk's need for attorney fees is found at TV2:154 L13-21. Ms. Kirk simply testified that in hiring her counsel, she had "made some payments, but...haven't been able to pay it all."

Ms. Kirk's Financial Declaration shows she owns a condominium in Arizona. She claims it does not generate a positive cash flow, yet admits its value of \$80,000.00 and having roughly \$60,000.00 in equity. Certainly this equity, nearly ten times the award of her fees and costs, could be easily used to satisfy obligations to her counsel.

As noted above, during the nine month trial proceeding, Ms. Kirk was easily able to pay \$517.21 per month to her counsel. Said sum is the average she paid as reflected on her Exhibit 34, shown herein as Exhibit "I". In addition, while claiming to have a \$685.00 shortfall between her income and expenses, she not only met all her expenses, but increased the total balance in her checking account by \$2,588.51 to almost \$8,000.00 while the underlying matter proceeded to trial.

There is no reason given this increase, the near \$8,000.00 available to her, and her ability to have averaged \$517.21 per month in fee payment for nine months, that she could not pay the \$6,565.05 fee balance she owed. In addition, as argued above, the aforementioned evidence supports that during the nine months preceding the trial, Ms. Kirk averaged either a) over \$1,200 per month income from undisclosed sources, b) inflated her actual expenses by approximately \$1,200 per month, or c) a combination of the forgoing two aspects. She could continue paying \$517.00 per month and satisfy her attorney fees and costs in just one year.

B. THE TRIAL COURT ERRED WHERE MS. KIRK FAILED TO ADEQUATELY DEMONSTRATE THE REASONABLENESS OF HER ATTORNEY FEE BASED ON FOUR REQUIRED FACTORS DISCUSSED BELOW:

The Trial Court made no findings on the four required factors discussed below. The only findings on attorney fees and costs are found in the first half of Paragraph

51 and all of 52. Those findings are conclusory only. The findings' language merely makes conclusions on the issues of need, ability and reasonableness. Thus, the findings are inadequate on their face.

1. THE DIFFICULTY OF THE LITIGATION

This case was not so complex or difficult as to merit a rate of \$175.00 per hour and a total fee of \$11,229.97. This is particularly so when considering the result Ms. Kirk obtained, which factor is treated separately below. Thus, the reasonableness factor is not supported since the case was actually straightforward and relatively simple. The case was not complex nor difficult. The Trial Court only disagreed with Mr. Kirk on the issues of alimony and attorneys fees -- issues which are not inordinately difficult. Mr. Kirk of course, now seeks to have this court overturn the Trial Court's decision on those two issues.

2. THE NECESSITY AND REASONABLENESS OF THE NUMBER OF HOURS SPENT ON THE CASE.

Defendant's Exhibit 34, Exhibit "I" herein, provides no break down of how the billable time was spent. It simply reflects a total of hours allegedly spent by Ms. Kirk's counsel, two associates and a paralegal. Included in paralegal time is 30.65 hours at \$50.00 per hour. Nothing is provided as to what work the paralegal allegedly performed during the 30.65 hours at a \$50.00 per hour rate. No time logs were submitted to support and specify how the time was spent. Thus, it is a mere guess as to whether or not the time was necessary or reasonable.

3. THE FEE CUSTOMARILY CHARGED IN THE LOCALITY FOR SIMILAR SERVICES.

Though Ms. Kirk's counsel proffered that his "fees are \$175.00 an hour," nothing was mentioned comparing this to the fee customarily charged in the locality for similar services. Such a comparison is required under *Rasband*, *Bell*, *Morgan*, *Houmont*, *Kerr*, and *Sorrensen*. The Trial Court erred in failing to compare and justify Ms. Kirk's counsel's fee to the significantly lower fee which is customarily charged.

#### 4. THE RESULT OBTAINED.

The Trial Court seriously erred in awarding attorney fees and costs to Ms. Kirk when considering the result obtained. As noted above, this Court in *Rasband, Bell, Morgan, Houmont, Kerr, and Sorrensen*, specifically stated that "the result obtained" is a major deciding factor in the determination of whether or not attorneys fees are reasonable.

The major issue between the parties in this matter decided at trial was the division of property. In Paragraph 9 of its findings the Trial Court noted, "The defendant asserts that...she is entitled to one-half of all the properties that were designated to be included in the Kirk Family Trust."

In Defendant's Exhibit 12, "Proposed distribution of assets and Liabilities," Ms. Kirk claimed that she was entitled to the sum of \$242,493 from Mr. Kirk to equalize the parties' values and realize her claim of one-half of the parties' property. The Trial Court firmly rejected her claim, noting that both parties' premarital property had been kept separate during their marriage and had never been commingled in a prenuptial agreement by way of the Trust, which Trust was created solely as an estate planning device.

By far the majority of the discovery, pre-trial preparation, testimony - including supporting exhibits, and the trial memoranda, dealt with Ms. Kirk's claim for a sum equal to one-half of the parties' property. An inspection of both parties' Trial Memoranda and Ms. Kirk's Reply Memorandum, the trial exhibits, and the transcripts, support that approximately 85% of Ms. Kirk's fees were likely consumed in advancing her property division claim, the issue upon which she failed to obtain the result sought.

The Trial Memoranda are a good representation of what percentage of time was consumed by the division of property issue. An inspection of Mr. Kirk's Memorandum (R.O.A. 60-81) show 16 pages (4-19) of the 19 pages (4-22) under the Argument section addressing the property division issue. Ms. Kirk's Trial Memorandum (R.O.A. 114-124 of Case No. 92490 1796) shows 6 pages (3-8) of the 8 pages (3-10) under the Argument section addressing the property division issue. Ms. Kirk's Reply Memorandum (R.O.A. 84-89) shows all 6 of its 6 pages addressing the

same issue. Of the 33 pages contained under the Argument sections in the three Memoranda, 28 pages were consumed with addressing the property division issue. The 28 pages addressing solely this issue equals 85% of the 33 pages.

The Transcript of the summary argument held after trial on March 23, 1993 is also illustrative of the same percentage. Counsel argued the property division, alimony and attorney fee issues on pages 3 - 57 therein, 55 pages in total. The property division issue consumes 45 pages, (3-27, 33-43, and 49-47) while the alimony and attorney fee issues take up only 10 pages (28-32 and 44-48). The 45 pages on property division equals 82% of the 55 page total.

Yet, notwithstanding the Trial Court's agreement with Mr. Kirk on this major issue which consumed roughly 80% of the fees incurred in the proceedings below, Paragraph 51 of the Trial Court's findings state,

Defendant seeks an award of attorney's fees from plaintiff on the basis that she is in need of assistance financially to meet those attorney's fee obligations and that the plaintiff has the ability to assist her in connection therewith. The Court is satisfied that the plaintiff ought to be required to assist the defendant in meeting her attorney's fee obligation not only for the reasons suggested by the defendant, that is her need and the plaintiff's ability to pay, but based upon the unreasonable approach that plaintiff has taken to the resolution of this case. (emphasis added)

Mr. Kirk contended since the inception of this case that it was reasonable and appropriate that each party have awarded to them the property they each owned prior to their marriage. He argued that all their premarital property had been kept separate during the marriage. More than 80% of the underlying proceedings dealt with discovery, trial preparation, and testimony relating to the property division issue. The Trial Court agreed with Mr. Kirk. He prevailed on the major disputed issue in this matter. Clearly the majority of the time spent by Ms. Kirk's counsel in disputing this issue resulted in a denial of the relief she sought.

Ms. Kirk should not be awarded attorneys fees which were accumulated by spending more than 80% of attorney/paralegal time on an unmerited claim. The Trial Court erred in finding Mr. Kirk to be unreasonable when he prevailed on the major issue before the Court. The Trial Court further erred in awarding attorneys fees on the basis of Mr. Kirk purported "unreasonable approach". The result obtained on the

major issue at trial does not merit an award of attorney fees to Ms. Kirk. Ms. Kirk's unreasonable approach to the property division issue likely cost Mr. Kirk more than 80% of his attorney fees which he otherwise would not have incurred.

C. THE MERE PROFFER BY MS. KIRK'S COUNSEL AS TO HER ATTORNEYS FEES AND COSTS IS INSUFFICIENT TO SUPPORT THE EVIDENCE REQUIRED ON THE FOUR ABOVE FACTORS.

Instead of providing evidence in relation to the above four factors, Ms. Kirk's counsel simply made a "proffer on attorney fees" submitting Defendant's Exhibit 34, herein Exhibit "I", as evidence thereof. (TV2:208 L4 to 210 L11) When asked by the Trial Court if Mr. Kirk's counsel had "[a]ny abjection to a proffer?" he responded, "I don't have any objection to the proffer with the usual admonishment to the Court that by accepting the proffer, we do not admit that Mr. Kirk should be obligated for the same." The Trial Court then replied, "I take that as a given." Thus, the evidence of Ms. Kirk's attorney fees is clearly inadequate under *Sorrensen* concerning proffered testimony on such fees.

Without the required evidence in support of the four specific factors addressed above, the proffer is insufficient to support reasonableness under *Sorrensen* and the other cases cited above requiring such evidence. Ms. Kirk's counsel's mere proffer that "the number of hours invested in this case were appropriate and reasonable" (TV2:209 L9-10), does not make them so. Any attorney would certainly proffer a belief that the time spent on every case was reasonable. Ms. Kirk's counsel's mere proffer as to fee reasonableness is inadequate, just as the mere testimony, without supporting evidence as to expenses by a spouse requesting alimony, is inadequate under *Baker v. Baker*, 866 P.2d 540, 546-7 (Ut. App. 1993) discussed above on the alimony issue.

D. THE TRIAL COURT ERRED IN AWARDING MS. KIRK'S FEES TWICE.

the Trial Court mistakenly counted Ms. Kirk's costs twice. Such error shows the undue hastiness in which the feeble evidence contained in Exhibit "I" herein was accepted. The Exhibit states, "Total Costs Advanced: \$592.47". That total is also included in the "Total Services and Costs: \$11,229.97". At the bottom of the Exhibit it provides, "Total Balance Due: \$6,565.05". The balance includes what Ms. Kirk

owed on both attorney fees and costs. Yet, the Trial Court obviously misinterpreted this Exhibit and awarded the costs as though they were in addition to the Total Balance Due of \$6565.05. The Trial Court's findings in Paragraph 52 state,

The Court determines those attorney's fees to be \$6565, the amount still due Mr. Dart after partial payment by the defendant herein. The Court further determines that the defendant is entitled to reimbursement of her legitimate costs incurred in this matter and as reflected in the exhibit attached to [actually included in] defendant's Exhibit D-34, in the total amount of \$592.47.

The above finding obviously counted Ms. Kirk's costs twice, once in the Total Balance Due and once separately. The Trial Court erred in counting Ms. Kirk's costs in the double fashion.

*Summary on attorneys fees and costs*

The award of attorney fees and costs is unjustified. Ms. Kirk did not have need of the award where she was able to a) meet all her alleged expenses including her unsubstantiated \$685 per month shortfall, and b) pay her counsel an average of \$517.21 per month during the nine month trial proceeding, and c) increase her bank balance by \$2,588.51 to a total of almost \$8,000. Her bank balance is obviously sufficient to meet the \$6,565 balance owed to her counsel. She also has close to \$60,000.00 equity available in her condominium to satisfy her fees.

Further, the attorney fee and cost award is unjustified where she failed to show the reasonableness thereof under the required factors of 1) the difficulty of the litigation, 2) the necessity and reasonableness of the number of hours spent on the case, 3) the fee customarily charged in the locality for similar services, and particularly 4) the result obtained. Also, the mere proffer by Ms. Kirk's counsel is insufficient to support the necessary evidence on the aforesaid four factors.

Ms. Kirk likely incurred at least 80% of her attorney fees arguing her unmerited property division claim. Mr. Kirk likely incurred an equal percentage of his attorney fees in defending against her unmerited claim. The Trial Court agreed with Mr. Kirk's position concerning the property division issue, which issue consumed by far the majority of both parties' attorney fee expenses for discovery, trial preparation and the trial itself.

The Trial Court incorrectly included Ms. Kirk's \$592.47 in costs twice -- once separately and once included in the attorney fee award.

*Thus, where neither Ms. Kirk's need for attorneys fees and costs, nor the reasonableness of such fees and costs were shown, the award of the fees and costs, with the costs counted twice, is clearly erroneous and should be reversed and vacated. In the alternative, the award should be reversed and remanded to assess her need in light of the \$1,200 discrepancy, her bank balance, and her condominium equity, along with instruction to assess beyond a mere proffer the four factors discussed above.*

### CONCLUSION

This Court should a) reverse and vacate because the findings are clearly erroneous, or b) reverse and remand the award of alimony, attorneys fees, and costs as requested in the *italics* portion at the conclusion of each section above.

The alimony award should be reversed and vacated, or reversed and remanded, on the following factors:

- a) Ms. Kirk's need,
- b) Ms. Kirk's ability to provide sufficient income for herself,
- c) Mr. Kirk's ability to pay,
- d) The replacement theory is error of law,
- e) Enforcement of the purported oral promise is contrary to the Statute of Frauds,
- f) The parties never established nor experienced a combined standard of living, and
- g) Adequate consideration of the brevity of the marriage.

The award of attorneys fees and costs should be reversed and vacated, or reversed and remanded, on the following factors:

- a) Ms. Kirk's need,
- b) Ms. Kirk's ability to pay,
- c) Mr. Kirk's ability to pay,
- d) The reasonableness of the fees and costs considering:
  - 1) The difficulty of the litigation,

- 2) The necessity and reasonableness of the number of hours spent on the case,
- 3) The fee customarily charged in the locality for similar services, and
- 4) The result obtained,
- e) The mistake of awarding Ms. Kirk's fees twice.

Respectfully submitted this \_\_\_\_\_ day of June, 1994.

---

Jimi Mitsunaga  
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_\_ day of June, 1994, I mailed by U.S. mail, postage prepaid, two copies of the foregoing Brief of Appellant to the following:

Bert L. Dart, #818  
DART, ADAMSON & DONOVAN  
Attorneys for Defendant/Appellee  
310 South Main Street, #1330  
Salt Lake City, Utah 84101



## ADDENDUM

**EXHIBIT "A"**

**25-5-4. Certain agreements void unless written and signed.**

The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement:

- (1) every agreement that by its terms is not to be performed within one year from the making of the agreement;
- (2) every promise to answer for the debt, default, or miscarriage of another;
- (3) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry;
- (4) every special promise made by an executor or administrator to answer in damages for the liabilities, or to pay the debts, of the testator or intestate out of his own estate;
- (5) every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation;
- (6) every credit agreement.

(a) As used in Subsection (6):

(i) "Credit agreement" means an agreement by a financial institution to lend, delay, or otherwise modify an obligation to repay money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation. "Credit agreement" does not include the usual and customary agreements related to deposit accounts or overdrafts or other terms associated with deposit accounts or overdrafts.

(ii) "Creditor" means a financial institution which extends credit or extends a financial accommodation under a credit agreement with a debtor.

(iii) "Debtor" means a person who seeks or obtains credit, or seeks or receives a financial accommodation, under a credit agreement with a financial institution.

(iv) "Financial institution" means a state or federally chartered bank, savings and loan association, savings bank, industrial loan corporation, credit union, or any other institution under the jurisdiction of the commissioner of Financial Institutions as provided in Title 7, Financial Institutions Act of 1981.

(b) A debtor or a creditor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the party against whom enforcement of the agreement would be sought. For purposes of this act, a signed application constitutes a signed agreement, if the creditor does not customarily obtain an additional signed agreement

from the debtor when granting the application.

(c) The following actions do not give rise to a claim that a credit agreement is created, unless the agreement satisfies the requirements of Subsection (b):

(i) the rendering of financial advice by a creditor to a debtor;

(ii) the consultation by a creditor with a debtor; or

(iii) the creation for any purpose between a creditor and a debtor of fiduciary or other business relationships

(d) Each credit agreement shall contain a clearly stated typewritten or printed provision giving notice to the debtor that the written agreement is a final expression of the agreement between the creditor and debtor and the written agreement may not be contradicted by evidence of any alleged oral agreement. The provision does not have to be on the promissory note or other evidence of indebtedness that is tied to the credit agreement.

1989

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

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

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

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

(4) Orders entered under this section prior to entry of the final order or judgment may be amended dur-

**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.

**EXHIBIT "B"**

MAY - 4 1993

SALT LAKE COUNTY  
*Evelyn Thompson*  
Clerk

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

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OTIS B. KIRK, JR.,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 924901796
vs.	:	
PEGGIE M. KIRK	:	
Defendant.	:	

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The above-referenced divorce action was before the Court in consolidated case number 924901709. Prior to the trial in this matter, the Court consolidated a companion case where the plaintiff had filed for divorce in number 924901796, treating the second filed lawsuit as a counterclaim in the original surviving action. Following the taking of evidence in this matter and closing arguments, the matter was submitted to the Court for decision. The Court took the matter under advisement to consider the testimony offered by the parties and their witnesses, the arguments of counsel both oral and written, and the legal authorities submitted by the parties in support of their respective positions. The Court has considered those matters, along with the documentary evidence received during the course of the trial, and being fully advised, enters the following Memorandum Decision.

00091

INTRODUCTORY STATEMENT

This is a marriage of relatively short duration, approximately one year. Both the plaintiff and the defendant had been married before the instant marriage. Plaintiff Otis B. Kirk, Jr. had, a short time before this marriage, lost his former wife as a result of her death. The defendant Peggie M. Kirk had been a friend of the plaintiff's deceased wife prior to and at the time of her death. At the time of the instant marriage, the defendant was divorced from her prior husband and was receiving permanent alimony in the sum of \$800.00 per month.

The plaintiff, after the death of his first wife, actively courted the defendant. It is undisputed that the plaintiff's courting of the defendant was aggressive. The defendant was reluctant to remarry, being concerned regarding her financial status. Both the plaintiff and the defendant are in their mid-60's, and neither is actively employed. The defendant works part-time on an irregular basis, earning little income. The plaintiff has substantial available income from his various premarital investments and retirement programs.

Prior to the marriage the evidence supports the finding and the Court does find that the defendant while certainly not wealthy,



was financially comfortable and reasonably secure relating to her financial matters.

The evidence is clear and the Court finds that when confronted with the defendant's reluctance to remarry for the reasons stated above, the plaintiff promised the defendant that she would not need to worry financially, that he would "take care of her" in a financial setting. In support of and to encourage the defendant to marry the plaintiff, the plaintiff revealed to the defendant his substantial financial holdings. On continued pressure to enter into a marriage relationship, the defendant ultimately was satisfied based upon the plaintiff's representations that remarriage at her stage of life under the circumstances then existing would not effect her financial stability, even though she would lose her permanent alimony. Based upon the foregoing, she agreed to marry the plaintiff.

Following marriage, the parties lived in the defendant's apartment while the plaintiff remodeled his residence where he and his first wife lived for many years. After completion of the remodeling, the parties moved in to the remodeled residence and following a period of time their relationship deteriorated to a point of separation.

The position of the plaintiff is that all of the properties that he owned, both real, personal and financial accounts, are his sole and separate property and should be returned to him in this divorce proceeding. The plaintiff, while acknowledging that he made representations and promises to the defendant to induce her to enter into the marriage relationship, resists the defendant's claims that she is entitled to share in his premarital property. In addition to the plaintiff's position that all of the properties, real, personal and financial accounts that he either owned or inherited prior to his marriage to the defendant should be returned to him, the plaintiff also asserts that the defendant is not entitled to alimony, nor any of the other monetary considerations that she has requested, and rejects any suggestion that he should assist her in attorney's fees.

The defendant asserts that as a result of the promises of the plaintiff to induce her to enter into the marriage relationship and as a result of the creation of the Kirk Family Trust, an exhibit in this matter, that she is entitled to one-half of all the properties that were designated to be included in the Kirk Family Trust. Some of the properties designated in the Kirk Family Trust were actually transferred to the Trust, some were not.

The defendant further asserts in the alternative that should the property of the plaintiff be determined by this Court to be premarital and not subject to division, that she is entitled to substantial alimony based upon the promises and representations of the plaintiff in view of what she gave up in the form of permanent alimony by agreeing to marry the plaintiff, as well as on the basis of need. The defendant also seeks miscellaneous expenses and sums that she attributes to the plaintiff's insistence that she enter into the marital relationship. The defendant requests an award of attorney's fees as well.

#### RESIDENCY AND GROUNDS

Based upon the testimony of the parties, the Court is satisfied that the requirements of residency have been established and that there exists sufficient grounds to terminate this marriage on the basis of irreconcilable differences. The divorce will be final upon the signing and entry of the final divorce Decree in this matter.

#### PROPERTY DIVISION

With the exception of a condominium in Arizona and other minor premarital property assets, the bulk of the real property and

financial assets in dispute in these proceedings were acquired by the plaintiff prior to the marriage between he and the defendant. After considering the relevant authorities, the written and oral arguments of the parties, the Court is satisfied, using the appropriate criteria announced by the appellate courts of this state, that the property held by the plaintiff, both real and personal, as well as the property held by the defendant, both real and personal, prior to the entry of the marriage ought to be returned to each as their sole and separate property.

The Court is satisfied that to the extent the defendant makes claim against the defendant's premarital property, that the inclusion of some of the plaintiff's premarital property and the suggestion that a substantial additional amount would be included in the Kirk Family Trust does not change the character of the property from premarital or inherited property to that of joint property. Clearly, the plaintiff's property was accumulated either through premarital efforts or inheritance prior to his marriage to the defendant, as was the defendant's premarital properties. The Court is constrained to reject the proposition asserted by the defendant that the establishment of the Kirk Family Trust after the marriage constituted a prenuptial agreement for dissolution of the parties' assets should a divorce occur. To the contrary, the Court

is satisfied that the establishment of the Kirk Family Trust was an estate planning device and so contemplated by the parties.

It does not appear to the Court and the Court does not find that there was ever a contemplated gift between the parties of their premarital assets, even though some of those assets of the plaintiff and a majority of the assets of the defendant were transferred into the aforementioned Trust. The Trust did not contemplate divorce, but rather provided for the respective parties should one predecease the other. For the reasons suggested by the plaintiff in his written materials, as well as those suggested by his counsel in oral argument, the Court rejects the position asserted by the defendant that she is entitled to one-half of the properties that were included in or designated to be included in the Kirk Family Trust.

Any properties that have been transferred into the Kirk Family Trust are to be returned to the original owner to be held as that party's sole and separate property, based upon the determination of this Court that those properties are premarital and not subject to distribution in this divorce.

#### ALIMONY

While the Court has determined that the plaintiff's promises to the defendant are not sufficient to allow her to assert a legal

claim against the plaintiff's premarital properties, the Court is satisfied that the plaintiff's promises which induced the defendant to give up financial security are enforceable. The plaintiff made promises of financial security to the defendant to induce her to enter into the marriage relationship. The Court is satisfied that she would not have entered into the marital relationship except for the promises of the plaintiff that she would be reasonably financially secure should she agree to give up her sources of income in the form of permanent alimony from a prior spouse and enter into the marital relationship with the plaintiff. The plaintiff made a promise which he acknowledges. The promise was significant as far as the defendant was concerned, and the plaintiff ought to be held to his promise in all good conscience and in equity. This Court therefore determines that the defendant is entitled to permanent alimony from the plaintiff even though the marriage was of short duration.

In considering the amount of permanent alimony that should be paid to the defendant, the Court has taken into account the limited ability of the defendant to earn income, her age, and her needs, as well as the style in which the parties lived during the course of the marriage, even though it was short. The defendant gave up a comfortable apartment, many of her personal pieces of property at

the insistence of the plaintiff, and of course gave up her permanent alimony income from her former husband. She has submitted expenses which she will be required to expend ongoing, which the Court finds reasonable. The defendant does, however, have income from social security which she did not have prior to the marriage.

The plaintiff has substantial ability to assist the defendant in meeting her monthly expenses, and to provide for her financial well-being in accordance with his premarital promises. Over the years, the plaintiff has acquired substantial financial assets in the form of investments and retirements. He owns or is a mortgage holder on real properties. His own personal expenses are minimal by his own choice. Further by his own choice, the plaintiff does not draw against his retirement or other assets, even though he has the ability to do so. It is clear to the Court that the plaintiff has the financial ability to assist the defendant in the form of permanent alimony.

Based upon the needs of the defendant and the financial abilities of the plaintiff, also based upon what the defendant gave up when entering into the marriage, and considering the promises made to the defendant by the plaintiff, and the reasonable needs of

the defendant, the Court is satisfied that an ongoing alimony requirement in the sum of \$1,000.00 per month is necessary and reasonable. Alimony will continue until such time as it is terminated under the usual and customary circumstances.

#### MISCELLANEOUS MATTERS

The defendant by way of Exhibit 27 and other testimony has suggested that as a result of the demands of the plaintiff, she disposed of certain property that she owned and enjoyed prior to the marriage. The defendant has assigned a value to the property items listed on Exhibit 27 which, with the exception of the moving costs of separation, the Court finds are not the fair market value of the property.

The personal properties identified, such as the washer and dryer, antique piano, dining room set, art work, and the sewing machine, were all given as gifts to the parties' children, and the amounts by way of value placed upon the individual pieces of property, with the exception of perhaps the antique piano, are not reflective of their current value. While it is undisputed that these items of personal property were given by the defendant to her children and the plaintiff's son at the time of the move into the remodeled home, the Court is unable to determine any legal or



equitable basis upon which the plaintiff ought to pay for the value of those properties. That would include the washer and dryer which was given to the plaintiff's son. In addition, the Court is unable to find any legal or equitable basis upon which the plaintiff should be required to reimburse the defendant for moving costs, and accordingly the sums sought by the defendant from the plaintiff as represented on Exhibit 27 are rejected by the Court.

The defendant has requested certain items to be returned to her as listed on Exhibit 26. The plaintiff resists the return of some of the items. The Court is satisfied that to the extent that items 1 through 21 on Exhibit 26 are in the plaintiff's possession, they should be returned to the defendant forthwith.

The plaintiff has suggested that he paid on behalf of the defendant certain sums prior to the marriage, and identified those in his testimony as medical treatment for the defendant, paying off defendant's obligation to Chase Visa, a medical bill at Cottonwood Center, and the purchase of a wedding ring for the defendant. The Court finds those to have been gifts from the plaintiff to the defendant, and to the extent that the plaintiff seeks reimbursement or credit in some other fashion for those amounts, that claim is rejected by the Court.

The defendant seeks an award of attorney's fees from the plaintiff on the basis that she is in need of assistance financially to meet those attorney's fee obligations, and that the plaintiff has the ability to assist her in connection therewith. The Court is satisfied that the plaintiff ought to be required to assist the defendant in meeting her attorney's fee obligation, not only for the reasons suggested by the defendant, that is, her need and the plaintiff's ability to pay, but based upon the unreasonable approach that the plaintiff has taken to the resolution of this case.

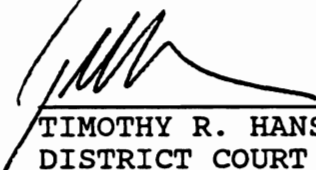
Plaintiff's suggestion that the parties should be required to merely take what they brought into the marriage and walk away with no further financial obligations between them is disingenuous. This is particularly true in view of the aggressive nature of the courting of the defendant by the plaintiff, and his promises to her to induce her to enter into the marital relationship. While fault for the deterioration of the marriage is not an issue in this case, the Court is satisfied that for whatever reasons only known to the plaintiff, he apparently had second thoughts after the marriage regarding the propriety of his original conduct, and that that for the most part caused the dissolution of the relationship between the parties.

For those reasons, together with those suggested by the defendant, the Court is satisfied that the attorney's fees testified to by Mr. Dart are reasonable and were necessarily incurred in this case, and that the plaintiff should be required to pay to the defendant for the use and benefit of her attorney the sums proffered by Mr. Dart at the conclusion of the evidence in this case. The Court determines those attorney's fees to be \$6,565.00, the amount still due Mr. Dart after partial payment by the defendant herein. The Court further determines that the defendant is entitled to reimbursement of her legitimate costs incurred in this matter.

The parties' counsel are directed to collaborate in preparing Findings of Fact and Conclusions of Law that would put into effect the decisions of this Court as contained in this Memorandum Decision. The Court would request that Mr. Dart take the responsibility for the initial draft, to be supplemented by Mr. Mitsunaga, particularly on the issue where Mr. Mitsunaga's client has prevailed, to wit: the issue of premarital property. Once the documents have been prepared and approved as to form, the Court would request that the Findings of Fact, Conclusions of Law, and the final Decree be submitted to the Court for its review and signature and filing as may be appropriate.

To the extent that it is not otherwise indicated herein, the Court would require in the final papers that each party be required to execute the necessary documents of title or other evidence of ownership necessary to return the properties, both real and personal, to their individual owners. That would be a requirement imposed by the Court on the parties both in their individual capacity, as well as their capacity of trustee under the Kirk Family Trust.

Dated this 4 day of May, 1993.

  
TIMOTHY R. HANSON  
DISTRICT COURT JUDGE

**ATTEST**

By   
\_\_\_\_\_  
Deputy Clerk

Deputy Clerk

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 4 day of May, 1993:

Jimi Mitsunaga  
Attorney for Plaintiff  
731 E. South Temple  
Salt Lake City, Utah 84102

B. L. Dart  
Attorney for Defendant  
310 S. Main, Suite 1330  
Salt Lake City, Utah 84101

*Evelyn Thompson*

---

**EXHIBIT "C"**

01.1 18 1993

By *[Signature]* 10/6/93  
SALT LAKE COUNTY  
Deputy Clerk

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

---ooo000ooo---

OTIS B. KIRK, JR.,	:	
Plaintiff,	:	FINDINGS OF FACT
	:	AND
v.	:	CONCLUSIONS OF LAW
PEGGIE M. KIRK,	:	Civil No. 924901796DA
Defendant.	:	Judge Timothy R. Hanson

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The above-referenced divorce action was before the Court consolidated with case No. 92-4901709. Prior to the divorce in this matter the Court consolidated a companion case where the plaintiff had filed for divorce in case No. 92-4901796, treating the second filed law suit as a counterclaim in the original surviving action.

Trial was held on the 9th day of March, 1993, with closing argument on the 23rd day of March, 1993. Following the taking of evidence in this matter and closing arguments the matter was submitted to the Court for decision. The Court took this matter under advisement to consider the testimony offered by the parties and their witnesses, the arguments of counsel both oral and written and the legal authorities submitted by the parties in support of their respective positions. The Court has considered those matters along with the documentary evidence received during the course of the trial and being fully advised enters the following:

00102

### FINDINGS OF FACT

1. Both plaintiff and defendant are residents of Salt Lake County, State of Utah, and have been for more than three months before the filing of this action and the Court is satisfied that the requirements of residency have been established.

2. Plaintiff and defendant were married to each other in Jackson, Wyoming, on the 2nd day of June, 1991, and since that time have been husband and wife.

3. Both parties testified to disagreements and arguments and a growing apart which resulted in their differences becoming irreconcilable. Each of the parties is entitled to a divorce on their respective Complaint and Counterclaim on the grounds of irreconcilable differences, to become final upon signing and entry.

4. No children have been born as issue of this marriage and none are expected and there are no issues of child custody or child support.

5. This is a marriage of relatively short duration, approximately one year. Both the plaintiff and the defendant had been married before the instant marriage. Plaintiff, Otis B. Kirk, Jr., had a short time before this marriage lost his former wife as a result of her death. The defendant, Peggie M. Kirk, had been a friend of the plaintiff's deceased wife prior to and at the time of death. At the time of the instant marriage the defendant was divorced from her prior husband and was receiving permanent alimony in the sum of \$200 a week, or \$860 per month.



The plaintiff after the death of his first wife actively courted the defendant. It is undisputed that the plaintiff's courting of the defendant was aggressive. The defendant was reluctant to marry being concerned regarding her financial status. Both the plaintiff and the defendant are in their mid-60's and neither is actively employed in any substantial way. The defendant works part-time on an irregular basis earning little income. The plaintiff has substantial available income from his various premarital investments and retirement programs.

Prior to the marriage the evidence supports the finding and the Court does find that defendant while certainly not wealthy, was financially comfortable and reasonably secure relating to her financial matters.

The evidence is clear and the Court finds that when confronted with the defendant's reluctance to remarry for the reasons stated above, that plaintiff promised the defendant that she would not need to worry financially, that he would take care of her in a financial setting. This promise was made under circumstances where she had shared with him her financial information and provided him with her tax returns going back several years. In support of and to encourage the defendant to marry the plaintiff, the plaintiff revealed to the defendant his substantial financial holdings. Both parties testified that just prior to the marriage they discussed and agreed to put all of their property into a trust for their mutual benefit so that what was his was hers and what was hers was his. On continued pressure to enter

into a marriage relationship, the defendant ultimately was satisfied based upon the plaintiff's representations that marriage at her stage in life under the circumstances then existing would not effect her financial stability even though she would lose her permanent alimony. Based on the foregoing, she agreed to marry the plaintiff.

6. Shortly following the parties' marriage on June 2, 1991, they entered into the execution of a Trust Agreement, introduced in evidence as Exhibit P-1. Schedule "A" of the Trust described the assets conveyed into the Trust which essentially included all of the assets of the parties. Following the execution of the Trust Agreement, some of the properties, including all of the real properties of the parties, the plaintiff's checking account with Valley Bank and Trust, account no. 02-30406-65 and a Franklin U.S. Government Securities Fund, account no. 10178837808 were transferred into the Trust. While plaintiff promised that he would place the remaining assets into the Trust, those transfers never occurred as the plaintiff testified that he had not had time to do it.

7. After the marriage, the parties lived in the defendant's apartment while the plaintiff remodeled his residence where he and his first wife had lived for many years. Defendant was actively involved in the remodeling process in providing color coordination advice and designer advice and some physical labor. After completion of the remodeling, the parties moved into the

remodeled residence and following a period of time their relationship deteriorated to the point of separation.

8. The position of the plaintiff is that all of the properties that he owned, both real, personal and financial accounts, are his sole and separate property and should be returned to him in this divorce proceeding. The plaintiff, while acknowledging that he made representations and promises to the defendant to induce her to enter into the marriage relationship, resists the defendant's claim that she is entitled to share in his premarital property. In addition to the plaintiff's position that all of the properties, inherited prior to his marriage to the defendant should be returned to him, the plaintiff also asserts that the defendant is not entitled to alimony, nor any of the other monetary considerations that she has requested, and rejects any suggestion that he should assist her in attorney's fees.

9. The defendant asserts that as a result of the promises of the plaintiff to induce her to enter into the marriage relationship and as a result of the creation of the Kirk Family Trust, an exhibit in this matter, that she is entitled to one-half of all the properties that were designated to be included in the Kirk Family Trust. Some of the properties designated in the Kirk Family Trust were actually transferred to the Trust, some were not.

The defendant further asserts in the alternative that should the property of the plaintiff be determined by this Court to be premarital and not subject to division, that she is entitled to substantial alimony based upon the promises and

representations of the plaintiff in view of what she gave up in the form of permanent alimony by agreeing to marry the plaintiff, as well as on the basis of need. The defendant also seeks miscellaneous expenses and sums that she attributes to the plaintiff's insistence that she enter into the marital relationship. The defendant requests an award of attorney's fees as well.

10. The plaintiff has acquired various and sundry items of property prior to the date of marriage. The following property, real and personal are:

- A. Residence: 3518 2000 East, Salt Lake City, Utah.  
This is a resident structure with 1.25 acres.  
It was purchased by the plaintiff and his deceased wife in 1956 and fully paid off in 1980. The property is now encumbered by a construction loan for approximately \$59,000.00.
- B. Strip of land: This is a one foot wide protection strip granted by Salt Lake County and is adjacent and contiguous to the lot upon which the residence (paragraph 22(a) is situated and was purchased at the same time.
- C. Lewis contract: This is a real estate contract on the sale of real property acquired by the plaintiff and his deceased wife in 1966. The real estate contract was entered into December 5, 1980.

D. Pensions and retirement (Monthly):

(Legend: I, inherited from deceased wife, PMS,  
premarital source)

1.	Carpenter Union P/M/S	\$ 64.00
2.	Boise Cascade P/M/S	676.00
3.	U.S. West I	423.00

E. Dividends - Interest (Monthly):

1.	Mountain American CU I	2.16
2.	Putnam IRA P/M/S	158.65
3.	Boise Cascade Supplemental Savings	631.40
4.	U.S. Government Security (Jt)	465.00
5.	Alliance Government Reserve (Jt)	2.30
6.	No. american Service Trusts	162.50
7.	Thomson Growth Fund (Jt)	0
8.	AT&T I	4.04
9.	Ameritech I	8.20
10.	Bell Atlantic I	11.34
11.	Bell South I	7.42
12.	NYNEX	11.37
13.	Pactel I	7.42
14.	South West Bell	7.66
15.	U.S. West I	41.38

F. Social Security:

1.	Social Security P/M/S	869.00
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G. Valley bank checking P/M/S

This is the only checking account used by the plaintiff before and after the marriage. Two transfers were made by the plaintiff into this checking account:

1. December 7, 1990 - monies from deceased wife's retirement \$20,176.00
2. Feb. 1991 - monies from deceased wife's retirement \$14,269.66

H. Retirements, pensions & Stock (Exhibit 9):

1. Mountain Credit Union I 650.00
2. Putnam IRA P/M/S 23,432.98
3. Putnam IRA Cash account
4. Boise Cascade Supplemental Retirement JT 96,943.00
5. Franklin U.S. Government Security Fund P/M/S
6. U.S. government Securities - North Am Service Trust P/M/S
7. Alliance Government Reserve P/M/S
8. Mainstay Family of Funds P/M/S 31,745.00
9. Thomson Fund
10. AT&T Stock I 35.6130 shares
11. Ameritech I 26.440 "
12. Bell Atlantic I 51.0970 "
13. Bell South I 39.1420 "
14. NYNEX 27.6860 "

15.	Pactel I	40.7050	"
16.	Southwest Bell I	29.3840	"
17.	U.S. West I	37.3090	"
18.	U.S. West I	68.000	"
19.	U.S. West I	252.00	"

I. Vehicles: (Inherited and pre-marital)

1. 1980 Chevrolet
2. 1981 Toyota
3. 1968 Nomad Trailer
4. 1975 Yamaha motorcycle

11. Defendant's Property: It is equally without dispute and uncontroverted that Ms. Kirk had the following pre-marital property.

1. Condominium 7018 No. Barbados  
in Phoenix, Arizona  
Market Value \$80,000.00
2. Household furniture and fixtures
3. 1983 Lincoln Continental Mark VI
4. First Interstate, checking account  
#21-28727-1 66.53
5. First Interstate checking  
#28-16407-7 Balance 9,537.00  
"Peggie M. Kirk"  
"Otis B. Kirk"

12. The aforesaid properties described in Paragraph 10 and Paragraph 11 were acquired by each as indicated prior to the instant marriage and without any contribution of either spouse to the other and absent any efforts of either party towards accumulation or enhancement of the same.

13. The pre-marital property ought to be returned to each as his or her sole and separate property.

14. The trust Schedule A recites and describes the real estate which was placed in the Trust. Thus, the residence located in Salt Lake County, the Lewis Contract, Condominium in Maripose County, Arizona, and small protection strip of land was so placed.

15. Schedule A continues on page 2 to describe the accounts place in the Trust. Of the total accounts listed, only two accounts were, in fact, placed into the Trust by executing the necessary documents to convert the accounts from the plaintiff's name of plaintiff's name and former wife's name to the Kirk Family Trust.

16. These accounts were money market checking account, Valley Bank & Trust, Account #02-30-406-65 and Franklin U.S. Government Securities Fund Investment account No. 10178837808.

17. The remaining accounts listed in Schedule A, page 2, were not placed into the Trust due to the plaintiff's preoccupation with remodeling tasks.

18. The transfer of the real property by either party and the transfer of the accounts by either party into the trust does not change the character of the pre-marital or inherited property to that of joint property.

19. The accumulation of the plaintiff's property were through the pre-marital efforts of himself and his deceased wife prior to the instant marriage, as was the defendant's pre-marital property.



20. The establishment of the Kirk Family Trust is not and cannot be construed as a pre-nuptial agreement which would purportedly govern the rights of the parties should a divorce occur.

21. The Kirk Family Trust was an estate planning device and was so contemplated by the parties.

22. That the assets transferred in part by the plaintiff and the majority of the assets of the defendant was never contemplated as a gift between the parties of his or her pre-marital assets to the other.

23. The Trust did not contemplate divorce but rather provided for the respective parties should one predecease the other.

24. The placement of defendant's name on the plaintiff's Valley Bank account No. 913213945 as a joint signatory does not amount to co-mingling of those funds. The same holds true on the placing of the plaintiff's name on the defendant's checking account at First Interstate No. 28-16407-7.

25. The adding of each other's names to his or her separate bank account was in form, not substance, i.e.: each party continued to treat his or her account as his or her separate incomes and withdrawals for their separate expenses.

26. This treatment is consistent with the fact that each continued to treat his or her pre-marital bank accounts as they had prior to the marriage.

27. The fact that plaintiff made payments for the majority of the party's joint living expenses from the Valley Bank does not alter the practice and interest of the parties to keep and maintain his or her bank account separate and apart.

28. The defendant contributed nothing to the day to day living expenses from her First Interstate Account.

29. There was no co-mingling of the parties separate incomes.

30. The placement of the other party's names by either party does not establish that a gift was intended by the transferor to the transferee.

31. There was no intent of either party to divest himself or herself of all dominion and control to the other.

32. Transfer to the Kirk Family Trust was not a transfer to the other party as an individual.

33. Both parties were recipients as a designated trustees governed by the terms of the Trust Agreement. It was an interest which would become vested upon the death of either party.

34. The Trust Agreement, by its terms, is revocable by either party, although neither had done so at the time of the divorce.

35. The defendant was under a temporary restraining order not to transfer any of the marital assets.

36. All property that have been transferred into the Kirk Family Trust should be returned to the original owners to be held as his or her sole and separate property.

37. While the Court has determined that the plaintiff's promises to the defendant are not sufficient to allow her to assert a legal claim against the plaintiff's premarital properties, the Court is satisfied that the plaintiff's promises which induced the defendant to give up financial security are enforceable. The plaintiff made promises of financial security to the defendant to induce her to enter into the marriage relationship. The Court is satisfied that she would not have entered into the marital relationship except for the promises of the plaintiff that she would be reasonably financially secure should she agree to give up her sources of income in the form of permanent alimony from a prior spouse and enter into the marital relationship with the plaintiff. The plaintiff made a promise which he acknowledges. The promise is significant as far as the defendant was concerned, and the plaintiff ought to be held to his promise in all good conscience and in equity. In addition, defendant is in need of alimony. Her resources are not sufficient to meet that need and plaintiff is financially capable of providing alimony to defendant as hereinafter set forth. Furthermore, it does not appear that defendant due to her current circumstances and age will be able to rehabilitate herself so that in the foreseeable future she will be capable of meeting her own financial needs. This Court, therefore, determines that defendant is entitled to permanent alimony from plaintiff even though the marriage was of short duration.

In considering the amount of permanent alimony that should be paid to the plaintiff, the Court has taken into account

the limited ability of the defendant to earn income, her age and her needs as well as the style in which the parties lived during the course of the marriage, even though it was short. The defendant gave up a comfortable apartment, many of her personal pieces of property at the insistence of the plaintiff, and of course gave up her permanent alimony income from her former husband.

38. Defendant's current income consists of her income from her employment, which net after expenses is \$256 a month based upon the 1992 income tax return. She receives \$496 in social security. She has a condominium in Arizona which she rents for \$700 but after payment of the underlying mortgage and condominium assessment, there actually is no net income from this property and, in fact, the net expense is \$62 a month. Defendant's total monthly income without benefit of alimony from plaintiff is only the sum of \$690 a month. This income was set out in defendant's Exhibit 24, which the Court accepts.

39. The Court finds that defendant's reasonable monthly living expenses are \$2,287 as reflected in her Exhibit D-25, which the Court accepts and finds to be reasonable based upon the standard of living of the parties during their marriage and the standard of living of the defendant prior to her marriage to plaintiff.

40. The Court finds that plaintiff has substantial ability to assist the defendant in meeting her monthly expenses and to provide for her financial well being in accordance with his

premarital promises. Over the years the plaintiff has acquired substantial financial assets in the form of investments and retirements. He owns or is a mortgage holder on real property. The balance sheet prepared by him as of July 15, 1992, and introduced as Exhibit D-18, reflects assets having a net equity of over \$500,000. His own personal expenses are minimal by his own choice and as reflected under Exhibit P-3 setting forth his list of monthly expenses only come to \$2,319 a month. Plaintiff's income as reflected in the 1992 income tax return of the parties introduced as Exhibit D-29 and analyzed by E. J. Passey, CPA, as set forth in Exhibit D-33, shows that he receives social security payments each year of \$10,200, retirement plan payments each year of \$14,000 and interest and dividend income each year based upon the 1992 tax return of \$25,184. The combined amounts of these sources of income are \$49,384 or \$3,497.67 per month.

By his own choice, plaintiff does not draw against his retirement or other assets even though he has the ability to do so. It is clear to the Court that the plaintiff has the financial ability to assist the defendant in the form of permanent alimony.

41. Based upon the needs of the defendant and the financial abilities of the plaintiff, also based upon what the defendant gave up when entering into the marriage and considering the promises made to the defendant by the plaintiff and reasonable needs of the defendant, the Court is satisfied that an ongoing alimony requirement in the sum of \$1,000 per month is necessary and

reasonable, which alimony should continue until such time as defendant should remarry, cohabit or the death of either party.

42. The defendant, through Exhibit 27 and other testimony suggests that as a result of the plaintiff's demand, she disposed of certain property that she owned and enjoyed prior to the marriage.

43. With the exception of the moving expenses, the following are found to as indicated:

(1) Washer/dryer was purchased in 1970 and sold to son.

(2) Antique piano given to the defendant in 1980 and given to defendant's daughter in Hawaii.

(3) Dining room set consisting of a buffet, 12 years old; table, 40 years old; chairs, 15 years old.

(4) Art work (Sante Fe Gallery) given to defendant's daughter, Pam.

(5) Sewing machine, purchased 12 years ago, given to defendant's daughter, Leslie.

(6) Sheepskin rug was ruined. It was purchased 11-12 years ago.

44. In all of the foregoing items, the Court could not find that a market value as opposed to replacement as purported by the defendant, was established. Nor was the replacement value reflecting of their current value.

45. Nor was the Court unable to determine any legal or equitable basis upon which to order the plaintiff to pay for the value of those properties.

46. The moving costs requested by defendant are rejected in that there is no legal or equitable basis for such reimbursement.

47. Other items of personal property on Exhibit No. 26 are as follows:

- (1) All defendant's financial records left at plaintiff's residence--including but not limited to the following: 1990 tax return and all supporting documents; 1991 tax records of defendant; 1991 First Interstate Bank statements/checks/deposits; and 1992 First Interstate Bank statements/checks/deposits prior to the parties' separation
- (2) Wig base for defendant's wig block.
- (3) Two large turntables and round wooden cutting board with handle.
- (4) Navy blue ski sweater (expensive woolen)
- (5) Navy tennis sweater (button front)
- (6) New ice bucket
- (7) Bathroom scales
- (8) Meat rack (never used)
- (9) All defendant's tools
- (10) Wok and round wok base
- (11) Fondue dish and serving dishes in bright colored metal
- (12) Defendant's sister's two larger family portraits in gold ornate frames 2' x 4' in size
- (13) Stainless steel coffee server and tray
- (14) Brown wicker bedroom lamp
- (15) Double hibachi (electric)
- (16) 18" tall yellow blown glass vase given to defendant by her sister before sister's death
- (17) Cutting board, tray and utensils to Weber cooking
- (18) Yellow metal mug rack and yellow taper candle holder with mugs with "Love" on each cup given to defendant by her daughter for Mother's Day
- (19) Roll of quilted covering for tabletop to play cards on (new, still in original plastic bag, never used)
- (20) 2' oak and copper pot rack
- (21) Yellow water repellent hooded jacket

48. To the extent that items 1 to 21 on Exhibit 26 are in plaintiff's possession, they should be returned.

49. The defendant expended certain sums prior to the marriage of the parties for the benefit of the defendant.

50. Plaintiff has requested that he be reimbursed from defendant for certain sums which he paid on behalf of the defendant prior to the marriage. These were identified in his testimony as medical treatment for defendant, paying off defendant's obligation to Chase Visa, a medical bill at Cottonwood Center and the purchase of a wedding ring for the defendant. The Court finds that these expenditures were gifts from the plaintiff to the defendant and to the extent that plaintiff seeks reimbursement or credit in some other fashion for those amounts, that claim is rejected by the Court.

51. Defendant seeks an award of attorney's fees from plaintiff on the basis that she is in need of assistance financially to meet those attorney's fee obligations and that the plaintiff has the ability to assist her in connection therewith. The Court is satisfied that the plaintiff ought to be required to assist the defendant in meeting her attorney's fee obligation not only for the reasons suggested by the defendant, that is her need and the plaintiff's ability to pay, but based upon the unreasonable approach that the plaintiff has taken to the resolution of this case.

Plaintiff's suggestion that the parties should be required to merely take what they brought into the marriage and



walk away with no further financial obligation, between them is disingenuous. This is particularly true in view of the aggressive nature of the courting of the defendant by plaintiff and his promises to her to induce her to enter into the marital relationship. While fault for the deterioration of the marriage is not an issue in this case, the Court is satisfied that for whatever reasons only known to the plaintiff, he apparently had second thoughts after the marriage regarding the propriety of his original conduct, and that for the most part caused the dissolution of the relationship between the parties.

Defendant is effectively without any substantial assets except the condominium in Arizona which provides her with no positive cash flow. She is without funds with which to pay for the costs of her attorney in this action. Plaintiff has assets in excess of \$500,000 and the Court finds that defendant is in need for payment of her attorney's fees and plaintiff has the financial ability to meet those fees.

52. The Court finds that the attorney's fees testified to by Mr. Dart in this case are reasonable in amount and were necessarily incurred in this case and that the plaintiff should be required to pay to the defendant for the use and benefit of her attorney the sums proffered by Mr. Dart at the conclusion of the evidence in this case. The Court determines those attorney's fees to be \$6,565, the amount still due Mr. Dart after partial payment by the defendant herein. The Court further determines that the defendant is entitled to reimbursement of her legitimate costs

incurred in this matter and as reflected in the exhibit attached to defendant's Exhibit D-34, in the total amount of \$592.47.

53. The Court anticipates each party may have some dissatisfaction with this ruling and for that reason counsel for each of the parties is to be involved in the drafting of these Findings of Fact and Conclusions of Law, which have put into effect the decision this Court has contained in its Memorandum Decision. The Court would request that Mr. Dart take the responsibility for the initial draft to be supplemented by Mr. Mitsunaga, particularly on the issue where Mr. Mitsunaga's client has prevailed, to wit: the issue of premarital property and the issue of reimbursement for personal property which the defendant brought into the marriage and which was given away or sold during the marriage.

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

#### CONCLUSIONS OF LAW

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

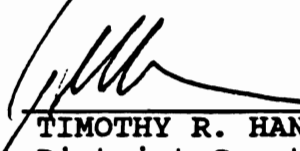
2. Each of the parties is awarded any items of property which he or she had at the time of the marriage of the parties free of any claim of the other.

3. Defendant is awarded alimony from plaintiff in the sum of \$1,000 a month until such time as defendant should remarry, cohabit or the death of either party.

4. Defendant is awarded attorney's fees in the sum of \$6,565 and costs in the amount of \$592.47.

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

DATED this 18 day of October, 1993.

  
TIMOTHY R. HANSON  
District Court Judge

  
E. Thompson  
Attorney

**EXHIBIT "D"**

**JUDGEMENT**

OCT 18 1993

10/6/93

By

By

SALT LAKE COUNTY

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---ooo000ooo---

OTIS B. KIRK, JR.,

:

Plaintiff,

:

DECREE OF DIVORCE

v.

:

2186797

PEGGIE M. KIRK,

:

10-21-93

8:57am

Civil No. 924901796DA

Defendant.

:

Judge Timothy R. Hanson

---ooo000ooo---

The above matter came on for trial on March 9 and March 23, 1993, before the Honorable Timothy R. Hanson, Judge.

Prior to trial, the Court consolidated a companion case wherein the plaintiff had filed a divorce as No. 924901796, and treating the second filed lawsuit as a counterclaim in the original surviving action.

The parties and witnesses having been duly sworn and exhibits offered and received and the Court having heard oral arguments of counsel and, having taken the matter under advisement and having rendered a written memorandum decision on May 4, 1993 and the Court having entered its Findings of Fact and Conclusions of Law,

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

1. The parties are granted a Decree of Divorce, each from the other, said Decree to become final upon entry.

2. The plaintiff is awarded all of his premarital property as his sole and separate property as follows:

00127

- A. Residence: 3518 2000 East, Salt Lake City, Utah.  
This is a resident structure with 1.25 acres.  
It was purchased by the plaintiff and his deceased wife in 1956 and fully paid off in 1980. The property is now encumbered by a construction loan for approximately \$59,000.00.
- B. Strip of land: This is a one foot wide protection strip granted by Salt Lake County and is adjacent and contiguous to the lot upon which the residence (paragraph 22(a) is situated and was purchased at the same time.
- C. Lewis contract: This is a real estate contract on the sale of real property acquired by the plaintiff and his deceased wife in 1966. The real estate contract was entered into December 5, 1980.
- D. Pensions and retirement (Monthly):  
(Legend: I, inherited from deceased wife, PMS, premarital source)
- |                          |          |
|--------------------------|----------|
| 1. Carpenter Union P/M/S | \$ 64.00 |
| 2. Boise Cascade P/M/S   | 676.00   |
| 3. U.S. West I           | 423.00   |
- E. Dividends - Interest (Monthly):
- |                                       |        |
|---------------------------------------|--------|
| 1. Mountain American CU I             | 2.16   |
| 2. Putnam IRA P/M/S                   | 158.65 |
| 3. Boise Cascade Supplemental Savings | 631.40 |
| 4. U.S. Government Security (Jt)      | 465.00 |

5.	Alliance Government Reserve (Jt)	2.30
6.	No. american Service Trusts	162.50
7.	Thomson Growth Fund (Jt)	0
8.	AT&T I	4.04
9.	Ameritech I	8.20
10.	Bell Atlantic I	11.34
11.	Bell South I	7.42
12.	NYNEX	11.37
13.	Pactel I	7.42
14.	South West Bell	7.66
15.	U.S. West I	41.38

F. Social Security:

1.	Social Security P/M/S	869.00
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G. Valley bank checking P/M/S

This is the only checking account used by the plaintiff before and after the marriage. Two transfers were made by the plaintiff into this checking account:

1.	December 7, 1990 - monies from deceased wife's retirement	\$20,176.00
2.	Feb. 1991 - monies from deceased wife's retirement	\$14,269.66

H. Retirements, pensions & Stock (Exhibit 9):

1.	Mountain Credit Union I	650.00
2.	Putnam IRA P/M/S	23,432.98
3.	Putnam IRA Cash account	

4.	Boise Cascade Supplemental Retirement JT	96,943.00	
5.	Franklin U.S. Government Security Fund P/M/S		
6.	U.S. government Securities - North Am Service Trust P/M/S		
7.	Alliance Government Reserve P/M/S		
8.	Mainstay Family of Funds P/M/S	31,745.00	
9.	Thomson Fund		
10.	AT&T Stock I	35.6130	shares
11.	Ameritech I	26.440	"
12.	Bell Atlantic I	51.0970	"
13.	Bell South I	39.1420	"
14.	NYNEX	27.6860	"
15.	Pactel I	40.7050	"
16.	Southwest Bell I	29.3840	"
17.	U.S. West I	37.3090	"
18.	U.S. West I	68.000	"
19.	U.S. West I	252.00	"

I. Vehicles: (Inherited and pre-marital)

1. 1980 Chevrolet
2. 1981 Toyota
3. 1968 Nomad Trailer
4. 1975 Yamaha motorcycle

3. The defendant is awarded all of her premarital property as her sole and separate property as follows:



1. Condominium 7018 No. Barbados  
in Phoenix, Arizona  
Market Value \$80,000.00
2. Household furniture and fixtures
3. 1983 Lincoln Continental Mark VI
4. First Interstate, checking account  
#21-28727-1 66.53
5. First Interstate checking  
#28-16407-7 Balance 9,537.00  
"Peggie M. Kirk"  
"Otis B. Kirk"

4. Defendant is awarded alimony from plaintiff in the sum of \$1,000 a month until such time as defendant should remarry, cohabit or the death of either party.

5. Defendant is awarded attorney's fees in the sum of \$6,565 and costs in the amount of \$592.47.

6. Each party is ordered as individual or trustees under the Kirk Family Trust to execute the necessary documents to transfer ownership of the premarital assets to the respective parties.

DATED this 18 day of October, 1993.

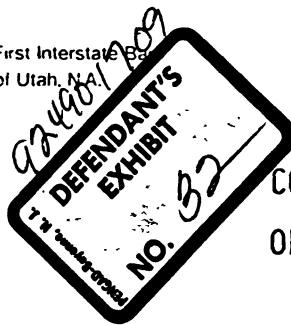
  
TIMOTHY R. HANSON  
District Court Judge

**EXHIBIT "E"**

**First  
Interstate  
Bank**

PEGGIE M JENNINGS TAYLOR  
P O BOX 21126  
SALT LAKE CITY, UT 84121

First Interstate Bank  
of Utah, N.A.



COMBINED STATEMENT  
OF ACCOUNT

17 28 08

CHECKBOOK INTEREST  
HILLSIDE PLAZA OFFICE  
ACCOUNT 28 16407 7

JUNE 19, 1991  
PAGE 2

BEGINNING BALANCE	5,388.37
4 DEPOSITS (+)	2,679.73
17 CHECKS (-)	1,886.08
0 OTHER (-)	.00
INTEREST PAID (+)	24.75
SERVICE CHARGE (-)	.00
ENDING BALANCE	JUNE 19, 1991 6,206.77

DEPOSITS

DATE	DESCRIPTION	AMOUNT
05/21	DEPOSIT	1,244.00
06/03	SSA DEPOSIT	454.00
06/04	DEPOSIT	200.00
06/10	DEPOSIT	781.73
06/19	INTEREST PAID	24.75

CHECKS

DATE	NUMBER	AMOUNT	DATE	NUMBER	AMOUNT
05/28	715	20.00	06/06	725	16.72
06/19	716	10.00	06/10	751	185.96
06/03	717	108.02	06/06	752	30.51
05/31	718	39.80	06/07	753	2.45
06/07	719	486.00	06/07	754	2.74
06/06	720	480.00	06/10	755	81.95
06/11	721	85.00	06/10	756	250.00
06/04	723	39.63	06/18	758	17.00
06/04	724	30.30			

HECKING  
AN WINKLE OFFICE  
CCOUNT 36 11544 2

BEGINNING BALANCE	FEBRUARY 14, 1991	.00
0 DEPOSITS (+)		.00
0 CHECKS (-)		.00
0 OTHER (-)		.00
SERVICE CHARGE (-)		.00
ENDING BALANCE	JUNE 19, 1991	.00
TRANSACTION DETAIL AND CANCELLED CHECKS FOR THIS ACCOUNT WILL BE MAILED SEPARATELY ON THIS ACCOUNT'S REGULAR STATEMENT DATE.		
INTEREST PAID YTD		.15

**EXHIBIT "F"**

**First  
Interstate  
Bank**

First Interstate Bank  
of Utah, N.A.

PEGGIE M KIRK  
TIS B KIRK  
HE KIRK FAMILY TRUST  
O BOX 21126  
ALT LAKE CITY, UT 84121

31 28 08

REFERRED CHECKING  
HILLSIDE PLAZA OFFICE  
CCOUNT 28 16407 7

FEBRUARY 21, 1993  
PAGE 1

BEGINNING BALANCE	4,994.01
2 DEPOSITS (+)	1,496.00
31 CHECKS (-)	2,282.55
0 OTHER (-)	.00
INTEREST PAID (+)	7.78
SERVICE CHARGE (-)	.00
ENDING BALANCE	FEBRUARY 21, 1993 4,215.24

DEPOSITS

DATE	DESCRIPTION	DEPOSIT	AMOUNT
02/03	SSA		496.00
02/08	DEPOSIT		1,000.00
02/19	INTEREST PAID		7.78

CHECKS

DATE	NUMBER	AMOUNT	DATE	NUMBER	AMOUNT
02/11		32.09	02/08	477	17.00
01/22	459	49.95	02/09	478	25.00
01/21	460	8.87	02/09	480	12.74
01/25	463	150.00	02/10	481	13.76
01/26	464	69.06	02/11	482	5.00
01/27	465	37.30	02/11	483	100.00
02/01	466	25.00	02/12	484	184.42
02/05	467	488.74	02/16	485	13.76
02/05	468	100.00	02/16	486	32.00
02/02	469	550.00	02/18	487	9.71
02/03	471	74.25	02/18	489	22.72
02/02	472	30.22	02/19	490	19.51
02/03	473	4.52	02/18	491	105.00
02/03	474	25.00	02/19	492	8.20
02/10	475	35.00	02/19	493	24.96
02/04	476	8.77			





First Interstate Bank  
of Utah, N.A.

PEGGIE M KIRK  
P O BOX 21126  
SALT LAKE CITY, UT 84121

0 21 09

CHECKING  
MURRAY OFFICE  
ACCOUNT 21 28727 1

FEBRUARY 22, 1993  
PAGE 1

BEGINNING BALANCE	3,133.98
1 DEPOSIT (+)	627.66
0 CHECKS (-)	.00
0 OTHER (-)	.00
SERVICE CHARGE (-)	.00
ENDING BALANCE	3,761.64
FEBRUARY 22, 1993	

DEPOSITS

DATE	DESCRIPTION	AMOUNT
01/29	DEPOSIT	627.66

**EXHIBIT "G"**

924901709

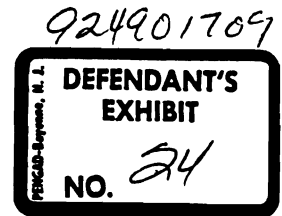


STATEMENT OF MONTHLY EXPENSES  
PEGGIE TAYLOR-KIRK

Rent, Salt Lake City	\$550
Electricity	45
Mountain Fuel	35
Water, sewer, garbage	25
Telephone	52
Food and household supplies	225
Lunches out	50
Clothing (included in VISA payment below)	---
Dry cleaning/laundry	10
Automobile insurance	50
Automobile gas, oil, repairs, maintenance	250
Medical and Rx	100
Dental	30
Health insurance (anticipated after divorce--FHP)	100
Business expenses/licensing	85
Business schools/seminars	40
Entertainment	100
Vacation/travel (Annual trip to Hawaii to visit daughter; occasional travel to Phoenix)	125
Personal grooming	35
Gifts/Christmas	55
Miscellaneous and incidentals	125
VISA payment	<u>200</u>
<b>TOTAL MONTHLY EXPENSES</b>	<b>\$2,287</b>



**EXHIBIT "H"**



STATEMENT OF MONTHLY INCOME  
PEGGIE TAYLOR-KIRK

Income (From 1992 Tax Return)

Income from earnings (net after expenses)  
\$3,068 annual \$256

Social Security 496

Rental income: Arizona condo

Gross before expenses \$700

Less:

Mortgage payment (487)  
Assessment--\$425/year (35)  
Condo association (85)  
Property management (56)  
Maintenance/repairs \$1,186 (99)

Net Rental Income/Loss (62)

Alimony 1,000

TOTAL INCOME BEFORE TAXES \$1,690

Less Taxes (per E.J. Passey analysis):

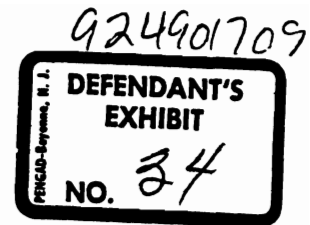
Federal income tax--\$619/year (52)  
Self-employment tax--\$438/year (36)

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NET EXPENDABLE MONTHLY INCOME \$1,602  
with alimony at \$1,000 per month

**EXHIBIT "I"**

PEGGIE KIRK ATTORNEY'S FEES AND COSTS RECAP



Services Rendered:

Mr. Dart -- 42.75 hours at \$175/hour	\$ 7,481.25
Mr. Sheaffer -- 1.80 hours at \$100/hour	180.00
Ms. Clark -- 19.25 hours at \$ 75/hour	1,443.75
Paralegal Services -- 30.65 hours at \$50/hour	1,532.50

Total Services Rendered:	<u>\$10,637.50</u>
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Costs Advanced:

Filing fee - Complaint	\$ 82.00
Service fee for Complaint, TRO and OSC	31.00
Filing fee - Answer and Counterclaim	60.00
Deposition of Otis Kirk & copy of deposition of Peggie Kirk	247.45
Recording fee - Lis Pendens	8.00
Copies	68.20
Postage	5.32
Hand Deliveries	52.50
FAX copies	38.00

Total Costs Advanced:	<u>\$ 592.47</u>
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Total Services and Costs:	\$11,229.97
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Less Retainer Paid 4/22/92	( 1,000.00)
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Less Payments to Date:

6/24/92	\$ 262.65
7/22/92	233.77
8/12/92	1,190.05
10/2/92	56.25
10/29/92	412.65
12/1/92	396.70
12/23/92	987.85
2/23/93	125.00

Total Balance Due:	\$ 6,565.05
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