

2006

# Kenneth Raymond Lowry v. Judith Wanda Lowry : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

---

KENNETH RAYMOND LOWRY,

Appellant,

vs.

JUDITH WANDA LOWRY,

Appellee.

---

Appellate No. 20060018-CA

Argument Priority No.

District Court 044500246

---

BRIEF OF APPELLANT

---

Appeal from the Judgment and Orders of the District Court  
of the Fifth Judicial District, State of Utah  
the Honorable James L. Shumate, Presiding.

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UTAH APPELLATE COURT  
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IN THE COURT OF APPEALS  
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## JURISDICTION OF THE UTAH COURT OF APPEALS

Jurisdiction is proper in the Utah Court of Appeals pursuant to Utah Code §78-2a-3(2)(h).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

### ISSUE NO. 1

Did the Trial Court correctly award attorney's fees to the Appellee?

### STANDARD OF REVIEW

The appellate court will not overturn a trial court's award of attorney's fees absent a clear showing the trial court abused its discretion. Wilde v. Wilde, 969 P.2d 438, 442, 444 (Utah Ct. App. 1998).

### PRESERVATION OF THE ISSUE

This issue was preserved in proposed findings of fact and in post trial motions. (R. 148, p. 9; R. 184, p. 6; R. 338, p. 5).

### ISSUE NO. 2

Did the Trial Court err in signing the proposed order within four days after the same being filed with the court and served upon the Appellant?

### STANDARD OF REVIEW

Questions of law are reviewed for correctness according no deference to the trial court's legal conclusions. Bearden v. Wardley Corp., 72 P.3d 144 (Utah Ct. App. 2003).

### PRESERVATION OF THE ISSUE

This issue was preserved in post trial motions. (R. 270, p. 4).

### ISSUE NO. 3

Did the Trial Court err in its division and valuation of the marital residence?

#### STANDARD OF REVIEW

Factual determinations made by a court are reviewed under a clearly erroneous standard. Kunz v. Dept. of Transportation, 949 P.2d 763 (Utah 1997); Rule 52(a), Utah Rules of Civil Procedure. The standard of review of a trial court's division of property in a divorce case is "an abuse of discretion." Hall v. Hall, 858 P.2d 1018 (Utah Ct. App. 1993).

#### PRESERVATION OF THE ISSUE

This issue was preserved in oral argument and in post trial motions. (R. 421, p. 44, 12 – 23; R. 421, p. 45, 20 – 25, - p.49; R. 421, p. 8, 17-25, - p. 9, 1-7).

### ISSUE NO. 4

Did the trial court err in awarding the Appellee a portion of the Appellant's inheritance?

#### STANDARD OF REVIEW

Factual determinations made by a court are reviewed under a clearly erroneous standard. Kunz v. Dept. of Transportation, 949 P.2d 763 (Utah 1997); Rule 52(a), Utah Rules of Civil Procedure. The standard of review of a trial court's division of property in a divorce case is "an abuse of discretion." Hall v. Hall, 858 P.2d 1018 (Utah Ct. App. 1993).

#### PRESERVATION OF THE ISSUE

This issue was preserved in oral argument and in post trial motions. (R148, p.5; R. 421, p. 33, 6-16; R. 421, p. 95, 7-25; R. 421, p. 96, 1-14; R. 421, p. 98, 2-9; R. 184, p. 5).



## ISSUE NO. 5

Did The Trial Court Err In Its Division Of Certain Items Of Personal Property And Debt Between The Parties?

### STANDARD OF REVIEW

Factual determinations made by a court are reviewed under a clearly erroneous standard. Kunz v. Dept. of Transportation, 949 P.2d 763 (Utah 1997); Rule 52(a), Utah Rules of Civil Procedure. The standard of review of a trial court's division of property in a divorce case is "an abuse of discretion." Hall v. Hall, 858 P.2d 1018 (Utah Ct. App. 1993).

### PRESERVATION OF THE ISSUE

This issue was preserved in oral argument and in post trial motions. (R. 421, p. 66, 14-20; R148, p. 4, 5, 6,7; R. 148, p. 6; R. 421, p. 95, 11-17; R. 421, p.96, 1-6; R. 184, p.5; R. 148, p.6, 7; R. 421, p. 92, 18 – p. 93, 15; R. 421, p. 92, 18 – p. 93, 15; R. 421, R. 338, p. 5).

### DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Utah Constitution Art. 1, §7  
Utah Code Ann. §30-3-3  
Utah Code Ann. §30-3-5  
Utah Code Ann. §78-2a-3(2)(h)  
Rule 7(f)(2) of the Utah Rules of Civil Procedure  
Rule 26(3) of the Utah Rules of Civil Procedure  
Rule 52(a) of the Utah Rules of Civil Procedure

### STATEMENT OF THE CASE

#### 1. NATURE OF THE CASE

This is an appeal from a final Order and Judgments of the Fifth District Court of Utah, Washington County, State of Utah, Honorable James L. Shumate, and related findings of fact and conclusions of law, entered on November 21, 2005, relating to the division of marital and separate property, division of marital debt, award of alimony, and award of attorneys fees and costs.

2. STATEMENT OF FACTS

A. The Appellee and Appellant were married on August 20, 1960, in Dalton, Massachusetts. (R. 303, p. 2).

B. The parties separated on March 12, 2004 when the Appellee moved from the martial home. This was two days after the Appellant underwent heart surgery. (R. 303, p. 2 – 3; R421, p.79, 1; R. 148, p. 2).

C. After the Appellee moved from the marital home, she returned while the Appellant was absent and removed all documents and other items from a filing cabinet in the home. The majority of such documents were the personal property of the Appellant were not marital documents. Additionally, the Appellee removed \$400.00 in cash from such filing cabinet. (R. 148, p.6).

D. A Bifurcated Decree of Divorce was entered on July 28, 2004. (R. 43).

E. Temporary Orders were entered on August 10, 2004, which among other things

i. Awarded the Appellee \$1,500.00 per month as temporary alimony.

ii. Awarded the Appellee the temporary use and possession of the home and furnishings.

iii. Awarded the Appellee the temporary use and possession of the 1997 Cadillac Deville and the Appellant temporary use and possession of the 2000 GMC Truck.

iv. Awarded the Appellee a lump sum support payment of \$5,000.00.

v. Awarded each party one-half of the Exxon Retirement Portion of an American Funds account; and

vi. Ordered the Appellant to maintain the Appellee on his health, medical, dental and optical insurance and submit the costs thereof to the Court at the time of trial. (R. 49; R. 148, p.2).

F. As a result of the split of the Exxon Retirement account under the Court's August 10, 2004 Temporary Order, the Appellee and Appellant were each awarded funds of approximately \$125,000.00. (R. 49; R. 421, p. 26, 24-25; R. 148, p. 3).

G. The issues at trial involved the Appellee's claim for alimony and the division of marital assets consisting of a home located at 1020 East Fort Pierce Drive, St. George, Utah, furniture and household furnishings, vehicles, and certain accounts. (R. 421 p. 3, 24-25, p. 8, 3-5; R148, p. 3).

H. The Appellee presented evidence at trial attempting to establish that the Appellant had engaged in an extramarital affair. Such evidence was disputed and rebutted by the Appellant and the court found no evidence that an extramarital affair had occurred. (R. 421, p.70 – p. 89, 1-7; R. 148, p. 3).

I. At the time of trial the Appellee testified that she received the sum of \$635.00 per month from Social Security and \$180.73 per month from her retirement plan.



(R. 421, p.8, 8-14; Trial Exhibit 2; ). She later testified at a post trial hearing that her social security was reduced by \$75.00 a month. (R. 422, p.5, 19-25, p.6, 1-12).

J. The Appellee alleged that her monthly expenses exceeded her current income by \$2,489.16. (R. 421, p. 10, 20-25; R. 148, p. 3).

K. The Appellant receives \$1,200.00 per month from Social Security. The Appellant also works as a real estate agent. During 2004, the Appellant received gross commissions from real estate sales in the amount of \$47,276.43. Of these commissions, the Appellant received more than half of such commissions (\$27,600.00) from one sale of a commercial property. This sale was an unusual event and a one-time occurrence. From January 1, 2005 until the date of trial, March 1, 2005, the Appellant had received on commission the amount of \$1,018.12. Thus, the normal average gross commissions earned by the Appellant from January 1, 2004 through March 1, 2005 is \$1,476.06 per month. (R421, p. 11, 10-13; p. 12, 1-10; p. 22, 20-24; R. 148, p. 3-4).

L. In earning commissions, the Appellant is required to pay certain business expenses. Evidence presented by the Appellant reflected the payment of business expenses and taxes in an amount of at least \$23,182.60. (R. 421, p. 12, 5-10; R. 421, p. 39, 6-18; Trial Exhibit 19). Thus, the expenses incurred by the Appellant in the operation of his business exceed his normal average gross commissions by \$2,488.05. If the one-time commission of \$27,600.00 is added to determine net income, the Appellant's net income would only average \$1,245.58 per month. (R. 148, p.4).

M. In conducting his business the Appellant has formed a "Team" with other real estate agents in his office. Such an arrangement is informal and allows the team

members to assist each other and divide commissions accordingly. (R. 421, p. 66, 14-20; R148, p. 4).

N. The parties both maintain bank accounts into which their Social Security and retirement income is deposited. (R148, p. 4).

O. In conducting his business activities, the Appellant maintains accounts at State Bank of Southern Utah. Such accounts hold funds deposited by the Appellant and other Team members and funds derived from the real estate efforts of the Appellant and other Team members. (R. 148, p.5; R. 184, p. 3).

P. During the term of the marriage the parties each received an inheritance as a result of the death of their parents. (R. 421, p. 36, 3-8; Trial Exhibit #7; Trial Exhibit #25; R. 148, p. 5).

Q. The Appellee received cash inheritance and General Electric Stock. The Appellee deposited all cash received by her as inheritance into a separate account and informed the Appellant that such sums were the Appellee's. At Trial, the Appellee alleged that she had spent all of the cash received by her as inheritance. (R148, p.5).

R. The Appellant received cash inheritance of approximately \$80,000.00 and certain items of household furnishings. The Appellant's inheritance was put into an account with American Funds. The Appellee demanded that such sums be placed into an account in both of the parties' names for estate planning purposes. However, at all times, the Appellant exercised exclusive control over such funds, the parties treated the funds as Appellant's separate funds, the Appellee made no withdrawals from or otherwise dealt with the Appellant's inheritance account, and the Appellant exclusively determined for

what purpose such funds would be used. (R148, p.5; Trial Exhibit #7; Trial Exhibit #25; R. 421, p. 33, 6-16; R. 421, p. 95, 7-25; R. 421, p. 96, 1-14; R. 421, p. 98, 2-9; R. 184, p. 5)

S. The Appellant used \$10,000.00 from his inheritance to pay toward the purchase of the 1997 Cadillac Deville. The Appellant also used his inheritance funds to purchase a 2000 GMC truck. (R. 148, p. 6; Trial Exhibit #25; R. 421, p. 95, 11-17; R. 421, p.96, 1-6; R. 184, p.5).

T. After the separation and divorce of the parties, the Appellee was involved in a traffic accident which totaled the Cadillac Deville. The Appellee subsequently purchased, in her own name, a 2002 Toyota Camry. The Appellee made no reimbursement to the Appellant for the funds from the Appellant's inheritance used to purchase the Cadillac Deville and did not credit the Appellant with any funds received from insurance on account of the damage to the vehicle. (R. 148, p.6).

U. As part of his inheritance, the Appellant received a bed, dresser, 2 bedroom end tables, coffee table, 2 living room end tables, lamp table, crystal lamp, large mirror, marble top table, 2 blue chairs, and a chair used by the parties in their master bathroom. (R. 148, p.6).

V. After the parties' separation, the Appellant paid to or for the benefit of the Appellee, the sum of \$6,685.85. The majority of this expense was to pay for medical insurance premiums and expenses, payment of credit card expenses incurred by the Appellee, payment of auto insurance covering the Cadillac in the possession of the



Appellee, and to put money into a joint account after the Appellee had depleted the funds in the account. (R. 148, p.6; Trial Exhibit 23; Trial Exhibit 24).

W. After the parties' separation and until the date of judgment, the Appellant paid insurance premiums of \$840.00 to maintain medical insurance solely on the Appellee. Additionally, the Appellant was required to pay \$1,477.19 in co-pay amounts for services rendered to the Appellee. (R. 421, p. 92, 18 – p. 93, 15), Such payments were necessary due to the Court's August 10, 2004 temporary order and so as not to jeopardize the Appellant's own coverage. (R. 148, p.7).

X. Between August 10, 2004 and the date of trial, the Appellant paid the Appellee \$18,500.00 in temporary alimony. (R. 148, p.7).

Y. The Appellee is 64 years of age and suffers from several health problems. While this may limit her ability to work, it does not deprive her of such ability. (R. 421, p. 18, 9 - p. 21, 22; Trial Exhibit #6 ; R. 421, p.43, 6-16; R. 148, p.7).

Z. The Appellant is 67 years of age and works as a real estate agent. The Appellant suffers from several health problems, including heart problems, which have, and will, affect his ability to work. His doctor has advised him that he should cut back on his activities, including employment. (R421, p. 11, 22-25; R. 421, p. 22, 16 – p. 26, 4; R. 148, p.7).

AA. At the time the parties purchased the marital home, each party withdrew \$8,000.00 from accounts holding funds each had inherited and used such funds toward the purchase of the home. (R. 148, p. 8; R. 184, p. 4).

BB. At trial, the Appellee presented expert testimony from an appraiser regarding the value of the marital home. The Appellant objected to such evidence being presented as the identity, opinion, and basis of the opinion of the expert witness had not been previously disclosed by the Appellee to the Appellant. The Court overruled the objection as to the expert's testimony and allowed the appraiser to testify but did not admit the appraisal report into evidence. (R. 421, p. 44, 12 – 23; R. 421, p. 45, 20 – 25, - p.49; R. 421, p. 8, 17-25, - p. 9, 1-7).

CC. The Court also heard testimony from the Appellant, a real estate agent, and another real estate agent who works with the Appellant, as to the value of the home. Both testified that the home was worth between \$209,000.00 and \$215,000.00. (R. 421, p. 51 – p. 56; R. 421, p.45, 1).

DD. There exists a debt on the home in the amount of \$82,042.71. (R. 303, p. 8; Trial Exhibit #12).

EE. No evidence was presented at trial nor was any claim asserted at trial by Appellee that the Appellant should pay the GM credit card expense. (R. 421, R. 338, p. 5).

FF. The parties have no minor children as issue of this marriage. (R. 303, p.3).

GG. After trial on this matter, the parties submitted proposed findings of fact, conclusions of law and judgments. (R. 144, R. 148, and R. 161).

HH. Several months later, the Appellant filed a motion with the Court to terminate the award of temporary alimony to the Appellee. This motion was based upon

certain health problems experienced by the Appellant which limited his ability to work. (R. 242).

II. The Court set a hearing on Appellant's motion to terminate alimony. However, due to a conflict in timing, the Appellant obtained a verbal agreement from the Appellee to continue the hearing and filed a motion and order to continue with the Court. The hearing was not set for a resolution of the parties' proposed findings. (R. 270 p. 1-2, 5).

KK. On the original date set for the hearing, the Appellee appeared and requested that the matter go forward as no order continuing the hearing had been entered. The Court denied the Appellant's motion to terminate alimony, (R. 422, p. 3, 16-21). took a proffer of evidence as to the Appellee's then claimed income, (R. 422, p.5, 23-25 and p.6 1-5) edited, at the bench, a draft of the Court's Findings of Fact and Conclusions of law, (R. 422, p.7, 19-23) and awarded the Appellee judgment against the Appellant in accordance with the Appellee's request. This hearing was not noticed up for a resolution of the proposed Findings of Facts and Conclusions of Law. (R. 422, R. 270, p. 5).

LL. The Appellant filed a motion to reconsider with the Court. A hearing was held thereon, after which the Court modified to some degree the prior Findings of Fact and Conclusions of Law. These modifications formed the basis for the final Order and Judgments. (R. 270 and R. 423).

MM. The Appellee mailed the final proposed Findings of Fact and Conclusions of Law and Order and Judgments to Appellant on November 17, 2005. (R. 303 and R. 328).



NN. Four days after the Findings of Fact and Conclusions of Law and Order and Judgments were mailed to the Appellant, the Court entered the same. (R. 303. and R. 328).

OO. The Appellant filed his Notice of Appeal on December 20, 2005. (R. 348).

### SUMMARY OF ARGUMENTS

#### Issue No. 1

The Trial Court failed to make a finding as to the Appellant's expenses and his ability to pay attorney's fees. The Trial Court also failed to take into account the Appellant's own attorney's fees. The Trial Court erred in awarding the Appellee her attorney's fees when she received ample assets from the marital estate to satisfy her own attorney's fees where there was no finding of bad faith.

#### Issue No. 2

The Trail Court entered the final Order and Judgments just four days after it was filed and served upon the Appellant, thus denying the Appellant due process and violated Rule 7 of the Utah Rules of Civil Procedure.

#### Issue No. 3

The Trial Court allowed the testimony of the Appellee's appraiser when he was never disclosed prior to the morning of trial as required by Rule 26 of the Utah Rules of Civil Procedure. The Trial Court should have valued the house higher than \$185,000.00 given the fact that the market was "hot" and the Appellant and his witness, both real estate agents testified that the house would sell between \$209,000 and \$215,000.00.

#### Issue No. 4

The Trial Court erred in finding that the Appellant's inheritance was commingled and lost his identity wherein the inherited funds were deposited into a joint account that only the Appellant exercised control over.

#### Issue No. 5

The Trial Court erred in awarding an account that the Appellant shared with his other team members in his real estate business, ordering the Appellant to pay the debt to the GMC Credit Card, awarding half of the value of the 2000 GMC truck to the Appellee and not awarding half of the value of the 2002 Toyota Camry or the insurance proceeds from the wreck of the 1997 Cadillac Deville.

### ARGUMENTS

#### Issue No. 1

Did The Trial Court Correctly Award Attorney's Fees To The Appellee?

Utah Code Ann. §30-3-3 allows for the award of attorney's fees in a divorce action. However, unless the action is an enforcement action where substantially prevailed on the merits is the standard, the court must look at the parties' ability to pay in determining whether an award of attorney's fees is appropriate or not.

In Wilde v. Wilde, the Utah Supreme Court stated, "A trial court may award costs and attorney fees in divorce and modification proceedings. See Utah Code Ann. §30-3-3 (1995), Crockett v. Crockett, 836 P.2d 818, 821 (Utah Ct. App. 1992). Both the decision to award attorney fees and the amount of such fees are within the trial court's sound discretion. See Crouse v. Crouse, 817 P.2d 836, 839 (Utah Ct. App. 1991). However, 'the

award [or denial of such fees] must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees,' Bell v. Bell, 810 P.2d 489, 493 (Utah Ct. App. 1991). Failure to consider these factors is grounds for reversal on the fee issue. See Marshall v. Marshall, 915 P.2d 508, 517 (Utah Ct. App. 1996)." Wilde v. Wilde, 969 P.2d 438, 444 (Utah 1998).

The appellate court will not overturn a trial court's award of attorney's fees absent a clear showing the trial court abused its discretion. Wilde v. Wilde, 969 P.2d 438, 442, 444 (Utah Ct. App. 1998).

The Trial Court did make the following findings related to the award of attorney's fees in its Order and Judgments, "The Appellee has incurred costs and attorney fees herein in the sum of Fifteen Thousand Two Hundred Fifty-seven Dollars Sixty-nine Cents (\$15,257.69), through trial. The Appellee borrowed Three Thousand Five Hundred Dollars (\$3,500.00), from her son to pay a retainer to her counsel at the commencement of this action. The Appellee's counsel submitted an Attorney's Affidavit specifying the service performed and the charges therefore. The Attorney fees the Appellee agreed to pay is \$175.00 per hour plus the costs of the case. The hourly rate is reasonable in light of the circumstances of this case and the fees of other experienced lawyers in the community and the services performed for the Appellee by her counsel were reasonable and necessary. The Appellee does not have the ability to compensate her counsel and the Appellant has the ability to pay the Appellee's costs and attorney fees from his employment and other income and other assets. The Appellant should be ordered to pay



the Appellee's costs and attorney fees incurred herein in the sum of \$10,000.00, . . ." (R. 303, p.13).

In marshaling the evidence that supports this finding, the Appellee's net monthly income was found to be \$742.73. (R. 422, p.5, 19-25, p.6, 1-12). The Appellee's also testified at trial that her monthly need was \$3,304.89. Thus, her monthly shortfall before the alimony award is \$2,489.16. (R. 421, p. 10, 20-25; R. 148, p. 3). Appellant was ordered to pay \$1,000.00 per month as alimony. (R. 303, p. 7). The Court also found that the Appellant was able to earn \$2,500.00 per month. (R. 303, p. 7). The Court did not make a finding as to the Appellant's monthly expenses and his ability to pay spousal support or attorney's fees. Both parties were awarded \$125,000.00 in division of retirement funds and the Appellee was awarded half the equity in the marital home plus \$8,000.00. (R. 303, p. 8, 10).

The Appellee received ample assets to satisfy her own attorney's fee award. It was not equitable for the Court to award the Appellee her attorney's fees when the Appellant had incurred his own attorney's fees as well that the Court did not take into account when deciding to award attorney's fees. The Court also failed to take into account the Appellant's own expenses in determining the Appellant's ability to pay attorney's fees. For these reasons, this issue should be overturned and/or remanded for further findings.

#### ISSUE NO. 2

Did The Trial Court Err In Signing The Proposed Order Within Four Days After The Same Being Filed With The Court And Served Upon The Appellant?

The Utah Constitution states, "No person shall be deprived of life, liberty or property, without due process of law." Utah Constitution Art. 1, §7.

Rule 7(f)(2) of the Utah Rules of Civil Procedure sets forth, "Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object."

Questions of law are reviewed for correctness according no deference to the trial court's legal conclusions. Bearden v. Wardley Corp., 72 P.3d 144 (Utah Ct. App. 2003).

The Court entered the final Order and Judgments and Findings of Fact and Conclusions of Law just four days after service. The Court did not order any time frame different than the five day provision contained in Rule 7. This was also not an order submitted based upon the initial memorandum. This is a clear error and should be reversed.

### ISSUE NO. 3

Did The Trial Court Err In Its Division And Valuation Of The Marital Residence?

The Trial Court erred in its division and valuation of the marital residence by allowing the testimony of the Appellee's appraiser, when he was not disclosed until the morning of trial and by ignoring the Appellant's \$8,000.00 contribution from inherited funds towards the purchase of the marital residence.



Rule 26(3) of the Utah Rules of Civil Procedure states, "A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703 or 705 of the Utah Rules of Evidence." Rule 26 of the Utah Rules of Civil Procedure effective until May 2, 2005.

Questions of law are reviewed for correctness according no deference to the trial court's legal conclusions. Bearden v. Wardley Corp., 72 P.3d 144 (Utah Ct. App. 2003).

Factual determinations made by a court are reviewed under a clearly erroneous standard. Kunz v. Dept. of Transportation, 949 P.2d 763 (Utah 1997); Rule 52(a), Utah Rules of Civil Procedure. The standard of review of a trial court's division of property in a divorce case is "an abuse of discretion." Hall v. Hall, 858 P.2d 1018 (Utah Ct. App. 1993).

In marshalling the evidence, the Appellee's expert witness testified that the marital home was worth \$185,000.00. The Appellee testified that she thought the house was worth \$175,000.00. The home also had a debt against it in the amount of \$82,042.71. The Appellee also testified that she used \$8,000.00 of her inheritance to purchase the home. The Court valued the house at \$185,000.00 and awarded the Appellee one half of the equity in the house plus \$8,000.00 for her contribution from her inheritance.

However, the Court ignored the fact that the Appellant also contributed \$8,000.00 from his inheritance and that he testified as a real estate agent that the house was worth \$215,000.00 and he had another real estate agent testify that the house was worth approximately \$209,000.00. In addition to the difference in testimony as to the value of the house, the Appellant objected to the Appellee's expert witness because he was never disclosed as an expert witness and his appraisal was never provided to the Appellant prior to

trial. The Court overruled the Appellant's objection and allowed the testimony, but would not allow the appraisal report. The Court should not have allowed the expert witness testimony pursuant to Rule 26(3) of the Utah Rules of Civil Procedure. *See also Stevenett v. Wal-Mart Stores, Inc.*, (Utah 1999).

The Court should have not allowed the testimony of the Appellee's appraiser and should have given more weight and consideration to the testimony of the Appellant and his witness because of their experience in the field. The Court erred in allowing the appraiser's testimony and then in using the appraiser's valuation as the valuation for the marital residence.

Had the trial court not allowed the appraiser's testimony, then the court would have had to weigh the Appellee's value of \$175,000.00 versus the Appellant's value of \$215,000.00 together with his agent's value of \$209,000.00. The Appellant's value of the house should be given more weight because he works in the field and St. George was admittedly a "hot market". (R. 421, p. 6, 3-8).

The Trial Court should have also considered the Appellant's contribution of \$8,000.00 from his inheritance as part of the equation and awarded the Appellant one-half of the equity plus \$8,000.00 just like the Appellee. Because both parties contributed \$8,000.00 of pre-marital funds toward the house, the equity in the house should simply be divided in half. The value of the house should have been higher than \$185,000.00

The Trial Court also prevented the Appellant from accessing his half of the value of the house by giving the Appellee a life estate in the house. This does not seem

equitable when the Appellee received over half of the marital estate, and a \$1,000.00 a month award of alimony.

#### ISSUE NO. 4

Did The Trial Court Err In Awarding The Appellee A Portion Of The Appellant's Inheritance?

Inheritance is considered separate property and only awarded to the other party if there is a commingling of the inheritance to the point where the inheritance loses its separate identity. Mortensen v. Mortensen, 760 P.2d 304, 308 (Utah 1988).

Factual determinations made by a court are reviewed under a clearly erroneous standard. Kunz v. Dept. of Transportation, 949 P.2d 763 (Utah 1997); Rule 52(a), Utah Rules of Civil Procedure. The standard of review of a trial court's division of property in a divorce case is "an abuse of discretion." Hall v. Hall, 858 P.2d 1018 (Utah Ct. App. 1993).

In marshalling the evidence, the Appellee stated that the American Funds Account was a joint account. The Appellant testified that he received \$31,000.00 in an inheritance. The Appellant deposited these funds into a joint account. The Appellant used this account to purchase the 2003 GMC pick up and titled the pick up in their joint names. The Appellant also deposited his earnings into this account. (R. 161, p. 5).

The Appellant does not dispute that the account was a joint account, but he can trace \$32,045.00 to inherited funds. (Trial Exhibit #7). This amount should be taken out of the account as the Appellant's sole and separate property, unless the court awarded the two vehicles purchases out of the funds from this account as the Appellant's sole and



separate property. The Appellant should not lose his inheritance simply because he placed it into a joint account where the Appellee exercised no control over the account.

#### Issue No. 5

Did The Trial Court Err In Its Division Of Certain Items Of Personal Property And Debt Between The Parties?

Utah Code Ann. §30-3-5 states, “When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties.” Generally, in a divorce proceeding, each party is presumed to be entitled to all of his or her separate property and 50% of the marital property. Bradford v. Bradford, 993 P.2d 887 (Utah 1999). Overriding consideration in property division is that ultimate division be equitable, that is, that property be fairly divided between parties given their contributions during marriage and their circumstances at time of divorce. Each party is presumed to be entitled to all of his or her separate property and 50% of marital property. Dunn v. Dunn 802 P.2d 1314, (Utah 1990).

Factual determinations made by a court are reviewed under a clearly erroneous standard. Kunz v. Dept. of Transportation, 949 P.2d 763 (Utah 1997); Rule 52(a), Utah Rules of Civil Procedure. The standard of review of a trial court’s division of property in a divorce case is “an abuse of discretion.” Hall v. Hall, 858 P.2d 1018 (Utah Ct. App. 1993).

The Trial Court erred in the following division of the marital property and debts:

A. State Bank of Southern Utah Account:



The Appellee presented evidence that this account was the Appellant's sole account and he alone used the account. (R. 161, p. 4). This evidence was presented in the Appellee's Objection to the Appellant's proposed Findings of Fact and was not stated at trial. The Appellant specifically stated that these funds were part of his real estate's teams funds and that they shared the account. (R. 148, p.5; R. 184, p. 3). The Trial Court was not presented enough evidence to determine that the State Bank of Southern Utah Account was the Appellant's sole account.

B. GMC Credit Card:

The only evidence presented at trial about the GMC Credit Card was Appellee's Exhibit #13. There were no statements that this debt should have been awarded to the Appellant and why. If the Court found that the debt was a marital debt, which it did not make such finding, then why did it not award the debt to both parties equally. The Court should not have made a finding that the Appellant was responsible for the GMC Credit Card.

C. 2000 GMC Truck:

The Court awarded the Appellee one-half of the value of the 2000 GMC Truck even though the Appellant purchased the vehicle with money from his account wherein he placed his inheritance. (R. 303, p.11). The Appellee presented evidence that the account was a joint account and that the Appellant placed his earnings into the account. (R. 161, p.4). However, the Appellant was the only one who exercised control over the account and could trace over \$32,000.00 from the account as his separate property through inheritance. (R. 184, p. 5).

D. 2002 Toyota Camry:

The Trial Court failed to place a value on the Toyota Camry, but simply awarded it and the associated obligation to the Appellee. (R. 303, p. 12). The Court divides the equity in the Appellant's 2000 GMC Pick Up, but does not divide the Appellee's Camry. This issue should be remanded for further findings and then equally divided.

E. Insurance Proceeds on 1997 Cadillac Deville:

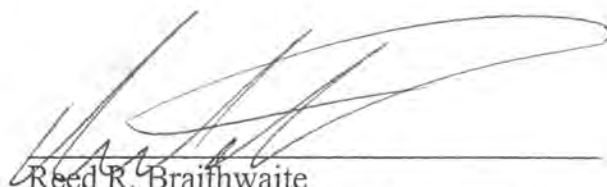
The Trial Court ignored that after separation the Appellee wrecked the 1997 Cadillac Deville, the Appellant's separate asset or at the very least a marital asset, and used the insurance proceeds for her own benefit. (R. 148, p. 6). The Appellee presented evidence that the monies used to purchase the 1997 Cadillac Deville were taken from the parties' joint account and the vehicle was titled in both the parties' names. (R. 161, p.6). However, this does not discount the fact that at the very least the insurance proceeds in marital property and should have been equally divided. The Appellant did testify that the Cadillac Deville was purchased with separate funds acquired through inheritance. (R. 148, p.6).

CONCLUSION

For these reasons the Court should overturn the award of attorney's fees, remand the final Order and Judgments because the Court failed to follow due process and Rule 7 of the Utah Rules of Civil Procedure, find that the appraiser's testimony should have been excluded and the house valued between \$209,000 and \$215,000.00 and divided immediately, overturn the trial court's ruling that the Appellant's inherited funds were

commingled, and overturn the trial court's division of the marital estate in that it was not equitable.

DATED this 13 day of July, 2006.

A handwritten signature in black ink, appearing to read 'Reed R. Braithwaite', written over a horizontal line.

Reed R. Braithwaite  
Attorneys for Appellant/Appellant

## ADDENDUM

Findings of Fact and Conclusions of Law

Order and Judgments

2005 MAR 21 PM 3:23

ANDREW B. BERRY, JR. USB #0309  
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IN THE FIFTH JUDICIAL DISTRICT COURT FOR WASHINGTON COUNTY

STATE OF UTAH

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JUDITH WANDA LOWRY,	:	ORDER AND JUDGMENTS
Petitioner,	:	
vs.	:	Civil No. 044500246
KENNETH RAY LOWRY,	:	Assigned to:
Respondent.	:	Honorable James L. Shumate

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This action came on for a regularly scheduled trial on the 1st day of March, 2005, before the Honorable James L. Shumate, of the Fifth Judicial District Court for Washington County within the State of Utah. The Petitioner and the Respondent were present and represented by their counsel, Andrew B. Berry, Jr., and Gary G. Kuhlmann, respectively. The parties presented their documentary evidence and witnesses and the Court examined the Petitioner and the Respondent. The Petitioner and the Respondent each presented proposed findings of fact, orders and judgments to the Court and



filed objections thereto. **THE COURT**, upon the pleadings on file herein, the witnesses and documentary evidence presented by the parties and having made and entered Findings of Fact and Conclusions of Law and with good cause appearing therefore, hereby

**ORDERS, ADJUDGES AND DECREES:**

1. The Petitioner is hereby awarded temporary spousal support which should be paid by the Respondent in the sum One Thousand Dollars (\$1,000.00), each month on the 1st day of each month hereafter and commencing November 1, 2005. Because the finding upon the Respondent's income is temporary, either party may bring this issue back to the Court by motion, rather than by petition.

2. The Petitioner and the Respondent purchased a residence and real property in October, 2002, and during the marriage situate at 1020 East Fort Pierce Drive in the City of St. George in the County of Washington within the State of Utah.

The fair market value of the parties' residence and real property as of February 24, 2005, was One Hundred Eighty-five Thousand Dollars (\$185,000.00). Accordingly, the parties have just less than One Hundred Three Thousand Dollars (\$103,000.00), of equity in the marital residence and real property. The Petitioner paid Eight Thousand Dollars (\$8,000.00), from her separate



inherited funds toward the purchase of the marital residence and real property.

The Petitioner is awarded the ownership and all right, title and interest in and to said residence and real property subject to the Respondent's lien for his share of the equity therein in the sum of Forty-seven Thousand Five Hundred Dollars (\$47,500.00). The Respondent shall forthwith quit claim the ownership and all right, title and interest therein to the Petitioner. The Petitioner shall pay the payments and the outstanding debt to U.S. Bank on the residence and real property. The Petitioner shall live in the marital residence and real property until she dies, or sells the marital residence and real property. The sale of the marital residence and real property shall be in the Petitioner's sole discretion. The Petitioner shall not be required to pay the Respondent's equity lien upon the marital residence and real property until she sells the residence and real property, or re-marries. In the event Petitioner chooses not to sell the residence and real property during her lifetime and the Respondent dies prior to the payment of his equity lien, said equity lien shall become an asset of the Respondent's estate.

3. The Respondent has in his possession marital property which he took with him at the time of separation. These items

include a refrigerator, television, chest of drawers, laptop computer, lounging chairs, a green desk, the barometer, a crystal chandelier, golf clubs, fishing gear, camping gear, 2 shop vacuums, saws, drills and several other tools, all purchased during the marriage. He also has weapons which were purchased during the marriage including 3 rifles, a revolver and reloading equipment. The Petitioner nor the Respondent made any claim for personal property in the possession of the other at the time of trial. The Petitioner and the Respondent acquired household furniture, fixtures, furnishings and appliances and other personal property during their marriage which have been divided between the parties and which are awarded pursuant to this division.

4. Each party should be awarded his or her personal effects.

5. The Respondent acquired pension, retirement and stock benefits during the parties' marriage which are presently held by American Funds. The Petitioner and the Respondent are each awarded the ownership of one-half ( $\frac{1}{2}$ ), of all pension, retirement and IRA funds and accounts. These funds have not yet been divided although the Petitioner's counsel has submitted a Domestic Relations Order for execution by the Court. The Respondent shall forthwith execute all documents necessary to effectuate the division of the American

Funds Accounts specifically, but not limited to, an IRA Distribution Request form provided to the Respondent's counsel by the Petitioner's counsel on January 4, 2005, which requires the Respondent's signature guarantee in Section 7. The guaranteed signature of the Respondent is required before American Funds can distribute the Respondent's pension and retirement IRAs, and he shall do so forthwith.

6. The Respondent deposited into a separate American Funds account approximately \$32,045.00, which he inherited from his father in 1999. The Respondent and the Petitioner created this account with American Funds in joint tenancy. The funds in this account have been commingled and have not remained the separate property of the Respondent and are marital property. The American Funds accounts shall be equally divided between the Respondent and the Petitioner and the provisions of paragraph 5, of this Order and the Domestic Relations Order shall apply to the distribution of all of the said American Funds accounts.

7. In November 2003, the Respondent purchased a 2000 GMC Extended Cab 4x4 pickup truck which he paid for in full. No loan obligation or other liens exist against this vehicle. The truck is titled in the names of the Respondent and the Petitioner. The present NADA value of this marital asset exceeds \$22,000.00. The



Respondent has also added a satellite radio, tool box, fancy wheels and running boards to this vehicle the value of which is \$1,000.00. The Respondent shall forthwith pay the Petitioner and she is awarded judgment against the Respondent in the sum of Eleven Thousand Five Hundred Dollars (\$11,500.00), which is one-half ( $\frac{1}{2}$ ), of the value of the 2000 GMC Extra Cab 4x4 pickup truck.

8. The Petitioner purchased a 2002 Toyota Camry after the parties' separation because an accident, not the fault of the Petitioner, totaled the 1997 Cadillac DeVille driven by the Petitioner at the time of separation. This motor vehicle is titled solely in the Petitioner's name. The Petitioner owes nearly \$7,000.00, to Box Elder Credit Union upon the 2002 Toyota Camry and her monthly payment thereon is \$129.68, per month. The ownership and all right, title and interest in 2002 Toyota Camry, acquired after the parties' separation by the Petitioner, is awarded to her and she is ordered to pay the debt thereupon.

9. The Respondent is ordered to forthwith pay the debt to the GM credit card in the sum of \$4,282.73.

10. The Petitioner and the Respondent are each awarded one-half ( $\frac{1}{2}$ ), of the value of the accounts at Southern Utah State Bank and Zions Bank and all other accounts existing at the time of the hearing upon the Order to Show Cause. The Respondent shall




forthwith pay the Petitioner her one-half ( $\frac{1}{2}$ ), share of these accounts and the Petitioner shall be awarded judgment against the Respondent therefore.

11. The Petitioner has incurred costs and attorney fees herein in the sum of Fifteen Thousand Two Hundred Fifty-seven Dollars Sixty-nine Cents (\$15,257.69), through trial. The Respondent is ordered to forthwith pay the Petitioner's costs and attorney fees incurred herein in the sum of \$10,000.00, and she is awarded judgment against the Respondent therefore. Said judgment shall be augmented by the Petitioner's costs and attorney fees incurred after trial and in the collection of the judgments and enforcement of the orders entered herein.

DATED this 21 day of November, 2005.

**BY THE COURT:**



HONORABLE JAMES L. SHUMATE,  
Fifth Judicial District Court

CERTIFICATE OF SERVICE AND MAILING

I HEREBY CERTIFY that on this 17<sup>th</sup> day of November, 2005, I served upon and mailed, postage prepaid and by first class mail, a true and correct copy of the foregoing Order and Judgments to Gary G. Kuhlmann, Attorney for Respondent, at 113 East 200 North, Suite 1, Post Office Box 910387, St. George, Utah 84791.

*Lisbeth Berry*

ANDREW B. BERRY, JR. USB #0309  
Attorney for Judith Wanda Lowry  
39 West Main Street  
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Telephone: 435 436-8200

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IN THE FIFTH JUDICIAL DISTRICT COURT FOR WASHINGTON COUNTY

STATE OF UTAH

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JUDITH WANDA LOWRY,	:	<b>FINDINGS OF FACT AND</b>
	:	<b>CONCLUSIONS OF LAW</b>
Petitioner,	:	
vs.	:	Civil No. 044500246
KENNETH RAY LOWRY,	:	Assigned to:
	:	Honorable James L. Shumate
Respondent.	:	

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This action came on for a regularly scheduled trial on the 1st day of March, 2005, before the Honorable James L. Shumate, of the Fifth Judicial District Court for Washington County within the State of Utah. The Petitioner and the Respondent were present and represented by their counsel, Andrew B. Berry, Jr., and Gary G. Kuhlmann, respectively. The parties presented their documentary evidence and witnesses and the Court examined the Petitioner and the Respondent. The Petitioner and the Respondent each presented proposed findings of fact, orders and judgments to the Court and

filed objections thereto. **THE COURT**, upon the pleadings on file herein, the witnesses and documentary evidence presented by the parties and with good cause appearing therefore, now makes and enters the following:

#### **FINDINGS OF FACT**

1. The Petitioner and the Respondent were residents of the County of Washington within the State of Utah for three (3), months prior to the commencement of this action.

2. The Petitioner and the Respondent were married on the 20th day of August, 1960, in City of Dalton within the State of Massachusetts, and have been married in the LDS Temple and have since remained husband and wife, a period of nearly forty-three (43), years. This is a marriage of long-term.

3. The Respondent refused to give the Petitioner physical affection for several months prior to the parties' separation and told the parties' children he wanted a divorce from the Petitioner. There was insufficient evidence presented at trial to find that the Respondent was having an extra-marital affair. On March 12, 2004, two days after the Respondent had heart surgery, the Petitioner and the Respondent had an argument and the Petitioner was driving to Salt Lake to visit her children. The Petitioner called the Respondent and asked if she should return



home to work out the problem. The Respondent told the Petitioner to "keep going North and don't come home." The Respondent has told the Petitioner that he wants a divorce. The Petitioner did not want the divorce and requested the Respondent attend marriage counseling which he refused. Irreconcilable differences exist between the parties rendering this marriage no longer viable and making reconciliation impossible.

4. Four (4), children were born as issue of the Petitioner and the Respondent. All of said children are adults and are fully emancipated and are not dependent upon the parties for their support.

5. The Petitioner retired from the Shepard Montana School District in 1994. She receives retirement income from the State of Montana in the sum of One Hundred Eighty Dollars Seventy-three Cents (\$180.73), per month. The Petitioner also received Social Security income at the time of trial in the sum of Six Hundred Thirty-five Dollars (\$635.00), per month, but this sum has since been reduced by Seventy-three Dollars (\$73.00), per month since trial and the Petitioner now receives social security income of Five Hundred Sixty-two (\$562.00), per month. The Petitioner is completely disabled. She has had six (6), foot surgeries resulting from peripheral neuropathy, is in need of further surgeries and

suffers in continuous pain. The Petitioner has also had surgery fusing the vertebrae in her neck which causes the Petitioner continuous pain. The Petitioner suffers from arthritis and is in present need of cataract surgery. Becky Torgerson of the State of Utah Office of Rehabilitation assessed the Petitioner and determined that the Petitioner is disabled which prevents her from engaging in full-time gainful employment and it is highly questionable whether the Petitioner can engage in even part-time employment. Becky Torgerson was subpoenaed by the Petitioner to testify as to the Petitioner's complete disability but was released from the subpoena at trial because the parties stipulated that the Petitioner was completely disabled. The Petitioner is receiving both physical therapy and other therapy, and the copay cost thereof is One Hundred Twenty Dollars (\$120.00), per month.

6. The Respondent receives Social Security income in excess of One Thousand Two Hundred Five Dollars (\$1,205.00), per month. The Respondent deposited into the parties joint bank account funds from his retirement account and his social security from June, 2003, through April, 2004, the eleven (11), months prior to the parties' separation, in the sum of \$42,265.35, which averages \$3,842.30, per month. These deposits did not include his income from his employment at Century 21 Real Estate nor the

Petitioner's social security and retirement income.

The Respondent deposited his income from Century 21, into the State Bank of Southern Utah during the parties marriage. On July 16, 2005, the Respondent testified that he had earned a commission of \$27,600.00, on June 1, 2004, which he had deposited into his personal account at the State Bank of Southern Utah and that all of the funds in this account were his. The Respondent had also deposited several thousand dollars in a separate account at Zions Bank. Paragraphs 5, and 7, of the Court's Order Arising from Order to Show Cause Hearing refer to these accounts and ordered the division of these accounts reserved for trial and any amounts withdrawn therefrom offset against any other amount awarded at the time of trial. The Petitioner was paid a lump sum payment of Five Thousand Dollars (\$5,000.00), following the hearing upon the her order to show cause.

In any event, the monies in the accounts were marital property having been earned by the Respondent during the marriage from commissions earned as a real estate agent at Century 21, where he had been employed since 2002. The Petitioner and the Respondent should each be awarded one-half ( $\frac{1}{2}$ ), of the value of the accounts at Southern Utah State Bank and Zions Bank and all other accounts existing at the time of the hearing upon the Order to Show Cause.



7. The Respondent has had heart surgery and has had stints placed in his heart and has other medical problems. The Respondent is presently employed as a real estate agent at Century 21, in St. George, Utah. His adjusted gross income from his 1099, at Century 21 in the year 2004, was Forty-seven Thousand Two Hundred Seventy-six Dollars Forty-three Cents (\$47,276.43), although one of the commissions earned by the Respondent in the amount of Twenty-seven Thousand Six Hundred Dollars (\$27,600.00), was an unusual event. The Respondent's average monthly income from Century 21, alone for the year 2004, was Three Thousand Nine Hundred Thirty-nine Dollars Seventy Cents (\$3,939.70). The Court finds that the Respondent's earning capacity is limited by his health status.

The Respondent suffers from coronary and renal artery disease which bars him from full time work. If the Respondent could work full time his income would be Four Thousand Five Hundred Dollars (\$4,500.00), per month. However, at the date of the Court's last hearing, November 1, 2005, the Respondent was only capable of part-time work. It is also very clear to the Court that the Respondent's health is in a changing status. The Court is unable to fix his earning capacity on a permanent basis due to his precarious state of health. At the present time the Court is



persuaded by the necessary burden of proof, that this Respondent is now able to earn Two Thousand Five Hundred Dollars (\$2,500.00), per month. Because this is a temporary finding, either party may bring this issue back to the Court by motion, rather than by petition.

8. The Petitioner's monthly living expenses are Three Thousand Three Hundred Four Dollars Eighty-nine Cents (\$3,304.89), per month. Her monthly need for financial or spousal support from the Respondent (following the deduction of her monthly social security and retirement income in the sum of \$742.73) is Two Thousand Four Hundred Eighty-nine Dollars Sixteen Cents (\$2,489.16), per month.

The Respondent has no ability to pay said sum as spousal support from his income. The Petitioner is entitled to maintain the standard of living to which the parties have become accustomed because this is a long-term marriage. The Petitioner should be awarded temporary spousal support which should be paid by the Respondent in the sum One Thousand Dollars (\$1,000.00), per month on the 1st day of each month hereafter and said sum is to be paid from and after November 1, 2005, to the Petitioner by the Respondent.

9. The Petitioner and the Respondent purchased a residence and real property in October, 2002, and during the

marriage situate at 1020 East Fort Pierce Drive in the City of St. George in the County of Washington within the State of Utah. The purchase price of the parties' home and real property was One Hundred Forty-nine Thousand Dollars (\$149,000.00). U.S. Bank is owed Eighty-two Thousand Forty-two Dollars Seventy-one Cents (\$82,042.71), as of the date of trial and the payment thereon is Six Hundred Thirty-eight Dollars Ninety-one Cents (\$638.91), per month.

The Petitioner testified that the present fair market value of the marital residence and real property at the time of trial was One Hundred Seventy-five Thousand Dollars (\$175,000.00).

On February 24, 2005, Craig Morley, a licensed, certified and accredited real estate appraiser of Morley & McConkie, L.C., performed an appraisal of the marital residence and real property. Mr. Morley was qualified as an expert witness as to the value of the parties' residence and real property. Mr. Morley determined and testified that the fair market value of the parties' residence and real property as of February 24, 2005, was One Hundred Eighty-five Thousand Dollars (\$185,000.00). Accordingly, the parties have just less than One Hundred Three Thousand Dollars (\$103,000.00), of equity in the marital residence and real property. The Petitioner paid Eight Thousand Dollars (\$8,000.00), from her separate

inherited funds toward the purchase of the marital residence and real property.

The Petitioner should be awarded the ownership and all right, title and interest in and to said residence and real property subject only to the Respondent's lien for his share of the equity therein in the sum of Forty-seven Thousand Five Hundred Dollars (\$47,500.00). The Respondent shall forthwith quit claim the ownership and all right, title and interest in the marital residence and real property to the Petitioner. The Petitioner shall pay the outstanding debt to U.S. Bank on the residence and real property. The Petitioner needs to live in the residence because of her health problems and shall be entitled to live in the residence until she dies, or sells the marital residence and real property. The sale of the marital residence and real property should be in the Petitioner's sole discretion. The Petitioner shall not be required to pay the Respondent's lien upon the marital residence and real property until she sells the residence and real property, or re-marries. In the event the Petitioner chooses not to sell the residence and real property during her lifetime and the Respondent dies prior to the payment of his equity lien, said equity lien shall become an asset of the Respondent's estate.



10. The Respondent has in his possession marital property which he took with him at the time of separation. These items include a refrigerator, television, chest of drawers, laptop computer, lounging chairs, a green desk, the barometer, a crystal chandelier, golf clubs, fishing gear, camping gear, 2 shop vacuums, saws, drills and several other tools, all purchased during the marriage. He also has weapons which were purchased during the marriage including 3 rifles, a revolver and reloading equipment. The Petitioner nor the Respondent made any claim for personal property in the possession of the other at the time of trial. The Petitioner and the Respondent acquired household furniture, fixtures, furnishings and appliances and other personal property during their marriage which have been divided between the parties and which should be awarded pursuant to this division except as otherwise ordered herein.

11. Each party should be awarded his or her personal effects.

12. The Respondent acquired pension, retirement and stock benefits during the parties' marriage which are presently held by American Funds. These funds have not yet been divided although the Petitioner's counsel has submitted a Domestic Relations Order for execution by the Court. The Respondent shall



forthwith execute all documents necessary to effectuate the division of all of the American Funds Accounts specifically, but not limited to, an IRA Distribution Request form provided to the Respondent's counsel by the Petitioner's counsel on January 4, 2005, which requires the Respondent's signature guarantee in Section 7. The guaranteed signature of the Respondent is required before American Funds can distribute the Respondent's pension and retirement IRAs, and the Respondent shall do so forthwith.

13. The Respondent deposited into a separate American Funds account approximately \$32,045.00, which he claims he inherited from his father in 1999. The Respondent and the Petitioner created this account with American Funds in joint tenancy. Thereafter, the Respondent purchased a new GMC pickup truck with said funds from the joint American Funds account and this pickup truck was titled jointly with the Petitioner. The Respondent later sold the pickup truck and placed the proceeds of the sale into the American Funds account held in joint tenancy with the Petitioner. The Respondent also added a portion of his earnings during the marriage to this account during the marriage. The funds in this account have been commingled and have not remained the separate property of the Respondent. This American Funds account should be equally divided between the Respondent and

the Petitioner.

14. In November 2003, the Respondent purchased a 2000 GMC Extended Cab 4x4 pickup truck which he paid for in full. No loan obligation or other liens exist against this vehicle. The truck is titled in the names of the Respondent and the Petitioner. The present NADA value of this marital asset exceeds \$22,000.00. The Respondent has also added a satellite radio, tool box, fancy wheels and running boards to this vehicle the value of which is \$1,000.00. The value of this marital asset should be divided equally between the Respondent and the Petitioner.

15. The Petitioner purchased a 2002 Toyota Camry after the parties' separation because an accident, not the fault of the Petitioner, totaled the 1997 Cadillac DeVille driven by the Petitioner at the time of separation. This motor vehicle is titled solely in the Petitioner's name. The Petitioner owes nearly \$7,000.00, to Box Elder Credit Union upon the 2002 Toyota Camry and her monthly payment thereon is \$129.68, per month. The ownership and all right, title and interest in 2002 Toyota Camry, acquired after the parties' separation by the Petitioner, is awarded to her and she is ordered to pay the debt thereupon.

16. The only debt of the parties is a GM credit card and the balance owed thereupon is \$4,282.73. The credit card was used

during the marriage for family expenses such as bill payments, Christmas and birthday gifts, airline tickets and motel reservations. The Respondent should be ordered to pay the debt to the GM credit card in the above stated sum.

17. The Petitioner has incurred costs and attorney fees herein in the sum of Fifteen Thousand Two Hundred Fifty-seven Dollars Sixty-nine Cents (\$15,257.69), through trial. The Petitioner borrowed Three Thousand Five Hundred Dollars (\$3,500.00), from her son to pay a retainer to her counsel at the commencement of this action. The Petitioner's counsel submitted an Attorney's Affidavit specifying the services performed and the charges therefore. The attorney fees the Petitioner agreed to pay is \$175.00 per hour plus the costs of the case. The hourly rate is reasonable in light of the circumstances of this case and the fees of other experienced lawyers in the community and the services performed for the Petitioner by her counsel were reasonable and necessary. The Petitioner does not have the ability to compensate her counsel and the Respondent has the ability to pay the Petitioner's costs and attorney fees from his employment and other income and other assets. The Respondent should be ordered to forthwith pay the Petitioner's costs and attorney fees incurred herein in the sum of \$10,000.00, and the Petitioner is awarded



judgment against the Respondent therefore.

**THE COURT**, having made and entered Findings of Fact now makes and enters the following:

**CONCLUSIONS OF LAW**

1. The Court has both *in personam* and subject matter jurisdiction of the parties in this action.

2. The Petitioner and the Respondent were married on the 20th day of August, 1960, in City of Dalton within the State of Massachusetts, and have been married in the LDS Temple and have since remained husband and wife, a period of nearly forty-four (44), years. This is a marriage of long-term.

3. Irreconcilable differences exist between the parties rendering this marriage no longer viable and making reconciliation impossible. The Petitioner should be awarded a divorce against the Respondent.

4. Four (4), children were born as issue of the Petitioner and the Respondent. All of said children are adults and are fully emancipated and are not dependent upon the parties for their support.

5. The Petitioner retired from the Shepard Montana School District in 1994. She receives retirement income from the State of Montana in the sum of One Hundred Eighty Dollars Seventy-



three Cents (\$180.73), per month. The Petitioner also receives Social Security income in the sum of Six Hundred Thirty-five Dollars (\$635.00), per month at the time of trial. The Petitioner's social security income has been reduced by Seventy-three Dollars (\$73.00), since trial. The Petitioner is completely disabled and unable to engage in gainful employment.

6. The Respondent receives Social Security income in excess of One Thousand Two Hundred Five Dollars (\$1,205.00), per month. The Respondent deposited into the parties joint bank account funds from his retirement account and social security from June, 2003, through April, 2004, the eleven (11), months prior to the parties' separation, in the sum of \$42,265.35, which averages \$3,842.30, per month. These deposits did not include his income from his employment at Century 21 Real Estate nor the Petitioner's social security and retirement income.

The Respondent deposited his income from Century 21, into the State Bank of Southern Utah during the parties' marriage. On July 16, 2005, the Respondent testified that he had earned a commission of \$27,600.00, on June 1, 2004, which he had deposited into his personal account at the State Bank of Southern Utah and that all of the funds in this account were his. The Respondent had also deposited several thousand dollars into a separate account at

Zions Bank. Paragraphs 5, and 7, of the Court's Order Arising from Order to Show Cause Hearing refer to these accounts and ordered the division of these accounts reserved for trial and any amounts withdrawn therefrom offset against any other amount awarded at the time of trial.

In any event, the monies in the accounts were marital property having been earned by the Respondent during the marriage from commissions earned as a real estate agent at Century 21, where he had been employed since 2002. The Petitioner and the Respondent should each be awarded one-half ( $\frac{1}{2}$ ), of the value of the accounts existing at the time of the hearing upon the Order to Show Cause.

7. The Respondent has had heart surgery and has had stints placed in his heart several years ago and has other medical problems. The Respondent is presently employed as a real estate agent at Century 21, in St. George, Utah. His adjusted gross income from his 1099, at Century 21 in the year 2004, was Forty-seven Thousand Two Hundred Seventy-six Dollars Forty-three Cents (\$47,276.43), although Twenty-seven Thousand Six Hundred Dollars (\$27,600.00), of said sum was an unusual commission. The Respondent's average monthly income from Century 21, alone for the year 2004, was Three Thousand Nine Hundred Thirty-nine Dollars Seventy Cents (\$3,939.70). The Court concludes that the

Respondent's earning capacity is limited by his health status.

The Respondent suffers from coronary and renal artery disease which bars him from full-time work. If the Respondent could work full time his income would be \$4,500.00. However, at the date of the Court's last hearing, November 1, 2005, the Respondent was only capable of part-time work. It is also very clear to the Court that the Respondent's health is in a changing status. The Court is unable to fix his earning capacity on a permanent basis due to his precarious state of health. At the present time, the Court is persuaded by the necessary burden of proof, that this Respondent is now able to earn \$2,500.00, per month. Because this is a temporary finding, either party may bring this issue back to the Court by motion, rather than by Petition.

8. The Petitioner's monthly living expenses are Three Thousand Three Hundred Four Dollars Eighty-nine Cents (\$3,304.89), per month. Her monthly need for financial or spousal support from the Respondent (following the deduction of her monthly social security and retirement income in the sum of \$742.73) is Two Thousand Four Hundred Eighty-nine Dollars Sixteen Cents (\$2,489.16), per month.

The Respondent has no ability to pay said sum as spousal



support from his income. The Petitioner is entitled to maintain the standard of living to which the parties have become accustomed because this is a long-term marriage. The Petitioner should be awarded temporary spousal support which should be paid by the Respondent in the sum of One Thousand Dollars (\$1,000.00), per month on the 1st day of each month hereafter and said sum should be paid by the Respondent to the Petitioner from and after November 1, 2005, the date of the trial of this action.

9. The Respondent deposited his income from Century 21, into the State Bank of Southern Utah during the parties marriage. On July 16, 2005, the Respondent testified that he had earned a commission of \$27,600.00, on June 1, 2004, which he had deposited into his personal account at the State Bank of Southern Utah and that all of the funds in this account were his. The Respondent had also deposited several thousand dollars in a separate account at Zions Bank. Paragraphs 5, and 7, of the Court's Order Arising from Order to Show Cause Hearing refer to these accounts and ordered the division of these accounts reserved for trial and any amounts withdrawn therefrom offset against any other amount awarded at the time of trial. The Petitioner received a lump sum payment of Five Thousand Dollars (\$5,000.00), following the hearing upon her order to show cause. In any event, the monies in the accounts were



marital property having been earned by the Respondent during the marriage from commissions earned as a real estate agent at Century 21, where he had been employed since 2002. The Petitioner and the Respondent should each be awarded one-half ( $\frac{1}{2}$ ), of the value of the accounts at Southern Utah State Bank and Zions Bank and all other accounts existing at the time of the hearing upon the Order to Show Cause. The Respondent should forthwith pay the Petitioner said sums and she should be awarded a judgment against the Respondent therefore.

10. The Petitioner and the Respondent purchased a residence and real property in October, 2002, and during the marriage situate at 1020 East Fort Pierce Drive in the City of St. George in the County of Washington within the State of Utah. The purchase price of the parties' home and real property was One Hundred Forty-nine Thousand Dollars (\$149,000.00). U.S. Bank is owed Eighty-two Thousand Forty-two Dollars Seventy-one Cents (\$82,042.71), as of the date of trial and the payment thereon is Six Hundred Thirty-eight Dollars Ninety-one Cents (\$638.91), per month.

The fair market value of the parties' residence and real property as of February 24, 2005, was One Hundred Eighty-five Thousand Dollars (\$185,000.00). Accordingly, the parties have just

less than One Hundred Three Thousand Dollars (\$103,000.00), of equity in the marital residence and real property. The Petitioner paid Eight Thousand Dollars (\$8,000.00), from her separate inherited funds toward the purchase of the marital residence and real property.

The Petitioner should be awarded the ownership and all right, title and interest in and to said residence and real property subject to the Respondent's lien for his share of the equity therein in the sum of Forty-seven Thousand Five Hundred Dollars (\$47,500.00). The Petitioner shall pay the payments and debt to U.S. Bank upon the residence and real property. The Respondent should forthwith quit claim the ownership and all right, title and interest therein to the Petitioner. The Petitioner should be entitled to reside in the marital residence and real property until she dies, or until the home and real property are sold. The sale of the marital residence and real property shall be in the Petitioner's sole discretion. The Petitioner shall not be required to pay the Respondent's lien until such time as she sells the marital residence and real property, or re-marries. In the event that the Petitioner chooses not to sell the residence and real property and the Respondent dies before his equity lien is paid to him, said equity lien shall become an asset of the

Respondent's estate.

11. The Respondent has in his possession marital property which he took with him at the time of separation. These items include a refrigerator, television, chest of drawers, laptop computer, lounging chairs, a green desk, the barometer, a crystal chandelier, golf clubs, fishing gear, camping gear, 2 shop vacuums, saws, drills and several other tools, all purchased during the marriage. He also has weapons which were purchased during the marriage including 3 rifles, a revolver and reloading equipment.

The Petitioner nor the Respondent made any claim for personal property in the possession of the other at the time of trial. The Petitioner and the Respondent acquired household furniture, fixtures, furnishings and appliances and other personal property during their marriage which have been divided between the parties and which should be awarded pursuant to this division.

12. Each party should be awarded his or her personal effects.

13. The Respondent acquired pension, retirement and stock benefits during the parties' marriage which are presently held by American Funds. These funds have not yet been divided although the Petitioner's counsel has submitted a Domestic Relations Order for execution by the Court. The Respondent should



forthwith execute all documents necessary to effectuate the division of all of the American Funds Accounts specifically, but not limited to an IRA Distribution Request form provided to the Respondent's counsel by the Petitioner's counsel on January 4, 2005, which requires the Respondent's signature guarantee in Section 7. The guaranteed signature of the Respondent is required before American Funds can distribute the Respondent's pension and retirement IRAs.

14. The Respondent deposited into a separate American Funds account approximately \$32,045.00, which he inherited from his father in 1999. The Respondent and the Petitioner created this account with American Funds in joint tenancy. Thereafter, the Respondent purchased a new GMC pickup truck with said funds from the joint American Funds account and this pickup truck was titled jointly with the Petitioner. The Respondent later sold the pickup truck and placed the proceeds of the sale into the American Funds account held in joint tenancy with the Petitioner. The Respondent then purchased the 2000 GMC pickup truck referred to below and titled this vehicle in the parties' names jointly. The Respondent also added a portion of his earnings during the marriage to this account during the marriage. The funds in this account have been commingled and have not remained the separate property of the



Respondent. The American Funds accounts are marital property and should be equally divided between the Respondent and the Petitioner. A qualified domestic relations order should issue to effectuate the division of all retirement, pension, IRA, and other accounts.

15. In November 2003, the Respondent purchased a 2000 GMC Extended Cab 4x4 pickup truck which he paid for in full. No loan obligation or other liens exist against this vehicle. The truck is titled in the names of the Respondent and the Petitioner. The present NADA value of this marital asset exceeds \$22,000. The Respondent has also added a satellite radio, tool box, fancy wheels and running boards to this vehicle the value of which is \$1,000.00. The value of the equity in this marital asset should be divided equally between the Respondent and the Petitioner.

16. The Petitioner purchased a 2002 Toyota Camry after the parties' separation because an accident, not the fault of the Petitioner, totaled the 1997 Cadillac DeVille driven by the Petitioner at the time of separation. This motor vehicle is titled solely in the Petitioner's name. The Petitioner owes nearly \$7,000.00, to Box Elder Credit Union upon the 2002 Toyota Camry and her monthly payment thereon is \$129.68, per month. The ownership and all right, title and interest in 2002 Toyota Camry, acquired

after the parties' separation by the Petitioner is awarded to her and she is ordered to pay the debt thereupon.

17. The only debt of the parties is a GM credit card and the balance owed thereupon is \$4,282.73. The credit card was used during the marriage for family expenses such as bill payments, Christmas and birthday gifts, airline tickets and motel reservations. The Respondent should be ordered to pay the debt to the GM credit card in the above stated sum.

18. The Petitioner has incurred costs and attorney fees herein in the sum of Fifteen Thousand Two Hundred Fifty-seven Dollars Sixty-nine Cents (\$15,257.69), through trial. The Petitioner borrowed Three Thousand Five Hundred Dollars (\$3,500.00), from her son to pay a retainer to her counsel at the commencement of this action. The Petitioner's counsel submitted an Attorney's Affidavit specifying the services performed and the charges therefore. The attorney fees the Petitioner agreed to pay is \$175.00 per hour plus the costs of the case.


The hourly rate is reasonable in light of the circumstances of this case and the fees of other experienced lawyers in the community and the services performed for the Petitioner by her counsel were reasonable and necessary. The Petitioner does not have the ability to compensate her counsel and

the Respondent has the ability to pay the Petitioner's costs and attorney fees from his employment and other income and assets.

The Respondent should be ordered to pay the Petitioner's costs and attorney fees incurred herein in the sum of \$10,000.00, and the Petitioner should be awarded judgment against the Respondent therefore augmented by the costs and attorney fees incurred in the collection of the judgments entered herein.

DATED this 21 day of November, 2005.

BY THE COURT:

  
\_\_\_\_\_  
HONORABLE JAMES L. SHUNATE,  
Fifth Judicial District Court

CERTIFICATE OF SERVICE AND MAILING

I HEREBY CERTIFY that on this 17<sup>th</sup> day of November, 2005, I served upon and mailed, postage prepaid and by first class mail, a true and correct copy of the foregoing Findings of Fact and Conclusions of Law to Gary G. Kuhlmann, Attorney for Respondent, at 113 East 200 North, Suite 1, Post Office Box 910387, St. George, Utah 84791.



CERTIFICATE OF SERVICE

I hereby certify that on the 13 day of July, 2006, I did mail a true and correct copy of the foregoing: APPELLANT'S BRIEF to the following:

Andrew Berry, Jr.,  
P.O. Box 600  
39 West Main Street  
Moroni, Utah 84646-0600

Candice Montoya