

2006

Judith Wanda Lowry v. Kenneth Ray Lowry : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JUDITH WANDA LOWRY,

Petitioner and Appellee,

vs.

KENNETH RAY LOWRY,

Respondent and Appellant.

Case Number: 20060018

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BRIEF OF APPELLEE

APPEAL FROM THE JUDGMENT AND ORDERS OF THE
FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY
STATE OF UTAH, HONORABLE JAMES L. SHUMATE PRESIDING

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THE APPELLANT WAS AFFORDED DUE PROCESS IN THE TRIAL COURT AND WAIVED HIS OBJECTIONS BY UNTIMELY FILING OBJECTIONS TO THE FINDINGS, ORDERS AND JUDGMENTS.

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STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Court by Utah Code Annotated, Section 78-2a-3(2)(h), and by Rules 3, and 4, of the Utah Rules of Appellate Procedure.

STATEMENT OF THE FACTS

The Petitioner and Appellee, Judith Wanda Lowry, and the Respondent and Appellant, Kenneth Ray Lowry, were married in the City of Dalton within the State of Massachusetts, on August 20, 1960. The parties were married in the LDS Temple and remained married for over forty-three (43), years. (*R. 1, 40, Tr. 3, 8/15/05 Tr. 4*)

Four (4), children were born as issue of the Petitioner and the Respondent. All of the parties' children are adults and are fully emancipated and are not dependent upon the parties for their support.*(R. 2)*.

The Petitioner retired from the Shepard Montana School District in 1994, and receives retirement therefrom in the sum of One Hundred Eighty Dollars Seventy-three Cents (\$180.73), per month. She also receives 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 been reduced by Seventy-three Dollars (\$73.00), per month since trial and she now receives Social Security income of Five Hundred Sixty-two Dollars (\$562.00), per month.
(Tr. 4, 8; 8/15/05 Tr. 5, Exhibits 2 & 4)

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 causing the Petitioner continuous pain. The Petitioner suffers from arthritis and is in present need of cataract surgery.
(Tr. 18-22).

Petitioner suffers from arthritis and is in present need of cataract surgery. (*Tr. 18-22*).

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 (*Tr. 43, Exhibit 6, R. 166*). The Petitioner is receiving both physical therapy and other therapy, and the copay cost thereof is One Hundred Twenty Dollars (\$120.00), per month. (*Exhibit 6*).

The Respondent receives Social Security income in excess of One Thousand Two Hundred Five Dollars (\$1,205.00), per month. (*Tr. 4*). 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, 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. (*Exhibit 8*).

The Respondent deposited income from Century 21, into the State Bank of Southern Utah and Zions Bank 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. (*Exhibit 18, R. 162-163*). The Respondent had also deposited several thousand dollars in a separate account at Zions Bank. (*Exhibit 8*). Paragraphs 5, and 7, of the Court's Order Arising from Order to show Cause Hearing 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. (*R. 49, 171*). The Petitioner was paid a lump sum payment of Five Thousand Dollars (\$5,000.00), following the hearing upon her order to show cause. 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. (*Exhibits 10, 18, 31*).

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). (*Exhibits 10, 18, 31, Tr. 33, 61, R. 166*).

The Respondent suffers from coronary and renal artery disease barring 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. The Respondent, on November 1, 2005, was only capable of part-time work. The Respondent's health is in a changing status. The Respondent, on November 1, 2005, was capable of earning Two Thousand Five Hundred Dollars (\$2,500.00), per month. (*Tr. 22-26, R. 166*).

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. (*Exhibit 27, R. 165-175*).

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. (*Exhibit 12*).

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). (*Tr. 45*). The Respondent, Kenneth Lowry, testified that the value of the marital residence was Two Hundred Fifteen Thousand Dollars (\$215,000.0). (*Tr. 44*).

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). (*Tr.* 45-50). 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. (*R.* 166).

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 three (3), rifles, a revolver and reloading equipment. (*R.* 169-170). 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. (*Exhibit 26, R. 69-70*).

The Respondent acquired pension, retirement and stock benefits during the parties' marriage presently held by American Funds. (*Exhibit 7*).

The Respondent deposited into a separate American Funds account approximately \$32,045.00, which he claimed he inherited from his father in 1999. The Respondent and the Petitioner created this account with American Funds in joint tenancy. (*Exhibit 7, 7/16/04 Exhibit 3*). 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. The funds in this account have been commingled and have not remained the separate property of the Respondent. (*Tr. 95-96, R. 164-165*).

The Petitioner and the Respondent incurred a single marital debt, the GMC credit card which was used for family purchases. (*Exhibit 13, R. 165*).

The Petitioner, Judith Wanda Lowry, had incurred court costs and attorney fees through trial in the sum of \$15,257.69. (*R. 119-123*).

The trial court directed counsel for the Petitioner and the Respondent to prepare their proposed findings of fact, conclusions of law and proposed orders and judgments at the trial on March 1, 2005; (*Tr. 94-98, R. 124*).

The Respondent, Kenneth Ray Lowry, submitted to the trial court the Respondent's Proposed Findings of Fact and Conclusions of Law and the Respondent's Proposed Judgment Dividing Property and Liabilities on April 1, 2005 (*R. 144-147, 148-160*);

On April 8, 2005, Petitioner submitted Objections to [Respondent's] Findings of Fact, Conclusions of Law and Judgment (*R. 161-174*);

On April 9, 2005, the Petitioner submitted her proposed Findings of Fact, Conclusions of Law, Orders and Judgments to the trial court and to the Respondent. On April 22, 2005, Respondent filed Objection to Petitioner's Findings of Fact, Conclusions of Law and Order (*R. 184-190, 194*);

On April 22, 2005, the Respondent filed his Response to Petitioner's Objections to Proposed Findings of Fact, Conclusions of Law and Judgment (*R. 181-183*);

On July 20, 2005, the Respondent filed his Motion to Terminate Temporary Alimony (*R. 242-243, 244-245*);

On July 26, 2005, the trial court sent the parties' counsel notice of a hearing upon the Respondent's Motion to Terminate Temporary Alimony scheduling a hearing for August 15, 2005 (*R. 247-248*);

On August 15, 2005, the Petitioner and her counsel appeared before the trial court pursuant to the notice given by the Court for hearing. The Respondent and his counsel did not appear but had filed a motion to continue the hearing. The trial court denied the Respondent's motion to continue the hearing and made findings using the proposed findings, conclusions and orders, and the objections to the proposed findings and orders of both the Petitioner and the Respondent (*8/1/05 Tr. 3-10*);

On August 17, 2005, the Petitioner submitted Findings of Fact, Conclusions of Law and Order and Judgments to the Respondent and the

trial Court conforming to the findings and decisions of the trial court made on August 15, 2005 (*R. 280-281*);

On August 25, 2005, the Respondent again filed his Objection to Findings of Fact and Conclusions of Law and Order and Judgments (*R. 268-269*). The Respondent also filed his Motion to Reconsider Rulings claiming he had been denied due process of law because he was not present at the hearing scheduled by the Court for August 15, 2005, despite having received notice of the hearing (*R. 270-274*);

On September 29, 2005, the trial court scheduled a hearing upon each of the parties' proposed findings of fact, orders and judgments for November 1, 2005, and each parties' objections to the others documents. (*R. 298-299*);

On November 1, 2005 the trial court held a hearing upon the proposed findings of fact, conclusions of law, orders and judgments proposed by the Petitioner and the Respondent, and upon the parties objections to each others proposed findings, conclusions and orders (*R. 300, 11/01/05 Tr.1-12*);

On November 3, 2005, the trial court mailed to counsel for the Petitioner and the Respondent, the Petitioner's proposed Findings of Fact

and Conclusions of Law which the court had modified and handwritten changes to the proposed findings (*Addendum A*);

On November 17, 2005, the Petitioner's counsel mailed the Findings of Fact, Conclusions of Law, Orders and Judgments, revised under the direction of the trial court, to the Respondent and to the trial court. These findings, conclusions, orders and judgments incorporated the changes the trial court had directed the Petitioner's counsel make to the documents on November 3, 2005 (*R. 303-327, 328-335*);

The trial court signed and entered the Findings of Fact, Conclusions of Law, Orders and Judgments on November 21, 2005 (*303-327, 328-335*);

On December 2, 2005, the Respondent filed his untimely Objection to Petitioner Findings of Fact, Conclusions of Law and Order and Judgments. These objections were identical to the Respondent's objections and issues previously considered by the trial court in the Respondent's and the Petitioner's proposed findings of fact, conclusions of law, orders and judgments, and the objections filed by both parties to the other parties proposed pleadings (*338-343*);

On December 12, 2005, the Petitioner filed her Reply to Respondent's Objections to Findings of Fact, Conclusions of Law and Order and Judgments asserting that the objections raised by the Respondent were the same objections which the Respondent had raised twice before and which had been resolved by the trial court on November 1, and 3, 2005, following a hearing in the trial court upon the parties' proposed findings, and the parties objections thereto. The Petitioner also asserted that the Respondent's objections were untimely because they were not filed by November 25, 2005, eight days after the findings, conclusions, orders and judgments were submitted to the trial court and the Respondent on November 17, 2005 (*R.344-347*); and

Rather than bringing the issue of his untimely and previously resolved objections before the trial court for resolution the Respondent filed his Notice of Appeal on December 9, 2005 (*R. 348-349*).

SUMMARY OF THE ARGUMENTS

The trial court's award of attorney fees and costs to the Petitioner should be affirmed. The appellant has failed to make a minimal effort to marshal the evidence in support of the trial court's findings and has made no

effort to demonstrate that the trial court's decision was clearly erroneous. The appeal upon this issue is frivolous and without merit. The Appellee should be awarded her costs and attorney fees incurred upon this appeal pursuant to Rule 33, of the Utah Rules of Appellate Procedure.

Mr. Lowry had his days in court. His objections were repeatedly considered by the trial court and ruled upon thrice. He has not established that he was deprived of a single item of his property. Mr. Lowry was afforded, and re-afforded, due process of law. The trial court had heard his position at trial, twice considered his objections to the findings, orders and judgments and made modifications thereto based upon his objections.

The Respondent and Appellant's argument that his right of due process under Article I, Section 7, of the Constitution of Utah and Rule 7, of the Utah Rules of Civil Procedure is without merit and is frivolous. He cites no facts and no authority, nor makes an argument in his brief in support of his position. Judith Wanda Lowry should be awarded her costs and attorney fees upon this appeal pursuant to Rule 33, of the Utah Rules of Appellate Procedure. The Findings of Fact, Conclusions of Law, Orders and Judgments of the trial court should be affirmed.

All of the trial court's findings of fact and the evidence presented at trial support the valuation and disposition of the marital residence. The trial court considered the facts in the record and made the required findings necessary in valuing and disposing of the marital residence. The trial court was cognizant of and considered the trial testimony about the value of the marital residence. Mr. Lowry's argument based upon nothing more than his mere dissatisfaction with the award does not show an abuse of discretion by the trial court valuing and dividing the marital residence.

The appellant has wholly failed to make even a minimal effort to marshal the evidence in support of the trial court's findings and has made no effort to demonstrate that the trial court's decision was clearly erroneous. The appeal upon this issue is frivolous and without merit. The trial court's valuation and division of the marital residence should be affirmed. The Appellee should be awarded her costs and attorney fees incurred upon this appeal pursuant to Rule 33, of the Utah Rules of Appellate Procedure.

All of the trial court's findings of fact and the evidence presented at trial support the findings and the disposition of the joint American Funds account. The trial court considered and addressed the facts in the record

and made the required findings necessary in determining whether the account had been commingled and had become marital property. The trial court was cognizant of and considered the trial testimony about the parties' use of the account. Mr. Lowry's argument based upon nothing more than his mere dissatisfaction with the findings and award does not show an abuse of discretion by the trial court by finding the monies were marital property.

The appellant has wholly failed to make even a minimal effort to marshal the evidence in support of the trial court's findings and has made no effort to demonstrate that the trial court's decision was clearly erroneous. The appeal upon this issue is frivolous and without merit. The trial court's findings and award of the joint American Funds account should be affirmed. Judith Wanda Lowry should be awarded her costs and attorney fees incurred upon this appeal pursuant to Rule 33, of the Utah Rules of Appellate Procedure.

The trial court's division of the personal property and single debt should be affirmed. The appellant has failed to make even a minimal effort to marshal the evidence in support of the trial court's findings and has made no effort to demonstrate that the trial court's decision was clearly erroneous.

The appeal upon this issue is frivolous and without merit. Judith Lowry was awarded nothing more than one-half (1/2), of the value of the marital assets. The trial court's division of the marital assets and debt should be affirmed. Judith Wanda Lowry should be awarded her costs and attorney fees incurred upon this appeal pursuant to Rule 33, of the Utah Rules of Appellate Procedure.

THE ARGUMENTS

THE APPELLANT HAS FAILED TO MARSHALL THE EVIDENCE AND SHOW THAT THE TRIAL COURT'S DECISION IS CLEARLY ERRONEOUS AND THE TRIAL COURT PROPERLY AWARDED THE PETITIONER ATTORNEY FEES

The Respondent and Appellant, Kenneth Ray Lowry, challenges the trial court's award of partial attorney fees to the Petitioner and Appellee, Judith Wanda Lowry. Mr. Lowry urges this Court to reverse the trial court's award of attorney fees to Mrs. Lowry because Mr. Lowry incurred his own attorney fees and because the trial court "failed to take into account the Appellant's own expenses in determining the Appellant's ability to pay attorney's fees."

The appellant does not challenge the trial court's findings of fact and he only makes a cursory attempt to marshal the evidence in support of the trial court's award of attorney fees and costs to Judith Lowry. In *Bolliger v. Bolliger*, 997 P.2d 903 (Utah Ct. App. 2000), this Court held that an award of attorney fees will be upheld where there is no challenge by the appellant to any of the findings of fact entered by the trial court in support of the award of attorney fees.

Not only does the appellant not challenge the trial court's factual findings in support of the award of attorney fees, he fails to marshal "every scrap of competent evidence" in the record in support of the trial court's decision to award Judith Lowry partial attorney fees and "ferret out a fatal flaw in the evidence," and demonstrate how the trial court's award of attorney fees is "clearly erroneous." In *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991), this Court states:

In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to

convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

See also, McPherson v. Belnap, 830 P.2d 302, 305 (Utah App. 1992)(appellant failed to demonstrate, after marshaling the evidence, that the trial court's findings were clearly erroneous), and *Stewart v. Board of Review*, 831 P.2d 134, 138 ((Utah App. 1992)(Once the evidence is listed or marshaled with appropriate citation to the record, the appellant must then demonstrate that the marshaled evidence is legally insufficient to support the findings when viewing the evidence and inferences in a light most favorable to the decision).

On April 1, 2005, a month after the trial, the Respondent's counsel filed an affidavit of attorney fees the trial court presumably considered, when it awarded the Petitioner her costs and attorney fees. (*R. 127-140*)

The appellant claims the trial court "failed to take into account the Appellant's own expenses in determining the Appellant's ability to pay attorney's fees." The statement is simply untrue and frivolous. Mr. Lowry, submitted Exhibits 19, and 20, to the trial court which listed his expenses and was examined at trial upon the exhibits in detail. *Respondent's Exhibits*

19, 20, *Tr. 14, 90-94*. The exhibits listed his expenses for the years 2003, 2004, and 2005. Additionally, Mr. Lowry's friend, fellow employee, and office manager at Century 21, Russell Gwilliam, was examined regarding which of the office expenses Mr. Lowry pays, those paid by Century 21, and the trial court considered his testimony. *Tr.62-66*.

Moreover, the trial court was cognizant of many other facts in the record, not listed or marshaled by Mr. Lowry in his brief, which supported the award of attorney fees to Judith Lowry. For example, the length of the marriage (*Tr. 10*), Judith Lowry's monthly living expenses and income (*Tr. 10-11, Petitioner's Exhibits 27, 12*), Mr. Lowry's medical condition (*Tr. 11, 22-26*), Mr. Lowry's social security income (*Tr. 11, 27*), Mr. Lowry's Century 21 income (*Tr. 12, 22, 27, Exhibits 10, 18, 31*), Mr. Lowry's other recent income (*Exhibit 8*), the retirement which had not been distributed (*Tr. 15-16*), Mrs. Lowry's total disability and extensive medical problems (*Tr. 18-22, Exhibit 6*), Mr. Lowry's expenses, debts and obligations (*Tr. 27-28, Exhibits 13, 19, 24, 28*), Mrs. Lowry's attorneys fees and costs (*Tr. 41, R. 119-123*), Mr. Lowry's attorney fees and costs which the trial court

presumably considered because they were part of the record at the time of the entry of the findings of fact and judgments. (*R. 127-140*).

The appellant merely presents a few selected facts in support of his own position omitting many facts supporting the trial courts award of attorney fees to Judith Lowry. The appellant has not properly marshaled, “in comprehensive and fastidious order, every scrap of competent evidence” introduced at trial which supports the very findings the appellant resists. *West Valley City v. Majestic Inv. Co.*, *id.*

Just as importantly, the appellant has failed to demonstrate that the trial court’s findings and decision were clearly erroneous, or otherwise legally insufficient, when viewing the evidence and inferences in a light most favorable to the decision. *Stewart*, *id.*; *McPehrson*, *id.*

All of the trial court’s findings of fact support the award of attorney fees and costs to Judith Lowry. (*R. 303-327*) The trial court considered and addressed the facts in the record and made the three required findings necessary in awarding attorney’s fees, i.e., the receiving spouse’s financial need, the payor spouse’s ability to pay, and the reasonableness of the requested fees, (*R. 303-327*), and was cognizant of and considered the trial

testimony and many exhibits identified above. Mr. Lowry's argument based upon nothing more than his dissatisfaction with the award does not show an abuse of discretion by the trial court awarding Judith Lowry a portion of her attorney fees in the action. *Childs v. Childs*, 967 P.2d 942 (Utah Ct. App. 1998), cert. denied, 982 P.2d 88 (Utah 1999).

Mr. Lowry has failed to make even a minimal effort to marshal the evidence in support of the trial court's findings and he has made no effort, and failed to demonstrate that the trial court's decision was clearly erroneous. The appeal upon this issue is frivolous and without merit. The trial court's award of attorney fees and costs to Judith Wanda Lowry should be affirmed. Mrs. Lowry should be awarded her attorney fees incurred upon this appeal pursuant to Rule 33, of the Utah Rules of Appellate Procedure. *Eames v. Eames*, 735 P.2d 395 (Utah Ct. App. 1987); *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct. App. 1989).

THE APPELLANT WAS AFFORDED DUE PROCESS IN THE TRIAL COURT. HE WAIVED HIS OBJECTIONS BY UNTIMELY FILING THE OBJECTIONS AND FAILING TO PROPERLY BRING THE ISSUE BEFORE THE TRIAL COURT FOR RESOLUTION

The Respondent and Appellant, Kenneth Ray Lowry, contends that he was denied his right of due process guaranteed by Article 1, Section 7, of the Utah Constitution because the trial court executed the Findings of Fact, Conclusions of Law, Orders and Judgment four days after the mailing of the documents to the trial court and Respondent's counsel. (R. 303-327, 328-335.)

"Due process of law" requires that, before one can be bound by a judgment affecting his property rights, some process must be served upon him which in some degree at least is calculated to give him notice. *Naisbitt v. Herrick*, 290 P. 950 (Utah 1930). See also, *Christensen v. Harris*, 163 P.2d 314 (Utah 1945)(a party shall have his day in court.)

The Appellant's claim is untrue, meritless and frivolous. A review of the record reveals the following:

The trial court directed counsel for the Petitioner and the Respondent to prepare their proposed findings of fact, conclusions of law and proposed orders and judgments at the trial on March 1, 2005; (Tr. 94-98, R. 124).

The Respondent, Kenneth Ray Lowry, submitted to the trial court the Respondent's Proposed Findings of Fact and Conclusions of Law and the

Respondent's Proposed Judgment Dividing Property and Liabilities on April 1, 2005 (*R. 144-147, 148-160*);

On April 8, 2005, the Petitioner submitted her Objections to Findings of Fact, Conclusions of Law and Judgment (*R. 161-174*);

On April 9, 2005, the Petitioner submitted her proposed Findings of Fact, Conclusions of Law, Orders and Judgments to the trial court and to the Respondent. On April 22, 2005, Respondent filed Objection to Petitioner's Findings of Fact, Conclusions of Law and Order (*R. 184-190, 194*);

On April 22, 2005, the Respondent filed his Response to Petitioner's Objections to Proposed Findings of Fact, Conclusions of Law and Judgment (*R. 181-183*);

On July 20, 2005, the Respondent filed his Motion to Terminate Temporary Alimony and supported the motion with the Affidavit of Kenneth Lowry (*R. 242-243, 244-245*);

On July 26, 2005, the trial court sent the parties' counsel notice of a hearing upon the Respondent's Motion to Terminate Temporary Alimony scheduling a hearing for August 15, 2005 (*R. 247-248*);

On August 15, 2005, the Petitioner and her counsel appeared before the trial court pursuant to the notice given by the Court for hearing. The Respondent and his counsel did not appear but had filed a motion to continue the hearing. The trial court denied the Respondent's motion to continue the hearing and made findings using the proposed findings, conclusions and orders, and the objections to the proposed findings and orders of both the Petitioner and the Respondent (8/1/05 Tr. 3-10);

On August 17, 2005, the Petitioner submitted Findings of Fact, Conclusions of Law and Order and Judgments to the Respondent and the trial Court conforming to the findings and decisions of the trial court on August 15, 2005 (R. 280-281);

On August 25, 2005, the Respondent again filed his Objection to Findings of Fact and Conclusions of Law and Order and Judgments (R. 268-269). The Respondent also filed his Motion to Reconsider Rulings claiming he had been denied due process of law because he was not present at the hearing scheduled by the Court for August 15, 2005, despite having received notice of the hearing (R. 270-274);

On September 29, 2005, the trial court scheduled another hearing upon the proposed findings of fact, orders and judgments for November 1, 2005 (*R. 298-299*). On November 1, 2005 the trial court held a hearing upon the proposed findings of fact, conclusions of law, orders and judgments proposed by the Petitioner and the Respondent, and upon the parties objections to each others proposed findings (*R. 300, 11/01/05 Tr.1-12*);

On November 3, 2005, the trial court mailed to counsel for the Petitioner and the Respondent the Petitioner's proposed Findings of Fact and Conclusions of Law which the court had handwritten changes to the proposed findings and conclusions. (*Addendum A*);

On November 17, 2005, the Petitioner's counsel mailed the Findings of Fact, Conclusions of Law, Orders and Judgments, revised under the direction of the trial court, to the Respondent and to the trial court. (*R. 303-327, 328-335*);

The trial court signed and entered the Findings of Fact, Conclusions of Law, Orders and Judgments on November 21, 2005 (*303-327, 328-335*);

On December 2, 2005, the Respondent filed his untimely Objection to Petitioner Findings of Fact, Conclusions of Law and Order and Judgments.

These objections were identical to the Respondent's objections and issues previously considered by the trial court in the Respondent's and the Petitioner's proposed findings of fact, conclusions of law, orders and judgments, and the objections filed by both parties to the other parties proposed pleadings (338-343);

On December 12, 2005, the Petitioner filed her Reply to Respondent's Objections to Findings of Fact, Conclusions of Law and Order and Judgments asserting that the objections raised by the Respondent were the same objections which the Respondent had raised twice before and which had been resolved by the trial court on November 1, and 3, 2005, following a hearing upon the parties' proposed findings, and the parties objections thereto. The Petitioner asserted that the Respondent's objections were untimely because they were not filed by November 25, 2005, eight days after the findings, conclusions, orders and judgments were submitted to the trial court and the Respondent on November 17, 2005 (R.344-347); and

Rather than bringing the issue of his untimely and previously resolved objections before the trial court for resolution the Respondent filed his Notice of Appeal on December 9, 2005 (R. 348-349).

The appellant, Kenneth Lowry, does not present nor cite any authority supporting his position that he was deprived of his property in violation of Article I, Section 7, of the Constitution of Utah in violation of Rule 33, of the Utah Rules of Appellate Procedure.

Mr. Lowry does not make any argument whatsoever in his Appellant's Brief in support of his position that he was deprived of his property without due process of law in violation of Rule 33, of the Utah Rules of Appellate Procedure.

Mr. Lowry has not established that he was deprived of any "property" at all. He has not specifically identified anything, not a single item, of property that he was deprived of. Indeed, the properties awarded to Judith Lowry were her fair share of the marital assets, jointly acquired and owned, and possessed by her. The appellant, Mr. Lowry, has failed to establish a principal element of his claim under Article I, Section 7, of the Constitution of Utah, the property of which he was deprived.

Moreover, the appellant Mr. Lowry was afforded due process of law upon his objections to the Findings of Fact, Conclusions of Law, Orders and

Judgments entered by the trial court under Rule 7 of the Utah Rules of Civil Procedure.

Although Rule 7(f)(2), of the Utah Rules of Civil Procedure requires that the Respondent, Mr. Lowry, file objections within five days (eight with the mailing rule), he failed to do so. Mr. Lowry untimely filed his written objections to the third revised set of Findings of Fact, Conclusions of Law, Orders and Judgment on December 2, 2005. (338-343). These objections were the same objections the trial court had twice previously ruled upon.

Mr. Lowry had his days in court. His objections were repeatedly considered by the trial court and ruled upon thrice. He has not established that he was deprived of a single item of his property. Mr. Lowry was afforded, and re-afforded, due process of law. The trial court had heard his position at trial, twice considered his objections to the findings, orders and judgments and made modifications and revisions based upon his objections.

The trial court, upon receiving the third set of revised Findings of Fact, Conclusions of Law, Orders and Judgments, determined that the documents were in accord with the Court's intentions in the action and executed and entered them in good discretion.

The Respondent and Appellant's argument that his right of due process under Article I, Section 7, of the Constitution of Utah and Rule 7, of the Utah Rules of Civil Procedure is without merit and is frivolous and the findings and orders should be affirmed. He cites no facts and no authority nor makes an argument in his brief in support of his position. Judith Wanda Lowry should be awarded her costs and attorney fees upon this appeal pursuant to Rule 33, of the Utah Rules of Appellate Procedure. *Eames v. Eames*, 735 P.2d 395 (Utah Ct. App. 1987); *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct. App. 1989).

THE APPELLANT HAS FAILED TO MARSHALL THE EVIDENCE AND SHOW THAT THE EVIDENCE DOES NOT SUPPORT THE PROPERTY VALUATION AND DIVISION. THE TRIAL COURT DID NOT ABUSE IT'S DISCRETION VALUING AND DIVIDING THE MARITAL RESIDENCE

The Appellant, Kenneth Ray Lowry, contends that the trial court erred in the valuation of the marital residence by allowing the testimony of the Appellee's appraiser and by ignoring the Appellant's \$8,000.00, contribution of inherited funds toward the purchase of the marital residence.

The appellant does not challenge the trial court's findings of fact and he only makes a cursory attempt to marshal the evidence in support of the

trial court's award valuation of the marital residence. In *Proudfit v. Proudfit*, 598 P.2d 1318 (Utah 1979), this Court held that an appellant must establish that the trial court abused its discretion in valuing and disposing of a marital residence in a divorce action. See also *Hall v. Hall*, 858 P.2d 1018 (Utah Ct. App. 1993).

Not only does the appellant not challenge the trial court's factual findings in support of the valuation and disposition of the marital residence, he fails to marshal "every scrap of competent evidence" in the record in support of the trial court's decision valuing and dividing the marital residence and "ferret out a fatal flaw in the evidence," and demonstrate how the trial court's valuation and disposition of the marital residence is "clearly erroneous." *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991). See also, *McPherson v. Belnap*, 830 P.2d 302, 305 (Utah App. 1992)(appellant failed to demonstrate, after marshaling the evidence, that the trial court's findings were clearly erroneous), and *Stewart v. Board of Review*, 831 P.2d 134, 138 ((Utah App. 1992)(Once the evidence is listed or marshaled with appropriate citation to the record, the appellant must then demonstrate that the marshaled evidence is legally insufficient to support the

findings when viewing the evidence and inferences in a light most favorable to the decision).

Importantly, the both the Respondent and the Petitioner presented extensive testimony and evidence to the trial court at trial upon the valuation and disposition of the marital residence. (*Tr. 5-9, 27, 30, 43-45, 45-50, 50-60*)

The appellant claims the trial court “failed to take into account the Appellant’s own valuation and his “expert witness” testimony in determining the value of the marital residence, Mr. Gwilliam, his friend, fellow employee and office manager at Century 21. The statement is simply untrue and frivolous. Mr. Lowry presented Mr. Gwilliam as his “expert witness” upon the value of the marital residence. (There was no prior notice to the Petitioner under Rule 26, that Mr. Gwilliam would be presented by the Respondent as an “expert witness” at the time of trial.)

Moreover, the trial court was cognizant of many other facts in the record, not listed or marshaled by Mr. Lowry in his brief, which supported the trial court’s valuation and division of the marital residence. For example, the length of the marriage (*Tr. 10*), Judith Lowry’s monthly living expenses and income (*Tr. 10-11, Petitioner’s Exhibits 27, 12*), Mr. Lowry’s

medical condition (*Tr. 11, 22-26*), Mr. Lowry's social security income (*Tr. 11, 27*), Mr. Lowry's Century 21 income (*Tr. 12, 22, 27, Exhibits 10, 18, 31*), Mr. Lowry's other recent income (*Exhibit 8*), the retirement which had not been distributed (*Tr. 15-16*), Mrs. Lowry's total disability and extensive medical problems (*Tr. 18-22, Exhibit 6*), Mr. Lowry's expenses, debts and obligations (*Tr. 27-28, Exhibits 13, 19, 24, 28*), Mr. Lowry's valuation of the residence, Mr. Gwilliam's valuation of the residence, and Mr. Morley's valuation of the residence. (*R. 27, 30, 43-45, 45-50, 50-60*). It was within the trial court's discretion to value the residence at \$185,000.00.

There was no evidence whatsoever presented at trial that the Appellant, Mr. Lowry, had made an \$8,000.00, contribution to the purchase of the marital residence from his inherited, separate property. Indeed, the trial court found that Mr. Lowry's inheritance had been commingled with the marital estate when he placed the funds into a joint American Funds account with Mrs. Lowry, used the funds to purchase automobiles and trucks which the parties jointly titled, deposited his earnings into the account, and used the monies for trips and household expenses. (*R. 313*).

The appellant merely presents a few selected facts in support of his own position omitting many facts supporting the trial courts valuation and disposition of the marital residence. The appellant has not properly marshaled, “in comprehensive and fastidious order, every scrap of competent evidence” introduced at trial which supports the very findings the appellant resists. *West Valley City v. Majestic Inv. Co.*, id.

Just as importantly, the appellant has failed to demonstrate that the trial court’s findings and decision were clearly erroneous, or otherwise legally insufficient, when viewing the evidence and inferences in a light most favorable to the decision. *Stewart*, id.; *McPehrson*, id.

“The trial court in a divorce action is permitted considerable discretion in adjusting the financial and property interests of the parties, and its actions are entitled to a presumption of validity.” *Savage v. Savage*, 658 P.2d 1201, 1203 (Utah 1983). In particular, the “[d]etermination of the value of assets is a matter for the trial court which will not be reviewed in the absence of a clear abuse of discretion. *Turner v. Turner*, 649 P.2d 6 (Utah 1982).” *Argyle v. Argyle*, 688 P.2d 468, 470 (Utah 1984).

All of the trial court's findings of fact and the evidence presented at trial support the valuation and disposition of the marital residence. (*Tr.* 27, 30, 43-45, 45-50, 50-60). The trial court considered and addressed the facts in the record and made the required findings necessary in valuing and disposing of the marital residence. The trial court was cognizant of and considered the trial testimony about the value of the marital residence. Mr. Lowry's argument based upon nothing more than his mere dissatisfaction with the award does not show an abuse of discretion by the trial court valuing and dividing the marital residence. *Hall v. Hall*, 858 P.2d 1018 (Utah Ct App. 1993). *Childs v. Childs*, 967 P.2d 942 (Utah Ct. App. 1998), cert. denied, 982 P.2d 88 (Utah 1999). *Turner, id.*; *Argyle, id.*

The appellant has wholly failed to make even a minimal effort to marshal the evidence in support of the trial court's findings and has made no effort to demonstrate that the trial court's decision was clearly erroneous. The appeal upon this issue is frivolous and without merit. The trial court's valuation and division of the marital residence should be affirmed. Judith Wanda Lowry should be awarded her costs and attorney fees incurred upon this appeal pursuant to Rule 33, of the Utah Rules of Appellate Procedure.

Eames v. Eames, 735 P.2d 395 (Utah Ct. App. 1987); *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct. App. 1989).

THE APPELLANT HAS FAILED TO MARSHAL THE EVIDENCE AND SHOW THAT THE FINDINGS ARE CLEARLY ERRONEOUS THE RESPONDENT'S INHERITANCE HAD BEEN COMMINGLED AND WAS MARITAL PROPERTY

The Appellant, Kenneth Ray Lowry, asserts that the trial court committed err in awarding the Appellee, Judith Wanda Lowry, a portion of his inheritance.

The appellant does not challenge the trial court's findings of fact and he only makes a cursory attempt to marshal the evidence in support of the trial court's findings and decision that the \$32,045.00, in the joint American Funds account was marital property because it had been commingled. In *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1988), the Supreme Court held that once inherited property is so commingled that it loses it's separate identity it is marital property.

Not only does the appellant not challenge the trial court's factual findings in support of the trial court's finding that the funds were commingled and marital property, he fails to marshal "every scrap of

competent evidence” in the record in support of the trial court’s decision and findings that the account was commingled and marital property, and “ferret out a fatal flaw in the evidence,” and demonstrate how the trial court’s finding that the inheritance was commingled is clearly erroneous. *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991). *See also*, *McPherson v. Belnap*, 830 P.2d 302, 305 (Utah App. 1992); *Stewart v. Board of Review*, 831 P.2d 134, 138 ((Utah App. 1992.)

Importantly, both the Respondent presented extensive argument, testimony and evidence to the trial court at trial upon the issue of whether the \$32,045.00, which the parties had placed into a joint American Funds account had been commingled and was thus marital property. (*Tr. 95-96, Trial Exhibits 7, and 25, R. 144-160, 170-172, 188, 324-325*).

Moreover, the trial court was cognizant of many other facts in the record, not listed or marshaled by Mr. Lowry in his brief, which supported the trial court’s finding that the joint American Funds account had been commingled and was marital property. For example, trial exhibit 7, showed the funds had been placed into a joint account with Judith Lowry. The parties had purchased the parties’ Cadillac and GMC pickup truck with the

funds and titled the vehicles in both parties' names jointly. The truck was sold and the proceeds placed back into the joint American Funds account. Mr. Lowry had put his marital earnings into the joint account, the parties had taken trips using the funds and the parties had paid living expenses out of the account.

There was no evidence whatsoever presented at trial that the Appellant, Mr. Lowry, had maintained the funds as his inherited, separate property. Indeed, the trial court found that Mr. Lowry's inheritance had been commingled with the marital estate when he placed the funds into a joint American Funds account with Mrs. Lowry, used the funds to purchase automobiles and trucks which the parties jointly titled, deposited his earnings into the account, and used the monies for trips and household expenses. (*R. 313*).

The appellant merely presents a few selected facts in support of his own position omitting many facts supporting the trial courts findings and decision that the joint American Funds account had been commingled and was marital property. The appellant has not properly marshaled, "in comprehensive and fastidious order, every scrap of competent evidence"

introduced at trial which supports the very findings the appellant resists. *West Valley City v. Majestic Inv. Co.*, id. In fact, the appellant, Kenneth Lowry, presented no evidence at trial that he had maintained his inheritance separately from the interests of his wife, nor did he provide any evidence to the trial court that the monies could be traced to his inheritance. (*Tr.* 1-98). All of the facts presented to the trial court preponderate against Mr. Lowry's position.

Just as importantly, the appellant has failed to demonstrate that the trial court's findings and decision were clearly erroneous, or otherwise legally insufficient, when viewing the evidence and inferences in a light most favorable to the decision. *Stewart*, id.; *McPehrson*, id.

"The trial court in a divorce action is permitted considerable discretion in adjusting the financial and property interests of the parties, and its actions are entitled to a presumption of validity." *Savage v. Savage*, 658 P.2d 1201, 1203 (Utah 1983). *Argyle v. Argyle*, 688 P.2d 468, 470 (Utah 1984).

All of the trial court's findings of fact and the evidence presented at trial support the findings and the disposition of the joint American Funds

account. The trial court considered and addressed the facts in the record and made the required findings necessary in determining whether the account had been commingled and had become marital property. The trial court was cognizant of and considered the trial testimony about the parties' use of the account. Mr. Lowry's argument based upon nothing more than his mere dissatisfaction with the findings and award does not show an abuse of discretion by the trial court its finding that the monies were marital property. *Hall v. Hall*, 858 P.2d 1018 (Utah Ct App. 1993). *Childs v. Childs*, 967 P.2d 942 (Utah Ct. App. 1998), cert. denied, 982 P.2d 88 (Utah 1999). *Turner, id.*; *Argyle, id.*

The appellant has wholly failed to make even a minimal effort to marshal the evidence in support of the trial court's findings and has made no effort to demonstrate that the trial court's decision was clearly erroneous. The appeal upon this issue is frivolous and without merit. The trial court's findings and award of the joint American Funds account should be affirmed. Judith Wanda Lowry should be awarded her costs and attorney fees incurred upon this appeal pursuant to Rule 33, of the Utah Rules of Appellate

Procedure. *Eames v. Eames*, 735 P.2d 395 (Utah Ct. App. 1987); *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct. App. 1989).

THE APPELLANT HAS FAILED TO MARSHALL THE EVIDENCE AND SHOW THE FINDINGS AND DECISION ARE CLEARLY ERRONEOUS. THE TRIAL COURT DID NOT ABUSE IT'S DISCRETION IN THE DIVISION OF PERSONAL PROPERTY AND MARITAL DEBT

The Appellant, Kenneth Ray Lowry, challenges the trial court's division of certain items of personal property and debt. He challenges the award to Judith Lowry of one-half (1/2), of the value of the funds in the State Bank of Southern Utah, one-half (1/2), of the value of the parties jointly titled 2000 GMC pickup truck, the award of the 2002 Toyota Camry (together with the debt thereon) to Judith, and the insurance proceeds from the crash of the 1997 Cadillac Deville, which were used by Mrs. Lowry as a down payment on the Toyota Camry. He also challenges the order that he pay the only debt of the parties', the GMC credit card, which was used for family and household expenses.

The appellant does not challenge the trial court's findings of fact and he only makes a cursory attempt to marshal the evidence in support of the

trial court's award division of the personal property and debt. *Hall v. Hall*, 858 P.2d 1018 (Utah Ct. App. 1993).

Not only does the appellant not challenge the trial court's factual findings in support of the disposition of the personal property and debt, he fails to marshal "every scrap of competent evidence" in the record in support of the trial court's decision dividing the personal property and debt and "ferret out a fatal flaw in the evidence," and demonstrate how the trial court's disposition of the property and debt is "clearly erroneous." *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991). *See also, McPherson v. Belnap*, 830 P.2d 302, 305 (Utah App. 1992)(appellant failed to demonstrate, after marshaling the evidence, that the trial court's findings were clearly erroneous), and *Stewart v. Board of Review*, 831 P.2d 134, 138 ((Utah App. 1992)(Once the evidence is listed or marshaled with appropriate citation to the record, the appellant must then demonstrate that the marshaled evidence is legally insufficient to support the findings when viewing the evidence and inferences in a light most favorable to the decision).

Importantly, the both the Respondent and the Petitioner presented extensive testimony and evidence to the trial court at trial upon the disposition of the personal property and debt. He made no claim for personal property at the time of trial (*Tr. 5-9, 27, 30, 43-45, 45-50, 50-60*) .

Moreover, the trial court was cognizant of many other facts in the record, not listed or marshaled by Mr. Lowry in his brief, which supported the trial court's division of the marital assets and debt. For example, the length of the marriage (*Tr. 10*), Judith Lowry's monthly living expenses and income (*Tr. 10-11, Petitioner's Exhibits 27, 12*), Mr. Lowry's medical condition (*Tr. 11, 22-26*), Mr. Lowry's social security income (*Tr. 11, 27*), Mr. Lowry's Century 21 income (*Tr. 12, 22, 27, Exhibits 10, 18, 31*), Mr. Lowry's other recent income (*Exhibit 8*), the retirement which had not been distributed (*Tr. 15-16*), Mrs. Lowry's total disability and extensive medical problems (*Tr. 18-22, Exhibit 6*), Mr. Lowry's expenses, debts and obligations (*Tr. 27-28, Exhibits 13, 19, 24, 28*), the crash of the 1997 Cadillac, the purchase of and debt upon the 2002 Toyota Camry by using the insurance proceeds as a down payment thereon, and the commingling of the inherited funds the Appellant contends were used to purchase the jointly

titled 1997 Cadillac. (*Exhibits 7, 21, 28, 27, 29, 30; Tr. 95-97*). It was within the trial court's discretion to divide the personal property and debts in the fashion that it did.

The appellant merely presents a few selected facts in support of his own position omitting many facts supporting the trial courts disposition of the personal property and the single debt, the GMC credit card. The appellant has not properly marshaled, "in comprehensive and fastidious order, every scrap of competent evidence" introduced at trial which supports the very findings the appellant resists. *West Valley City v. Majestic Inv. Co.*, *id.*

Just as importantly, the appellant has failed to demonstrate that the trial court's findings and decision were clearly erroneous, or otherwise legally insufficient, when viewing the evidence and inferences in a light most favorable to the decision. *Stewart*, *id.*; *McPehrson*, *id.*

"The trial court in a divorce action is permitted considerable discretion in adjusting the financial and property interests of the parties, and its actions are entitled to a presumption of validity." *Savage v. Savage*, 658

P.2d 1201, 1203 (Utah 1983); *Turner v. Turner*, 649 P.2d 6 (Utah 1982).”
Argyle v. Argyle, 688 P.2d 468, 470 (Utah 1984).

All of the trial court’s findings of fact and the evidence presented at trial support the disposition of the personal property and debt. (*Tr.* 27, 30, 43-45, 45-50, 50-60). The trial court considered and addressed the facts in the record and made the required findings necessary in disposing of the personal property and debt. The trial court was cognizant of and considered the trial testimony and each parties’ positions respecting the division of personal property and the single debt of the parties. Mr. Lowry’s argument based upon nothing more than his mere dissatisfaction with the award does not show an abuse of discretion by the trial court dividing the marital assets and debt. *Hall v. Hall*, 858 P.2d 1018 (Utah Ct App. 1993). *Childs v. Childs*, 967 P.2d 942 (Utah Ct. App. 1998), cert. denied, 982 P.2d 88 (Utah 1999). *Turner, id.*; *Argyle, id.*

The appellant has wholly failed to make even a minimal effort to marshal the evidence in support of the trial court’s findings and has made no effort to demonstrate that the trial court’s decision was clearly erroneous.

The appeal upon this issue is frivolous and without merit. Judith Lowry was

awarded nothing more than one-half (1/2), of the value of the marital assets.

The trial court's division of the marital assets and debt should be affirmed.

Judith Wanda Lowry should be awarded her costs and attorney fees incurred upon this appeal pursuant to Rule 33, of the Utah Rules of Appellate

Procedure. *Eames v. Eames*, 735 P.2d 395 (Utah Ct. App. 1987); *Maughan v. Maughan*, 770 P.2d 156 (Utah Ct. App. 1989).

CONCLUSIONS

The appellant has wholly failed to make even a minimal effort to marshal the evidence in support of the trial court's findings and has made no effort to demonstrate that the trial court's decision was clearly erroneous. The appeal upon this issue is frivolous and without merit. The trial court's award of attorney fees and costs to Judith Wanda Lowry should be affirmed. Judith Wanda Lowry should be awarded her costs and attorney fees incurred upon this appeal pursuant to Rule 33, of the Utah Rules of Appellate Procedure.

Mr. Lowry had his days in court. His objections were repeatedly considered by the trial court and ruled upon thrice. He has not established that he was deprived of a single item of his property. Mr. Lowry was

afforded, and re-afforded, due process of law. The trial court had heard his position at trial, twice considered his objections to the findings, orders and judgments and made modifications and revisions thereto based upon his objections.

Mr. Lowry's argument that his right of due process under Article I, Section 7, of the Constitution of Utah and Rule 7, of the Utah Rules of Civil Procedure is without merit and is frivolous. He cites no facts and no authority nor makes an argument in his brief in support of his position. Judith Wanda Lowry, should be awarded her costs and attorney fees upon this appeal pursuant to Rule 33, of the Utah Rules of Appellate Procedure. The Findings of Fact, Conclusions of Law, Orders and Judgments of the trial court should be affirmed.

All of the trial court's findings of fact and the evidence presented at trial support the valuation and disposition of the marital residence. The trial court considered the facts in the record and made the required findings necessary in valuing and disposing of the marital residence. The trial court was cognizant of and considered the trial testimony about the value of the marital residence. Mr. Lowry's argument based upon nothing more than his

mere dissatisfaction with the award does not show an abuse of discretion by the trial court valuing and dividing the marital residence.


The appellant has wholly failed to make even a minimal effort to marshal the evidence in support of the trial court's findings and has made no effort to demonstrate that the trial court's decision was clearly erroneous. The appeal upon this issue is frivolous and without merit. The trial court's valuation and division of the marital residence should be affirmed. Judith Wanda Lowry should be awarded her costs and attorney fees incurred upon this appeal pursuant to Rule 33, of the Utah Rules of Appellate Procedure.

All of the trial court's findings of fact and the evidence presented at trial support the findings and the disposition of the joint American Funds account. The trial court considered and addressed the facts in the record and made the required findings necessary in determining whether the account had been commingled and had become marital property. The trial court was cognizant of and considered the trial testimony about the parties' use of the account. Mr. Lowry's argument based upon nothing more than his mere dissatisfaction with the findings and award does not show an abuse of discretion by the trial court its finding that the monies were marital

property. The appellant has wholly failed to make even a minimal effort to marshal the evidence in support of the trial court's findings, and he has made no effort, and failed to demonstrate that the trial court's decision was clearly erroneous. The appeal upon this issue is frivolous and without merit. The trial court's findings and award of the joint American Funds account should be affirmed. Judith Wanda Lowry should be awarded her costs and attorney fees incurred upon this appeal pursuant to Rule 33, of the Utah Rules of Appellate Procedure.

The appellant has wholly failed to make even a minimal effort to marshal the evidence in support of the trial court's findings and has made no effort to demonstrate that the trial court's decision was clearly erroneous. The appeal upon this issue is frivolous and without merit. The trial court's division of the marital assets and debt should be affirmed. Judith Wanda Lowry should be awarded her costs and attorney fees incurred pursuant to Rule 33, of the Utah Rules of Appellate Procedure.


RESPECTFULLY SUBMITTED this 28th day of September, 2006.



ANDREW B. BERRY, JR.,
Attorney for Petitioner and Appellee,
Judith Wanda Lowry

CERTIFICATE OF SERVICE AND MAILING

I HEREBY CERTIFY that on this 28th day of September, 2006, I served upon and mailed, postage prepaid and by first class mail, two true and correct copies of the foregoing Appellee's Brief, to Reed R. Braithwaite, of Ascione, Heideman & McKay, LLC, attorneys for Respondent and Appellant, Kenneth Ray Lowry, at 50 East 100 South, Suite 101, St. George, Utah 84770.



In Lowry v. Lowry,
File the Order dated 8 Nov 05.
Send the Original Findings
w/ my edits and yellow sheet
to Mr. Berry with a copy
of it all to Mr. Kuhlman.
Mr. Berry is to prepare the
final Findings & Decree and
submit them under the rules
the 1 Nov 05 "Exhibit No. I" is
to be filed with the other
Exhibits. Copy this note
to each counsel.

8 Nov 05

ANDREW B. BERRY, JR. USB #0309
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Moroni, Utah 84646-0600
Telephone: 435 436-8200

IN THE FIFTH JUDICIAL DISTRICT COURT FOR WASHINGTON COUNTY

STATE OF UTAH

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JUDITH WANDA LOWRY,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW
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 ~~income from investments~~ *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, ~~he~~ ~~remains gainfully employed~~. 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 ~~adjusted gross monthly income is Four Thousand Five Hundred Dollars (\$4,500.00), each year.~~ *earning capacity is limited by his health status. (see yellow sheet)*

~~The Respondent submitted his Exhibit 19, which purported to itemize his employment expenses. The Respondent testified that the expenses listed on Exhibit 19, were for the years 2003, 2004 and 2005, and that some of the expenses listed were paid by Century 21. Several other expenses were one-time costs such as a laptop computer and automobile repairs to his vehicle which he uses both for employment and personal use. Many other expenses were listed more than once or were duplicated (such as tax payments and auto~~

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 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 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~~ either party may bring this issue back to the Court or

~~repairs.) The Respondent also listed as an expense on Exhibit 19,~~
the spousal support he has been paying the Petitioner since the
entry of the Temporary Order in this action.

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} ~~the~~ ability to pay said sum as spousal support from his ~~Social Security and investment income and from his employment income at Century 21.~~ The Petitioner is entitled to maintain the standard of living to which the parties have become accustomed ^{because} and this is a long-term marriage. The Petitioner should be awarded ^{temporary} ~~permanent~~ spousal support which should be paid by the Respondent in the sum ^{One Thousand Dollars (1,000.00)} ~~Two Thousand Dollars (\$2,000.00)~~, per month on the 1st day of each month hereafter and said sum is to be paid from and after ^{November} ~~March 1, 2005, the day of trial,~~ 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 ~~\$15,257.69~~ ^{\$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

*In accord w/
Findings*

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 income from investments 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.

7. The Respondent has had heart surgery and has had stints placed in his heart several years ago and has other medical problems but remains gainfully employed. 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 Respondent submitted his Exhibit 19, which purported to itemize his employment expenses. The Respondent testified that the expenses listed on Exhibit 19, were for the years 2003, 2004 and 2005, and that many of the expenses listed were paid by Century 21. Several other expenses were one-time costs such as a laptop computer and automobile repairs to his vehicle which he uses both for employment and personal use. Many other expenses were listed more than once or were duplicated (such as tax payments and auto repairs.) The Respondent also listed as an expense on Exhibit 19, the spousal support he has been paying the Petitioner since the entry of the Temporary Order in this action. The Respondent's adjusted gross monthly income is Four Thousand Five Hundred Dollars (\$4,500.00), per month.

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 the ability to pay said sum as spousal support from his Social Security and investment income and from his employment income at Century 21. The Petitioner is entitled to maintain the standard of living to which the parties have become accustomed and this is a long-term marriage. The Petitioner should be awarded permanent spousal support which should be paid by the Respondent in the sum Two Thousand Dollars (\$2,000.00), 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 March 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. 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 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 \$15,257.69, 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 ____ day of August, 2005.

BY THE COURT:

HONORABLE JAMES L. SHUMATE,
Fifth Judicial District Court

CERTIFICATE OF SERVICE AND MAILING

I HEREBY CERTIFY that on this 17th day of August, 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.

