

1994

Joyce Knowlden v. Grant R. Knowlden : Brief of Appellant

Utah Court of Appeals

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Manny Garcia; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

CASE NO. 940379CA

JOYCE KNOWLDEN,

Priority No. 15

APPELLEE,

-VS-

GRANT R. KNOWLDEN,

APPELLANT.

AN APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
FOR THE COUNTY OF TOOELE, STATE OF UTAH

THE HONORABLE WILLIAM A. THORNE, JUDGE, PRESIDING

BRIEF OF APPELLANT

MANNY GARCIA #3799
Attorney for Appellant
431 South 300 East, #101
Salt Lake City, Utah 84111
Telephone: (801) 322-1616

UTAH COURT OF APPEALS
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Utah Court of Appeals

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MANNY GARCIA #3799
Attorney for Appellant
431 South 300 East, #101
Salt Lake City, Utah 84111
Telephone: (801) 322-1616

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There are no prior or related appeals in this matter.

MANNY GARCIA #3799
Attorney for Appellant
431 South 300 East, #101
Salt Lake City, Utah 84111
Telephone: (801) 322-1616

IN THE UTAH COURT OF APPEALS

JOYCE KNOWLDEN,

Appellee,

vs.

GRANT R. KNOWLDEN,

Appellant.

:
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: BRIEF OF APPELLANT
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: Case No. 940379CA
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STATEMENT OF JURISDICTION

This is an appeal from a final Judgment and Order made and entered by the Third Judicial District Court for the County of Tooele, State of Utah, the Honorable William A. Thorne, Judge, presiding.

The Judgment being a final and therefore appealable Order, this Court has jurisdiction for the purpose of this appeal pursuant to § 78-2a 3(2)(i) of the Judicial Code, Utah Code Ann. (1953 as amended).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Defendant/Appellant, (hereinafter defendant) charges:

1. that the Court abused its discretion in its division of the marital properties; and

a. it failed to properly credit defendant for his identifiable pre-marital contributions to the marital properties;

b. it erroneously imputed income to defendant resulting in an inequitable alimony obligation.

THE STANDARD OF REVIEW

1. Regarding findings of fact, the reviewing court views the evidence and all reasonable inferences therefrom, in a light most supportive of the trial court's findings and will alter the trial court's findings only if clearly erroneous. Baker v. Baker 226 Ut. Adv. Rep. 27, 28. (Utah, 1993) To prevail on appeal, defendant must marshal the evidence that supports the findings and then demonstrate that, despite such evidence, the findings are "so lacking in support as to be against the clear weight of the evidence and, therefore, clearly erroneous." Baker at 28, quoting Crouse v. Crouse 817 P.2d 836, 838 (Ut. App. 1991) (citations omitted); accord Watson, 837 P.2d at 6.

2. The reviewing court will alter the trial court's property division "only if there was a misunderstanding or misapplication of the law resulting in a substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a

serious inequity has resulted as to manifest a clear abuse of discretion." Baker at 28 (quoting Watson v. Watson 837 P.2d 1, 5 (Ut. App. 1992)).

STATEMENT OF THE CASE

This matter was tried to the Court, pursuant to Plaintiff's Petition for Divorce, on January 20, 1994. Plaintiff was granted a divorce. The marital property was divided pursuant to stipulation and evidence. Judgment was entered on the Divorce action on March 8, 1994.

Defendant moved for a new trial, or in the alternative, for an Amendment to the Decree of Divorce pursuant to Rule 59, Utah Rules of Civil Procedure, which was denied on May 3, 1994. The final order was signed by the Court on May 17, 1994.

New counsel for defendant/appellant obtained an extension of time from the Court within which to file a Notice of Appeal, which was filed on June 23, 1994.

STATEMENT OF FACTS

The parties were married in 1978. (T.6) Defendant retired seven years after the marriage, after having worked at Kennecott for twenty-five years. (T. 223) Plaintiff was a homemaker. Plaintiff filed for Divorce in 1993. The issues at trial centered around the value and division of the marital estate.

In 1956, defendant purchased a 19.6 acre lot in Grantsville, Utah, for \$2,500.00. The parties final marital residence would

eventually be built on part of that lot, (hereinafter, the Grantsville property). (T. 225) Defendant also contributed \$18,000.00 towards the initial construction of the residence, mostly from funds he had accumulated before the marriage. (T. 226)

At trial, defendant presented evidence that the property had a current market value of \$86,000.00 That figure included a value for the lot of \$9,500.00. (T. 147) The property was awarded to defendant.

Defendant had purchased property in Kearns, Utah (hereinafter, the Kearns property) five years before the marriage. He paid the down payment. This property was initially used as the marital residence. It was put into joint tenancy after the marriage. It later provided rental income during the marriage. (T. 229) Plaintiff was awarded this property.

Defendant had purchased property on Louise Avenue in Salt Lake City (hereinafter, the Louise property) two years before the marriage. Defendant made a \$4,000.00 down payment and paid the monthly mortgage payments. (T. 232) This property provided rental income during the marriage. Plaintiff's name was never put on the title. Plaintiff was awarded this property. Defendant was responsible to satisfy the second mortgage on it, which was taken to improve the Grantsville property.

In 1993, defendant purchased a quilting machine with proceeds received from the sale of property that he owned prior to the marriage. (T. 233) Plaintiff had been quilting on the machine to earn extra money. (T. 135) Defendant was awarded the machine, then

the Court imputed the average monthly income that plaintiff had been deriving from use of the machine to defendant's income. It found defendant's income to be \$1,500.00 per month, which included \$300.00 per month as income from the quilting machine. The Court awarded plaintiff \$400.00 per month in permanent alimony. (T. 295)

The Court valued the marital estate at \$162,107.00, and based its division on that figure. (T. 291)

The Court ordered defendant to pay certain debts. Plaintiff was awarded the liquid assets. (T. 292-6)

The trial court had before it an amended complaint for divorce. Plaintiff's initial complaint had been assigned to Judge Pat Brian, who had also made findings and entered certain orders regarding the matter.

SUMMARY OF ARGUMENT

Defendant argues the Court did not divide the marital estate equitably. Specifically, defendant argues he should have received credit for the appreciated value of the land that was associated with the Grantsville property. Defendant was equitably entitled to at least an \$8,000.00 credit against the value of that property. Defendant argues he also should have received credit for the \$18,000.00 cash contribution that he made toward the initial construction of the residence on the property.

Next, defendant argues he should have been awarded the Louise property, as plaintiff's contributions to that property were fairly reflected in her share of the equity. Alternatively, defendant

argues he should have, at the very least, received credit for his pre-marital down payment on that property.

Defendant argues the Court erroneously ordered him to pay debts associated with the Kearns property that the court had previously ordered plaintiff to pay, pursuant to a pre-trial order.

Defendant argues the Marcus Knowlden note and the quilting machine should have both been either included or excluded from the estate.

Defendant also argues the Court erroneously imputed \$300.00 per month in income to his monthly total, based on his being awarded the quilting machine. The Court then used this inflated figure to determine defendant's alimony obligation.

ARGUMENT

DIVISION OF THE MARITAL ESTATE

Defendant contends the court abused its discretion in dividing up the marital estate and committed clear error in determining the value of the estate. It failed to properly credit defendant for his identifiable pre-marital contributions to the estate.

In dividing up the marital estate, the over-riding consideration is that the division be equitable, that the property be fairly divided between the parties given their contributions during the marriage, and the circumstances at the time of the divorce. Newmeyer v. Newmeyer 745 P.2d 1276 (Utah 1987).

In a divorce proceeding, there is no fixed formula from which to determine the division of property. Baker v. Baker 226 Ut. Adv.

Rep. 27, 28 (Utah App. 1993).

The trial court sought to equalize the division of the estate. The court found the marital estate, less debts, to be valued at \$162,107.00. (T. 291) (Findings of Fact, para. 15) This included a finding that the Grantsville property had a current fair market value of \$86,000.00. (T. 291) (Findings of Fact, para. 6, 15) The appraiser, Mr. Alsop, testified that the \$86,000.00 figure included a determination that the value of the lot was \$9,500.00. (T. 147) Defendant contends that at least eight thousand dollars (\$8,000.00) of the \$9,500.00 value of the lot should have been deducted from the value of the property because he had originally purchased the lot long before the marriage and was entitled to credit for any appreciation of the value of the lot. The lot was originally more than nineteen (19.6) unimproved acres. (T. 225) The marital residence and appurtenance was built on three acres. (See Order on Plaintiff's Motion, dated January 5, 1994, where Judge Brian recognized the three acre plot (Addendum A) (para. 3, 4, 5, 7)) A correct calculation would have credited defendant with the appreciated value of at least 16 unimproved acres. The value of the residence and appurtenance and three acres should have been used as the value of the marital property, not the entire lot. Mr. Alsop placed the current value of each acre at about \$500.00. (T. 149) The value of the marital property land was \$1,500.00.

Utah case law recognized that identifiable pre-marital assets are generally exempt from the marital estate. See Preston v. Preston 646 P.2d 705 (Utah 1982). (Each party should receive pre-

marital assets). In Burke v. Burke 733 P.2d 133, 135 (Utah 1987), the court noted that pre-marital property, gifts, and inheritance, may be viewed as separate property and in appropriate circumstances, equity will require that each party retain the separate property brought into the marriage (citing Preston at 706). The court listed some of the factors generally considered: the amount and kind of property; whether the property was acquired before or during the marriage; and the source of the property. Of particular concern is whether one spouse has made any contribution toward the growth of the separate assets of the other spouse (citing Dubois v. Dubois 504 P.2d 1381 (Utah 1991), and whether the assets were accumulated or enhanced by the joint efforts of the parties. In Burke, the court awarded one party his pre-marital property and the other party did not get credit for the appreciation of that property.

In Mortensen v. Mortensen 760 P.2d 304, 308 (Utah 1988), it was noted that according to the Supreme Court, trial courts should generally award property acquired by one spouse by gift and inheritance during the marriage, or property acquired in exchange thereof, to that spouse, together with any appreciation of enhancement of its value, unless: 1) the other spouse has by his or her efforts or experience contributed to the enhancement, maintenance, or projection of that property, thereby acquiring an equitable interest in it, or 2) the property has been consumed or its identity lost through commingling or exchange or where the acquiring spouse has made a gift or an interest therein to the

other spouse. (Also see Willey v. Willey 866 P.2d at 555 (Ut. App. 1993); Bingham v. Bingham 872 P.2d 1065, 1069 (Ut. App. 1994).

As noted in Newmeyer, the appropriate treatment of property brought into a marriage by one party may vary from case to case. In Newmeyer, plaintiff's inheritance, acquired during the marriage, was properly excluded from valuation of the marital estate (citing Jespersion v. Jespersen 610 P.2d 326, 328 (Utah 1980) (not unreasonable for trial court to withdraw from marital property the equivalent of assets brought into marriage). 745 P.2d at 1278 (Utah 1987)).

Here, the court found that defendant paid \$2,500.00 for the lot in 1956. The lot was, and stayed in defendant's name and remained unimproved until the construction on the residence began in 1981. (Findings, para. 6) The court adopted defendant's evidence regarding the \$86,000.00 fair market value of the property, which necessarily included the \$9,500.00 value for all the land. Defendant asked for the full credit but equity would dictate that defendant be credited with at least the appreciated value of the portion of the lot that remained unimproved. There was no evidence presented that plaintiff contributed anything to the unimproved land. She did nothing to enhance its value. The unimproved land is separable and identifiable and should not merge into the marital estate. The house and the three acre plot on which it sits is the actual marital property in which plaintiff had an interest. Judge Brian had already recognized that. (Addendum A, para. 3, 4, 5, 7)

Defendant submits the court should have credited him with a pre-marital asset worth at least \$8,000.00 to reflect the appreciation of his original pre-marital investment in the lot. The court erred in not deducting that, or any, amount from the \$86,000.00 figure. It should have calculated the property to be valued at no more than \$78,000.00.

Plaintiff suggested the proposed valuation of the property be set at \$86,813.00 (T. 185), based on a cost approach analysis that had the property worth over \$96,000.00. (T. 270) Plaintiff suggested crediting defendant with \$9,500.00 for the lot value and deducting it from the higher figure. (T. 185) The court rejected plaintiff's cost approach analysis and accepted defendant's fair market value figure, but then failed to credit defendant for the value of the unimproved lot.

Regarding the applicable factors listed in Burke (supra) and Mortensen, (supra), with respect to the kind of asset in question, defendant bought an unimproved lot long before the marriage that appreciated through no effort or contribution by the plaintiff. The plot of land actually used for the house and yard has its own separable value of \$1,500.00. That's the only "land" plaintiff had any interest in.

Defendant submits it is inequitable and abuse of discretion for the court to have failed to credit him fully for his identifiable pre-marital asset, only a small portion of which was commingled with the house and yard to make up the marital residence. There was no evidence from which to conclude that the

entire lot had merged into the marital property. A value had been placed on the small, separable part that was commingled. Judge Brian's order, by implication, means that defendant was not restricted from the 16 acres outside the marital property. This means the court did not consider that acreage part of the marital estate as far as plaintiff's interests were concerned.

The trial court wrongfully found that all the defendant's pre-marital interest and investments were commingled with plaintiff's "sweat equity." (T. 291- 2) The court only alluded to giving defendant "some credit for original down payments and other things on property," (T. 293) (Findings, para. 17), but made no other specific finding on the matter. Defendant contends the court erred in those findings due to insufficient evidence. The court should have identified, separated, and credited defendant for his appreciated pre-marital asset, the nature of which (unimproved lot) has remained the same throughout.

Defendant contends that the court erred in finding that his other identifiable pre-marital monetary contributions that were used to initiate construction of the marital residence had commingled with plaintiff's sweat equity, thus losing its separate identity. (T. 291-2) (Findings, para. 6)

In 1981, defendant withdrew \$7,000.00 from his sick leave and vacation benefits, the vast majority of which he had accumulated prior to the marriage, and spent it on the initial construction of the marital residence. (T. 83; 228) The parties had been married three years when work on the house began. In 1985, when he

retired, defendant withdrew \$12,000.00 of the \$15,000.00 he was entitled to from his retirement fund and spent it on the construction. (T. 84) Defendant asked the court for credit of those pre-marital funds against the value of the property.

The court heard testimony that the parties worked together to build the house. Both parties contributed time and labor. (T. 11; 81-3) Defendant submits that equity would dictate that the court do what was done in Newmeyer (supra). In Newmeyer (supra) the court credited the plaintiff with the identifiable amounts of money she had put into the marital home, then awarded the defendant one-half of the equity of the home. 745 P.2d at 1279. Since both parties contributed time and effort, both should be entitled to half the equity of the home. But since defendant also contributed substantial sums of money, the majority of which were pre-marital in nature, separate and identifiable, he was entitled to credit for those monetary contributions, apart from the value that the parties' combined efforts entitled them to share.

The court erred in finding that defendant's monetary contributions, as well as his labor and efforts, had merged with plaintiff's labor and efforts. The court wrongly found that defendant's money had lost its separate identity. If defendant had not put those funds toward the house, plaintiff would not otherwise have been entitled to benefit from all that money. She may have been entitled to half of that which was accumulated by defendant during the marriage, less than one-third. The vast majority of those funds were clearly pre-marital in origin. The court, based

on erroneous findings, abused its discretion in failing to credit defendant for his separate pre-marital monetary contribution.

The court abused its discretion in awarding the Louise property to the plaintiff. Alternatively, the court abused its discretion in failing to give defendant full credit for his identifiable pre-marital monetary contributions to that property. This failing caused the court to err in the valuation of the property and the estate.

Defendant purchased the property two years prior to the marriage (T.232); (Findings, para 13). He made a \$4,000.00 down payment and two years of mortgage payments of \$129.00 per month.

The property remained in defendant's name and was a source of rental income. (T. 30, 74, 232-3) (Findings, para. 13). In 1991, a second mortgage was taken against it to finance improvements on the Grantsville property. (T. 233)

Plaintiff testified she thought the equity in the property prior to the second mortgage being taken against it was \$7,000.00 - \$8,000.00. (T. 28)

Defendant testified the property was basically self-sufficient, that no other marital monies or resources were expended in its upkeep, including the two mortgage obligations; and that any expenditures incurred were more than set off by the profit realized from it, and that it was currently realizing no profit. (T. 74; 232-3) Plaintiff did not dispute that evidence. (T. 197,8) Plaintiff testified that they'd repainted the house, installed some new windows, used carpeting, and new kitchen cabinets. (T. 169)

Plaintiff did not testify to expending marital funds to do this. In fact, plaintiff corroborated the defendant by saying the property had produced income before the second mortgage. After that, it broke even. (T.197) There was insufficient evidence to support the findings that marital money was ever used to pay the mortgage or improve the premises. Nevertheless, the court so found. (Findings para. 13) The reasonable conclusion from that evidence would be that the rental income paid the mortgage and was used to purchase materials to improve the premises. Defendant testified the rent produced \$200.00 per month in income before the second mortgage (T. 74) While it is arguable that the rental income merged with other marital funds, this situation is still distinguishable. Sharing in the proceeds from a property is different than sharing the ownership and title to that property. Simply because plaintiff shared in the rental income does not necessarily entitle her to an ownership interest in the source of that income. The court erred in its findings, which were based on insufficient evidence.

Defendant made no gift of this property to plaintiff like he did with the Kearns property. The trial court found defendant's gift of joint tenancy to plaintiff on the Kearns property an important factor. (Findings, para. 12) This property was in a different posture. This property cost plaintiff nothing. It cost the marriage nothing. It was never a marital residence. Plaintiff's contributions to it would have been fairly reflected by her receipt of half the equity. (See Newmeyer supra) Defendant

intended to keep this property in the family. He was renting it to his son and his family for minimal rent because the family's wages were so meager. (T. 252) Under these circumstances, equity dictates that defendant should have been awarded the property. Plaintiff deserved a one-half interest in the equity, which by her own accounting was \$4,000.00. The court abused its discretion in awarding this property to plaintiff. Its findings were not supported by the evidence.

Alternatively, if awarding the property to plaintiff was equitable, then the court abused its discretion in not crediting defendant for his identifiable pre-marital monetary contribution to the property. Equity should dictate that, since no separate marital funds were used to maintain the property, and since both parties enjoyed any income from it and both contributed "sweat equity" through time and effort toward it, defendant's additional contribution of \$7,000.00 (\$4,000.00 down payment and \$3,000.00 in payments) of his pre-marital monies should have first been deducted from the value of the property. Because defendant lost the property, and the property continues to increase in value and generate income for plaintiff, equity should require that defendant at least get his pre-marital money back. Those funds are separable and identifiable. (Newmeyer, supra) The court erred in finding those funds just blended into the marital estate. (Findings, para. 13) No separate marital funds went into that property. The findings were not supported by the evidence.

The court found the Louise property value to be \$30,000.00. Defendant was ordered to pay the \$8,245.00 second mortgage obligation. (T. 293) Had defendant received his proper credit for his pre-marital contributions, the property should have been valued at \$23,000.00. At the very least, defendant should have gotten full credit for his down payment.

The court also ordered defendant to pay the same property taxes and fire insurance on the Kearns property (Findings, para. 16) that Judge Brian had previously ordered plaintiff to pay when he gave her the benefit of the Kearns rental income. (See Order, para. 3) (Addendum B) Plaintiff did not pay them. (T. 185) Her counsel incorrectly argued that there was no order in place regarding those obligations. (T. 315) The court found that plaintiff was still receiving the Kearns rental income. (T. 308)

There was no explanation given for this contrary order. Judge Brian issued a valid order that plaintiff did not comply with. Just because it was a pre-trial order did nothing to diminish its validity. The court erred in transferring that obligation to defendant without any findings to support it, and with no finding that Judge Brian's order was somehow invalid or plaintiff's contempt excusable. Plaintiff received a windfall from her non-compliance. Those amounts should be deducted from the defendant's debt obligation.

The court erred in including the value of the Marcus Knowlden note as part of the marital estate, or alternatively, in failing to

credit defendant with the value of the quilting machine against the value of the estate.

Shortly after the marriage, defendant sold some property that he had owned prior to the marriage. He sold it to Marcus Knowlden for \$30,000.00. He took a \$20,000.00 mortgage and assigned plaintiff a \$10,000.00 promissory note. (T. 243)

Mr. Knowlden paid off the mortgage with a lump sum payment a month before plaintiff filed for divorce. (T. 243) Defendant used that money to purchase the quilting machine.

The court awarded defendant the quilting machine in spite of finding that plaintiff was actually using it to make quilts. (Findings, para. 19) Apparently, the court did not consider the machine a marital asset due to its pre-marital sources. Since the court presumably found the machine was a pre-marital asset and excludable from the estate, it should follow that plaintiff's note, also of pre-marital origin, should have been excluded from the estate. It was plaintiff's gift all along.

The evidence showed that plaintiff was receiving the monthly payment on the note. (T. 182) Indeed, it was listed as a source of income for plaintiff.

Alternatively, if the note was properly included in the estate, then defendant's machine should have been included.

In other words, the court erred in not crediting each party's assets which derived from the same pre-marital source against the estate, or it erred in not excluding both from the value of the estate.

Had defendant been properly credited for all his identifiable, separable pre-marital monetary contributions, the value of the marital estate would have been less than that which the court found. The distribution would have been more equitable, with plaintiff still having received no less than she properly, equitable deserved, but certainly no more, as was the result here due to the court's errors.

ALIMONY

The Court abused its discretion in imputing income to Defendant and erred in determining his Alimony obligation.

Generally, alimony is to be awarded after consideration of three factors: a) the receiving spouse's financial condition and needs; b) the receiving spouse's ability to earn adequate income; c) the providing spouse's ability to provide support. Newmeyer v. Newmeyer 745 P.2d 1276, 1279 (Utah 1987).

Failure to consider these factors constitutes abuse of discretion. Hill v. Hill 869 P.2d 963, 966 (Utah App., 1994)

The trial court must make sufficiently detailed findings on each factor to enable the reviewing court to ensure the trial court's discretionary determination was rationally based upon [those] factors. Willey v. Willey 866 P.2d 547, 550 (Utah App. 1993).

Defendant contends the court failed to adequately consider his ability to provide that much support. The court correctly calculated defendant's monthly income to be \$1,200.00. (T. 295)

It then imputed an additional \$300.00 per month to his monthly income because he was being awarded the quilting machine. (T. 295) The \$300.00 per month represented plaintiff's earning ability from her use of the machine. (T. 296)

The court awarded the quilting machine to defendant. Evidence was presented that defendant had purchased the machine in March, 1993, with money that he derived from the sale of a pre-marital asset. (T. 243)

Plaintiff had testified that she was a skilled quilt maker. (T. 155) She had her own equipment (a quilting serger and an electronic Bernina sewing machine), which she used to sew the fabric together before quilting it on the quilting machine. She testified that her average monthly income from making quilts was \$300.00, although some months she earned "hardly anything." (T.157)

Defendant had never quilted, nor ever used the quilting machine. There was no evidence that he could even sew. He asked that he be awarded the machine because he felt it was his since he bought it with pre-marital funds. When asked if he intended to use the quilting machine, he responded that "...it looks like I'm going to have to have income from some source." (T.244)

In its findings, the court concluded that defendant

"...has the ability to earn an additional \$300.00 by virtue of the fact that he is being awarded the quilting machine, which he requested, and which should be awarded to him. Plaintiff testified that she could earn \$300.00 per month from the use of that machine and has been earning that sum... . The plaintiff will no longer have that money available to her, but defendant Knowlden should have that money available to him to add to his monthly net income."

(see Findings of Fact, para. 19)

The court went on to find that it "...questions whether defendant Knowlden will in fact make use of the quilting machine... ." (T. 296); (Findings, para. 19)

At the hearing on defendant's motion for a new trial, as defendant's trial counsel argued the error of that ruling, the court responded that:

"I seem to remember Mr. Knowlden indicating that he would make the same, same income from it." (T. 306)

Defendant contends the court abused its discretion by imputing \$300.00 more to his monthly income, bringing his total to \$1,500.00 per month. The court then calculated the disparity in the parties' incomes using the \$1,500.00 figure, and awarded plaintiff \$400.00 per month in permanent alimony. (T. 296); (Findings, para. 19)

In Willey v. Willey, supra, defendant claimed the trial court improperly imputed his income in setting the alimony award. Defendant argued that the court's findings were based solely upon speculation. The appellate court agreed and found abuse of discretion. The appellate court stated that the trial court has authority to impute income to defendant; however, it cannot be premised on conjecture; instead, it demands a careful and precise assessment requiring detailed findings. 886 P.2d at 544.

Defendant contends the court engaged in speculation and conjecture in determining that he had the requisite skill and ability to equal plaintiff's income from quilting. There was no evidence, nor any findings, that defendant had or could reasonably acquire any skill or experience in quilting. Secondly, he did not

have the other machines needed, nor the required skill for preparing the material for the quilting machine. There was no evidence, nor any findings, that he could even use any of the machines. There was no evidence, nor any findings, that he had a source or any contracts or contacts for selling his quilts. There was no basis for the court's apparent assumption that defendant's output and product quality would be the same as plaintiff's had been, and that his quilts would command a similar price. The court assumed that defendant's purported income from quilting would be steady. Plaintiff testified that it was sporadic at best.

There exists no rational basis, in fact, to conclude that defendant could earn even one penny making quilts, much less \$300.00 per month, every month. It's not simply a matter of feeding cloth into the machine and having it spit out a quilt. Just because plaintiff could use the machine to create a home-made product that people would buy does not mean defendant could do so as well. Defendant did not say that "he would make the same income from it" as the court seemed to remember. Defendant never stated he could use the machine to earn anything. His response was ambiguous at best.

The court did not engage in a careful and precise assessment of defendant's ability to provide that support, nor were its findings detailed to reflect such an assessment. It speculated that defendant could match plaintiff's skill and ability to quilt and earn the same amount of money. Unfortunately, the court could not award defendant the requisite skill and ability. The machine

is, in fact, useless to defendant and he can realize no monthly income from it.


The court abused its discretion in this matter. It should have used the \$1,200.00 figure in determining defendant's real income. Presumably, the disparity in incomes would not have been as great, and the alimony award should have been reduced or eliminated accordingly.

CONCLUSION

Based on the foregoing, defendant prays that this Court reverse the findings of the trial court and remand the matter back to that court to amend the distribution of property to reflect the proper credits due the defendant. Defendant prays the alimony award be reduced or eliminated.

DATED this 23 day of November, 1994.

Respectfully submitted,



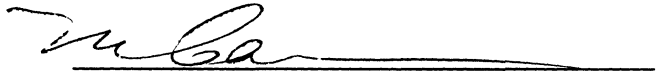
MANNY GARCIA
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLANT were mailed, first class, postage prepaid, to:

Kellie Williams
Attorney for Plaintiff
310 South Main Street, Suite #1400
Salt Lake City, Utah 84101

Dated this 23 day of November, 1994.



ATTACHMENTS

KELLIE F. WILLIAMS #3493
Attorney for Plaintiff
CORPORON & WILLIAMS, P.C.
310 South Main Street
Suite 1400
Salt Lake City, Utah 84101
Telephone (801) 328-1162

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

JOYCE KNOWLDEN,

Plaintiff,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

vs.

GRANT R. KNOWLDEN, and
GRACE POLOSKEY,

Civil No. 934300096

Defendants.

THE ABOVE-CAPTIONED MATTER having come on regularly for trial before the above-entitled court on January 20, 1994, at the hour of 9:00 a.m., the Honorable William A. Thorne, Third District Court Judge, presiding, and the Plaintiff appearing in person and being represented by counsel, Kellie F. Williams, and the Defendant, Grant R. Knowlden, being present in person and being represented by counsel, Jimi Mitsunaga, and the Defendant, Grace Poloskey, being present in person and being represented by counsel, J. Duke Edwards, and the parties having been sworn and having testified and having presented exhibits and evidence, and the court having

reviewed the Plaintiff's memorandum and' heard the arguments of counsel, and based thereon, the court now makes and enters the following:

FINDINGS OF FACT

1. The Plaintiff is now and has been for a period or more months immediately prior to the filing of the complaint in this action a resident of Tooele County, State of Utah.

2. That the parties Joyce Knowlden and Grant R. Knowlden are husband and wife, having been married on September 10, 1978, in Elko County, Nevada.

3. That the Defendant, Grace Poloskey is a resident of Tooele County, State of Utah, and the sister of the Defendant, Grant R. Knowlden.

4. That irreconcilable differences have arisen between the Plaintiff and the Defendant Knowlden which make continuation of the marriage impossible.

5. That Plaintiff and Defendant Knowlden have had no children born as issue of this marriage and none are expected.

6. Real property located at 6000 North Old Lincoln Highway, Grantsville, Utah, was acquired by Defendant Knowlden prior to the marriage. Defendant Knowlden paid \$2,500.00 for the land in, approximately, 1956, and the land remained undeveloped until the parties commenced building upon the property. Plaintiff and

Defendant Knowlden commenced building on the property and improving the property on or about 1981, and by their labor and "sweat equity," built the residence located at that property, which is valued at \$86,000.00, the current fair market value. The funds of money that Defendant Knowlden claims as premarital and which were used to assist in the construction of the Grantsville residence became co-mingled with marital funds and any monies that may have been separate property of Defendant Knowlden lost its separate identify because of that co-mingling. Further, the residence was constructed with the individual efforts and "sweat equity" of the Plaintiff and Defendant Knowlden. This Grantsville property was enhanced and augmented by the acts of the Plaintiff and its entire value became a marital asset.

7. That on or about May 13, 1991, Defendant Grant R. Knowlden transferred the Grantsville property to his sister, Defendant Grace Poloskey, for no money consideration. Since that time, the Plaintiff and Defendant Knowlden have continued to reside in the property and treated the property as their own, though the property remained in the name of Defendant Knowlden's sister, Defendant Poloskey. Defendant Poloskey paid the taxes and insurance at various times subsequent to the transfer, but was reimbursed those sums by monthly payments made by Defendant

located at 6000 North Old Lincoln Highway, Grantsville, Utah, to his sister, Defendant Grace Poloskey.

11. For purposes of dividing the marital estate, the current value of the Grantsville property should be used rather than the value of the property at the date of its transfer on or about May 13, 1991, as prayed for by Defendant Knowlden.

12. The Plaintiff and Defendant Knowlden resided together subsequent to their marriage at a home located at 4801 South 4900 West, Kearns, Utah. That property was purchased by Defendant Knowlden prior to the marriage, and in, approximately 1973, but transferred into the names of Plaintiff and Defendant Knowlden subsequent to the parties' marriage. The transfer of said property into joint tenancy constituted a gift of the premarital property to Plaintiff and Defendant Knowlden. Further, during the marriage, Plaintiff and Defendant Knowlden resided at that residence, made payments on the mortgage and made improvements on the property, including repainting and carpeting. Co-mingling occurred of this premarital asset with marital funds. Further there was an enhancement of the property by the acts of the Plaintiff. The property is a marital asset. The value of that property, at the date of trial, is \$42,000.00, based upon the appraisal and stipulation of the parties.

13. Prior to the marriage and in 1976, Defendant Knowlden purchased a property located at 39 East Louise Avenue, Salt Lake City, Utah. That property remained in his name during the marriage. During the marriage, the mortgage was paid. Further, during the marriage, Plaintiff and Defendant Knowlden put siding and new carpeting on the property as well as thermal windows and a new roof. Further, the marriage, Plaintiff assisted in scraping and repainting the property, cleaning the property for the rentals, making curtains for the property and managing the property for rentals. The property is a marital asset for purposes of assessing the marital estate and dividing the same due to the acquisition of equity over the period of the marriage and the augmentation and enhancement of the property by Plaintiff and the co-mingling of the marital funds with the property. The property is valued at \$30,000.00, pursuant to the evidence presented at trial and the testimony of the Plaintiff.

14. The court finds that the power tools have a value of \$3,500.00. Plaintiff testified that the power tools and equipment were valued at \$7,385.00, but that testimony was based an amount that was provided to her by another individual which sum she did not think was correct and to which she added some things in order to come up with that value. Defendant Knowlden valued the tools at

approximately \$3,500.00 and the court finds that value more convincing.

15. The Plaintiff and Defendant's marital assets, less debts, are valued at \$162,107.00, and as follows:

<u>PROPERTY/ASSET</u>	<u>VALUE</u>
Grantsville property	\$86,000.00
Kearns property	\$42,000.00
Louise property	\$30,000.00
Chevrolet Celebrity	\$1,325.00
Ford truck	\$800.00
Ford mustang	\$200.00
Oldsmobile Firenza	\$975.00
Chevrolet Citation	\$100.00
Chevrolet Cavalier	\$100.00
Marcus Knowlden note receivable	\$7,576.00
Farm equipment	\$1,000.00
Liquid accounts at Key Bank Account, Zions, Garfield Credit Union, Utah Credit Union and the debt from Ms. Eyre	\$1,224.00
Power Tools and tools	\$3,500.00

The above-referenced values are based upon the testimony of the parties, stipulation of the parties, appraisals or other evidence adduced at trial.

a. The Plaintiff should be awarded the Kearns property, the Firenza, the Cavalier, the Citation, the Marcus Knowlden note, the Key Bank Account, Zions, Garfield Credit Union, Utah Credit Union and the debt owed by Ms. Eyre. The total of the marital estate thus initially awarded to Plaintiff is valued at \$51,975.00.

16. Defendant Knowlden should be awarded the Grantsville property, the Celebrity, the Ford truck, the mustang, the power

equipment and tools and farm equipment. Further, Defendant Knowlden should pay the following debts: as set forth on Plaintiff's Exhibit 8, and as follows: Levitz \$546.00, Bank One \$437.00, property taxes (Kearns property \$297.00), fire insurance (Kearns property 179.00), Utah State taxes \$103, and the debt to Shellie Eyre \$113, which total \$1,693.00.

17. An equal division of the marital estate requires Plaintiff to receive, approximately, \$81,000.00. To equalize the estate, Plaintiff should be awarded the Louise property valued at \$30,000.00, less the first mortgage. The first mortgage owing to Lomas Mortgage should be paid by the Plaintiff and the second mortgage owing to Lomas Mortgage should be paid by Defendant Knowlden. That division is based upon the representations of Defendant Knowlden that the second mortgage is approximately \$8,245.00, with a monthly payment of \$249.72 and that the first mortgage is approximately \$3,086.00, with a monthly payment of \$97.00. The total award to Plaintiff of marital property is approximately \$79,000.00, which is approximately one-half of the estate and provides Defendant Knowlden some credit for the original down payment made on the Grantsville property.

18. It is reasonable that the building materials located at the Grantsville property be sold and that Defendant Knowlden insure that those be sold and that Defendant Knowlden obtain two estimates

from two different appraisers as to what they think the property can sell for and sell the building materials to the highest bidder. The money received should then be divided equally between the parties, one-half to each.

19. Defendant Grant R. Knowlden is retired and has total net income of \$1,200.00, which includes social security and his Kennecott Retirement income, less the deduction for the survivor benefit which he pays each month for the benefit of the Plaintiff. In addition, Defendant Knowlden has the ability to earn an additional \$300.00 by virtue of the fact that he is being awarded the quilting machine, which he requested and which should be awarded to him. Plaintiff testified that she could earn \$300.00 per month from the use of that machine and has been earning that sum during the pendency of this action. The Plaintiff will no longer have that money available to her, but Defendant Knowlden should have that money available to him to add to his monthly net income. The Plaintiff's monthly income is comprised of \$120.00 per month which she receives from Defendant Knowlden's son, Marcus Knowlden, which is a note receivable owed to her. Further, with the award of the Louise property to her, Plaintiff will receive the sum of approximately \$325.00 per month, for a total net income of \$445.00 per month. Based upon the respective incomes of the parties, it is reasonable that Defendant Knowlden pay Plaintiff

permanent alimony in the sum of \$400.00 per month. That sum does not equalize the parties' income. The court questions whether Defendant Knowlden will, in fact, make use of the quilting machine and it is anticipated that in the near future, Plaintiff will qualify for social security benefits. Four hundred dollars per month is reasonable based upon Defendant Knowlden's ability to pay and the Plaintiff's needs. The Plaintiff's monthly expenses are minimally \$879.00 per month, without a mortgage or rent payment. The Plaintiff will have \$448.00 net per month and the Kearns property which will provide her with a place to live, rent free. The \$400.00 is within Defendant Knowlden's ability to pay and, clearly, the Plaintiff needs that amount in order to survive.

20. Defendant Grace Poloskey testified that she is holding approximately \$7,000.00, representing fire insurance proceeds paid to her as the title holder to the Grantsville property. The court does not have authority to re-claim those assets as Defendant Poloskey had a contract with the insurance company and the court does not have authority to retrieve those sums.

21. That the personal property acquired by the parties should be divided according to Exhibit 10, attached hereto, designated as Exhibit A and incorporated herein by reference, except for the disputed items set forth on Exhibit 10b, which should be divided as follows:

ADDENDUM A

FILED BY R
94 JAN -5 PM 3:38
3RD JUDICIAL DISTRICT-COUNTY-TOOELE

KELLIE F. WILLIAMS #3483
Attorney for Plaintiff
CORPORON & WILLIAMS, P.C.
310 South Main Street
Suite 1400
Salt Lake City, Utah 84101
Telephone (801) 328-1162

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

JOYCE KNOWLDEN,

Plaintiff,

vs.

GRANT R. KNOWLDEN, and
GRACE POLOSKEY,

Defendants.

ORDER ON PLAINTIFF'S MOTION
IN RE: CONTEMPT

Civil No. 934300096

Judge Pat B. Brian

THE ABOVE CAPTIONED MATTER, having come on regularly for hearing before the above entitled court on December 14, 1993, at the hour of 11:30 a.m., the Honorable Pat B. Brian, Third District Court Judge presiding, on Plaintiff's Motion in Re: Contempt, and the Plaintiff being present in person and being represented by counsel, Terry R. Spencer for Kellie F. Williams, and the Defendant, Grant R. Knowlden, being present and being represented by counsel, Jimi Mitsunaga, and the court having heard the proffers of counsel regarding the issues presented, and the court having

000210

reviewed the files and pleadings; and for good cause appearing, therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The previously ordered payment of rental income from the Kearns rental and previously ordered alimony shall be paid by Defendant Grant R. Knowlden to Plaintiff on or before 5:00 p.m. on the 10th day of each month.

2. The rental income payment and alimony for December 1993 will be paid by December 15, 1993.

3. From the date of this order until February 1, 1994, Defendant Grant R. Knowlden is permitted to enter that portion of the approximately twenty-acre property which contains the marital residence (a portion of approximately three acres) for the specific purpose of completing or assisting in the completion of a "firewall."

4. During each of Defendant's visits to the three-acre portion of the property from the date of this order until February 1, 1994, Defendant is ordered not to in any way enter the living quarters of the marital residence.

5. After February 1, 1994, Defendant is ordered not to enter that approximately three-acre portion of property surrounding the marital residence for any reason. If the "firewall" is not completed by February 1, 1994, Plaintiff is permitted to obtain the

services of a third party to complete the "1" rear view mirror and
Grant. Knowlton will be financially responsible for all payments
to this third party should the services of a third party be
obtained.

6. Defendant is further ordered not to harass or threaten
Plaintiff in any way.

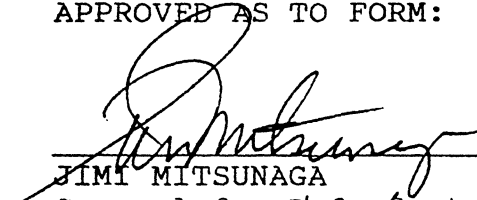
7. In addition to Defendant's access to the approximately
three acres of property surrounding the marital residence as
described above, Plaintiff is ordered to permit Defendant access to
his tools contained in the list provided in Exhibit "A" to this
order at 9:00 a.m. on December 27, 1993.

8. The Tooele County Sheriff's office, or other appropriate
law enforcement agency, is hereby ordered to assist in the transfer
of tools at 9:00 a.m. on December 27, 1993.

DATED this 5 day of January 1993.


PAT B. BRIAN
District Court Judge

APPROVED AS TO FORM:


JIMI MITSUNAGA
Counsel for Defendant
Dated: 12/23/93

ADDENDUM B

KELLIE F. WILLIAMS #3493
Attorney for Plaintiff
CORPORON & WILLIAMS, P.C.
310 South Main Street
Suite 1400
Salt Lake City, Utah 84101
Telephone (801) 328-1162

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

JOYCE KNOWLDEN,

Plaintiff,

vs.

GRANT R. KNOWLDEN, and
GRACE POLOSKEY,

Defendants.

ORDER ON ORDER TO
SHOW CAUSE

Civil No. 934300096

Judge Pat B. Brian

THE ABOVE CAPTIONED MATTER, having come on regularly for hearing before the above entitled court on May 11, 1993, at the hour of 10:30 a.m., the Honorable Pat B. Brian, Third District Court Judge presiding, and the Plaintiff being present in person and being represented by counsel, Kellie F. Williams, and the Defendant, Grant R. Knowlden, being present in person and being represented by counsel, Jimi Mitsunaga, and the court having met with the parties in chambers, and the parties having reached a stipulation and agreement as to the majority of the issues, and the court having recommended approval of the same, and entered its own

CLIENT'S COPY

order as to some issues, and based thereon and for good cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff, Joyce Knowlden, shall remain in the temporary use and temporary possession of that certain real property known as 6000 North Old Lincoln Highway, Grantsville, Utah, until further order of this court.

2. The \$2,600.00 (Two Thousand Six Hundred Dollar) insurance check recently received by the parties shall be endorsed by the parties and shall be used to pay the outstanding debts to Sears, Dr. Adamson, and Garfield Credit Union. The balance remaining, of approximately \$300.00 (Three Hundred Dollars) should be paid to ISAT on the debt for the therapy provided to Plaintiff. It is acknowledged that the debt to Garfield Credit Union is to pay off the balance owing on the Plaintiff's vehicle. If the court finds that there is some unequal benefit to the Plaintiff by payment of that debt, at the time of trial, then the payment of the debt may be considered in the allocation of assets.

3. The Defendant is ordered to continue to manage the parties' two rental properties known as 4801 South 4900 West, Grantsville, Utah, and 39 East Louise Avenue, Salt Lake City, Utah, and pay the mortgages thereon. On a temporary basis, Defendant is awarded the right to receive the rental proceeds from the Louise

Avenue property and pay all taxes and insurance thereon. On a temporary basis, the Plaintiff is awarded the right to receive the proceeds from the rental property at 4801 South 4900 West, Kearns, Utah, subject to her paying the water bill, ~~taxes~~ and ~~insurance~~ thereon.

4. The Defendant is hereby enjoined and restrained from coming around the Plaintiff at the marital residence at 6000 North Old Lincoln Highway, Grantsville, Utah, or purposely coming in contact with the Plaintiff or from telephoning or having any contact whatsoever with Plaintiff. Further, Defendant is enjoined from harassing, annoying, or physical touching or abusing the Plaintiff.

5. The Plaintiff is hereby awarded the temporary use and possession of the personal property at the marital residence, including the quilting machine. The Defendant's rights to the future use or possession of that machine should not be prejudiced by the temporary possession being awarded to Plaintiff. Plaintiff shall have the right to receive any and all proceeds from the sale of quilts and from the use of that machine.

6. The Plaintiff is ordered to inventory the personal property located at the marital residence and to provide the Defendant with a list of that property and a list of those items of personal property which she wishes awarded to her. Defendant is