

1994

# Marie Penrod v. Dale Penrod : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MARIE PENROD	)	
	)	
Plaintiff and Appellee,	)	
vs.	)	Case No. 940383-CA
	)	
DALE PENROD	)	
	)	Priority No. 2
Defendant and Appellant.	)	

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APPELLANT'S BRIEF

---

APPEAL FROM THE FOURTH JUDICIAL COURT, UTAH

COUNTY, STATE OF UTAH

JUDGE GUY R. BURNINGHAM

---

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**FILED**

OCT 28 1994

APPEAL

**FILED**

Utah Court of Appeals

OCT 21 1994

Marilyn M. Branch

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**STATUES**

**Utah Code Annotated 78-2a-3(2)(i) (1992 as Amended).....1**

IN THE UTAH COURT OF APPEALS

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MARIE PENROD	)	
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Plaintiff and Appellee,	)	
vs.	)	Case No. 940383-CA
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DALE PENROD	)	Priority No. 2
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Defendant and Appellant.	)	

---

JURISDICTION OF THE COURT

The Utah Court of Appeals had original appellate jurisdiction in this matter pursuant to Utah Code Annotated 78-2a-3(2) (i) (1992 as Amended).

ISSUES PRESENTED FOR REVIEW

The Defendant contends that the trial court committed error in awarding alimony to the Plaintiff in this case based upon the criteria established by the Utah appellate courts. In reviewing an alimony award, the trial court is given considerable discretion to provide for spousal support, and such an award will not be over turned on appeal unless there has been a clear and prejudicial abuse of discretion. Bingham v. Bingham, 872 P.2d 1065 (Utah App. 1984); Hall v. Hall, 858 P.2d 1018, 1021 (Utah App. 1993); Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986).

Secondly, the Defendant contends that the court abused its discretion in requiring the Defendant to maintain a life insurance policy with a death benefit of \$100,000.00. The Defendant contends that the trial court intended the life insurance to secure the alimony award and inasmuch as the alimony

award was improperly imposed, the requirement placed on the Defendant to maintain a life insurance policy should likewise be abated. The Defendant also contends that the amount of any required life insurance should reflect the present value of the alimony award. Trial court's have "considerable discretion in determining the financial interest of divorced parties." Hall v. Hall, 858 P.2d 1018, 1021 (Utah App. 1993). Jones v. Jones, 700 P.2d 1072, 1074 (Utah 1985). Accordingly, property and alimony awards "will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated." Howell v. Howell, 806 P.2d 1209, 1211 (Utah App. 1991).

The third issue relates to the trial court's error in determining that certain property received by the Defendant as part of his inheritance, became marital property. Trial courts should generally award property acquired by inheritance to that party together with any appreciation or enhancement of its value. A trial court's determination is only disturbed where there is "a misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderates against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion." Noble v. Noble, 761 P.2d 1369, 1373 (Utah 1988); Schaumberg v. Schaumberg, 240 Utah Adv. Rep. 11 (1994).

#### STATEMENT OF THE CASE

The Plaintiff commenced this action on August 13, 1992, seeking a decree of divorce and orders relating to real and

personal property, debts and obligations, alimony, life insurance, pension and profit sharing plans and attorney fees.

The Defendant answered the Complaint on September 5, 1992. An Amended Order resolving the temporary issues in the case was entered on November 23, 1992.

The matter was tried by the parties on July 28, 1993. The court entered Findings of Fact, Conclusions of Law and a Decree of Divorce on June 14, 1994. The Notice of Appeal was filed on June 28, 1994.

#### PROCEDURAL CHRONOLOGY OF THE CASE

1. The Complaint was filed on August 13, 1992 (R. 1-4). The Defendant filed an Answer to the Complaint on September 25, 1992 (R. 36-37).

2. As a result of a hearing on the Plaintiff's Order to Show Cause, the court entered an Amended Order resolving the temporary issues between the parties on November 23, 1992 (R. 41-42).

3. The matter was tried to the Honorable Guy R. Burningham on July 28, 1993. After the filing of various objections to the proposed findings, the court authorized the entry of Findings of Fact, Conclusions of Law and a Decree of Divorce on June 14, 1994 (R. 78-91).

4. The Notice of Appeal was filed on June 20, 1994 (R. 95).

#### STATEMENT OF FACTS

1. The Plaintiff and Defendant were married on December 10, 1965 (R. 3, 103 at 4). The parties had three children born as

issue of the marriage, all of whom are emancipated (R. 103 at 10).

2. During the course of the marriage, the Defendant operated a business known as Dale Penrod Excavating (R. 103 at 7-8). The Plaintiff worked at Smith's Food King as a checker during the last 10 years of the marriage and at the time of trial was working an average of 36 hours per week (R. 103 at 8-9).

**A. Real Property.**

3. The parties acquired approximately 3 acres of real property located in Utah County, State of Utah (Plaintiff's Exhibit No. 1, R. 103 at 12-13). The Plaintiff conceded that the property was inherited by the Defendant and should be awarded to him as his own separate property (Plaintiff's Exhibit No. 10; Defendant's Exhibit No. 11; R. 103 at 36-38, 47).

4. In addition, the parties acquired a one-acre parcel upon which the parties' home was built. The property was conveyed to the Plaintiff and Defendant by the Defendant's father, Leroy W. Penrod on February 3, 1972 (Plaintiff's Exhibit No. 2; R. 103 at 13-14). Subsequently, the one-acre parcel was conveyed by both the Plaintiff and the Defendant to the Defendant's brother, Mark C. Penrod on January 31, 1985 (Plaintiff's Exhibit No. 3; R. 103 at 14). The Plaintiff testified that the home and property was conveyed to the Defendant's brother in order to circumvent a judgment from a lawsuit that had been filed against the Defendant (R. 103 at 14-15). The parties continued to pay the mortgage on the home and

property from 1972 to the time of trial and no money was received from the Defendant's brother at the time of the conveyance (R. 103 at 17-18). The Plaintiff valued the home and property at \$108,400.00 minus the debt owing on the property of \$4,775.00 for a net value of \$103,625.00 (Plaintiff's Exhibit No. 1, R. 103 at 18-19).

5. The Defendant testified that the one-acre parcel was given to him by his father as part of his inheritance. The only reason that the Plaintiff's name appeared on the deed was to satisfy the requirements of the financing bank that both the Plaintiff and the Defendant's name be on the property (R. 103 at 82-83). The Defendant testified that the value of the lot in 1972 when it was conveyed to him by his father was \$15,000.00 (R. 103 at 83-84).

6. The home and property was appraised as of October 1, 1992 as having a fair-market value of \$108,400.00 (Plaintiff's Exhibit No. 4). As depicted on the appraisal, three buildings were located on the one-acre parcel; a house, carport with storage area and a block shop. The block shop was used as part of the Defendant's business. (Plaintiff's Exhibit No. 4, R. 103 at 20-21). The portion of the appraised value of the property attributable to the block shop was \$15,000.00 (Plaintiff's Exhibit No. 4, R. 103 at 21).

**B. Personal Property.**

7. The Plaintiff testified that her 1989 Jeep had an appraised value of \$10,600.00 with a loan of \$2,000.00, for a net

value of \$8,600.00 (Plaintiff's Exhibit No. 5, R. 103 at 25). The Plaintiff valued the lawn mower and the household furniture, which she wished to be awarded at a total value of \$6,000.00 (Plaintiff's Exhibit No. 6, R. 103 at 26-27).

8. The parties stipulated that the appraised value of the vehicle and equipment to be awarded the Defendant was as follow: 1957 GMC truck, (\$1,800.00); a 1965 drop deck trailer (\$5,000.00); and, the 1979 traxcavator (\$14,000.00). A 1985 Dodge truck used by the Defendant had a value of \$5,525.00 (Plaintiff's Exhibit No. 7, 8; R. 103 at 27-29). The Plaintiff testified that the Defendant had a bobtail (a small dumptruck). In addition the Defendant had a dune buggy and trailer valued at \$3,000.00 and a restored Chevele, valued at \$6,000.00 (R. 103 at 29-31). The Defendant agreed with the values made by the appraisers. However the Defendant testified that the Chevele automobile was worth only three or four thousand dollars. The Defendant testified that the body had rust on it, was not restored to its original condition and was a mosaic of various parts from different types of vehicles (R. 103 at 85-86).

9. The Plaintiff valued the Defendant's tools at \$15,000.00 (Plaintiff's Exhibit No. 9, R. 103 at 31-34). The Defendant testified that many of the tools were inherited by his father. The only tools that were not inherited were comprised of a welder, a set of torches, compressor, drill press and various hand tools which the Defendant valued at \$2,500.00 (R. 103 at 86-87).

10. Additionally the Plaintiff claimed the Defendant had access to a bank account with a balance of \$4,000.00 at the time of the separation (Plaintiff's Exhibit No. 9; Defendant's Exhibit No. 14, R. 103 at 31-34).

11. The Plaintiff also testified that she valued the Defendant's business at \$25,000.00 above the value of the assets (Plaintiff's Exhibit No. 9, R. 103 at 31-34). The Defendant testified that he was the sole proprietor and the only person involved in the business. The Defendant testified that if he was not associated with the business, the business would have no income. Accordingly the Defendant testified that the business had no value other than the income produced (R. 103 at 84-85).

**C. Debts and Obligations.**

12. The Plaintiff testified that the only debts she was aware of consisted of the remaining obligation on the house and the debt owing on the Jeep which she was willing to assume (R. 103 at 33-39).

**D. Alimony.**

13. The Plaintiff testified that she was born on October 18, 1946 and was 46 years of age (R. 62).

14. The Plaintiff testified, by way of her financial declaration that she had \$1,739.00 in gross monthly income and \$1,230.00 of net monthly income (R. 61). The Plaintiff conceded on cross-examination that she had been working nearly full-time over the past 10 years and had made \$19,851.29 (\$1,654.27 per month) in 1986 which by 1992 had escalated to \$26,188.41

(\$2,182.37 per month) (Defendant's Exhibit No. 12; R. 103 at 47-48). In fact, the Plaintiff and Defendant acknowledged that the income of the Plaintiff and that of the Defendant (subtracting only cost of business expense) from 1986 to 1992 was as follows:

<u>Year</u>	<u>Plaintiff</u>	<u>Defendant</u>
1992	\$26,188.41	\$ 2,890.00
1991	\$23,650.10	\$ 7,231.00
1990	\$21,358.22	\$ 6,387.00
1989	\$22,854.73	\$14,562.00
1988	\$19,573.81	\$17,295.00
1987	\$19,071.95	\$13,724.00
1986	\$19,851.29	\$19,530.00

Defendant's Exhibit Nos. 12 and 13; R. 103 at 49-53, 74-79.

15. Although the Plaintiff testified that the Defendant had a drinking problem that kept him from working (R. 103 at 6), the Plaintiff acknowledged that two of the Defendant's largest customers had gone bankrupt. Additionally the Plaintiff could not name any specific jobs that the Defendant had turned down (R. 103 at 53-57).

16. The Plaintiff testified her monthly expenses were \$2,494.00 (R. 58; 103 at 39-41). The Plaintiff also testified that she had a bulging disc and a spine that was narrowing that affected her when she stood for a long period of time (R. 103 at 41-42).

17. At the time of trial, the Defendant Dale Penrod was 47 years of age and had a high school education. The Defendant had been an equipment operator for 25 years and owned his own business since 1977 or 1978 (R. 103 at 69-70).

18. The Defendant testified that his business had decreased

because of an increase in competition and his inability to purchase a backhoe (costing approximately \$150,000.00). The Defendant testified that there was only limited use for his traxcavator (R. 103 at 70-72). The Defendant testified that several of his major clients had gone out of business including Mark IV and West America Homes (R. 103 at 71-73). The Defendant indicated that he was simply unable to replace the lost major clients with new ones (R. 103 at 73).

19. The Defendant testified that he had not turned down any work and that although he drank on occasion, drinking did not affect his work (R. 103 at 73).

20. The Defendant testified that his gross income through June 17, 1993 was \$9,387.50. After deducting the cost of gas, parts, taxes, insurance and utilities totaling \$3,384.88, his net income through five and a half months was \$6,002.62 (\$1091.38 per month) (Defendant's Exhibit No. 15, R. 103 at 79-81).

**E. life Insurance.**

21. The Plaintiff testified that the Defendant had a life insurance policy with Canada Life with a death benefit of \$100,000.00 (R. 60; 103 at 42-43).

**F. Attorney Fees.**

22. The Plaintiff testified that she had incurred attorney fees in the amount of \$2,350.00 (103 at 43).

23. The Plaintiff acknowledged that she had \$1,000.00 in savings, 15 shares of Smith's Food King stock and 220 shares of stock in a mutual fund that could be used to pay the attorney

fees (R. 103 at 61-66).

24. The Defendant testified that he had incurred attorney fees in the amount of approximately \$2,000.00 (R. 103 at 89-90).

#### SUMMARY OF ARGUMENT

The Defendant contends that the court abused its discretion in awarding the Plaintiff alimony. The historical earnings of the parties and the uncontroverted testimony of both the Plaintiff and the Defendant establish that the Plaintiff's income is over twice that of the Defendant. Additionally, the court's award of additional temporary alimony amounts to reimburse the Plaintiff for voluntary contributions to a missionary are clearly improper and violative of established appellate court guidelines. Finally, the court's attempt to impute additional monies to the Defendant does not have any foundation in the testimony and evidence and are based upon insufficient findings relating thereto.

The inclusion of a requirement that the Defendant maintain a life insurance policy with a death benefit of \$100,000.00 naming the Plaintiff as sole beneficiary, is an abuse of discretion. The court reasoned that the life insurance requirement was necessary to secure the Plaintiff's alimony award. Inasmuch as there is no foundation in the record to support an award of alimony, the related requirement to maintain a life insurance policy should likewise be abated. If the requirement to maintain life insurance is somehow affirmed by this Court, the requirement should be in accordance with the trial court's direction.

Specifically the policy should be in an amount not greater than the present value of the alimony award based upon the Plaintiff's life expectancy.

Lastly, the Defendant contends that all of the real property given to him by his father was in fact part of his inheritance and a gift to him. The Defendant contends that the trial court abused its discretion in holding that the one-acre parcel, upon which the family home was built, was marital property. The value of that parcel should have been awarded to him as his own separate inherited property.

#### ARGUMENT

##### POINT I: THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING ALIMONY TO THE PLAINTIFF

###### A. Standard of Appellate Review.

The Defendant recognizes that the trial court is given considerable discretion to provide for spousal support and that any such award will not be over-turned on appeal unless there has been a clear and prejudicial abuse of discretion. Bingham v. Bingham, 872 P.2d 1065 (Utah App. 1994); Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986).

###### B. Criteria for the Award of Alimony.

The general purpose of alimony is to prevent the receiving spouse from becoming a public charge and to maintain to the extent possible the standard of living enjoyed during the marriage. Schaumberg v. Schaumberg, 240 Utah Adv. Rep. 11 (1994); Rosendahl v. Rosendahl, 240 Utah Adv. Rep. 25 (1994); Howell v. Howell, 806 P.2d 1209, 1212 (Utah App. 1991).

In determining to award alimony and in setting the amount, the trial court must consider (1) the financial conditions and needs of the receiving spouse; (2) the ability of the receiving spouse to provide for him or herself; and (3) the ability of the payor or spouse to provide support. Chambers v. Chambers, 840 P.2d 841, 843 (Utah App. 1992); Schindler v. Schindler, 776 P.2d 84 (Utah App. 1989).

**C. Requirements for Specific Trial Findings.**

This Court has made it clear that if there is a factual basis and if the trial court has made adequate findings, the Appellate court will not disturb the trial court's alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion. Schindler, supra.

Moreover, "in considering these factors, the trial court is required to make adequate findings on all material issues, unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.' "

Haumont v. Haumont, 793 P.2d 421, 424 (Utah App. 1990) quoting Throckmorton v. Throckmorton, 767 P.2d 121, 124 (Utah App. 1988) quoting Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987).

In this case, the Findings of Fact, Conclusions of Law and Decree of Divorce are attached as part of the Addendum as Exhibit I. The sections relevant to alimony are paragraphs 5 and 15 of the Findings which are mirrored in paragraph 2 of the Conclusions and paragraph 2 of the Decree. Findings numbered 5 and 15 are as

follows:

5. The Court finds that the Plaintiff's monthly income is \$1,779.00 and imputes to the Defendant monthly income in the sum of \$2,383.00. Defendant's income is calculated based upon the testimony given at trial by the Defendant which showed that he worked twenty (20) hours per week, that sixty percent (60%) of his employment was billed at the rate of \$65.00/hour and forty percent (40%) of his employment billed at the rate of \$40.00/hour, that he worked nine (9) months during the year and that one-third (1/3) of his gross income was attributable to expenses and therefore that his yearly income amounted to \$28,600.00 or \$2,383.00 per month. The Court further finds that Defendant earns \$7,732.00 more than Plaintiff each year.

15. The Court finds that Plaintiff and Defendant were married for over twenty-seven (27) years and that Plaintiff is in need of alimony and that Defendant should pay to Plaintiff as alimony the sum of \$672.00/month said alimony to be permanent. This finding is based upon the additional expenses which Plaintiff presently incurs as reflected on her Financial Declaration and which she anticipates will be reduced after ten (10) months and upon the Defendant's minimal expenses and his ability to pay.

**D. The Trial Court Findings with Regard to the Financial Conditions and Needs of the Plaintiff are Improper.**

The trial court made a finding that the Plaintiff's yearly income was \$20,868.00 which equates to a monthly income to a monthly income of \$1,739.00 which is within \$40.00 of the amount recited in paragraph 5 of the Findings (R. 85, 103 at 138).

However, the court did not make either in his oral ruling from the bench or in the written Findings, Conclusions and Decree, any specific findings regarding the Plaintiff's monthly expenses and needs. The Plaintiff submitted a Financial Declaration showing monthly expenses of \$2,494.00, but the court did not make any findings relative to those claimed expenses (R. 58-62; 103 at 138-140).

As outlined in the Findings and Decree, the court ordered the Defendant to pay an increased alimony award for ten months of \$672.00 per month which then was reduced to \$322.00 per month which was to be permanent alimony. The court's reasoning employed to support the \$672.00 award was totally improper. The trial court awarded the extra \$350.00 simply to compensate the Plaintiff for her voluntary contribution to a child on a church mission. Although not specifically included in the written findings, it is clear from the court's oral ruling what he intended:

The expenses set forth in the Financial Declaration of the Plaintiff indicates her total monthly expenses are \$2,494.00. Now, of that, \$350.00 represents the amount going to support a missionary who apparently has been on his mission for

fourteen months and would have ten months to go . . .

I am going to award her \$322.00 per month alimony . . . what I'm going to do -- it appears she has supported the missionary since he's been out. I didn't hear any other evidence . . . but what I'm going to do is award temporary alimony in the amount of \$672.00 for ten months . . . .

R. 103 at 146-148.

The \$350.00 added alimony for the ten month period of time is clearly improper. The court is ordering the Defendant to pay support for an emancipated child. The parties stipulated and the Findings reflect that all three children born as issue of the marriage had attained the age of majority (Finding No. 4, R. 85).

Although U.C.A. 15-2-1 allows a court to order support of a child to age 21, the court may do so only upon a finding of necessity and special or unusual circumstances. Balls v. Hackle, 745 P.2d 836 (Utah App. 1987); Jackman v. Jackman, 696 P.2d 1191 (Utah 1985); Thornblad v. Thornblad, 849 P.2d 1197 (Utah App. 1993). In this case, the trial court simply referred to the voluntary contribution and made no findings relating to the child's need for the money or other special circumstances. It is clear that the child was not suffering from any mental or physical handicap or impairment. The court blatantly and improperly ordered the Defendant to make a voluntary contribution to his son's mission using alimony as a guise.

In Chambers v. Chambers, supra the Court noted the

impropriety of including children expenses into an alimony award.

Inasmuch as the court explicitly tied the Plaintiff's need for the extra \$350.00 to her voluntary contribution to an adult child, the inclusion of that requirement on the Defendant by way of an alimony award is clearly outside the mandate of this Court as to the allowable basis for an award of alimony.

One further item should be noted. Aside from being an improper attempt to order child support, the award is improper on another basis. This Court has ruled that alimony must be limited to provide for only basic needs and that a consideration of the recipient's station in life may be considered only when he is determined to have adequate resources. Howell v. Howell, 806 P.2d 1209, 1212 (Utah App. 1991); Martinez v. Martinez, 818 P.2d 538, 542 (Utah 1991).

The award of the \$672.00 as temporary alimony is improper in that it was devised as a means to force the Defendant to contribute to Plaintiff's voluntary expenditures. Secondly the award is a guise for forced child support for an emancipated child. Third, the amount exceeds the base needs of the Plaintiff.

**E. The Trial Court Findings with Regard to the Defendant's Ability to Pay Alimony are Unsupported by the Evidence of Actual Earnings in the Case.**

In Finding of Fact No. 5, the trial court imputed \$2,283.00 of monthly income to the Defendant. The court does so based upon the following calculation:

Defendant's income is calculated based upon the

testimony given at trial by the Defendant which showed that he worked twenty (20) hours per week, that sixty percent (60%) of his employment was billed at the rate of \$65.00/hour and forty percent (40%) of his employment billed at the rate of \$40.00/hour, that he worked nine (9) months during the year and that one-third ( $1/3$ ) of his gross income was attributable to expenses and therefore that his yearly income amounted to \$28,600.00 or \$2,383.00 per month. The Court further finds that Defendant earns \$7,732.00 more than Plaintiff each year.

R. 85.

The Finding of the court as it relates to the Defendant's income has no basis in the record. Both the Plaintiff and the Defendant testified that the joint tax returns, signed by both parties, demonstrated the following income. In 1986, the Defendant had \$19,530.00 of annual income which equates to a monthly income of \$1,627.50. In 1987, the Defendant had \$13,724.00 of income equating to \$1,143.00 per month. In 1988, the annual income was \$17,295.00 or \$1,431.25 per month. In 1989, the Defendant's total income was \$14,562.00 or \$1,213.50 per month. In 1990, the Defendant's total annual income was \$6,387.00 or \$532.25 per month. 1991 was only slightly better. The Defendant had \$7,231.00 of income or \$602.58 of monthly income. 1992 the Defendant's income was \$2,890.00 or \$240.83 per month. The Defendant testified that to the time of trial, his

net income for five and a half months was \$6,002.62 or \$1,091.38 per month (R. Defendant's Exhibit Nos. 12, 13 and 15; R. 103 at 49-43, 74-79). As indicated by Defendant's Exhibits 12, 13 and 15 and the graphic made apart of paragraph 14 of the Statement of Facts in this brief, the Defendant's income has never exceeded the Plaintiff's income from 1986 to the present. In fact, the Plaintiff's income has been at least twice as much as the Defendants from 1990 to the present.

Based upon the jointly filed tax returns and the failure of either party to contend that the tax returns did not reflect their actual income, there is no question that the Plaintiff's income has historically, without exception, exceeded the income of the Defendant. Based upon the actual income of the parties, no alimony award would be justified. The court calculated alimony by taking the alleged difference between the annual income of the Plaintiff and the Defendant and dividing that number by twelve and than by two (R. 103 at 146-147). Obviously of the Plaintiff's income exceeded that of the Defendant, no alimony would be due under the standard and analysis employed by the trial court.

**F. The Trial Court Findings with Regard to the Defendant's Ability to Pay Alimony are Unsupported by the Evidence of Imputed Earnings in the Case.**

As outlined above, there is no question that the hard evidence of actual earnings do not support alimony to the Plaintiff. The only remaining analysis is an assessment of whether there is evidence upon which the court could, in good

faith, impute additional earnings to the Defendant.

The Plaintiff testified that in her opinion, the Defendant had a drinking problem, which she surmised interfered with the Defendant's job performance (R. 103 at 6). However, the Plaintiff acknowledged that the Defendant had an excellent reputation and that she could not identify one person or client for whom Dale had refused to work (R. 103 at 6-7, 53-57). Although the Plaintiff testified that the Defendant charged \$65.00 an hour on the cat and \$40.00 per hour on the truck, she acknowledged that the Defendant could only work three or four months out of the year. In fact, the specific interchange with the Plaintiff and her counsel is as follows:

Q. Yet when I look at your tax returns, it doesn't show that he made \$10,000.00 per month for the whole year. Can you explain that?

A. Because he only works three or four months out of the year.

Q. So he'd work during the spring and summer?

A. Yeah.

Q. Then not the rest of the year?

A. No, not unless he worked on fixing up his equipment.

R. 103 at 9-10.

The testimony of the Plaintiff is consistent with the general notion that those persons employed in the construction field can not work the entire year because of weather and

temperature considerations.

The Defendant testified that his family has always been in the equipment operating business and that he had been running his own business as an excavator since 1977 (R. 103 at 70). The Defendant's uncontroverted testimony, which was corroborated by the Plaintiff, was that his major clients had gone out of business and that he had been unable to replace them (R. 103 at 54-55, 70-73). The Defendant testified that West American Homes, who had been his biggest and only client for a significant period of time, had gone out of business (R. 103 at 72-73).

The Defendant denied that he had never turned down a job or been unable to perform because of drinking. No one had ever complained about his drinking and never interfered with the performance of his job (R. 103 at 73).

On cross-examination, the Defendant testified that:

- A. He had worked for five hours the day before the trial (R. 103 at 94);
- B. That he billed \$65.00 per hour for the cat and tried to charge \$35.00 to \$40.00 per hour for the truck (R. 103 at 100);
- C. When asked if he could estimate the percentage of time he worked at \$65.00 per hour versus \$35.00 to \$40.00 per hour, the Defendant testified that he worked a little over half to two-thirds with the cat and the other with the truck (R. 103 at 100-101);
- D. When asked to give an average of the number of

hours the Defendant worked a week, the Defendant testified that he could not. He stated that some weeks he worked and some weeks he didn't (R. 103 at 102);

E. Only when counsel for the Plaintiff asked the Defendant the number of hours he worked the previous week, was the Defendant able to answer that he worked approximately 20 hours (R. 102 at 103).

The trial took place on July 28, 1993. The only testimony given by the Defendant above and beyond the hard evidence contained in the income tax returns and his year-to-date income statement (Defendant's Exhibit No. 15), was that in the week preceding July 28, 1993, the Defendant worked 20 hours.

Finding of Fact No. 5 clearly states that "Defendant's income is calculated based upon the testimony given at trial by the Defendant which showed that he worked 20 hours per week." (R. 85).

There is no question that the court's conclusion that the Defendant has the ability to make \$28,600.00 per year or \$2,383.00 per month is without any basis in the record. Since 1986, the highest amount made by the Defendant was \$19,530.00, in 1986. The amount imputed by the court is \$9,070.00 higher than any income made by the Defendant to date. To conclude that because the Defendant worked 20 hours in a week in July, he was capable of working that same amount for nearly 40 weeks is clear error. Even the Plaintiff testified that the Defendant's work

was limited to the Spring and Summer months.

It must be remembered that the Defendant is not engaged in general construction which would allow him to work during approximately nine months of the year. The Defendant excavates or digs basements. Obviously that work would be done at a time of year that would still allow the construction of a home to its basic conclusion before the onset of inclement weather. Certainly the Plaintiff and Defendant, after having lived with the business since 1977, know its limitations and both testified that the excavation season was much more limited than the period of time pulled from the air by the trial court. There are simply no facts, adduced by either party that would support the income imputed to the Defendant.

This Court has held that findings not supported by the evidence or those that are rendered in summary form will not be allowed to stand. See Morgan v. Morgan, 795 P.2d 684, 689 (Utah App. 1990); Johnson v. Johnson, 771 P.2d 696, 699 (Utah App. 1989); Marchant v. Marchant, 743 P.2d 199, 207 (Utah App. 1987). As noted by the Court in Chambers v. Chambers, 840 P.2d 841 (Utah App. 1992), the Court must do more than simply state or conclude that "the Defendant has the ability to pay."

The Findings made by the trial court clearly fail to meet the test set out in Schaumberg v. Schaumberg, 240 Utah Adv. Rep. 11 (1994):

When the trial court has failed to make findings  
on the three factors listed above, we reverse, unless

pertinent facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment. (Emphases added.)

In this case, there are no findings that adequately attempt to extrapolate from the parties tax returns for eight years to the amount of income set out in the Findings. Without those specifics, the Findings are insufficient and cannot be sustained. In fact, the evidence in this case supports an appellate finding that the judgment should be set aside and that an order be entered abating the award of alimony.

**POINT II: THE TRIAL COURT ABUSED ITS DISCRETION IN  
REQUIRING THE DEFENDANT TO MAINTAIN A \$100,000 LIFE  
INSURANCE POLICY**

Paragraph 16 of the Findings of Fact states as follows:

Defendant is ordered to maintain a life insurance policy in the sum of \$100,000.00 naming the Plaintiff as the sole beneficiary thereunder. Defendant is entitled to the cash value of any life insurance policies which he owns and is ordered to maintain a life insurance policy in the sum of \$100,000.00 naming the Plaintiff as the sole beneficiary thereunder free and clear from any encumbrances thereon.

R. 82.

The Defendant has two objections to the requirement of maintaining a life insurance policy. The first objection is that the life insurance was intended by the court as a guarantee of the Defendant's alimony obligation in the event the Defendant

preceded the Plaintiff in death. That fact, although not detailed in the written findings, is referenced in the court's ruling from the bench:

MR. PETRO: So what's the holding then with regard to life insurance?

THE COURT: That up to the \$100,000.00 amount be maintained to protect Mrs. Penrod's interest in alimony for the rest of her life, \$322.00 a month. If the present value of that is less than \$100,000.00, I'll simply require him to maintain a sufficient amount to make sure that should something happen to Mr. Penrod, that she still receives the \$322.00 a month.

R. 103 at 149.

Accordingly, if this Court finds that the alimony award to the Plaintiff is unjustified, the requirement to maintain a life insurance policy to secure the alimony, should be abated.

The second objection of the Defendant is that the Plaintiff and her counsel failed to adhere to the instruction of the trial court. Judge Burningham clearly instructed counsel to determine the life expectancy of a person of the Plaintiff's age and calculate the present value of her alimony award. The Defendant was only to be required to maintain a policy that was equal to the value of the alimony award but did not exceed \$100,000.00. Any casual reference to a life expectancy table under a heading of a caucasian woman, age 48, will readily reveal that the alimony award is way over insured by a policy with a death

benefit of \$100,000.00.

In summary, the requirement to maintain a life insurance policy should be reversed with a finding by the Court that the alimony is unjustified. If for any reason, the life insurance requirement is maintained, the Defendant should not be required to maintain insurance with a benefit of more than the present value of the alimony award (based upon life expectancy tables).

**POINT III: THE TRIAL COURT ABUSED ITS DISCRETION IN  
FAILING TO COMPENSATE THE DEFENDANT FOR THE ONE-ACRE  
PARCEL RECEIVED AS PART OF HIS INHERITANCE**

The Plaintiff testified that the approximate three acres of property located behind the family home was undeveloped and given to the Defendant by his father, Leroy W. Penrod, as part of his inheritance. Based thereon, the court found that the 2.76 acre parcel should be awarded to the Defendant as his separate inheritance (Finding of Fact No. 10; R. 84). The court made the award even though the Defendant had transferred title of the property to the Plaintiff at the time the Defendant was sued (R. 103 at 44-47).

The Plaintiff testified that the one-acre parcel, upon which the family home was built was likewise acquired from the Defendant's father, Leroy W. Penrod by way of warrantee deed dated February 3, 1972 (Plaintiff's Exhibit No. 2). The Plaintiff testified that the conveyance was made in order to allow the building of a home. The Plaintiff did not testify as to any conversation with Leroy W. Penrod wherein he acknowledged that the conveyance was anything other than a gift to Dale as

part of his inheritance (R. 103 at 12-14).

The Defendant testified that the one-acre parcel was given to him by his father and that the only reason the Plaintiff's name was placed on the deed was to satisfy the bank from whom the loan to build the house was procured. The Plaintiff's name was placed on the deed only to facilitate financing (R. 103 at 82-83). The Defendant testified that the value of the lot at the time he received it from his father was \$15,000.00 (R. 103 at 84). At the time the property was appraised, the lot was valued at \$35,000.00 (Plaintiff's Exhibit No. 4).

In Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988), the Utah Supreme Court stated that 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 or enhancement of its value, unless (1) the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it, or (2) the property has been consumed or its identity lost through commingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse.

See also, Bingham v. Bingham, 872 P.2d 1065 (Utah App. 1994).

As the Court noted in Schaumberg, supra:

While a trial court has discretion to award inherited property, such property, "as well as its appreciated value, is generally regarded as separate from the marital estate and hence is left with the receiving spouse in a property division incident to divorce."

See also, Burt v. Burt, 799 P.2d 1166, 1169 (Utah App. 1990); Hall v. Hall, 858 P.2d 1018, 1022 (Utah App. 1993). The Defendant recognizes that the court has authority to award inherited property to the other party but only in circumstances where it is done in lieu of alimony and in other extraordinary situations. Id.

The evidence in this case is that the lot was given to the Defendant by his father as a gift and as part of his inheritance. The only reason the Plaintiff's name was put on the property was to facilitate financing and the procurement of a loan to build a house. That lot although used as the site of the family home, has a value which over time increased from \$15,000.00 to \$35,000.00. The lot's value was not enhanced by any efforts of the Plaintiff and can be separately valued a part from the house and related improvements.

In keeping with the mandate of the appellate court, Finding No. 7 that the Defendant's father made a joint gift to the parties should be reversed and the value of the lot, as noted in the appraisal, should be awarded to the Defendant.

#### CONCLUSION

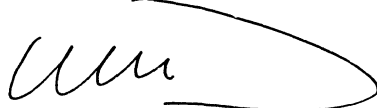
The historical earnings of the parties, produced by all

sides, established that the Plaintiff, since 1986, has made more money than the Defendant. During the last years, the Plaintiff made from two to eight times the income produced by the Defendant. Based upon the uncontroverted evidence, no award of alimony should have been made to the Plaintiff. The granting of an increased temporary alimony award to reimburse the Plaintiff for contributions to an emancipated child, was clear error. Finally, there was no factual basis and insufficient findings to sustain the trial court's imputation of income to the Defendant.

The order of the trial court with regard to life insurance should be reversed because it is tied to an alimony award that was improperly assessed. Additionally, the amount of life insurance violated the court's oral mandate and was far in excess of the present value of the alimony award.


The court's finding that the one-acre parcel constituted marital property flies in the face of the evidence and the applicable case law. The Defendant, as part of the property settlement, should be awarded the value of the lot, at the time that the Decree of Divorce was entered.

DATED this 21st day of October, 1994.

  
\_\_\_\_\_  
Michael J. Petro, Esq.  
Attorney for Appellant

**MAILING CERTIFICATE**

I certify that 2 copies of the Appellant's Brief were mailed, postage prepaid to Mr. Brian C. Harrison, Attorney at Law, 3319 North University Avenue, Suite 200, Provo, Utah 84604 on the 21<sup>st</sup> day of October, 1994.

  
A handwritten signature, appearing to be 'UM', is written above a horizontal line.

## **A D D E N D U M**

Tab 1

9 JUN 14 04:11:03

61594

Civil No. 924401632

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

01

become final upon entry.

2. Defendant shall pay to Plaintiff as alimony the sum of \$672.00 per month for ten (10) months after which alimony is reduced to \$322.00 per month, said alimony award to be permanent.

3. The Plaintiff and Defendant are each awarded one-half the equity in the home and real property of the parties which should be divided as follows:

a. The home, carport, and three-quarters (3/4) acre on which the home and carport are situated is awarded to the Plaintiff.

b. The shop plus one-quarter (1/4) acre of the marital property is awarded to the Defendant.

c. Plaintiff and Defendant are ordered to jointly petition the City of Provo for a lot split which would allow the shop and real property awarded to the Defendant to be attached to the adjoining property owned by the Defendant and his brother.

4. Defendant is awarded the 2.76 acres adjacent to the marital property, as his separate inheritance.

5. The personal property of the parties is awarded as follows:

a. Defendant is awarded the 1979 CAT, 1965 trailer, GMC truck, Dodge, Bobtail, dune buggy and trailer, Chevelle,

shop tools, bank account, family business (Dale Penrod Excavation), green chair, china closet, and two prints.

b. Plaintiff is awarded the remaining household furniture and equipment, and Jeep.

6. Defendant is ordered to record the unrecorded deed presently held by him covering the marital home and property, conveying the subject property from Mark Penrod to the Plaintiff and Defendant herein, and said property is then ordered divided as herein above specified.

7. Plaintiff is ordered to assume and pay the debts on the home and real property of the parties and on the Jeep which has been awarded to her.

8. Defendant is ordered to maintain a life insurance policy in the sum of \$100,000.00 naming the Plaintiff as the sole beneficiary thereunder free and clear from any encumbrances thereon.

9. Defendant is ordered to assume and pay all other marital debts and obligations incurred by the parties during the marriage.

10. Plaintiff and Defendant are each awarded one-half of the Smith's stock, Dean Whitter stock, and \$500.00 from the joint bank account of the parties.

11. Plaintiff and Defendant are each awarded one-half of Plaintiff's pension fund. Defendant is authorized to prepare a

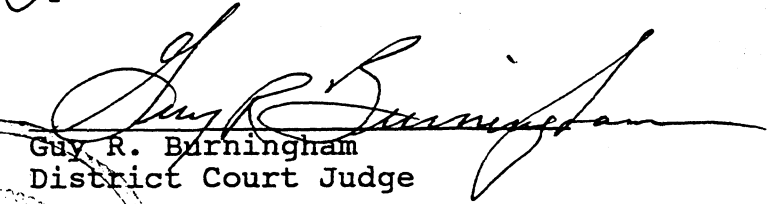
Qualified Domestic Relations Order if the pension fund cannot be divided in any other fashion.

12. Plaintiff is ordered to pay to Defendant the sum of \$11,200.00 within six (6) months of the date of the entry of the Decree of Divorce herein, with interest accruing thereon at the legal rate of interest from the date of said Decree until paid, said sum representing the difference between the value of the home and real property awarded to the Plaintiff and the property awarded to the Defendant.


13. Plaintiff and Defendant are ordered to pay their own court costs and legal fees incurred herein.

DATED this 14 day of June, 1993.

By the Court:

  
Gay R. Burningham  
District Court Judge

Approved as to form:

  
Michael J. Petro

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing Decree of Divorce on this 18<sup>th</sup> day of February, 1994, by first-class U.S. mail, postage prepaid, to the following:

Michael J. Petro  
101 E. 200 S.  
Springville, UT 84663

Traci Goodman  
Secretary

FILED  
CLERK OF DISTRICT COURT  
JUL 14 1993  
JUL 14 PM 11:03

HILL, HARRISON & HILL  
Brian C. Harrison  
Attorney for Plaintiff  
3319 North University Avenue, #200  
Provo, Utah 84604  
Telephone: (801) 375-6600  
Utah State Bar #1388

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
STATE OF UTAH

---

MARIE PENROD	)	
	)	
Plaintiff,	)	
	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
-vs-	)	
	)	
DALE PENROD	)	
	)	
Defendant.	)	Civil No. <u>924401632</u>

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This matter having come on regularly for hearing on the 28th day of July 1993, Plaintiff appearing in person and by her attorney Brian C. Harrison, and the Defendant appearing in person and by his attorney Michael J. Petro, and the Court having considered the evidence submitted by the parties and the argument of counsel and being fully advised in the premises, hereby enters its:

FINDINGS OF FACT

1. Plaintiff and Defendant are actual and bona-fide residents of Utah County, State of Utah, and have been for more than three (3) months immediately prior to the commencement of this

action.

2. Plaintiff and Defendant were married on December 10, 1965, in Mapleton, Utah, and are presently married at this time.

3. Irreconcilable differences have developed between Plaintiff and Defendant which have caused the irremedial breakdown of the marriage.

4. The parties have had three (3) children born as issue of the marriage but none of the children are presently under the age of majority.

5. The Court finds that the Plaintiff's monthly income is \$1,779.00 and imputes to the Defendant monthly income in the sum of \$2,383.00. Defendant's income is calculated based upon the testimony given at trial by the Defendant which showed that he worked twenty (20) hours per week, that sixty percent (60%) of his employment was billed at the rate of \$65.00/hour and forty percent (40%) of his employment billed at the rate of \$40.00/hour, that he worked nine (9) months during the year and that one-third (1/3) of his gross income was attributable to expenses and therefore that his yearly income amounted to \$28,600.00 or \$2,383.00 per month. The Court further finds that Defendant earns \$7,732.00 more than Plaintiff each year.

6. The Court finds that the ordinary expenses of the marriage were shared during the marriage and thus both parties

should be given equal credit for the mortgage payments made on the home and real property of the parties.

7. The Court finds that in 1972 the Defendant's father made a joint gift to Plaintiff and Defendant of the one acre parcel upon which the parties constructed the marital home.

8. The Court finds that the present net equity value of the home and real property of the parties is \$103,625.00 and that each party should be awarded one-half (1/2) of the equity therein.

The Court finds that the Plaintiff has been a homemaker for over 27 years and has resided in the home of the parties for over 20 years.

The Court further finds that the home, carport, and the three-quarters (3/4) acre on which the home and carport are situated should be awarded to the Plaintiff and that the shop plus one-quarter (1/4) acre of the marital property should be awarded to the Defendant, so long as this division does not violate applicable zoning ordinances.

9. The Court finds that the parties should jointly petition the City of Provo for a lot split which would allow the shop and real property awarded to the Defendant to be attached to the adjoining property owned by the Defendant and his brother.

10. Defendant should be awarded the 2.76 acres adjacent to the real property of the parties as his separate inheritance which

the Court finds is valued at \$385,000.00.

11. With respect to personal property, the Court finds that Exhibit 9, items 1 - 6, are not disputed in terms of valuation and the Court finds accordingly that the personal property to be awarded to the Defendant is as follows:

a.	1979 CAT	\$14,000
b.	1965 Trailer	\$ 5,000
c.	GMC Truck	\$18,000
d.	Dodge	\$ 5,525
e.	Bobtail	\$ 1,000
f.	Dune buggy and trailer	\$ 3,000
g.	Chevelle	\$ 4,000
h.	Shop tools	\$ 9,000
i.	Bank account	\$ 4,000
j.	Family business - Dale Penrod Excavation	\$ -0-.

12. In addition, the Court finds that the green chair awarded to the Defendant is valued at \$1,000.00 and that the China Closet and two prints should be awarded to the Defendant and that the other household furniture and equipment is valued at \$4,000.00, and should be awarded to the Plaintiff. Plaintiff should be awarded her Jeep subject to assuming the debt thereon with an equity value of \$8,600.00.

13. The Court finds that the unrecorded deed presently held

by the Defendant covering the marital home and property should be recorded, conveying the subject property from Mark Penrod to the Plaintiff and Defendant herein and that said property should then be divided pursuant to the Decree herein.

14. The Court finds that the Plaintiff should assume and pay the debts on the home and real property of the parties and the Jeep which are awarded to her.

15. The Court finds that Plaintiff and Defendant were married for over twenty-seven (27) years and that Plaintiff is in need of alimony and that Defendant should pay to Plaintiff as alimony the sum of \$672.00/month for ten (10) months after which alimony should be reduced to \$322.00/month said alimony to be permanent. This finding is based upon the additional expenses which Plaintiff presently incurs as reflected on her Financial Declaration and which she anticipates will be reduced after ten (10) months and upon the Defendant's minimal expenses and his ability to pay.

16. Defendant is ordered to maintain a life insurance policy in the sum of \$100,000.00 naming the Plaintiff as the sole beneficiary thereunder. Defendant is entitled to the cash value of any life insurance policies which he owns and is ordered to maintain a life insurance policy in the sum of \$100,000.00 naming the Plaintiff as the sole beneficiary thereunder free and clear from any encumbrances thereon.

17. Defendant should assume and pay all other marital debts and obligations incurred by the parties during the marriage.

18. Plaintiff and Defendant should each be awarded one-half of the Smith's stock, and Dean Whitter stock, and \$500.00 from the joint bank account of the parties.

19. Plaintiff and Defendant should each be awarded one-half of Plaintiff's pension fund. Defendant is authorized to prepare a Qualified Domestic Relations Order if the pension fund cannot be divided in any other fashion.

20. The Court finds that the net equity in the home and real property of the parties is \$93,475.00 minus the value of the personal property awarded to the Defendant in the sum of \$71,075.00 which equals \$22,400.00 in joint marital equity which should be awarded one-half to each party. Accordingly, Plaintiff should pay to Defendant the sum of \$11,200.00 within six (6) months from the date of entry of the Decree herein, with interest accruing thereon at the legal rate of interest from the date of the Decree until paid.

21. The Court finds that Plaintiff and Defendant should each pay their own court costs and legal fees incurred herein.

From the foregoing Findings of Fact, the Court now enters its:

CONCLUSIONS OF LAW

1. Plaintiff is awarded a Decree of Divorce from Defendant

upon the grounds of irreconcilable differences, said Decree to become final upon entry.

2. Defendant should pay to Plaintiff as alimony the sum of \$672.00 per month for ten (10) months after which alimony is reduced to \$322.00 per month, said alimony award to be permanent.

3. The Plaintiff and Defendant are each awarded one-half the equity in the home and real property of the parties which should be divided as follows:

a. The home, carport, and three-quarters (3/4) acre on which the home and carport are situated is awarded to the Plaintiff.

b. The shop plus one-quarter (1/4) acre of the marital property is awarded to the Defendant.

c. Plaintiff and Defendant are ordered to jointly petition the City of Provo for a lot split which would allow the shop and real property awarded to the Defendant to be attached to the adjoining property owned by the Defendant and his brother.

4. Defendant is awarded the 2.76 acres adjacent to the marital property, as his separate inheritance.

5. The personal property of the parties is awarded as follows:

a. Defendant is awarded the 1979 CAT, 1965 trailer, GMC

truck, Dodge, Bobtail, dune buggy and trailer, Chevelle, shop tools, bank account, family business (Dale Penrod Excavation), green chair, china closet, and two prints.

b. Plaintiff is awarded the remaining household furniture and equipment, and Jeep.

6. Defendant is ordered to record the unrecorded deed presently held by him covering the marital home and property, conveying the subject property from Mark Penrod to the Plaintiff and Defendant herein, and said property is then ordered divided as herein above specified.

7. Plaintiff is ordered to assume and pay the debts on the home and real property of the parties and on the Jeep which has been awarded to her.

8. Defendant is ordered to maintain a life insurance policy in the sum of \$100,000.00 naming the Plaintiff as the sole beneficiary thereunder free and clear from any encumbrances thereon.

9. Defendant is ordered to assume and pay all other marital debts and obligations incurred by the parties during the marriage.

10. Plaintiff and Defendant are each awarded one-half of the Smith's stock, Dean Whitter stock, and \$500.00 from the joint bank account of the parties.

11. Plaintiff and Defendant are each awarded one-half of

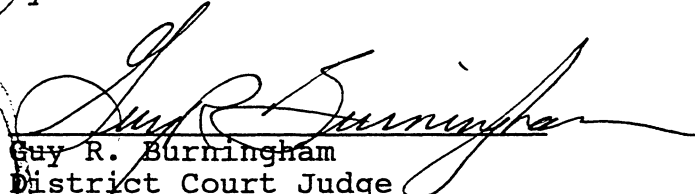
Plaintiff's pension fund. Defendant is authorized to prepare a Qualified Domestic Relations Order if the pension fund cannot be divided in any other fashion.

12. Plaintiff is ordered to pay to Defendant the sum of \$11,200.00 within six (6) months of the date of the entry of the Decree of Divorce herein, with interest accruing thereon at the legal rate of interest from the date of said Decree until paid, said sum representing the difference between the value of the home and real property awarded to the Plaintiff and the property awarded to the Defendant.

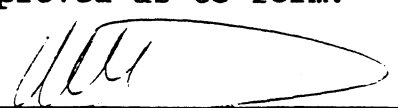
13. Plaintiff and Defendant are ordered to pay their own court costs and legal fees incurred herein.

DATED this 14 day of June, 1994.

By the Court:

  
Guy R. Burningham  
District Court Judge

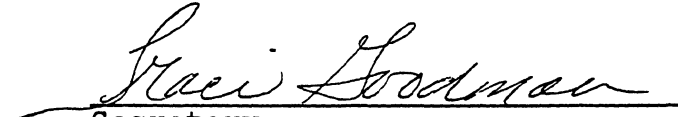
Approved as to form:

  
Michael J. Petro

MAILING CERTIFICATE

I HEREBY CERTIFY that I personally mailed a true and correct copy of the foregoing Findings of Fact and Conclusions of Law on this 18th day of February, 1994, by first-class U.S. mail, postage prepaid, to the following:

Michael J. Petro  
101 E. 200 S.  
Springville, UT 84663

  
Secretary

Tab 2

EXHIBIT 1718

SECURITY #17593  
P-1-7600

1718

WARRANTY DEED

RECORD THIS DEED IN THE  
DEED BOOK OF THE COUNTY OF  
UTAH, BOOK NO. 23648

805 n. 7  
F 1029-B

\*\*\*\*\* LEROY W. PENROD, a single man \*\*\*\*\*

Grantor, of Provo, Utah

hereby CONVEYS AND WARRANTS to \*\* DALE C. PENROD and MARIE M.  
PENROD, His Wife, as joint tenants with full rights of survivorship

and not as tenants in common \*\*\*

Grantee, of 272 East 1000 South Orem Utah Utah  
for the sum of \*TEN \$10.00 and other good and valuable considerations \*DOLLARS  
the following described tract of land in UTAH County,  
State of Utah, to-wit:

1.0 Acre Parcel

Commencing at a point in the intersection of a fence line and the South  
boundary of 3700 North Street, Provo, Utah, which point is North  
36.16 feet and west 2425.46 feet from the East quarter corner of  
Section 24, Township 6 South, Range 2 East, Salt Lake Base and \*  
Meridian; thence South 1°40' West along a fence line 240.98 feet; thence  
North 1°30' East along a fence line 220.50 feet; thence North 83°52'  
East along the South boundary of said 3700 North Street 190.82 feet  
to the point of beginning. Area = 1.0 acre

7215-62  
S.M.

\* thence West 188.49 feet;

MARK C. PENROD

WITNESS THE HAND of said Grantor this 3rd day of  
February, A. D. 1972

Signed in the presence of

*Leroy W. Penrod*

STATE OF UTAH,  
County of UTAH

On the 3rd day of February, A. D. 1972, personally appeared  
before me, a Notary Public in and for the State of Utah, LEROY W. PENROD



the above instrument, who duly acknowledged to me that he executed the same.

Notary Public

COMMISSION EXPIRES AUGUST 14, 1974

Residing at Springville, Utah

PLAINTIFF'S  
EXHIBIT  
2

EXHIBIT FED. SAVS. &

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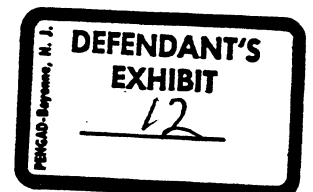
MAIL TAX NOTICE TO

REC-1233 n. 41

Tab 3

**DALE PENROD/ MARIE PENROD**  
**Gross Income Before Taxes**  
**1986 through 1992**

<u>Year</u>	<u>Marie</u>	<u>Dale</u>
1992	\$26,188.41	\$2,890.00
1991	\$23,650.10	\$7,231.00
1990	\$21,358.22	\$6,387.00
1989	\$22,854.73	\$14,562.00
1988	\$19,573.81	\$17,295.00
1987	\$19,071.95	\$13,724.00
1986	\$19,851.29	\$19,530.00



Tab 4

DALE PENROD  
EXCAVATING INCOME AND EXPENSES  
1/1/93 to 6/17/93

Gross Income to 6/17/93	\$9,387.50
Less Expenses:	
Gas	\$936.22
Parts and Labor	\$500.54
Tax and License	\$500.00
Insurance	\$550.00
Diesel Fuel	\$414.26
Oil and Grease	\$105.86
Shop Power & Phone	\$378.00
TOTAL EXPENSES	\$3,384.88
NET INCOME to 6/17/93	<u>6,002.62</u>

