

1994

# Mauria T. Tanner (Swensen) v. James G. Swensen, Jr. : Brief of Appellant

Utah Court of Appeals

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Kenneth Okazaki; Prince, Yeates & Gelzahler.

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IN THE UTAH COURT OF APPEALS

FOR THE STATE OF UTAH

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MAURIA T. TANNER (Swensen)	)	BRIEF OF APPELLANT
	)	
Plaintiff and Appellant,	)	
	)	
v.	)	APPELLATE CASE
	)	No. 940079-CA
	)	
JAMES G. SWENSEN, JR.	)	CIVIL CASE
	)	No. 924902803DA
	)	
Defendant and Appellee.	)	PRIORITY NO. 15
	)	

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APPEAL FROM AN ORDER OF  
THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, STATE OF UTAH  
HONORABLE J. DENNIS FREDERICK  
DATE OF ORDER: December 16, 1993

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940079

**FILED**  
Utah Court of Appeals

**AUG 22 1994**

Marilyn M. Branch  
Clerk of the Court

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FOR THE STATE OF UTAH

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PARTIES BELOW:

- A. MAURIA T. TANNER (Swensen)  
Plaintiff and Appellant,
- B. JAMES G. SWENSEN,  
Defendant and Appellee.

## TABLE OF CONTENTS

	PAGE
LIST OF THE PARTIES.....	
TABLE OF CONTENTS.....	i - iii
TABLE OF AUTHORITIES.....	iv - v
JURISDICTIONAL STATEMENT.....	1
NATURE OF PRECEDENCE.....	1
STATEMENT OF ISSUES ON APPEAL.....	2
STATEMENT OF FACTS.....	2
STANDARD OF REVIEW ON APPEAL.....	7
ISSUES FOR REVIEW.....	7
STATEMENT OF THE CASE.....	10
SUMMARY OF THE ARGUMENT.....	11
DETAIL OF THE ARGUMENT.....	12
 I. THE DIVISION OF THE MARITAL PROPERTY WAS NOT EQUITABLE.....	12
A. The court should not consider the division of marital property in a vacuum (Newmeyer v. Newmeyer). Trial court did not take into consideration the special circum- stances of Ms. Tanner.....	13
B. Ms. Tanner is at tremendous disadvantage regarding marital property. She never had any control over the assets. (Record at 51, lines 23-25).....	14
C. The court improperly used pre-marital prop- erty in assessing Ms. Tanner's income.....	14
D. Ms. Tanner received no income producing prop- erties (Ruling) which causes an inequality in the property division. (Newmeyer v. Newmeyer).....	15
 II. THE ASSIGNMENT OF ALIMONY WAS NOT EQUITABLE....	16
A. The parties have a long term marriage where the Defendant has a law degree and Plaintiff is a student. The court erred in awarding ali- mony for a 2 year period causing an extreme disparity in future lifestyle.....	16
B. The award of \$700.00 for a two year period is an abuse of discretion. (Johnson v. Johnson).....	20

	C. The trial court did not use the <u>Jones v. Jones</u> factors in determining alimony.....	20
III.	THE TRIAL COURT ABUSED ITS DISCRETION IN IMPUTING INCOME.....	28
	A. Ms. Tanner no longer is able to participate in the past income activities. (Savage v. Savage and Weston v. Weston).....	29
	B. The court used pre-inheritance property to impute income to Ms. Tanner. (Wiley v. Wiley).....	31
	C. The court erred in finding Ms. Tanner could earn \$20,000.00 in 2 years. (Wiley v. Wiley).....	34
IV.	THE COURT ABUSED DISCRETION IN NOT AWARDING ATTORNEY FEES TO PLAINTIFF/APPELLANT.....	35
	A. (Huck v. Huck) (Sinclair v. Sinclair) (Pusey v. Pusey) (Rasband v. Rasband)	
V.	COURT ABUSED DISCRETION IN NOT ALLOWING PLAINTIFF'S/APPELLANT'S COUNSEL TO PRESENT CLOSING ARGUMENT.....	37
	A. (Bunnell v. Industrial Commission of Utah)	
	CONCLUSION.....	38
	CERTIFICATE OF MAILING.....	40
	ADDENDUM TO BRIEF.....	41
	A. Reporter's Transcript of Judge's Ruling;	
	B. Amended Decree of Divorce;	
	C. Plaintiff/Appellant's Financial Declaration, dated July 15, 1993;	
	D. Defendant/Appellee's Financial Declaration, dated August 13, 1993;	
	E. Affidavit of Attorney Fees (Plaintiff's Exhibit 10);	
	F. Reporter's Transcript of Proceedings: (testimony of Plaintiff/Appellant)	

P.23 - Plaintiff/Appellant works to put Defendant through law school,

P.24 - same;

P.35 - Monies owed by Plaintiff/Appellant for Attorney fees;

P.39 - Lifestyle changes for Plaintiff/Appellant;

P.40 - Needs of Plaintiff/Appellant;

P.51 - Pre-inheritance gifting to Plaintiff/Appellant;

P.52 - Defendant/Appellee's use of marital funds during pendancy;

P.53-54 (continuation from P.52);

G. Reporter's Transcript of Proceedings: (testimony of Defendant/Appellee);

P.152 - Marital property taken and in possession of Defendant/Appellee;

P.162 - Appellee uses marital funds to pay legal fees;

P.164 - Appellee's use of marital funds;

P.168-169 - Appellee pays student loan from marital funds during the pendancy.



# TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
Action v. Deliran, 737 P.2d 996, 999 (Utah 1987).....	26, 28
Bridenbaugh v. Bridenbaugh, 786 P.2d 241, 242 (Utah Ct. App. 1990).....	23
Bunnell v. The Industrial Commission of Utah, 740 P.2d 1331, 62 Utah Adv. Rep. 9 (1987).....	9
Bunnell v. The Industrial Commission of Utah, 740 P.2d 1331, 31 Utah Adv. Rep. 9 (1987).....	37
Bushell v. Bushell, 649 P.2d 85, 88 (Utah 1982).....	25
Dority v. Dority, Utah, 645 P.2d 56, 59 (1982).....	16
English v. English, 565 P.2d 409, 410 (Utah 1977).....	7, 17
English v. English, 565 P.2d 411 (Utah 1977).....	16
Gardner v. Gardner, 748 P.2d 1076, 73 Utah Adv. Rep. 35 (1988).....	24, 28
Highley v. Highley, Utah, 676 P.2d 379, 382 (1983).....	16
Howel v. Howel, 806 P.2d 1209, 155 Utah Adv. Rep.....	24
Huck v. Huck, 734 P.2d 417 (Ut. 1986).....	9, 36
Jespersion v. Jespersen, 610 P.2d 326, 328 (Utah 1980)...	32
Johnson v. Johnson, 855 P.2d 250, 214 Utah Adv. Rep. 41 (1994).....	8
Jones v. Jones, 700 P.2d 1072 (Ut. S.C. 1985).....	16, 18, 24
Lee v. Lee, 744 P.2d 1378, 1380 (Utah Ct. App. 1987)....	26
Newmeyer v. Newmeyer, 745 P.2d 1276, 1279, 69 Utah Adv. Rep. 32 (1987).....	7, 8, 11,
Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986).....	26

Preston v. Preston, 646 P.2d 705, 706 (Utah 1982).....	31
Pusey v. Pusey, 728 P.2d 117 (Ut. 1986).....	9, 36
Rasband v. Rasband, 752 P.2d 1331, 1337 (Ut. App. 1988).	9, 36
Sampinos v. Sampinos, 750 P.2d 615, 77 Utah Adv. Rep. 24.	25
Savage v. Savage. 658 P.2d 1201, (S. Ct. 1983).....	8, 29
Sinclair v. Sinclair, 718 P.2d 396 (Ut. 1986).....	9, 36
Walters v. Walters, 812 P.2d 64 (Ut. App. 1989).....	9, 33
Wiley v. Wiley, 227 Ut. Adv. Rep. 39 (Utah Ct. App. 1993).....	9, 30, 35
Weston v. Weston, 773 P.2d 408, 107 Utah Adv. Rep. 78..	8, 29

#### UTAH RULES OF APPELLATE PROCEDURE

Utah Rules of Appellate Procedure 1953, as amended Rule 9)c)(4).....	1, 2
---	------

#### STATUTES

Utah Code Annotated 1953, as amended, Section 78-2-2(3)(j).....	1
Utah Code Annotated 1953, as amended, Section 30-3-5 (1984 ed.).....	16

MAURIA T. TANNER (SWENSEN), )  
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 v. )  
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 JAMES G. SWENSEN, JR., )  
 )  
 )  
 Defendant and Appellee. )  
 )

**BRIEF OF APPELLANT**

Civil Case No. 924901803DA

Appellate Case No. 940079-CA

This appeal is authorized under **Utah Code Annotated, sec. 78-2-2 (3)(j)**, and Utah Rule of Appellate Procedure 3 which indicates a procedure for taking appeals from judgments and order of trial courts. This brief follows the structural requirements outlined in Rule 24 of the Utah Rules of Appellant Procedure. This is an appeal by Mauria T. Tanner (Swensen), Plaintiff, from a judgment and Decree of Divorce.

This appeal is from a trial of the Third Judicial District Court in and for Salt Lake County, State of Utah, before the Honorable Dennis Frederick, without a jury. The final orders ~~WERE~~ Amended Decree Of Divorce and Amended Findings Of Fact And Conclusions of Law.

### **STATEMENT OF THE ISSUES ON APPEAL**

1. Whether the division of the marital property was equitable.
2. Whether the trial court abused its discretion in awarding alimony of \$700 per month for a two-year period.
3. Whether the trial court abused its discretion in imputing income from Tanner, Inc., as well as income from teaching Art classes in the past during the summer, for purposes of child support and alimony.
4. Whether the trial court abused it's discretion in using Ms. Tanner's interest in Tanner, Inc., in figuring child support and/or alimony.
5. Whether the trial court abused its discretion in finding that Ms. Tanner has the future capacity to earn \$20,000 a year in approximately two years.
6. Whether the court abused its discretion in not awarding attorney's fees.
7. Whether the trial court abused its discretion in not allowing Plaintiff's counsel to present a closing argument.

### **RULE 9(C)4: STATEMENT OF FACTS**

The facts which are material to the questions presented on this appeal are as follows:

1. The parties had a long-term marriage, approximately 19 years. They were married on the 22nd day of November, 1974, in Salt Lake City, Utah. (Record at 23, line 15)

2. The parties have four children. (Record at 21, line 13)

3. Mauria Tanner worked to help James Swensen, Jr. obtain two separate graduate degrees. (Record at 23, lines 18-25, Record at 24, line 1-6)

4. James Swensen, Jr., is currently a tax attorney as well as a Certified Public Accountant with a Masters Degree in Accountancy. (Record at 23 & 24)

5. Ms. Tanner has recently begun a graduate program which should be completed within two years with a Masters Degree in Expressive Therapy from the University of Utah. (Record 23, lines 1-10)

6. Ms. Tanner testified that in two years, she is hopeful that she might earn up to \$20,000 a year. (Record at 94, lines 2-4)

7. Mr. Swensen's projected annual income for the year of 1993 was \$67,500 (Defendant's Exhibit 2, page 0000043)

8. Ms. Tanner has, in the past, earned approximately \$1,500 a year for teaching Art in the summer time; however, she is not planning to continue this seasonal job as a result of her year-

round school obligation. (Transcript of Judge's Ruling, page 3, line 19)

9. Ms. Tanner owes her Father \$3,000, of which \$2,000 went to Attorney's fees. (Record 35, lines 13-18)

10. Ms. Tanner paid just under \$5,000 for Attorney's fees just prior to the loan from her Father. (Record at 35, lines 16-18)

11. Ms. Tanner owed approximately \$12,000 to law offices of present counsel. (Record 36, lines 17-20)

12. Ms. Tanner's lifestyle significantly altered since the separation. (Record at 39, lines 5-20)

13. The Tanner Corporation made disbursements for the purpose of paying the personal taxes of the parties. (Record at 48, lines 3-3)

14. Ms. Tanner had no control over any of the IRA's , retirement accounts, savings accounts, or other significant marital assets during separation - making no withdrawals from any of these accounts. (Record at 51, lines 23-25, Record at 52, lines 5-6)

15. Ms. Tanner never gave her permission to use or withdraw marital funds. (Record at 55, lines 1-2)

16. Mr. Swensen withdrew significant amounts from the marital IRA accounts during the separation. (Record at 53, lines 14-19)

17. Defendant/Appellee, James Swensen gave himself zero value

for furniture, he has in his possession, although he admits taking marital property. (Record at 152, lines 1-25, record at 153, lines 1-4, record 155, lines 1-25, and record at 156, lines 1-25)

18. Defendant/Appellee, James Swensen paid his personal legal fees from marital funds during the separation. (Record at 164, lines 11-15)

19. Defendant/Appellee, James Swensen used marital funds to pay off his student loans in the approximate amount of \$10,996. (Record at 168, lines 2-25)

20. Plaintiff's expert witness, a CPA, never received requested materials and relied upon Swensen's figure for values regarding Defendant's business. (Record at 7, lines 7-20, record at 16, lines 10-18, and record at 19, lines 20-25)

21. Ms. Tanner has received some monies on a periodic basis from Tanner, Inc., a family corporation. These disbursements have occurred approximately five times in 19 years. The amounts have varied. Ms. Tanner has generally received approximately \$2,000 in one year until several years ago when she received \$8,000 two years in succession. (Record at 50, lines 24-25, record at 51)

22. Ms. Tanner received these two \$8,000 amounts as a result of the sale of a trading post business. (Record at 48, lines 18-23, record at 50, lines 12-23)

23. The two previous disbursements from Tanner Inc. were \$2,000 and \$4,000 respectively. (Record at 49, lines 1-5)

24. These disbursements were generally intended to cover Ms. Tanner's allotted portion of the taxes for the family business. (Record at 50)

25. Ms. Tanner has been advised that she will not be receiving any more lump sum payments as large as the amount of \$8,000 in the future by her father, Mr. Maurice Tanner, the President of Tanner, Inc. Those larger \$8,000 amounts accrued solely as a result of the sale of the trading post business. (Record at 50, lines 12-33)

26. At trial, Plaintiff's counsel was not given the opportunity to present a closing argument to make the court aware of case law which pertained to the issues of fact and law before the court, (Record at 192, lines 20-24)

27. The trial court imputed income from sources no longer available to Ms. Tanner. (Record at 50, lines 12-33)

28. Ms. Tanner is planning to pursue a Ph.D. degree if possible. Such training will require approximately 7 years (2 years for the Masters' degree and an additional 5 years for the Ph.D.) (Record at 99, lines 20-25, record at 100, line 1)

29. Ms. Tanner was awarded alimony for 2 years (Transcript of



Judge's Ruling, pages 1 & 2)

#### **STANDARD OF REVIEW ON APPEAL**

The Standard of Review on Appeal is that the Appellate Court must reverse if there is a misapplication or misunderstanding of the law, if the evidence clearly preponderates against the findings or conclusions or if there is a serious inequity that must be rectified as set forth in English v. English, 565 P.2d 409, 410 (Utah 1977).

#### **ISSUES FOR REVIEW**

1. The division of the marital property was not equitable. Newmeyer v. Newmeyer, 745 P.2d 1276, 1279 (Utah 1987), stated that "in determining whether a certain division of property is equitable ... the relative abilities of the spouses to support themselves after the divorce are pertinent to an equitable...division of the fixed assets of the marriage".

Ms. Tanner contends that in the division of the property, the trial court did not take into consideration her special circumstances, i.e., her relative lack of work experience, and her full-time student status.

2. The court accepted values of property not consistent with the worth of the property if sold, causing an inequitable division of property.

3. The court's award of \$700 per month alimony for a two-year period is an abuse of discretion. Johnson v. Johnson, 855 P.2d 250, 214 Utah Adv. Rep. 41 (1994).

4. The court abused its discretion in imputing income from Tanner, Inc., as well as income from teaching Art classes in the summer as Ms. Tanner can no longer participate in that activity because of her participation in year-round schooling. Savage v. Savage, 658 P.2d 1201, (S. Ct. 1983). Weston v. Weston, 773 P.2d 408, 107 Utah Adv. Rep. 78. Ms. Tanner provided an accurate figure regarding income for the purposes of child support.

5. Ms. Tanner's interest in Tanner, Inc. qualifies as a pre-inheritance gift and the court abused it's discretion in utilizing the family corporation in figuring child support and/or alimony, as it was not income but a property interest.

- A. Ms. Tanner testified at trial that her brothers and sisters also received similar disbursements to hers.
- B. That the Tanner family corporation has been in place for approximately 35 years and it was in the form of pre-inheritance. (Record at 46, lines 16-21, record at 47, line 11, and record at 47, lines 24-25). Typically, inherited property will be awarded to the person who inherited it, even when the property was inherited years before the divorce.
- C. Newmeyer v. Newmeyer, 745 P.2d 1276 (Ut. 1987). If the court should determine that Tanner, Inc., was not pre-inheritance, it would be forced to admit that the Plaintiff's/Appellant's interest in the family corporation property was premarital property, at the very

least, an interest which had not been commingled into the marital estate, and one that was not augmented and/or maintained by the other spouse in any capacity. A court must find unique circumstances that warrant disregarding the general rule that premarital property is separate property. Waiters v. Waiters, 812 P.2d 64 (Ut. App. 1989).

6. The trial court abused its discretion in finding that Ms. Tanner could earn \$20,000 a year in two years, after she completed her schooling. It presumed that she will indeed complete the schooling, secure employment and earn that amount. Wiley v. Wiley, 227 Ut. Adv. Rep. 39 (1993), found such a finding improper.

7. The court abused its discretion in not awarding attorney's fees. Utah law provides that the award be based upon the need of the party seeking the award, and reasonableness of the fee sought. Huck v. Huck, 734 P.2d 417 (Ut. 1986). Sinclair v. Sinclair, 718 P.2d 396 (Ut. 1986). Pusey v. Pusey, 728 P.2d 117 (Ut. 1986). Rasband v. Rasband, 752 P.2d 1331, 1337 (Ut. App. 1988).

8. The court abused its discretion in not allowing Plaintiff's counsel to present argument and cases relevant to the matter at bar in closing argument. Bunnell v. The Industrial Commission of Utah, 740 P.2d 1331, 62 Utah Adv. Rep. 9 (1987).

### STATEMENT OF THE CASE

This is a divorce action involving the issues of alimony, property division, award of attorney fees and the related issues of pre-inheritance property assessed as income as well as the appropriateness of imputing income to Plaintiff/Appellant.

These matters were heard at trial before the Honorable J. Dennis Frederick in the Third Judicial District Court of Salt Lake County, State of Utah, on the 16th day of December, 1993.

The final order and Judgement in this matter was executed on the 22nd day of February, 1994.

Notice of Appeal was filed on the 4th day of February, 1994, pursuant to Utah Code Annotated, Section 78-2-2 (3)(j) and Utah Rule of Appellate Procedure 3.

Ms. Tanner received alimony for a two year period in the amount of \$700.00, even though she had a long-term marriage of 20 years, had been married to a tax attorney and CPA, for whom she had worked in order that he receive his professional degrees and credentials.

The trial courts' holdings in regards to property division, alimony, attorneys fees, imputation of income from a family corporation, etc., caused the Plaintiff/Appellant to bring this appeal.

### **SUMMARY OF THE ARGUMENT**

The assets of the marriage were not divided equitably. The Appellee during the term of marriage controlled all marital assets. Appellant had no access to marital funds during the pendancy, while Appellee used marital funds for his personal benefit such as his own attorney fees.

Newmeyer v. Newmeyer, 745 P.2d 1276, (Utah 1987) states that division of property must also take into consideration the earning capabilities of the parties, the ability of the parties to support themselves after the divorce as well as the amount of alimony awarded. The court did not properly consider the appellant's ability to earn a living regarding the property division, especially in light of the fact that the court awarded only \$700.00 a month alimony for a two year period, even though the Defendant/Appellee was a professional (tax attorney) and the marriage was of a long duration.

In addition, the alimony award was inequitable. The court did not take into consideration the factors in Jones v. Jones, 700 P.2d 1072 (Utah S.C. 1985).

The court improperly imputed income from pre-inheritance disbursements from Appellant's family in determining alimony even though the evidence indicated Appellant would not receive full

disbursements of said funds. The court also imputed income from Appellant's past participation in summer art classes, even though Appellant testified that as a result of her student status, she would no longer have an opportunity to teach those classes.

The trial court refused to award Plaintiff/Appellant her attorney fees even though the evidence indicated Defendant/Appellee used marital funds to pay his own attorney fees, and the evidence also indicated that Appellant was a full-time student without any income. In addition, Appellant testified she had borrowed monies to pay for fees and costs of the divorce action. The court's findings over-all demonstrated a general attitude of bias against Plaintiff/Appellant which prejudiced the Appellant's right to a fair and impartial trial.

POINT 1:

**DETAIL OF THE ARGUMENT**

The division of the marital property was not equitable.

**Newmeyer v. Newmeyer**, 745 P.2d 1276, 1279 (Utah 1987), states that:

(in) determining whether a certain division of property is equitable, neither the trial court nor this Court considers the property division in a vacuum. The amount of alimony awarded and the relative earning capabilities of the parties are also relevant, because the relative abilities of the spouses to support themselves after the divorce are pertinent to an equitable determination of

the division of the fixed assets of the marriage.

The trial court did not take the special circumstances of Ms. Tanner into consideration when making the property division. During the course of the marriage, the couple had four children, and Ms. Tanner worked in minor clerical jobs. After the family began to grow, Ms. Tanner worked only intermittently, usually teaching Art classes in the summer to neighborhood children. Her primary occupation, during the marriage, was raising children, caring for the needs of her husband, and running the couple's home. Ms. Tanner has no professional training and few marketable skills. Ms. Turner has no dependable outside income. As a result of the success of the law practice of Mr. Swensen, the couple enjoyed a very comfortable lifestyle. Ms. Tanner was awarded no income producing assets.

(Transcript of Judge's Ruling, page 3, lines 2-5)

Ms. Tanner was at a tremendous disadvantage regarding the marital property. She had no control over marital funds, during the marriage and/or the separation, nor investments, bank accounts and/or Real Property. Mr. Swensen controlled all of the assets - making deposits, withdrawals, investments at will, without permission from Ms. Tanner, and often without even informing her of any of these transactions. (Record at 51, lines 23-25; 52, lines 5-6; 55, lines 1-2; 53, lines 14-19; 48, lines 3-4; 164, 11-15; 168,

lines 2-25; 52, lines 1-25; and at 58, lines 23-20.

Ms. Tanner received some monies from Tanner, Inc., during the years of the marriage, but this money was intended to cover Ms. Tanner's allotted portion of taxes for the family business and was not intended to supplement her income. She has been informed by her father, Mr. Maurice Tanner, that she will not be receiving any more large disbursements of money from Tanner, Inc., similar to those she had in the recent past because those monies had come from the sale of a family business. Ms. Tanner has no current income that she can depend upon for support.

Mr. Swensen on the other hand, has a law degree and a degree in accounting. He is a successful tax attorney and a Certified Public Accountant. Mr. Swensen's projected annual income for the year of 1993 was \$67,000. (Defendant's exhibit 2, page 0000043)

The division of property as done by the trial court creates an inequity by dividing the property in such a way that Ms. Tanner does not have any income from the properties she received to support herself, yet Mr. Swensen has the benefit of the property he received and the degrees he holds to support himself.

In addition, the court accepted the values proffered on the exhibits as valid even though Defendant claimed a zero value. (Defendant's exhibit 1, page 000001) The testimony controverted



that assertion as Defendant had removed tools and furniture from the marital home. In addition, the court did not take into consideration the fact that Mr. Swensen used marital funds under his care, custody and control to pay his attorney fees and other personal expenses attributable to him, such as a \$10,996.00 student loan.

Ms. Tanner had no marital assets available to her during the pendency and was left with a substantial amount of costs and fees which the court ordered her to pay, some of which Ms. Tanner borrowed money to cover.

Ms. Tanner worked to support Mr. Swensen while he earned his degrees and yet an inequitable division of the property was performed leaving her without sufficient income to support herself in a manner approaching the standard of living reached during the marriage. There is not sufficient finding of fact to show that Ms. Tanner can support herself. There is sufficient findings to show that Mr. Swensen can support himself on his current income. The property division was not conducted in a manner that reflected the parties abilities to earn income and has created an inequitable situation that leaves Ms. Tanner without a means of supporting herself, and in debt.

**POINT 2:**

### ALIMONY ISSUE

The parties were married for twenty years. During the course of the marriage, the parties bought a home, had four children, and Mr. Swensen established a law practice specializing in tax law. During the early years of the marriage, Ms. Tanner worked in minor clerical jobs. After the family began to grow, Ms. Tanner worked only intermittently, usually teaching art classes in the summer to neighborhood children. Her primary occupation, during the marriage, was raising children, caring for the needs of her husband and running the couple's home.

In a divorce proceeding, the trial court may make such orders concerning property distribution and alimony as are equitable. U.C.A., 1953, § 30-3-5 (1984 ed.). See, e.g., Highley v. Highley, Utah, 676 P.2d 379, 382 (1983); Dority v. Dority, Utah, 645 P.2d 56, 59 (1982); English v. English, Utah, 565 P.2d 409, 410 (1977). The trial court must exercise its discretion in accordance with the standards that have been set by this Court. In the present case, we find that the trial court did not comply with those standards. Jones v. Jones, 700 P.2d 1072 (Ut. S.C. 1985) Id Page 2. The court only awarded alimony for a two year period, even though the evidence demonstrated

a substantial disparity in income between the parties, as well as the ability to produce income in the future; that Plaintiff contributed to the degrees of Defendant, by working while he was in graduate school and the marriage was of long duration - twenty years.

In Jones, the court describes the purpose of alimony:

[T]he most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during marriage, and to prevent the wife from becoming a public charge. English v. English, 565 P.2d at 411. With this purpose in mind, the Court in English articulated three factors that must be considered in fixing a reasonable alimony award:

[1] the financial conditions and needs of the wife;

[2] the ability of the wife to produce a sufficient income for herself; and

[3] the ability of the husband to provide support."

Id at Page 4.

In the case at hand, nowhere in the trial court's decision, its findings of fact, or its statements made on the record at the conclusion of the hearing is there any indication that the court adequately analyzed the circumstances of the Jones case.

in light of these three factors. And our attempt to perform this analysis through a review of the record and evidence compels us to conclude that the trial court abused its discretion in fixing the alimony award. In addition, the record exemplifies the courts attitude about the Plaintiff, when the court commented after Plaintiff's/Appellants counsel requested that the court make Plaintiff a beneficiary, along with the children, on the life insurance policy of Defendant/Appellee, at least during the period she had a right to alimony. The court commented: "... I'm concerned about the protection of the children, not the protection of the Plaintiff here". Transcripts of (Judge's Ruling, page 7, lines 12-14)

The tone and tenor of the entire proceeding evidenced the court's lack of concern for Plaintiff's/Appellant's rights.

As in Jones, other than the assets awarded her in the property distribution, Ms. Tanner has no dependable outside income. As a result of the success of the law practice of Mr. Swensen, the couple, as did the parties in Jones, enjoyed a very comfortable lifestyle. In the instant case, as in Jones, the wife was awarded no income-producing assets.

It is almost certain that Ms. Tanner will be unable to maintain anything even approaching the standard of living she

enjoyed during the marriage, given the \$700 per month alimony awarded by the trial court for two years and the termination of that award at that time.

The second factor to be considered in Jones is the wife's ability to produce a sufficient income for herself. Ms. Tanner was married in her early twenties. She's been married for twenty years. The paid work she did in the early years of the marriage and the miscellaneous functions she performed during the summer were all relatively unskilled in nature. During most of the marriage, with the full consent and support of her husband, she devoted her time to raising their four children. She has no professional training and few marketable skills. The husband managed the finances of both the family and the business and provided his wife with an allowance to cover her expenses. The wife has no independent income. Intermittently, she received from her parents, from a family corporation which provided some money for taxes. It is entirely unrealistic to assume that a woman in her 40's, with no substantial work experience or training, will be able to enter the job market and support herself in anything even resembling the style in which the couple had been living.

The family corporation, Tanner Inc., provided past money that Ms. Tanner cannot depend upon in the future. As a matter of fact,

her father has advised Ms. Tanner that she will, in all likelihood, not receive any future distributions.

The final factor to be considered, as outlined in Jones, is the ability of the husband to provide support to the wife. The record shows that although the husband paid himself an annual income of approximately \$67,472 from the proceeds of his law practice, the total profits from the business actually amounted to almost \$130,000 per year. While the trial court apparently viewed the \$67,472 as the husband's total annual income for purposes of determining alimony, in fact he had control over all the profits, but chose to take only a portion of them as personal income and to set the rest aside for reinvestment in the business.

Mr. Swensen is an expert in finance and tax as he not only has a law degree but he is also a certified public account, as well as having a masters in accounting. During the marriage the Defendant controlled all the finances, investments, etc., of the couple. As a matter of fact, Ms. Tanner was unsure, as the divorce proceedings were initiated in this case, what investments and assets the couple actually owned.

Ms. Tanner was definitely at a disadvantage regarding the assets in the marriage. Even the last figures provided by Mr. Swensen regarding investments were modified just before trial in

his exhibits making the figures he provided earlier for Ms. Tanner, which she used on her exhibits, outdated. The new figures were never made available prior to trial even though Mr. Swensen admitted in his testimony that the parties were going by the last set of figures provided and there was a cut-off date the parties had informally agreed upon. Never the less, Mr. Swensen's figures had been updated for trial on his exhibits.

The exhibits containing updated figures which were not available to Ms. Tanner constructively nullified her exhibits, making them inconvenient and literally unusable by the trial court.

On the record, there is no reason to surmise that the income generated by the defendant's law practice will decrease in the future. The Defendant, therefore, as sole owner, is in an excellent position to provide adequate continuing support to his ex-spouse. And yet, the trial court ordered alimony for only period of two years, at a mere \$700.00 a month.

Jones, analyzes the apportionment of income in a close corporation between personal and business uses. It states:

The apportionment of income between personal and business uses is quite properly a matter left to the discretion of the husband as owner of the pharmacy and gift shop. However, how he chooses to allocate that profit is not binding on the court in determining his ability to pay alimony to his ex-spouse. The full profit produced by the business, adjusted by the court to take into account legitimate and reasonable needs of the

business for additional capital, should have been used as the basis for assessing the husband's ability to provide for his spouse. In making this analysis, the trial court should not permit all claims of need for capital on the part of the business to take precedence over the support needs of the wife. If these capital needs are a result of discretionary decisions of the husband to expand and improve the business, rather than to maintain it in its present condition, then to permit him to divert income into the business at the expense of his ex-spouse's support needs would be to permit him to enrich himself at her expense.

The analysis and the facts of Jones relate to the present case.

Both were marriages of long duration. Both situations involved a closed corporation owned and controlled by the husband. Both wives remained at home involved in domestic duties. Both wives had no history of any significant personal income.

As in Jones and the foregoing analysis leads us to the conclusion in the present case that the trial court's alimony award was inequitable, both in terms of the initial amount and its termination. Ms. Tanner is in her 40's, possesses few marketable job skills, and has little hope of ever recovering her former standard of living. This is simply not the sort of situation in which a small alimony is appropriate. The husband operates a financially successful business, built up over twenty years of marriage through the joint efforts of both the husband and the wife. These facts clearly call for some form of continuing spousal



maintenance. The original award must be more substantial considering the husband's real discretionary income, and should continue at that level for the foreseeable future.

We believe it is consistent with the goal of equalizing the parties' post divorce status to look to the standard of living existing at or near the time of trial in determining alimony. This is consonant with the treatment of both marital property and child support and is better designed to equip both parties to go forward with their separate lives with relatively equal odds. It is further justified because any future changes in alimony are limited to instances where a material change of circumstances has occurred. Bridenbaugh v. Bridenbaugh, 786 P.2d 241, 242 (Utah Ct. App. 1990). Determining the standard of living is a fact-sensitive and subjective task. The standard of living cannot be determined by actual expenses alone. Those expenses may be necessarily lower than needed to maintain an appropriate standard of living for any number of reasons. As Webster says, standard of living includes "customary or proper status" considering the parties' circumstances. Those circumstances should be evaluated at the time of trial. In light of the facts of this case, we conclude that the trial court erred in not looking at not only the pre-separation standard of living in setting alimony, but also considering the

standard of living "during the marriage" up to the time of trial. In this case, it was inequitable and an abuse of discretion to ignore standard of living, along with all relevant facts surrounding it.

The alimony award, in the instant case, does not come close to equalizing the parties' standard of living, as Ms. Tanner continues to be a student with little or no income and Mr. Swensen continues to build his law practice with substantial income.

As in Howel v. Howel, 806 P.2d 1209, 155 Utah Adv. Rep., there was an improper analysis of this point allowing the husband a two to four times advantage.

Utah's appellate courts have considered the appropriateness of alimony after a long-term marriage, where the wife (usually) has worked primarily in the home, has limited job skills, and is in her late forties or fifties. Gardner, 748 P.2d 1076; Rasband, 752 P.2d 1331, 1333. In Jones v. Jones, 700 P.2d 1072 (Utah 1985), the supreme court found alimony awarded inadequate to allow the wife a standard of living even approaching that experienced during the marriage, and described the marriage as follows:

During most of the marriage, with the full consent and support of her husband, [the wife] devoted her time to raising their four children and donating her services to various social service

organizations... It is entirely unrealistic to assume that a woman in her middle years, with no substantial work experience or training, will be able to enter the job market and support herself in anything even resembling the style in which the couple had been living.

In the present case, the plaintiff spent the majority of her time raising children and caring for the home.

At this point in time, there is no way plaintiff can even recoup and catch up to the earning potential of her former husband.

In Sampinos v. Sampinos, 750 P.2d 615, 77 Utah Adv. Rep. 24, the court reviewed this issue pertaining to alimony:

Did the trial court award plaintiff alimony based solely on defendant's ability to pay rather than on the parties' needs and income earnings abilities?

The court explains in Sampinos that:  
in an action for divorce, the trial court has considerable discretion to provide for spousal support. Bushell v. Bushell, 649 P.2d 85, 88 (Utah 1982). However, the trial court must make findings on all material issues, and such findings must be sufficiently detailed and consist of enough subsidiary facts to reveal the steps the court took to reach its conclusions on each factual issue presented. Failure to substantiate such findings

constitutes reversible error unless the facts in the record are "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." Lee v. Lee, 744 P.2d 1378, 1380 (Utah Ct. App. 1987) (quoting Action v. Deliran, 737 P.2d 996, 999 (Utah 1987)). The court's findings in the instant case, do not include any facts revealing the steps taken to reach conclusions of how the court determined the alimony award and without sufficient detail. (Transcript of Judge's Ruling)

The Sampino court explain the basis of its alimony award when:

Alimony - Defendant contends that the trial court abused its discretion in awarding plaintiff alimony based solely on his ability to pay rather than on the parties' needs and income-producing abilities. The Utah Supreme Court has enunciated that the purpose of spousal support is to "enable the receiving spouse to maintain, as nearly as possible, the standard of living enjoyed during the marriage and to prevent the spouse from becoming a public charge." Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986). Three factors must be considered in fixing alimony awards: (1) the financial condition and needs of the spouse claiming support; (2) the ability of the spouse to produce sufficient income for himself or herself; and (3) the ability of the responding spouse to provide the support. Id. at 101.

The court in the present case seemed to focus solely on the defendant's ability to pay, neglecting the issue of potential loss of standard of living and future income in the Plaintiff.

Ms. Tanner is a full time student who hopes to be able to earn \$20,000 per year once she has earned her masters degree. There is no guarantee that she will be able to realize that hope. In addition, Ms. Tanner would hope to continue on in her education to earn a Ph.D., which would push back the time when she would be qualified to begin work and earn an additional four years. Mr. Swensen has the potential as an expert in tax law to earn more than three times what Ms. Tanner only hopes to earn in the future. Mr. Swensen has a successful law practice and there is no evidence that his ability to maintain or increase his yearly income will not change in the future.

Ms. Tanner has no guarantee what her future income will be, or when she will begin to earn it. The trial court's alimony award will terminate in two years regardless of her status, employed or not. Ms. Tanner could easily still be a student without any ability to produce income after such a short period. This is blatantly unfair.

The trial court erred in making its alimony award of \$700 per

month for a two year period. There was not a sufficient showing of fact establishing that Ms. Tanner will continue to receive large disbursements from the Tanner family business nor that she will earn \$20,000 per year in two years. Nor that she will have income in two years. The facts in the record are not "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment". Gardner v. Gardner, 748 P.2d 1076, 73 Utah Adv. Rep. 35 (1988) (quoting Action v. Deleran, 737 P.2d 996, 999 (Utah 1987)).

The trial court abused its discretion and created an inequitable situation where Ms. Tanner has no idea what her economic situation will be two years from now. Ms. Tanner may not be able to find a job making \$20,000 per year or she may find that she is incapable of completing her masters degree. Ms. Tanner may have no choice in two years but to become a public charge which is certainly one of the circumstances the award of alimony is designed to prevent.

The failure of the trial court to make sufficient findings on this material issue, as well as the short term minimal award is reversible error.

POINT 3:

### IMPUTED PAST INCOME

The trial court abused its discretion in imputing income from Tanner, Inc., as well as income from teaching Art classes in the summer. Ms. Tanner can no longer participate in the summer art classes because of her enrollment in year-round graduate school. The trial court imputed this income for purposes of child support and alimony. Wherefore the child support and alimony awards should be figured without using the imputed income amount. Savage v. Savage, 658 P.2d 1201, (Ut. S. Ct. 1983). Weston v. Weston, 773 P.2d 408, 107 Utah Adv. Rep 78. The court was aware that Ms. Tanner was no longer able to produce extra summer income and yet they imputed income to her in any case.

In addition, Ms. Tanner had received disbursements of money from Tanner Inc., in the past but the money historically had been used to pay income taxes allotted to Ms. Tanner from the business. There had in the past been some small amounts of money left over after the taxes were paid but was never a sum large enough to contribute to the families living expenses. The last two disbursements were larger than the rest however, (\$8,000 a piece) and were attributable to the sale of the family business. Mr. Maurice Tanner, the president of Tanner, Inc., and Ms. Tanner's father, informed Ms. Tanner that she would not be receiving any

future disbursements as large as the ones in the past. She cannot, therefore, depend on disbursements of money from Tanner, Inc., to support herself in the future.

As mentioned above, Ms. Tanner had also earned a small income from teaching Art classes to neighborhood children during the summer months but this income has also stopped. She was capable of teaching during the summers because she was not attending school herself and she could rely upon Mr. Swensen's income to support the family as the income from teaching was not significant (approximately \$1,500). Ms. Tanner is currently a full-time year-round student. She will not be able to teach the art classes and continue her education during the summers. If she did teach the classes it would cause a delay in her obtaining her masters degree in all probability, as much as a year. Ms. Tanner cannot afford the delay that teaching the art classes would cause. Ms. Tanner has no future plans to earn income from teaching art during the summer months.

The trial court, however, imputed the income that Ms. Tanner made in the past from the two above mentioned sources when determining the amount of child support and alimony awards. The court in Wiley v. Wiley, 227 Utah Adv. Rep. 39 (Utah Ct. App. 1993), faced a similar problem. The trial court found that Mrs.



Wiley was capable of earning an income of between \$1,500 and \$2,000 per month, based on her education and qualifications. The trial court had not made its award based upon the Jones factors, which include Mrs. Wiley's financial need, Mr. Wiley's financial need, and the ability of Mr. Wiley to provide support. Id.

In the instant case, the trial court did not look at Ms. Tanner's actual ability to support herself and what her financial needs were. She was no longer capable of teaching art classes during the summer and she would no longer be receiving large disbursements of money from Tanner Inc. The potential for income from these two sources were no longer present yet the trial court used these factors in its computations. Using these factors instead of the Jones factors is reversible error by the trial court.

POINT 4:

PRE-INHERITANCE/PREMARITAL PROPERTY

Ms. Tanner's interest in Tanner Inc. qualifies as a pre-inheritance gift and the court should not have utilized the family corporation in any capacity in figuring child support or alimony, as it was not income but a property interest. Typically, inherited property will be awarded to the person who inherited it, even when the property was inherited during the marriage. In Preston v.

Preston, 646 P.2d 705, 706 (Utah 1982), the court stated that inheritance acquired during the marriage was property excluded from the valuation of the marital assets.

In the instant case the property interest was inherited before the marriage. The Tanner family corporation was formed 35 years ago and predates the marriage. The disbursements of money sent to Ms. Tanner over the course of the 19 year marriage were sent mainly to cover Ms. Tanner's personal taxes with only several hundred dollars left over to go to personal use. The large disbursements of \$8,000 were the result of one of the family businesses being sold and Ms. Tanner has been informed that no future disbursements of \$8,000 will be forthcoming.

At no point, however, were the disbursements made that could be used to support the couple. The assets derived from Tanner Inc. were never commingled with the Swensen family funds except in the paying of personal taxes. None of the Swensen family property was purchased with funds acquired from Tanner Inc.

Mr. Swensen has not augmented or maintained Tanner Inc., in any way.

The assets brought into the marriage by one party that were not commingled with the family assets should be excluded from the valuation of the marital assets. The court in Jespersion v.

Jespersion, 610 P.2d 326, 328 (Utah 1980), said it was not unreasonable for the trial court to withdraw from marital property the equivalent of assets brought into the marriage.

Tanner Inc. was structured as a Family Corporation whose holdings primarily included land. Ms. Tanner was not a salaried employee of Tanner Inc. She did not receive regular disbursements of money. Her siblings also received equal disbursements to those she received. The corporation was structured with the purpose of transferring inheritable property to the Tanner children, prior to the death of the Tanner parents.

The court erred in determining that funds secured from Tanner Inc. was income to Ms. Tanner, in determining an equitable support award. At the very least, if the court dismisses the premise that the Tanner Inc. proceeds were pre-inheritance properties, it must certainly consider those proceeds pre-marital.

The general rule regarding premarital property as expressed in Walters v. Walters, 812 P.2d 64 (Ut. App 1989), is that "(b)fore a trial court can include either of the parties' premarital property in the marital estate, it must find unique circumstances that warrant disregarding the general rule that premarital property is separate property". (emphasis added). There must be a sufficiently detailed finding to show how the trial court determined that the

premarital property should be included in the marital estate. Id.

In the instant case, there was no detailed finding explaining how the trial court warranted including the disbursements received in the past in any capacity in figuring child support or alimony. The court committed error in doing so, as the family corporation monies were not income but a property interest that was pre-inheritance or at the very least premarital in nature.

POINT 5:

IMPUTED FUTURE INCOME

The trial court abused its discretion in finding that Ms. Tanner could earn \$20,000 a year in two years, after she completed her education. The trial court awarded Ms. Tanner \$700 per month alimony that will terminate in two years presumably on the premise that she would finish her masters degree in recreational therapy and obtain employment at \$20,000 per year.

Obtaining a masters degree is a demanding pursuit that is attempted by many and finished by few. There is no guarantee that Ms. Tanner will be able to finish the work for the masters degree or that her work will be sufficient to actually earn the degree. In addition, Ms. Tanner stated that she hoped to obtain employment after receiving her masters degree making \$20,00 per year. She did

not indicate that she had already secured employment at that rate of pay. There is again no guarantee that Ms. Tanner will be able to secure employment at all when she receives her degree. She has not determined the availability of job openings in her area, nor what the actual pay schedules are.

The court in Wiley v. Wiley, 227 Ut. Adv. Rep. 39 (1993), indicated that imputing income in the determination of alimony based on potential future income would be pure speculation. The alimony award "cannot be premised upon mere conjecture; instead, it demands a careful and precise assessment requiring detailed findings". Id.

There can be no detailed findings regarding Ms. Tanner's potential income in two years. To attempt to do so would be speculative and pure conjecture. Even if Ms. Tanner has the potential to earn \$20,000 a year when and if she receives her degree, there is no guarantee that she will realize her potential. As stated in Wiley, the alimony award and its termination cannot be premised upon speculation and conjecture. The trial court erred in this case by doing just that.

POINT 6:

ATTORNEY FEES

The trial court abused its discretion in not awarding attorney's fees to Ms. Tanner. "In divorce cases, an award of attorney fees must be supported by evidence that it is reasonable in amount and reasonably needed by the party requesting the award". Huck v. Huck, 734 P.2d 417 (Utah 1986); Sinclair v. Sinclair, 718 P.2d 396 (Utah 1986); Pusey v. Pusey, 728 P.2d 117 (Utah 1986); Rasband v. Rasband, 752 P.2d 1331, 1337 (Ut. Ct. App. 1988).

Ms. Tanner's counsel presented an itemized bill showing the reasonableness of the fees for the amount of time spent on the case. The fees were shown to be comparable with those of other attorneys in the region doing a comparable amount of work.

Ms. Tanner's financial need of the award of attorney fees was also shown. She was a full-time student at the time of trial and had no income. Ms. Tanner could not expect to receive another large disbursement of money from Tanner Inc. In fact, Maurice Tanner, the president of the corporation, and Ms. Tanner's father, informed her that the large disbursements were the result of the sale of a family business and not likely to be repeated in the future. Ms. Tanner had no income on which to rely for her attorney fees. Ms. Tanner also testified that she had borrowed money from her Father to pay attorney fees. Mr. Swensen on the other hand, operated a successful law practice with a monthly income of \$5,625.

The reasonableness of the fees was shown as well as the reasonableness of the need for the award yet the trial court ordered each party to bear and be responsible to pay their own attorney's fees and costs. This is clearly an abuse of discretion on the part of the trial court.

Ms. Tanner comes now before this Court requesting that she be awarded attorney fees on appeal.

POINT 7:

CLOSING ARGUMENT DENIED

The trial court abused its discretion in not allowing Plaintiff's counsel to present closing argument and cases relevant to the case before the court.

In Bunnell v. The Industrial Commission of Utah, 740 P.2d 1331, 31 Utah Adv. Rep. 9 (Utah 1987), the Utah Supreme Court reversed and remanded a decision by an administrative law judge who refused to listen to closing argument. When Bunnell's counsel offered argument assessing the evidence before the admission of the medical records on which the administrative law judge had made his decision, the judge told him to save the argument for rehearing. The judge indicated that he had already decided to hold against Bunnell without even examining the medical records.

In the instant case Ms. Tanner's counsel was not allowed to present argument which would have included a presentation of the Jones factors, issues of pre-marital property, pre-inheritance property, and an analysis of the property distribution. The Supreme Court went on to say in Bunnell, that "every agency has a due process right to receive a fair trial in front of a fair tribunal". The Supreme Court concluded that, "the administrative law judge's conduct so far diverged from that which would be expected from an impartial judge that we agree with plaintiff that his right to due process was violated".

Ms. Tanner's due process rights were violated in the instant case just as in Bunnell. Ms. Tanner's counsel was prepared to present case law that dealt with the issues before the court but was not allowed to do so. The trial court did not make the alimony award or the property distribution according to legal precedent that counsel was prepared to present to the court. (Record at 192, lines 20-24)

#### **CONCLUSION**

The trial court abused its discretion by not using the Jones factors when making its alimony award, the division of property, and in it's decision not to award attorney fees to Plaintiff. The



trial court imputed past income to Ms. Tanner that she will not receive in the future in the form of monies earned as an art teacher during the summer, and large money disbursements from the Tanner family corporation that historically had always been used for taxes and a minimal amount used for her personal use. The trial court also imputed future income on the presumption that Ms. Tanner will complete her Masters Degree program and locate a job that will pay her \$20,000 a year, clear speculation. These are all clear cases of the abuse of the trial court's discretion that has created a serious inequity.

Ms. Tanner has no income producing property and her only hope is to earn a masters degree and find a job. Ms. Tanner has no current income on which she can rely. Mr. Swensen is a successful tax attorney with a masters degree in accounting, as well as being a Certified Public Accountant. His estimated income for the year 1993 was \$67,500. In two years regardless of whether Ms. Tanner has employment at the income amount she hopes, the alimony award will terminate. She will be left with no income producing property, no alimony income and the possibility of no employment. She may be forced to become a public charge.

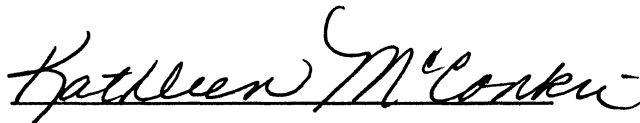
This will all be the result of the failure of the trial court to make an equitable alimony award as well as equitably and fairly

distributing the couples property. In addition, Ms. Tanner's counsel was prepared to present case law pertaining to the Jones factors in issues of property division, support and attorney fees, in closing argument, but was not allowed to do so. The court refused to protect the rights of the Plaintiff and the judgment of the court clearly reflects this refusal.

Dated this 19th day of August, 1994.

Respectfully submitted,

Crippen, McConkie & Cline, LC

A handwritten signature in cursive script, reading "Kathleen McConkie".

Kathleen McConkie, Esq.

**CERTIFICATE OF MAILING**

This is to certify that on the 19th day of August, 1994, two (2) true and correct copies of the foregoing Appellants Brief was hand delivered to:

Kenneth Okazaki, Esq.

PRINCE, YEATES & GELDZAHLER

City Center I, Suite 900

175 East 400 South

Salt Lake City, Utah, 84111

A handwritten signature in cursive script, reading "Kathleen McConkie". The signature is written in black ink and is positioned above the printed name.

Kathleen McConkie, Esq.

Attorney for Plaintiff and Appellant.

WP:tanner.brf

Tab A

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

MAURIA T. SWENSEN,

Plaintiff,

vs.

JAMES G. SWENSEN, JR.,

Defendant.

Case No. DOM 924902803 DA

REPORTER'S TRANSCRIPT OF  
JUDGE'S RULING

REPORTER'S TRANSCRIPT OF JUDGE'S RULING

THE HONORABLE J. DENNIS FREDERICK

on Thursday, December 16, 1993

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535-5203

COPY



1 pages 22 and 23, and accordingly adopt the same.

2 The parties have each submitted proposed distributions  
3 of marital property. I find that the more credible, reliable  
4 distribution proposal to be that of the defendant at Exhibit  
5 11, tab 1, pages 1 and 2, and accordingly adopt the same.

6 Based upon the credible, believable evidence, I find,  
7 for purposes of calculation of child support, the  
8 defendant's gross monthly income to be \$5,625. That is from  
9 Exhibit 11, page 42, which shows a projected annual income  
10 for the year of 1993 of \$67,500. I've simply divided that  
11 by 12. His monthly expenses I find to be \$2108. That's  
12 Exhibit 11, tab 4. That, of course, excludes the \$300 in  
13 donations which the defendant indicates he has not and can  
14 not pay.

15 The evidence establishes the plaintiff's income and  
16 imputable income to total \$1000 per month. That is  
17 calculated by the determination that she received \$8000  
18 from her distribution of the family corporation, she is  
19 capable of earning \$1500 during the summer teaching art,  
20 and she has received \$2500 in student stipend for a total of  
21 \$12,000, divided by 12, equals \$1000 per month. Support,  
22 accordingly, is to be calculated pursuant to the Uniform  
23 Child Support Guideline based upon those two gross income  
24 figure amounts.

25 The defendant is ordered to maintain health and accident

1 insurance on the children. Each of the parties are ordered  
2 to pay one-half of any noncovered medical expenses. The  
3 defendant is to maintain the existing life insurance  
4 policies which he has on his own life, designating the  
5 minor children of the parties as beneficiaries.

6 Each party is awarded the respective personal property  
7 in their possession and each party is ordered to pay and  
8 satisfy the debts incurred by them since the date of  
9 separation, October 1, 1992.

10 Given the plaintiff's financial condition, that is,  
11 \$1000 per month income, both income and imputable income,  
12 with her expenses at \$2885, which I find is the reasonable  
13 figure that is determined by taking Exhibit 6, which is  
14 \$3417, deducting therefrom her \$372 in donations which she  
15 can not afford to pay, and deducting therefrom the \$160 for  
16 the "other" category which she could not explain, less the  
17 support payment which will be approximately what is now  
18 being paid, that being about \$1286, though I have not  
19 calculated the final figure, the plaintiff has shown a need  
20 for alimony and the defendant has the ability to pay, but his  
21 disposable earnings which are \$3671 from Exhibit 11, page  
22 42, less the approximate \$1286 in support that he will have  
23 to pay, less his monthly expenses of approximately \$2108,  
24 he can not pay, in my judgment, any more than he is already  
25 paying. Accordingly, I also determine that the plaintiff,



1    however, can not receive any less than she is already  
2    receiving, and accordingly, I order that the \$700 per month  
3    in alimony continue to be paid. However, plaintiff will  
4    complete her schooling within two years, at which time she  
5    anticipates that she will be able to earn \$20,000 per year  
6    income. It is my order, therefore, that the alimony will  
7    terminate at the conclusion of two years from this date,  
8    from the date of the next payment that will, in all  
9    likelihood, be the month of January, January 1. Alimony,  
10    therefore, will terminate two years from that date, and  
11    moreover, it will terminate upon the usual happening of  
12    the events such as remarriage by the plaintiff, cohabiting  
13    with a member of the opposite sex without the benefit of  
14    marriage, et cetera.

15            Given the fact that the defendant will be paying  
16    the support for these children and given the fact that his  
17    earnings are considerably more than the plaintiff's, I order  
18    that he be able to take the tax deductions for the children,  
19    the minor children, for whom he will be paying support,  
20    so long as he is current in the payment of that obligation.

21            After the distribution which I have adopted here,  
22    the plaintiff will be the owner of approximately \$92,000  
23    worth of property in assets, plus she will continue to own  
24    her eight percent interest in the family corporation, the  
25    Tanner Family Corporation, which represents a considerable

1 value in her own right. I am therefore persuaded that she  
2 will not need assistance in the payment of her attorney's  
3 fees and moreover, I'm persuaded that there's been no  
4 evidentiary basis upon which to make such an order and  
5 I decline to order that attorney's fees be paid by the  
6 defendant or vice-versa. Each party is ordered to pay their  
7 own fees and costs in this matter.

8 Mr. Okazaki, you prepare the Findings of Fact,  
9 Conclusions of Law and Decree, submit them to Ms. McConkie  
10 for approval as to form.

11 Are there any questions?

12 MR. OKAZAKI: No, sir.

13 Oh, one thing.

14 MS. McCONKIE: I have one question, your Honor.

15 MR. OKAZAKI: On the visitation arrangement, the  
16 parties stipulated that we should adopt the advisory  
17 language in the Code respecting the access to schools, et  
18 cetera. Does the Court recall that?

19 THE COURT: I do, and I frankly wanted to leave it at  
20 reasonable on the assumption that the parties might expand  
21 that, but that's the reason I say that if they are not able  
22 to expand it by agreement, then that schedule will pertain.

23 MR. OKAZAKI: What I'm talking about is the advisory  
24 language.

25 THE COURT: The access to records, yes, I will order

1     that.

2             MS. McCONKIE: Your Honor, the plaintiff would like  
3     to have her maiden name restored.

4             THE COURT: She may certainly have it.

5             MS. McCONKIE: Thank you, and in terms of the life  
6     insurance policy, could she be one-half beneficiary for at  
7     least the term of the alimony and could the children be  
8     one-half beneficiary and she could as well, for the term of  
9     the alimony?

10            THE COURT: No, no, I'm not persuaded that's either  
11     appropriate or necessary, counsel. She has considerable  
12     property in her own right. I'm concerned about the  
13     protection of the children, not the protection of the  
14     plaintiff here.

15            MS. McCONKIE: Thank you, your Honor.

16            THE COURT: All right, counsel. We'll be in recess.

17            (Whereupon, the proceedings were concluded.)

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Tab B

Kenneth Okazaki, #3844  
PRINCE, YEATES & GELDZAHLER  
Attorney for Defendant  
City Centre I, Suite 900  
175 East Fourth South  
Salt Lake City, Utah 84111  
Telephone: (801) 524-1000

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

MAURIA T. SWENSEN	:	
	:	
Plaintiff,	:	AMENDED DECREE OF DIVORCE
	:	
	:	
v.	:	
	:	Civil No. 924902803DA
	:	Honorable Dennis J. Frederick
JAMES G. SWENSEN, JR.,	:	
	:	
Defendant.	:	

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This matter came on for Trial on the 16th day of December at 10:00 a.m. in the Third Judicial District Court, the Honorable Dennis J. Frederick, Third District Court Judge, presiding. Witnesses testified, exhibits were received, argument of the counsel was considered, file and pleadings were reviewed, the Court being thereby fully informed, having heretofore entered its Findings of Fact and Conclusions of Law, and being otherwise fully advised in the premises, now therefore, it is hereby:

ORDERED, ADJUDGED AND DECREED:

1. The parties are mutually awarded a Decree of Divorce, to become final and absolute as of the date of December 16, 1993, upon

the date of signing and entry thereof by the Court pursuant to the provisions of U.C.A. § 30-3-7 (1953 as amended).

#### CHILDREN

2. The Plaintiff is hereby awarded custody of the minor children subject to reasonable visitation by the Defendant.

#### VISITATION

3. The minimum visitation schedule shall be as set forth in § 30-3-35 of the Utah Code Ann. including the following:

- a. one weekday evening to be specified by the noncustodial parent from 5:30 p.m. until 8:30 p.m.;
- b. alternating weekends beginning on the first weekend after the entry of the decree from 6:00 p.m. on Friday until 7:00 p.m. on Sunday continuing each year;
- c. holidays take precedence over the weekend visitation, and changes shall not be made to the regular rotation of the alternating weekend visitation schedule;
- d. in years ending in an odd number, the noncustodial parent is entitled to visitation on Human Rights Day, Easter, Memorial Day, July 24th, Veteran's Day, Day before or after each child's birthday from 3:00 p.m. to 9:00 p.m. and the first half of

Christmas Vacation, including Christmas Eve and Christmas Day to 1:00 p.m.

- e. in years ending in an even number, the noncustodial parent is entitled to visitation on New Year's Day, President's Day, July 4th until 11:00 p.m., Labor Day, Columbus Day, UEA weekend from Wed. 6:00 p.m. to Sun. 7:00 p.m., each child's actual birthday beginning at 3:00 p.m. until 9:00 p.m., including taking the other siblings along for the birthday, Thanksgiving from Wed. 7:00 p.m. to Sun. 7:00 p.m., and the second half of Christmas Vacation, 1:00 p.m. to 9:00 p.m. Christmas Day;
- f. Father's Day shall be spent with the father every year;
- g. Mother's Day shall be spent with the mother every year;
- h. extended visitation with the noncustodial parent shall be four weeks of consecutive visitation during the summer at the option of the noncustodial parent; or, if year round, 1/2 of the vacation time for year-round school breaks, custodial parent allowed two week uninterrupted;
- i. notification of extended visitation or vacation



weeks with the children shall be provided at least 30 days in advance to the other parent; and

j. telephone contact shall be at reasonable hours.

4. The advisory guidelines as stated in § 30-3-33 of the Utah Code Ann. are hereby adopted and include the following:

- a. visitation shall be utilized to maximize the continuity and stability of the children's lives;
- b. special consideration shall be given by each parent to make the children available to attend family functions including funerals, weddings, family reunions, religious holidays, important ceremonies, and other significant events in the lives of the children or in the life of either parent which may inadvertently conflict with the visitation schedule;
- c. the noncustodial parent shall pick up the children at the times specified and return the children at the times specified, and the children's regular school hours shall not be interrupted;
- d. the custodial parent shall have the children ready for visitation at the time they are to be picked up and shall be present at the custodial home or shall make reasonable alternate arrangements to receive

- the children at the time they are returned;
- e. neither visitation nor child support shall be withheld due to either parent's failure to comply with a court-ordered visitation schedule;
  - f. the custodial parent shall notify the non-custodial parent within 24 hours of receiving notice of all significant school, social, sports, religious, and community functions in which the children are participating or being honored, and the noncustodial parent shall be entitled to attend and participate fully;
  - g. the noncustodial parent shall have access directly to all school reports including preschool and daycare reports and medical records and shall be notified immediately by the custodial parent in the event of a medical emergency;
  - h. each parent shall provide the other with their current address and telephone number within 24 hours of any change;
  - i. each parent shall permit and encourage liberal telephone contact during reasonable hours and uncensored mail privileges with the children;
  - j. parental care shall be presumed to be better care

for the children than surrogate care and the parties shall cooperate in allowing the noncustodial parent, if willing and able, to provide child care;

- k. each parent shall provide all surrogate care providers with the name, current address, and telephone number of the other parent and shall provide the noncustodial parent with the name, current address, and telephone number of all surrogate care providers unless the court for good cause orders otherwise; and
- l. each parent shall be entitled to an equal division of major religious holidays celebrated by the parents, and the parent who celebrates a religious holiday that the other parent does not celebrate shall have the right to be together with the children on the religious holiday.

#### PERSONAL PROPERTY

5. The parties' property is awarded as follows:

- a. The Plaintiff is awarded \$374.15 of the USAA money market account (account no. 42901560486) with the remaining balance awarded to the Defendant free and clear of any claim by the Plaintiff.

b. The Defendant is awarded \$895.86 of the 1992 Tax Refund with the remaining balance awarded to the Plaintiff free and clear of any claim by the Defendant.

c. The Franklin Telecom and Mining Services securities are awarded to the Defendant free and clear of any claim by the Plaintiff.

d. Plaintiff is awarded the personal property in her possession valued at approximately \$5,000 less any exclusions pursuant to the terms of this Order.

e. Plaintiff is awarded the 1990 Caravan, 1985 Reliant, and the 1981 Reliant free and clear of any claim by the Defendant.

f. Defendant is awarded the 1992 Honda Accord free and clear of any claim by the Plaintiff.

g. Plaintiff is awarded the marital residence located at 2615 East Lincoln Lane, Salt Lake City, Utah, together with the sole responsibility for any obligation owing thereon, free and clear of any claim by the Defendant.

h. Defendant is awarded the proceeds from the contract sale of the Crest Drive property free and clear from any claim by the Plaintiff.

i. Defendant is awarded his professional practice free and clear from any claim by the Plaintiff.

j. Plaintiff is awarded the Dreyfus IRA account (account no. 039-0560055352) in the amount of \$3,359.34 free and clear of any claim by Defendant.

l. Defendant is awarded the Dreyfus IRA account (account no. 039-0556358836) in the amount of \$6,717.55 free and clear of any claim by Plaintiff.

m. Plaintiff is awarded \$3,138.23 from the USAA money market account (account no. 42901704138) with the remaining balance awarded to the Defendant free and clear of any claim by the Plaintiff.

n. Plaintiff is awarded \$508.96 from the USAA CRST account (account no. 51902459719) with the remaining balance awarded to the Defendant free and clear of any claim by the Plaintiff.

o. Plaintiff is awarded \$1,064.18 from the USAA Gold account (account no. 50901211141) with the remaining balance awarded to the Defendant free and clear of any claim by the Plaintiff.

p. Plaintiff is awarded \$16,519.00 from the investment note with the remaining interest awarded to the Defendant free and clear of any claim by the Plaintiff.

q. Plaintiff is awarded \$1,723.00 from the FEGB Ltd. Partnership with the remaining interest awarded to the

Defendant free and clear of any claim by the Plaintiff.

#### DISTRIBUTION OF RETIREMENT ACCOUNTS

6. The retirement accounts shall be divided pursuant to a Qualified Domestic Relations Order within the meaning of §414(p) of the Internal Revenue Code of 1986.

#### DEFENDANT'S INCOME

7. The Defendant has a gross monthly income of \$5,625 and monthly expenses of \$2,108.

#### PLAINTIFF'S INCOME

8. The Court hereby imputes income to the Plaintiff in the amount of \$1,000 per month and monthly expenses of \$2,885.

#### CHILD SUPPORT

9. Child support calculated pursuant to the uniform child support guidelines and based upon the gross income for the Defendant of \$5,625 per month and the gross income of \$1,000 attributable to the Plaintiff is \$1,209.55 per month to be paid by the Defendant to the Plaintiff.

#### HEALTH INSURANCE

10. The Defendant shall maintain health and accident insurance for the minor children and shall deduct the premium from the child support amount. Each of the parties shall be ordered to pay one-half of any non-covered medical expenses.

#### LIFE INSURANCE

11. The Defendant shall maintain his existing life insurance policy which he presently has on his own life and shall designate the minor children as beneficiaries thereunder.

#### PERSONAL PROPERTY

12. Each party shall be awarded their respective personal property presently in their possession except as specifically divided pursuant to the terms hereof.

13. Defendant is awarded the piano, antique sewing machine, and remodeling tools presently in the possession of the Plaintiff.

#### DEBTS AND OBLIGATIONS

14. Each party shall pay and satisfy the personal debts incurred by them since the date of separation, October 1, 1992, and shall indemnify and hold the other harmless therefrom.

#### ALIMONY

15. The Defendant shall pay the Plaintiff the sum of \$700 per month in alimony commencing January 1, 1994, which shall terminate automatically on January 1, 1996.

16. Further, alimony shall terminate, in addition to the terms as stated above, upon the re-marriage of the Plaintiff, the Plaintiff residing with a person of the opposite sex without the benefit of marriage or any other statutory or legal grounds for termination of alimony.

**TAX EXEMPTIONS**

17. The Defendant is awarded the tax deductions for the minor children for whom he will be paying support so long as he is current in the payment of that support obligation.

**ATTORNEY'S FEES**

18. Each party shall bear and be responsible to pay their own attorney's fees and costs incurred herein.

**MAIDEN NAME**

19. The Plaintiff is hereby restored to the use of her maiden name of "Tanner."

DATED this 22nd day of February, 1994.

BY THE COURT:

(S)  
Dennis J. Frederick  
THIRD DISTRICT COURT JUDGE

APPROVED AS TO FORM AND CONTENT:

Kathleen McConkie  
Kathleen McConkie  
Attorney for the Plaintiff



CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_ day of February, 1994, a true and correct copy of the foregoing Decree of Divorce was hand-delivered to the following:

Kathleen McConkie  
1200 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111

---

Ingrid S. Westphal

Tab C

[illegible]

Other: (specify) \_\_\_\_\_

TOTAL MONTHLY DEDUCTIONS \_\_\_\_\_

3. Net monthly income - take home pay \_\_\_\_\_

\$	\$
\$	\$

4. Debts and obligations:

Creditor's Name                      For                      Date Payable                      Balance                      Monthly Payment

TOTAL			\$	\$

(If insufficient space, insert total and attach schedule)

5. All property of the parties known to me owned individually or jointly (indicate who holds or how title held: (H) Husband, (W) Wife, (J) Jointly).

WHERE SPACE IS INSUFFICIENT FOR COMPLETE INFORMATION OR LISTING PLEASE ATTACH SEPARATE SCHEDULE.

	Value	Owed Thereon
(a) Household furnishings, furniture, appliances and equipment	\$ 3,777.00	\$
(b) Automobile (Year-Make) 1997 Dodge Caravan	unknown	

(c) Securities - stocks, bonds


(d) Cash and Deposit Accounts (banks, savings & loans, credit unions - savings and checking)

Key Bank - 629714994	50.00	

(e) Life Insurance:

Name of Company	Policy No.	Face Amount	Cash value, accumulated dividend, or loan amount
		\$	\$

(f) Profit sharing or Retirement Accounts

Value of interest and amount presently vested

Name \_\_\_\_\_  
Name \_\_\_\_\_

(g) Other Personal Property and Assets (specify)


- (h) Real Estate (Where more than one parcel of real estate owned, attach sheet with identical information for all additional property)

Address _____	Type of Property _____
_____	Date of Acquisition _____
Original Cost \$ _____	Total Present Value \$ _____
Cost of Additions \$ _____	Basis of Valuation _____
Total Cost \$ _____	_____
Mtg. Balance \$ _____	_____
Other Liens \$ _____	_____
Equity \$ _____	_____
Monthly Amortization _____	And to whom _____
Taxes \$ _____	_____
Individual contributions _____	_____

- (i) Business Interest (indicate name, share, type of business value less indebtedness)

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

- (j) Other assets (Specify)

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

6. Total monthly expenses: \*(Specify which party is the custodial parent and list name and relationship of all members of the household whose expenses are included.)

	HUSBAND	WIFE
* <u>Mauria Swensen (custodial parent)</u>		
<u>Daughters (Alison, Clare)</u>	\$	\$
<u>Sons (Nate, Tanner)</u>		
Rent or mortgage payments (residence) _____		720.00
Real property taxes (residence) _____		
Real property insurance (residence) _____		
Maintenance (residence) _____		50.00
Food and household supplies _____		500.00
Utilities including water, electricity, gas and heat _____		150.00
Telephone _____		45.00
Laundry and cleaning _____		10.00
Clothing _____		200.00
Medical _____		200.00
Dental _____		
Insurance (life, accident, comprehensive liability, disability) Exclude Payroll Deducted _____		
Child Care _____		
Payment of child spousal support re: prior marriage _____		
School _____		300.00
Entertainment (includes clubs, social obligations, travel recreation) _____		200.00
Incidentals (grooming, tobacco, alcohol, gifts, and donations) _____		300.00
Transportation (other than automobile) _____		10.00
Auto expense (gas, oil, repair, insurance) _____		350.00
Auto payments _____		
Installment payment(s). (Insert total and attach itemized schedule if not fully set forth in (d) on the first page hereof) _____		
Other expenses (Insert total and specify on attached schedule) _____		160.00
	\$	\$
TOTAL EXPENSES		3,410.00

Husband's ( )

Wife's (X)

## Proposed Settlement of Pending Divorce Litigation

Child Support \$ \_\_\_\_\_ Total (per month) \$ \_\_\_\_\_

Alimony: \_\_\_\_\_ Total (per month) \$ 1,400.00

Property Distribution:

Mauria Swensen:

Jewelry (gifts to me ). Pistol (gift from my father). Sewing equipment. Honda car.  
Silver (gift from my grandmother). Tools and all yard equipment for yard and home  
upkeep (defendant has an apartment). Art (my personal art work). Furnishings and  
accessories presently in the home (to maintain more stability for the children, to  
maintain the home, because I personally acquired most of the furnishings by babysitting  
or my parents gave things to us. King bed. Chest. Nightstand. Lamp. Sofa. 2 chair  
2 tables. Linen chest. Desk. 2 Lamps. Microwave. Dining set. Kitchen set. TV and  
VCR. Entertainment center. Barbequer. Refrigerator. Washer and dryer. Household  
equipment and supplies. Children's personal furnishings and equipment. Home at  
Lincoln Lane. Defendant pays all attorney fees incurred during entire divorce proceedi  
Defendant pays all taxes, penalties, and interest for 1992 state and federal taxes.  
Sole custody of all four of our children. Half of all marital assets, his business  
included. Allow me to take at least two of the four children as deductions on tax  
returns.

GRAND TOTAL (per month) \$ \_\_\_\_\_

I, Mauria T Swensen, propose the above settlement.

Mauria T Swensen  
Plaintiff / Defendant

If this matter requires a trial, it will take approximately \_\_\_\_\_ hours and \_\_\_\_\_ witnesses will  
be called for this party.

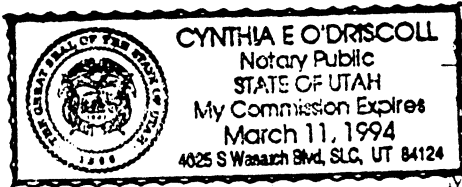
STATE OF UTAH

COUNTY OF SALT LAKE

ss.

I swear that the matters stated herein are true and correct,

Subscribed and sworn to before me this 1 day of August, 19 93



Cynthia E. O'Driscoll  
Notary Public residing in Salt Lake County, Utah

My Commission Expires: 3.11.94

BRING TO THE PRE-TRIAL HEARING ALL DOCUMENTS AND OTHER SUPPORTING INFORMATION NECESSARY TO VERIFY OR EXPLAIN THE STATEMENTS MADE IN THIS DECLARATION. INCLUDING BUT NOT LIMITED TO, PAYROLL STUBS FOR THE MOST RECENT 90 DAYS, 3 MOST RECENT TAX RETURNS, CREDIT UNION SHARE STATEMENTS, PASSBOOKS, CHECKBOOKS, CANCELLED CHECKS, CERTIFICATES, POLICIES AND OTHER RELEVANT AND MATERIAL DOCUMENTATION.

Tab D



# In the Third Judicial District Court of Salt Lake County STATE OF UTAH

MAURIA T. SWENSEN

Plaintiff

vs.

JAMES G. SWENSEN, JR.

Defendant

Case No. 924902803 DA

## Financial Declaration

Dated: AUG. 13, 1993

Husband: JAMES G. SWENSEN, JR.

Wife: MAURIA T. SWENSEN

Address: P.O. Box 1991

Address: 2615 LINCOLN LANE

SALT LAKE CITY, UTAH 84110

SALT LAKE CITY, UTAH

Soc. Sec. No.: 567-72-3130

Soc. Sec. No.: 585-24-2087

Occupation: ATTORNEY

Occupation: STUDENT

Employer: SELF

Employer: -

Birthdate: FEB. 23, 1950

Birthdate: MAY 17, 1954

NOTE: THIS DECLARATION MUST BE FILED WITH THE DOMESTIC CALENDAR CLERK 5 DAYS PRIOR TO THE PRE-TRIAL HEARING.

FAILURE BY EITHER PARTY TO COMPLETE, PRESENT, AND FILE THIS FORM AS REQUIRED WILL AUTHORIZE THE COURT TO ACCEPT THE STATEMENT OF THE OTHER PARTY AS THE BASIS FOR ITS DECISION.

ANY FALSE STATEMENT MADE HEREON SHALL SUBJECT YOU TO THE PENALTY FOR PERJURY AND MAY BE CONSIDERED A FRAUD UPON THE COURT.

### STATEMENT OF INCOME, EXPENSES, ASSETS AND LIABILITIES

(NOTE: To arrive at monthly figures when income is received and deductions are made weekly, multiply by 4.3; if figures are on a bi-weekly basis, multiply by 2.167)

1. Gross monthly income from:

Salary and wages, including commissions, bonuses, allowances and overtime, payable \_\_\_\_\_ (pay period) \_\_\_\_\_  
Pensions and retirement \_\_\_\_\_  
Social security \_\_\_\_\_  
Disability and unemployment insurance \_\_\_\_\_  
Public assistance (welfare, AFDC payment, etc.) \_\_\_\_\_  
Child support from any prior marriage \_\_\_\_\_  
Dividends and interest \_\_\_\_\_  
Rents \_\_\_\_\_  
All other sources: (Specify) \_\_\_\_\_

TOTAL MONTHLY INCOME \_\_\_\_\_

2. Itemize monthly deductions from gross income:

State and federal income taxes \_\_\_\_\_  
Number of exemptions taken \_\_\_\_\_  
Social security \_\_\_\_\_  
Medical or other insurance (describe fully) \_\_\_\_\_  
Union or other dues \_\_\_\_\_  
Retirement or pension fund \_\_\_\_\_

HUSBAND	WIFE
\$	\$
5,625.00	
\$	\$
5,625.00	
1,607.65	
1	
430.35	

Other: (specify) \_\_\_\_\_

TOTAL MONTHLY DEDUCTIONS \_\_\_\_\_

\$	2,038.00	\$
\$	3,587.00	\$

i. Net monthly income - take home pay \_\_\_\_\_

i. Debts and obligations:

Creditor's Name For Date Payable Balance Monthly Payment

NONE				
TOTAL			\$ 0	\$

(If insufficient space, insert total and attach schedule)

5. All property of the parties known to me owned individually or jointly (indicate who holds or how title held: (H) Husband, (W) Wife, (J) Jointly).

WHERE SPACE IS INSUFFICIENT FOR COMPLETE INFORMATION OR LISTING PLEASE ATTACH SEPARATE SCHEDULE.

	Value	Owed Thereon
(a) Household furnishings, furniture, (H)	\$ 700.00	\$ 0
appliances and equipment (W)	4,700.00	0
(b) Automobile (Year-Make) 1992 HONDA (H)	14,250.00	0
1990 DODGE (W)	8,900.00	0
1985 PLYMOUTH (H)	500.00	0

(c) Securities - stocks, bonds

FRANKLIN TELECOM 200 shs (J)	12.00	
MINING SERVICES 80 shs (J)	125.00	
TANNER, INC. (8%) (W)	?	

(d) Cash and Deposit Accounts (banks, savings & loans, credit unions - savings and checking)

USAA MONEY MARKET	742.76	

(e) Life Insurance:

Name of Company	Policy No.	Face Amount	Cash value, accumulated dividend, or loan amount
PRUDENTIAL		\$ 400,000	\$ 0 TERM

(f) Profit sharing or Retirement Accounts

Name	Value of interest and amount presently vested
IRA - DREYFUS JAMES SWENSEN (6-30-93)	6,674.61
IRA - DREYFUS MAURIA SWENSEN (6-30-93)	3,337.81

(g) Other Personal Property and Assets (specify)

P/S - USAA M/M (6-30-93)	45,221.67	76032
P/S - USAA M/M (12-31-93)	13,498.74	

Real Estate (Where more than one parcel of real estate owned, attach sheet with identical information for all additional property)

Address 2615 LINCOLN LANE  
SALT LAKE CITY, UTAH 84124

Type of Property RESIDENCE

Date of Acquisition JULY 1983

Original Cost \$ \_\_\_\_\_

Total Present Value \$ appraisal in progress

Cost of Additions \$ \_\_\_\_\_

Basis of Valuation \_\_\_\_\_

Total Cost \$ \_\_\_\_\_

Mtg. Balance \$ \$ 68,540

Other Liens \$ \_\_\_\_\_

Equity \$ \_\_\_\_\_

Monthly Amortization \_\_\_\_\_

And to whom \_\_\_\_\_

Taxes \$ \_\_\_\_\_

Individual contributions \_\_\_\_\_

) Business Interest (indicate name, share, type of business value less indebtedness)

) Other assets (Specify)

REAL ESTATE CONTRACT - SALE OF OAKH PROPERTY 11,255.00

Total monthly expenses: \*(Specify which party is the custodial parent and list name and relationship of all members of the household whose expenses are included.)

	HUSBAND	WIFE
* <u>(W) is custodial parent</u>		
<u>ALIMONY</u>	\$ <u>700.00</u>	\$
<u>CHILD SUPPORT</u>	<u>1,448.00</u>	
Rent or mortgage payments (residence)	<u>650.00</u>	
Real property taxes (residence)		
Real property insurance (residence)	<u>12.00</u>	
Maintenance (residence)	<u>20.00</u>	
Food and household supplies	<u>245.00</u>	
Utilities including water, electricity, gas and heat	<u>8.00</u>	
Telephone	<u>21.00</u>	
Laundry and cleaning	<u>20.00</u>	
Clothing	<u>50.00</u>	
Medical	<u>65.00</u>	
Dental		
Insurance (life, accident, comprehensive liability, disability) Exclude Payroll Deducted	<u>161.00</u>	
Child Care		
Payment of child spousal support re: prior marriage		
School		
Entertainment (includes clubs, social obligations, travel recreation)	<u>100.00</u>	
Incidentals (grooming, tobacco, alcohol, gifts, and donations)	<u>80.00</u>	
Transportation (other than automobile)		
Auto expense (gas, oil, repair, insurance)	<u>190.00</u>	
Auto payments		
Installment payment(s). (Insert total and attach itemized schedule if not fully set forth in (d) on the first page hereof)		

Husband's (X)

Wife's ( )

## Proposed Settlement of Pending Divorce Litigation

Child Support \$ \_\_\_\_\_ Total (per month) \$ 1448.00  
Alimony: FOR 5 YEARS Total (per month) \$ 700.00

### Property Distribution:

USAA Money Market and Securities - divide equally  
Personal Property to be awarded to the parties as now in their possession; except  
piano and antique sewing machine to be awarded to Defendant.  
1992 Honda and 1985 Plymouth awarded to Defendant.  
1990 Dodge awarded to Plaintiff  
Lincoln Lane House awarded to Plaintiff  
Real Estate Contract awarded to Defendant  
IRA - JAMES SWENSEN awarded to Defendant  
IRA - MARIAN SWENSEN awarded to Plaintiff  
P/S Accounts awarded to Defendant  
1992 Federal Tax Refund - divide equally, subject to reimbursement to Defendant  
of advances for Plaintiff in the amount of \$723.00 from Plaintiff's share.

GRAND TOTAL (per month) \$ 2148.00

I, JAMES G. SWENSEN, JR., propose the above settlement.

James G. Swensen, Jr.  
Plaintiff / Defendant

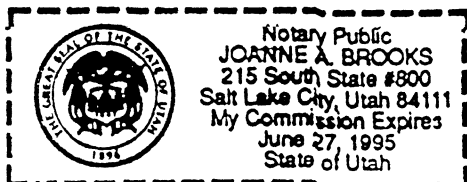
If this matter requires a trial, it will take approximately \_\_\_\_\_ hours and \_\_\_\_\_ witnesses will

STATE OF UTAH  
COUNTY OF SALT LAKE

ss.

I swear that the matters stated herein are true and correct,

Subscribed and sworn to before me this 16 day of August, 19 93



Joanne A. Brooks  
Notary Public residing in Salt Lake County, Utah  
My Commission Expires: June 27, 1995

BRING TO THE PRE-TRIAL HEARING ALL DOCUMENTS AND OTHER SUPPORTING INFORMATION NECESSARY TO VERIFY OR EXPLAIN THE STATEMENTS MADE IN THIS DECLARATION, INCLUDING BUT NOT LIMITED TO, PAYROLL STUBS FOR THE MOST RECENT 90 DAYS, 3 MOST RECENT TAX RETURNS, CREDIT UNION SHARE STATEMENTS, PASSBOOKS, CHECKBOOKS, CANCELLED CHECKS, CERTIFICATES, POLICIES AND OTHER RELEVANT AND MATERIAL DOCUMENTATION.

Tab E

**PLAINTIFF'S EXHIBIT 10**

Kathleen McConkie (3978)  
Attorney for Plaintiff  
1200 Beneficial Life Tower  
36 South State Street  
Salt Lake City, UT 84111  
Telephone: (801)537-1508  
Telefax: (801)328-3629

---

IN THE THIRD JUDICIAL DISTRICT COURT  
DAVIS COUNTY, STATE OF UTAH

---

MAURIA T. SWENSEN,	)	AFFIDAVIT OF
	)	ATTORNEY FEES
Plaintiff,	)	
	)	
v.	)	
	)	
JAMES G. SWENSEN, Jr.	)	Case No. 924902803DA
	)	
Defendant.	)	Judge Dennis Frederick

---

STATE OF UTAH            )  
                              :   SS  
COUNTY OF SALT LAKE )

I, Kathleen McConkie, Esq., being first duly sworn, deposes and states as follows:

1. I am the attorney of record in the above-entitled matter.
2. I primarily practise in the area of Domestic Relations and have done so for the last ten (10) years.
3. I charge \$130.00 an hour.
4. It is my belief the fees and rate are reasonable in the



community.

5. I have spent approximately 30 hours in travel, consultation with client, court appearances, and the drafting of pleadings in the above regard to trial. The fees to date are \$4,990.40.

6. I anticipate that I will bill 30 additional hours, which will include the month of December, the trial and final orders, etc.

7. Supplemental attorney's fees will, therefore, approximately total \$10,000.00.

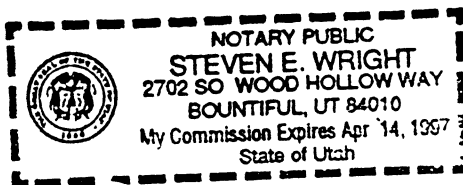
8. Further affiant saith not.

DATED this 15<sup>th</sup> day of December, 1993.

Respectfully submitted,

Kathleen McConkie  
Kathleen McConkie

SUBSCRIBED AND SWORN to before me this 15<sup>th</sup> day of December, 1993.



Steven E. Wright  
Notary Public

**CERTIFICATE OF DELIVERY**

I certify that on the \_\_\_\_\_ day of December, 1993, I hand delivered a copy of the foregoing document to the following:

Kenneth A. Okazaki, Esq.  
175 East 400 South, #900  
Salt Lake City, UT 84111

---

Kathleen McConkie  
Beneficial Life Tower, Suite 1200  
36 South State  
Salt Lake City UT 84111

Invoice submitted to:  
Ms. Mauria Swensen  
2615 East Lincoln Lane  
Salt Lake City UT 84124

October 4, 1993

Invoice #10072

	<u>Hrs/Rate</u>	<u>Amount</u>
Professional services		
06/02/93 Consultation.	1.00 130.00/hr	130.00
07/09/93 Research. Review file. Phone call to opposing counse.	2.50 130.00/hr	325.00
07/29/93 Discovery preparation.	2.00 130.00/hr	260.00
07/30/93 Telephone conference with client. Correspondence to Kenneth Okazaki.	0.30 130.00/hr	39.00
08/11/93 Telephone call to opposing counsel.	0.50 130.00/hr	65.00
Review file.	0.60 130.00/hr	78.00
08/17/93 Review of file and documents.	1.60 130.00/hr	208.00

Ms. Mauria Swensen

Page 2

	<u>Hrs/Rate</u>	<u>Amount</u>
08/18/93 Call from Ken Okazaki.	0.30 130.00/hr	39.00
08/19/93 Conference with opposing party.	1.80 130.00/hr	234.00
Pre-trial conference with client.	0.30 130.00/hr	39.00
08/25/93 Call from opposing counsel.	0.30 130.00/hr	39.00
08/30/93 Telephone conference with Kenneth Okazaki.	1.30 130.00/hr	169.00
08/31/93 Meeting with Ken Okazaki.	2.00 130.00/hr	260.00
09/02/93 Conference with client. Review of Discovery.	1.50 130.00/hr	195.00
09/21/93 Meeting with opposing counsel.	2.00 130.00/hr	260.00
Meeting with Wayne Mills.	1.50 130.00/hr	195.00
09/27/93 Call from Kenneth Okazaki.	0.30 130.00/hr	39.00
For professional services rendered	19.80	\$2,574.00
Additional charges:		
08/16/93 Three pages of faxes received from Ken Okazaki @ \$0.25 per page.		0.75

Ms. Mauria Swensen

Page 3

Amount

08/18/93 Ten pages of fax sent to Kenneth Okazaki @  
\$1.30 per page.

13.00

08/27/93 Three pages of fax sent to Ken Okazaki @  
\$1.30 per page.

3.90

Total costs

---

\$17.65

Total amount of this bill

---

\$2,591.65

09/13/93 Payment - thank you

(\$2,000.00)

Balance due

---

\$591.65

---

Kathleen McConkie  
Beneficial Life Tower, Suite 1200  
36 South State  
Salt Lake City UT 84111

Invoice submitted to:  
Ms. Mauria Swensen  
2615 East Lincoln Lane  
Salt Lake City UT 84124

November 5, 1993

Invoice #10081

	<u>Hrs/Rate</u>	<u>Amount</u>
Professional services		
10/07/93 Modify documents. Call to Ken Okazaki.	0.60 130.00/hr	78.00
10/11/93 Review of stipulation. Re-draft.	0.60 130.00/hr	78.00
Telephone call from Ken Okazaki.	0.40 130.00/hr	52.00
10/12/93 Review second stipulation.	0.30 130.00/hr	39.00
Redraft documents.	0.40 130.00/hr	52.00
10/15/93 Call to opposing counsel. Discussion regarding practice.	0.60 130.00/hr	78.00
10/19/93 Research.	0.40 130.00/hr	52.00

Ms. Mauria Swensen

Page 2

	<u>Hrs/Rate</u>	<u>Amount</u>
10/28/93 Draft documents.	0.50 130.00/hr	65.00
	<hr/>	<hr/>
For professional services rendered	3.80	\$494.00
Additional charges:		
10/31/93 Expert witness fees.		1,000.00
		<hr/>
Total costs		\$1,000.00
		<hr/>
Total amount of this bill		\$1,494.00
Previous balance		\$591.65
		<hr/>
Balance due		\$2,085.65
		<hr/>

Kathleen McConkie  
Beneficial Life Tower, Suite 1200  
36 South State  
Salt Lake City UT 84111

Invoice submitted to:  
Ms. Mauria Swensen  
2615 East Lincoln Lane  
Salt Lake City UT 84124

December 8, 1993

Invoice #10120

	<u>Hrs/Rate</u>	<u>Amount</u>
Professional services		
11/04/93 Review of documents. Discovery.	2.00 130.00/hr	260.00
11/09/93 Telephone call from Kenneth Okazaki. Discussion regarding settlement.	1.10 130.00/hr	143.00
11/23/93 Trial preparation.	0.60 130.00/hr	78.00
11/29/93 Trial preparation. Telephone call to opposing counsel.	2.00 130.00/hr	260.00
	<hr/>	<hr/>
For professional services rendered	5.70	\$741.00
Additional charges:		
11/20/93 Invoice from Wayne Mills for detailed letter regarding needed tax and accounting matters.		112.50



Ms. Mauria Swensen

Page 2

Amount

12/01/93	Two pages of fax to Okazaki @ \$1.30 per page.	2.60
12/03/93	Fourteen pages of fax to Wayne Mills, CPA @ \$1.30 per page.	18.20
	Two pages of fax to Kenneth Okazaki @ \$1.30 per page.	2.60
12/06/93	Three pages of fax to Ken Okazaki @ \$1.30 per page.	3.90
	Pedal Express to Kenneth Okazaki's and Wayne Mill's offices.	23.95

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Total costs	\$163.75
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Total amount of this bill	\$904.75
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Previous balance	\$2,085.65
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Balance due	\$2,990.40
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Tab F

1           A     I am.

2           Q     Would you tell the Court what you're doing?

3           A     I am studying at getting my master's degree at the  
4 University of Utah.

5           Q     What are you getting your master's in?

6           A     In recreational therapy.

7           Q     Do you have an estimate of how long it will take  
8 for you to complete this master's degree?

9           A     I should be finished in two more years from this  
10 month.

11          Q     Have you worked -- when were you married to the  
12 Defendant?

13          A     Pardon me?

14          Q     I'm sorry. When were you married to the Defendant?

15          A     On November 22nd, 1974.

16          Q     During that time have you worked outside of the  
17 home?

18          A     Yes, I worked while Jim was in law school.

19          Q     And when was Jim in law school?

20          A     '79, he started in 1979.

21          Q     Did you work the entire time he was in law school?

22          A     Yes.

23          Q     What did you do?

24          A     I worked as a graduate assistant for a professor on  
25 campus and I did some secretarial work for him. Mostly I was

1     able to bring the work home so that I could be home with my  
2     children.

3             Q     Was this at BYU?

4             A     It was.

5             Q     And do you recall what you earned?

6             A     I'm not sure. I think it's about \$6 an hour as a  
7     graduate student.

8             Q     Did you work full-time?

9             A     I did not.

10            Q     Do you have children, Ms. Swensen?

11            A     I do.

12            Q     How many children do you have?

13            A     I have four children.

14            Q     Could you tell the Court their names and ages,  
15     please?

16            A     Allison is 18, Nathan is 17, Claire is 13, and  
17     Tanner is 9.

18            Q     Do you own property? Do you own real property,  
19     land or houses?

20            A     Yes.

21            Q     Can you tell the Court what you own?

22            A     I own jointly with Mr. Swensen a home in Orem and  
23     the home that I'm presently living in.

24            Q     Were those pieces of property purchased during the  
25     marriage?

1 Q Do you owe your father \$3,000?

2 A I do.

3 Q Are you going to have to pay him back?

4 A Yes, I am.

5 Q And when did he loan you the \$3,000?

6 A Pardon me?

7 Q When did he loan you --

8 A When? In 1992 after July and in the fall.

9 Q What purpose was that why he loaned you the money?

10 A He loaned me the money, 2,000 of it, to pay attor-  
11 ney's fees and a thousand to pay him back for a personal  
12 loan.

13 Q Did you pay that \$3,000 to your -- the \$2,000 to  
14 your attorneys?

15 A I did.

16 Q How much did you pay prior to the time of your  
17 coming to me?

18 A Just under \$5,000.

19 Q Could you tell me how many attorneys you've had in  
20 this case?

21 A You're my third attorney.

22 Q And would you like to explain to the Court why you  
23 had needed three attorneys?

24 A I've needed three attorneys because of all of the  
25 complications of the case and they have not been able to have

1           A     Yes.

2           Q     Is it true and correct to the best of your  
3 knowledge?

4           A     It is.

5           Q     Has your lifestyle changed since you've been sepa-  
6 rated from the Defendant?

7           A     It has.

8           Q     And these things, the differences in your  
9 lifestyle?

10          A     Yes.

11          Q     I've noticed that you have put down here school  
12 clothes and furniture from thrift store.

13          A     Uh-huh (affirmative).

14          Q     Have you bought -- have you not been able to buy  
15 clothes for the children at a regular department store?

16          A     I haven't.

17          Q     What about for yourself, have you been able to buy  
18 any clothes for yourself?

19          A     I have purchased some for them but we have supple-  
20 mented also.

21          Q     Have you taken any vacations?

22          A     I have.

23          Q     Where have you gone?

24          A     I went to Phoenix in the spring. My mother lives  
25 there.

1 Q Did you take the children with you?

2 A I didn't.

3 Q Let's go to Plaintiff's Exhibit 9.

4 Mrs. Swensen, do you presently have life insurance?

5 A I don't.

6 Q Are you in need of life insurance?

7 A I am.

8 Q Do you presently have health insurance?

9 A Through Mr. Swensen's business.

10 Q Have you checked with Mr. Swensen's insurance

11 carrier to see if there's a Cobra policy?

12 A It is.

13 Q Is there a Cobra policy?

14 A I'm not able to continue with that policy.

15 Q So as soon as you're divorced, will you be in need

16 of health insurance?

17 A I will.

18 Q Mrs. Swensen, are you presently in need of

19 counseling?

20 A Yes.

21 Q And have you been going to counseling?

22 A I have.

23 Q Have you at this point been paying for that?

24 A I have not.

25 Q Will that be able to continue?

1           A     On several occasions he's stated no.

2           MR. OKAZAKI:  Object, hearsay.

3           THE COURT:  It is.  Sustained.

4           Q     (By Ms. McConkie)  Did your brothers and sisters  
5 receive similar disbursements when your parents gave you a  
6 disbursement?

7           A     Except for one brother.

8           Q     And what did he receive?

9           A     He had been cashing out of his portion because he  
10 wanted his inheritance.

11           MR. OKAZAKI:  Objection.

12           THE COURT:  Just a moment, ma'am.

13           State the grounds of your objection.

14           MR. OKAZAKI:  It's speculation, hearsay.

15           THE COURT:  There's no foundation.  I'm going to  
16 sustain the objection, but moreover, what relevance is it  
17 what her siblings got out of it?

18           MS. McCONKIE:  Your Honor, we're just trying to put  
19 evidence to show that it was a preinheritance gift and that  
20 all of the children --

21           THE COURT:  She has said that they all got money  
22 so --

23           Q     (By Ms. McConkie)  Have you had control over any of  
24 the IRA's or any of the other marital assets during the  
25 separation?



1           A     I have not.

2           Q     So is it your testimony that you have made no  
3 deposits?

4           A     None.

5           Q     No withdrawals?

6           A     None.

7           Q     Do you have information that would suggest that  
8 monies have been removed from those IRA accounts?

9           A     Yes.

10          Q     How do you have that information?

11          A     Bank statements.

12          Q     From the IRA's?

13          A     Yes.

14          Q     Where did you receive those statements?

15          A     From Mr. Swensen.

16          Q     And when did you receive those?

17          A     When did I? After the separation.

18          Q     Let me hand you a document -- may I approach, your  
19 Honor?

20                THE COURT: You may.

21          Q     (By Ms. McConkie) Let me hand you a document.  
22 Would you tell the Court what that is?

23          A     These are statements from USAA Money Market.

24          Q     Can you tell the Court on the first page --

25                THE COURT: Is this an exhibit, Counsel?

1 MS. McCONKIE: No, this is not an exhibit, your  
2 Honor, it's just testimony.

3 Q (By Ms. McConkie) The amount, the date on that  
4 document?

5 A The date on the document is October 5th, 1992.

6 Q And does the document have dates of certain  
7 withdrawals?

8 A It does.

9 Q Can you tell the Court the date of the first with-  
10 drawal on that document?

11 A 8-4-92.

12 Q Was that a month after you had filed for divorce?

13 A It was.

14 Q And how much was taken out of that?

15 A \$1200.

16 Q Would you go just quickly, read the list of amounts  
17 that were taken out of that IRA accounts?

18 A On the same day 3,000, 1700, another 1700, 2,000,  
19 1200, 800, a thousand, 1500 on the one page.

20 MR. OKAZAKI: Your Honor, perhaps it would assist  
21 the Court. These documents are found under tab 5 of our  
22 exhibits.

23 Q (By Ms. McConkie) Would you go to the second page?

24 MR. OKAZAKI: If the Court will, several pages down  
25 it says USAA Money Market. I don't believe it's an IRA

1 they're talking about. These are the last three pages under  
2 tab 5. That might help, your Honor.

3 Q (By Ms. McConkie) The third page, what is that  
4 page?

5 A The page is a xerox copy of checks that  
6 Mr. Swensen's written to himself out of this mutual fund.

7 Q Do you recognize Mr. Swensen's signature?

8 A I do.

9 Q Can you tell the Court the amounts of those checks?

10 A Twelve hundred, eight hundred, and a thousand.

11 Q And if you go to the next page, what is that?

12 MR. OKAZAKI: Your Honor, we'll stipulate to all  
13 these withdrawals that are contained --

14 THE COURT: They do appear to be, at least the ones  
15 that she's now referred to on the --

16 MR. OKAZAKI: We'll stipulate they're in our  
17 exhibit and we're going to testify about those withdrawals,  
18 so if Counsel wants to go through this, she can, but we're  
19 agreeing that those withdrawals were made and they're con-  
20 tained in our exhibit.

21 Q (By Ms. McConkie) Let me ask you this,  
22 Mrs. Swensen. Did you personally make any of those  
23 withdrawals?

24 A I didn't.

25 Q Did the Defendant ever ask you or have your

Tab G

1           Q     So this is a list that just includes the property  
2     that was left at the home; is that right?

3           A     Yes.

4           Q     The marital home?

5           A     Some of the property left at the home.

6           Q     Isn't it true that you took the queen-sized bed?

7           A     That's correct.

8           Q     And the double bed?

9           A     That was the children's.

10          Q     And the Eames chair?

11          A     That was a gift on the graduation from law school.

12          Q     Could you please be responsive? Just yes or no.

13                A table?

14          A     Yes.

15          Q     A lamp?

16          A     Yes.

17          Q     Chairs?

18          A     Four folding chairs.

19          Q     Power tools?

20          A     Yes.

21          Q     Sports equipment?

22          A     Yes.

23          Q     And some utensils?

24          A     Yes.

25          Q     And camping equipment?

1           A     That's correct.

2           Q     And that you have taken funds out of that account  
3     which you have not paid back; isn't that true?

4           A     That's correct.

5           Q     Do you recall taking out \$3500 from that account?

6           A     Thirty-five hundred?

7           Q     Thirty-five hundred.

8           A     No.

9           Q     Let me see if I can refresh your recollection on  
10    that.

11                     While I'm looking for that document, do you recall  
12    paying any marital or any accounts from your Guardian State  
13    Bank account?

14          A     Paying any accounts?

15          Q     Do you recall paying any bills from your Guardian  
16    State --

17          A     Yes.

18          Q     That are not related to the Crest View home?

19          A     Yes.

20          Q     And can you tell the Court what they are?

21          A     I've paid legal fees from that account.

22          Q     Now, those accounts were marital funds; isn't that  
23    true?

24          A     Yes.

25          Q     And you paid your legal fees from that account?

1           Q     Okay.

2           A     \$430, half of that's 215.

3           Q     Oh, okay. I see.

4           A     Fifth line, yes.

5           Q     I see it. Okay.

6                     Now, you actually took that \$430, did you not, and

7     paid that from marital funds?

8           A     I don't recall what the source of that amount was.

9     There were some amended returns relating to the schedule on

10    page 19 which I used funds from the Guardian account for.

11          Q     And in terms of those marital funds and in terms of

12    this balance sheet, were you requesting that Mrs. Swensen

13    repay you monies that you paid a marital debt from marital

14    funds; is that what you are asking?

15          A     Yes.

16          Q     And did you repay those funds to the Guardian

17    account?

18          A     No.

19          Q     But you're asking Mrs. Swensen repay those funds to

20    the Guardian account?

21          A     Well, it depends on who gets the Guardian account.

22    If I get the Guardian account, then it's in one pocket and

23    out the other. If Mrs. Swensen gets the Guardian account,

24    then it's the same thing.

25          Q     If in fact it was a marital debt and it was paid by

1 recently as August, I believe, I borrowed \$3,000 to carry  
2 over my law practice. That was repaid.

3 Q I'm going to hand you just a copy of a check that  
4 you've already testified to. On your first check, is this  
5 the check that -- the \$10,996.46 that you paid for your  
6 student loan?

7 A Yes.

8 Q And the next check down, 7,250, can you explain why  
9 you took money from the Dreyfus account and put it into the  
10 mutual fund?

11 A Consolidated --

12 MR. OKAZAKI: Your Honor, I'm confused. I haven't  
13 seen any of these things and I don't know if we're on the  
14 Dreyfus account or we're on the Guardian account or which  
15 account we're on. I thought you were asking about the  
16 Guardian account.

17 Q (By Ms. McConkie) Did you write these; is that  
18 your signature?

19 A Yes.

20 Q And did you -- and you've testified that you paid  
21 the student loan; isn't that true?

22 A Yes.

23 Q Did you use marital funds to do that?

24 A Sure.

25 Q Would you be willing to pay that back so that the



1 fund --

2 A No.

3 Q -- so that the fund wouldn't be deleted?

4 A No.

5 Q On your balance sheet which we talked about previ-  
6 ously, which is page 1, do you recall doing a balance sheet  
7 in October of 1992?

8 A I've done a variety of these balance sheets for  
9 different negotiations with Plaintiff.

10 Q Do you know if the figures in the IRA's have  
11 increased or decreased?

12 A They have --

13 MR. OKAZAKI: Time frame, Counsel.

14 Q (By Ms. McConkie) From the time of October 19th,  
15 1992, to December 1993.

16 A Probably -- well, I don't know. They had earnings  
17 and I've taken distributions.

18 Q Would you be surprised to know that from the two  
19 balance sheets that you have provided there has been a  
20 decrease of \$13,779?

21 MR. OKAZAKI: Counsel, perhaps you could show him  
22 the document you're talking about.

23 MS. McCONKIE: Just asking him, would you be  
24 surprised?

25 THE WITNESS: No, I would be surprised it would be