

1995

Mary Elizabeth Colburn v. James Robert Colburn : Brief of Appellant

Utah Court of Appeals

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STATE OF UTAH

COURT OF APPEALS

BRIEF OF APPELLANT

Honorable Glenn K. Iwasaki
District Court Judge

**UTAH COURT OF APPEALS
BRIEF**

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IN THE COURT OF APPEALS

STATE OF UTAH

MARY ELIZABETH COLBURN,)	
Plaintiff and Respondent,)	Case No. 950225 CA
vs.)	
JAMES ROBERT COLBURN,)	Priority No. 15
Defendant and Appellant.)	

BRIEF OF APPELLANT

Appeal from Judgment
Entered in the Third Judicial District Court
for Summit County, State of Utah

Honorable Glenn K. Iwasaki
District Court Judge

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JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to §78-2a-3(2)(i) Utah Code Annotated 1953, as amended.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the trial court properly impute income to Mr. Colburn of \$40,000 per year for purposes of computing alimony when there were no jobs available in the aviation insurance business, the highest job offer received outside his field of expertise was \$23,000 per year and working as a certified financial planner represented the most lucrative long-term employment reasonably available? Reviewed to determine if abuse of discretion in applying appropriate legal standards. Hall v. Hall, 858 P.2d 1018, 1021 (Utah App. 1993).

2. Did the trial court properly award alimony to Mrs. Colburn of \$1,000 per month for five years and \$500 per month thereafter where Mrs. Colburn's monthly income is \$3,092.00 more than Mr. Colburn's actual monthly income and only \$35.00 less than Mr. Colburn's monthly income using imputed earnings of \$3,333 per month? Reviewed to determine if abuse of discretion in applying appropriate standards. Johnson v. Johnson, 855 P.2d 250, 251-52 (Utah App. 1993); Bell v. Bell, 810 P.2d 489, 491-92 (Utah App. 1991).

3. Did the trial court properly award Mrs. Colburn 34% of Mr. Colburn's Navy retirement benefits based on years of marriage rather than 19.5% based on the point system utilized by the Navy? Reviewed for correctness without any special deference. Bingham v.

Bingham, 872 P.2d 1065, 1067 (Utah App. 1994); Smith v. Smith, 793 P.2d 407, 409 (Utah App. 1990).

CONSTITUTIONAL PROVISIONS

None.

STATUTES

Section 30-3-5(7)(a)(b)(c) U.C.A. 1953, as amended.

(a) The court shall consider at least the following factors in determining alimony:

(i) the financial condition and needs of the recipient spouse;

(ii) the recipients' earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support; and

(iv) the length of the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (a). However the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

Section 78-45-7.5(7) U.C.A. 1953, as amended.

(a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.

(b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community.

RULES

None.

STATEMENT OF THE CASE

On May 12, 1994, Mary Elizabeth Colburn (hereinafter "Mrs. Colburn") filed an action in the District Court of Summit County, Utah, seeking a divorce from James Robert Colburn (hereinafter "Mr. Colburn").

On September 14, 1994, the case was tried without a jury before the Honorable Glenn K. Iwasaki.

On March 3, 1995, the court executed the Findings of Fact and Conclusions of Law and Decree of Divorce after having resolved post-trial issues primarily relating to the language to be included in the Findings of Fact and Conclusions of Law and Decree of Divorce.

STATEMENT OF THE FACTS

1. The parties were married on September 1, 1973, in San Francisco, California. (R. 212, ¶ 2 FOF).

2. The parties have two children born as issue of the marriage, Michelle Renee Colburn who was born March 19, 1977 and James Andrew Colburn who was born on April 12, 1983. (R. 212, ¶ 4 FOF).

3. Mr. Colburn is a former aviation underwriter having worked for National Aviation Underwriters from 1971 through February, 1988 and Southern Marine and Aviation Underwriters from May, 1988 until July 1, 1992. (Tr. 77,83,85,90).

4. Mr. Colburn lost his employment at both National Aviation Underwriters and Southern Marine and Aviation Underwriters when both companies downsized as a result of the contracting aviation

underwriting business. (Tr. 83-84, 88; R. 212, ¶ 6 FOF).

5. Mr. Colburn's earned income for the six years prior to trial was as follows:

1989	\$117,980
1990	\$129,802
1991	\$140,585
1992	\$126,286
1993	\$ 0
1994	\$ 0

(Defendant's Exhibit 27; R. 212, ¶ 7 FOF).

6. Mr. Colburn attempted to locate employment as an executive in the aviation insurance industry for approximately six months after losing his job at Southern Marine and Aviation Underwriters in July, 1992. In this regard, he contacted headhunters but nobody wanted to pick up aviation executives because it was a dying industry; he contacted all of his previous contacts; and he contacted six or seven companies in the aviation industry and there was no employment options for senior aviation insurance underwriters. (Tr. 93,96,97; R. 212, ¶ 8 FOF).

7. Mr. Colburn considered going into other areas of insurance other than aviation. However, there were no jobs available in the Marine Division of Southern Marine and Aviation Underwriters and New York Life started agents at \$13,000 per year. The best offer Mr. Colburn received was selling financial products/insurance for IDS at \$23,000 per year. (Tr. 90,98; R. 212, ¶ 8 FOF).

8. In 1986, Mr. Colburn started working toward obtaining a certified financial planner (CFP) designation as his second career because he foresaw huge cutbacks in the aviation insurance business

as a result of product liability suits, low premiums and substantial decreases in the production of new aircraft. (Tr. 79-82; R. 213, ¶ 9 FOF).

9. In June, 1993, the parties moved to Park City, Utah to pursue Mr. Colburn's financial planning business. (Tr. 102).

10. In August, 1993, Mr. Colburn started Summit Financial Advisors Group, Inc.. (Tr. 102).

11. Mr. Colburn had no earnings in 1993 and the parties lived off their substantial savings. (Tr. 104; Defendant's Exhibit 27).

12. At the time of trial, Mr. Colburn was earning \$264.00 per month as a certified financial planner. (R. 211, ¶ 5 FOF).

13. At the time Mr. Colburn chose to become a certified financial planner the parties realized it would take four to five years to establish a secure and profitable business. (Tr. 105; R. 213, ¶ 11 FOF).

14. At the time of trial Mr. Colburn was fifty-one years of age. He is in good health, has a college education and job skills from employment in the insurance industry that can be transferred to different or other fields of employment. (Tr. 75; R. 213, ¶ 10 FOF).

15. The Court determined that Mr. Colburn was voluntarily underemployed as a certified financial planner and determined that he could earn a minimum salary of \$40,000 per year should he choose to remedy his voluntary underemployment based on his work history, historical income, occupational qualifications, prevailing earnings of people with similar backgrounds in the community and the

testimony of experts. (R. 213, ¶ 12 FOF).

16. At the time of trial, Mrs. Colburn was forty-two years of age. She is in good health, has a college education and secure employment as a registered nurse at a salary of \$2,900.00 per month. (Tr. 35; R. 213, ¶ 13 FOF).

17. During the marriage the parties acquired Non-IRA assets totaling approximately \$450,000 and IRA assets totalling approximately \$608,000 which by stipulation of the parties was divided equally between them. (R. 214,219, ¶ 15,35 FOF).

18. The Court determined that a reasonable expected rate of return on the above referenced non-IRA funds is six percent per annum. Accordingly, each party was attributed \$1,125.00 in interest on their non-IRA funds to be added to their incomes in calculating child support. (R. 214, ¶ 16 FOF).

19. Mr. Colburn is the owner of an additional ULTRA investment account which he acquired via an inheritance from his father. At the time of trial, the account was valued at \$61,220.67. The imputed rate of return on that account at six percent per annum is \$306.10 which amount is added to Mr. Colburn's income for purposes of calculating child support. (R. 214, ¶ 17 FOF).

20. Exclusive of alimony, Mrs. Colburn has income of \$4,729.00 per month (\$2,900 employment; \$1,125 non-IRA earnings; \$704 child support). (R. 213,214,215, ¶ 13,16,18 FOF).

21. Mrs. Colburn's monthly expenses total \$3,906.30 which include \$600 for entertainment, \$350 for schooling, \$1,500 rent and

\$200 auto expense associated with the 1993 Subaru vehicle. (Plaintiff's Exhibit 7).

22. Mr. Colburn has actual income of \$1,695.00 per month (\$264 employment; \$1,125 non-IRA earnings and \$306 ULTRA earnings). (R. 211,214, ¶ 5,16,17 FOF).

23. Mr. Colburn's monthly expenses total \$2,179.00 which include \$400 for rent, \$200 for entertainment and \$150.00 for auto expenses associated with a 1982 Volvo. (Defendant's Exhibit 28 with adjustments set forth in Point II).

24. Mrs. Colburn has a positive cash flow of \$823.00 each month without receiving the \$1,000.00 per month alimony awarded by the Court. (R. 213,214,215, ¶ 13,16,18 FOF; Plaintiff's Exhibit 7).

25. Mr. Colburn has a negative cash flow of \$484.00 each month without paying the \$1,000 per month alimony award ordered by the Court. (R. 211,214, ¶ 5,16,17 FOF; Defendant's Exhibit 28).

26. When alimony is factored into the calculations, Mrs. Colburn's positive cash flow for the first five years after divorce increases to \$1,823.00 each month and Mr. Colburn's negative cash flow will increase to \$1,484.00 per month. (R. 211,213,214,215,216, ¶ 5,13,16,17,18,22 FOF).

27. Mr. Colburn was on active duty with the United States Navy during the years 1965 through 1969 and on inactive duty thereafter until March 31, 1987. (Defendant's Exhibit 20).

28. Mr. Colburn has retirement benefits from his service in the United States Navy which utilizes a point system to determine

retirement benefits. Mr. Colburn earned 1,470.00 of his total retirement points of 2,409 prior to his marriage to Mrs. Colburn. (Defendant's Exhibit 20).

29. The Court granted Mrs. Colburn 34% of Mr. Colburn's Navy retirement based on the years of marriage rather than 19.49% which reflects the point system calculated by the Navy for awarding retirement benefits. (Defendant's Exhibit 20; R. 217, ¶ 29 FOF).

SUMMARY OF ARGUMENTS

I. The trial court improperly imputed income to Mrs. Colburn. The statute, 78-45-7.5(7)(a) U.C.A. 1953, as amended, specifically requires as a threshold matter that there be a determination of voluntary unemployment or underemployment before the Court can impute income. Mr. Colburn's diminished income level did not result from personal preference or voluntary decision, but rather from events beyond his control in the aviation underwriting industry. Despite his diligent efforts, the highest job offer Mr. Colburn was able to secure was \$23,000 per year selling financial products/insurance for IDS. Accordingly, the decision to start a financial planning business in Park City, Utah using Mr. Colburn's CFP training and contacts was a prudent business decision and does not constitute voluntary underemployment.

II. The trial court abused its discretion in awarding alimony to Mrs. Colburn where her monthly income is \$3,092.00 more than Mr. Colburn's actual monthly income and only \$35.00 less than Mr. Colburn's monthly income using imputed earnings for Mr. Colburn of \$3,333 per month. This abuse of discretion is further evidenced by

the fact Mrs. Colburn has a positive monthly cash flow of \$823.00 and Mr. Colburn has a negative monthly cash flow of \$484.00 without an alimony award. When alimony is factored into the calculations, Mrs. Colburn's positive monthly cash flow increases to \$1,823.00 each month and Mr. Colburn's negative cash flow increases to \$1,484.00 per month.

III. The trial court improperly awarded Mrs. Colburn 34% of Mr. Colburn's Navy retirement benefits based on years of marriage rather than the point system utilized by the United States Navy. Mr. Colburn accrued approximately 62% of his retirement benefits prior to marriage and Mrs. Colburn is only entitled to 50% of the retirement benefits actually earned during the marriage.

ARGUMENT

POINT I.

THE TRIAL COURT IMPROPERLY IMPUTED INCOME TO MR. COLBURN OF \$40,000.00 PER YEAR FOR THE PURPOSES OF COMPUTING ALIMONY INASMUCH AS THERE WERE NO JOBS AVAILABLE IN THE AVIATION INSURANCE BUSINESS, THE HIGHEST JOB OFFER RECEIVED OUTSIDE OF THE AVIATION INSURANCE INDUSTRY WAS \$23,000 PER YEAR AND WORKING AS A CERTIFIED FINANCIAL PLANNER REPRESENTED THE MOST LUCRATIVE EMPLOYMENT REASONABLY AVAILABLE.

Utah law requires that before a court may impute income there must be a finding of voluntary unemployment or underemployment. Section 78-45-7.5(7)(a) provides:

Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.

While the foregoing statute refers to a "parent", the above statute has been used in numerous cases as it pertains to imputation of income for the purposes of both child support and

alimony.¹ See Hall v. Hall, supra, Bell v. Bell, supra, and Willey v. Willey, 866 P.2d 547 (Utah App. 1993).

The issue of voluntary underemployment has been addressed by the appellate courts in the State of Utah on numerous occasions. In Hall v. Hall, supra, the husband was employed as a computer consultant and software developer and had earnings in excess of \$100,000 per year for the years 1988, 1989 and 1990. Approximately ten days before trial, the husband started a new job in Washington at a salary of \$40,000 per year. The husband argued that his diminished income level resulted not from his personal preference or voluntary decision, but because his former clients did not renew lucrative consulting contracts and the \$40,000.00 per year job was the only employment available. The trial court based its child support and alimony rulings on the husband's historical income rather than his income at the time of trial. The husband appealed on the basis that he was not voluntarily underemployed as required by the above quoted statute. The Court of Appeals reversed the trial court's decision that the husband was underemployed and remanded the case back to the trial court. In addressing the underemployment issue, the court stated:

A finding that appellant was voluntarily underemployed cannot properly be implied in this case. Although the trial court found that appellant is currently earning less than he was previously, that isolated findings does not answer the critical question of whether the drop in earnings was voluntary. Rather, appellant's current

¹Mr. Colburn is not appealing the trial court's child support award even though it is based on imputed income. This appeal relates solely to imputing income for purposes of calculating the alimony award.

earnings, as compared to his historical income, is merely one element in the matrix of factual issues affecting the ultimate finding of whether appellant is underemployed. Many critical questions are left unanswered: What are appellant's abilities? Is appellant's current salary below the prevailing market for a person with his abilities? Are there any job openings for a person with appellant's abilities? At a minimum, the trial court must determine appellant's employment capacity and earnings potential - which it failed to do even in its determination of the amount to impute under section (7)(b) - before it could logically conclude that he is, in fact, underemployed. Inasmuch as there are no subsidiary findings showing that the trial court actually found that a person with appellant's abilities could be earning more in the relevant market, we cannot imply a finding that appellant is underemployed. We accordingly reverse the trial court's determination that appellant is underemployed and remand for evaluation of that issue and the entry of appropriate findings. 858 P.2d at 1026

In Bell v. Bell, supra, the trial court imputed a \$1,500 income to Mrs. Bell despite undisputed testimony that she earned \$863 per month as a part-time teaching assistant at Utah State University. The imputed income was based on the level she had previously earned as a full-time school teacher in another state approximately two years before she filed for divorce. The court noted that no explanation was offered for this unusual income adjustment and remanded the case back to the trial court for additional findings on the alimony issue.

Similarly, in Willey v. Willey, supra, the trial court first imputed income to the wife based on full-time employment at her current wage of \$860.00 per month and then, without any factual basis, speculated that she could raise her income to \$1,500 to \$2,000 per month. In holding the imputation of income was an abuse of discretion, the court stated:

We do not question the trial court's authority to impute

income to Mrs. Willey. Imputing income to an unemployed or underemployed spouse when setting an alimony award is conceptually appropriate as part of the determination of that spouse's ability to produce a sufficient income. However, it cannot be premised upon mere conjecture; instead, it demands a careful and precise assessment requiring detailed findings....

In the case at bar, there is an insufficient basis for the court to determine that Mr. Colburn is voluntarily underemployed. The aviation insurance business has been a contracting industry for years. Debbie Valline, who to her knowledge operates the only exclusive aviation insurance underwriting business in the State of Utah, testified she was forced due to the nature of the business to fire all her employees and operate her business from her home. (Tr. 66,67) With regard to the state of the aviation insurance industry, Debbie Valine testified:

Q: Since 1971 when you first started, have you seen any changes in the aviation underwriting business?

A: A lot.

Q: And what are the major changes that you have seen?

A: Has decreased tremendously.

Q: And decreased in what respect?

A: Premiums have dropped, and there isn't as much aviation business out there. Just really a depressed market.

Q: When did the premiums start to drop?

A: Let's see, about 10 years ago they took a 60 percent drop in one year.

Q: What have they done since that time?

A: Have been going down steadily ever since.

Q: What about the number of companies? What is your awareness of the number of companies involved in aviation underwriting?

A: The companies have decreased also.

Q: And do you have an opinion as to what has caused that?

A: A lot of it is they haven't made any airplanes for about 15 to 18 years now, and so there isn't any new business coming into the market when all we are doing is taking business away from each other. (Tr. 64,65)

Mrs. Valline further testified that she could not hire Mr. Colburn even with his experience. Further, if she was able to hire Mr. Colburn it would be based primarily on a commission inadequate for Mr. Colburn to support his family. (Tr. 67,68)

Mr. Colburn also testified to the depressed state of the aviation insurance industry. Using the records put out by the General Aviation Manufacturers Association, Mr. Colburn testified that the production of planes have dropped from a high of 17,811 new aircraft in 1978 to a low of 941 in 1992. (Defendant's Exhibit 9) He also testified when he started in the aviation insurance business in 1971 there were 42 or 43 companies. In 1986 the number of companies had been reduced to 15. (Tr. 79) The reason attributed by Mr. Colburn for this dramatic decrease was products insurance unlimited liability by the manufacturers resulting in no new aircraft being produced thereby causing reduction of insurance premiums. (Tr. 81)

When Mr. Colburn was asked to resign from Southern Marine and Aviation there were simply no other jobs available anywhere in the aviation insurance business. Mr. Colburn's letter of resignation was forced upon him in order for him to get a positive recommendation for future employment and receive insurance and severance pay for four months. Mr. Colburn testified that he

attempted to secure work for six months both inside and outside of the aviation insurance business. With no other opportunities available, Mr. Colburn moved to Park City with his family to start a financial planning business.

The trial court found that there were no jobs available to Mr. Colburn as a result of the contracting aviation underwriting industry. (R. 212, ¶ 8 FOF). However, the court also found that Mr. Colburn with his education and experience as a high level executive in the insurance industry and an officer in the United States Navy had acquired qualification skills to be transferred to different or other fields of employment. (R. 213, ¶ 10 FOF). The only testimony presented in this regard was the testimony of Connie Romboy, a Rehabilitation/Employment Specialist of The Career Guidance Center. Ms. Romboy admitted that her company primarily deals with dislocated, disabled individuals, minorities and youth. While she testified she had a private case load, she has never represented anyone in the aviation underwriting business or any pilots. (Tr. 121) Her only experience with executives in the insurance business was one insurance executive from Connecticut Mutual. (Tr. 123) She further admitted that she had never represented a certified financial planner. (Tr. 125)

The court recognized the insufficient qualifications of Ms. Romboy as evidenced by the following statement:

THE COURT: Okay. Let me stop you there, Ms. Romboy. Objection is sustained as to her opinion relative to the basis of his employment that being as an underwriting both specifically as National Aviation Underwriter and Southern Maine Underwriters. Voir dire indicates that she does not have the -- in my opinion the necessary

contact and/or experience as to those particular areas in which to opine what available employment would be -- alternative available would be for the defendant in this matter.

However, I will let you pursue the aspect of a CFP. I believe that foundation has been established for her to opine as to her, number one, alternative employment opportunities and she has indicated a familiarity and studies in the area of CFPs and stocks. I will allow you to pursue that. (Tr. 126, 127)

After objection by Mr. Colburn's attorney regarding the issue of the transferability of skills, the court further stated:

THE COURT: Well, she cannot testify as to any insurance because she has no background there as to general aviation. I have allowed her to talk in terms of transferability as to -- and the relationship as to certified financial planners.

Let me ask Ms. Romboy, how many different categories did you examine for specific transferability?

THE WITNESS: Excuse me for that pause there. Basically I took a look at two of them.

THE COURT: Two of them? Which two were they?

THE WITNESS: They are a marketing and public relations manager and also management consultant.

THE COURT: And as to those areas I will allow her to give the low and high range. (Tr. 142)

Connie Romboy then testified that the public relations manager should earn between \$36,000 and \$52,000 per year and that while there is no high range for management consultants fifty percent of management consultants earn from \$24,900 to \$51,000 per year. (Tr. 142, 143)

It is difficult to imagine that Mr. Colburn who spent twenty years in the aviation underwriting business could qualify for a job as a public relations manager or management consultant. On cross

examination, Ms. Romboy conceded the following: Just because there are people who are making money within the salary ranges quoted does not necessarily mean there is a job opening at that salary (Tr. 144); In Utah wages are reduced by approximately five percent (Tr. 144); when placing individuals for employment you should consider not only the short term but the long term (Tr. 134); someone in the service industry such as a financial planner takes a few years to develop the type of contacts needed to make an average salary (Tr. 134); A person is not "underemployed" because they decide to become a school teacher instead of a financial planner even though their income is substantially less (Tr. 133); If Mr. Colburn was her client and unable to locate employment as an aviation underwriter, senior executive, she would consider financial planning to be a good field for him to pursue (Tr. 133).

Assuming for the purpose of argument that this court determines Mr. Colburn is voluntarily underemployed, there is no basis for the trial court ruling that Mr. Colburn's income be imputed at \$40,000 per year. The statute relating to the amount of imputed income is 78-45-7.5(7)(b) which provides:

If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community.

As set forth in the testimony of Debbie Valline, Connie Romboy and James R. Colburn, there is no market either locally or nationally for an aviation insurance underwriter. Ms. Romboy testified that Mr. Colburn has job skills and education which could

be transferred to other employment such as a co-pilot (average salary \$28,000-30,000) marketing public relations (average salary \$36,000-\$52,000), or management consultant (average salary \$24,900-\$51,000). However, there was no evidence that jobs were available in these areas especially for Mr. Colburn who is fifty-one years of age and without experience in these fields. In fact, Mr. Colburn specifically testified that he sought employment in non-aviation insurance fields and received only two job offers at \$13,000 and \$23,000 per year. Mr. Colburn testified he could earn \$10.00 per hour working for another financial planner and Connie Romboy testified that a beginning financial planning consultant would earn \$28,000 per year nationally or \$26,600 in the State of Utah. (Tr. 128, 156) Accordingly, if there is a basis to impute income in this case it should only be at a maximum of \$26,600 per year. However, there is no evidence that such jobs are available and Mr. Colburn has a better future owning and operating his own financial planning business.

POINT II.

THE TRIAL COURT IMPROPERLY AWARDED
ALIMONY TO MRS. COLBURN WHETHER OR
NOT INCOME IS IMPUTED TO MR. COLBURN.

In Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985), the Utah Supreme Court set forth the well-settled standard for alimony in Utah. The Court stated:

The most important function of alimony is to provide support for the [spouse] as nearly as possible at the standard of living she [or he] enjoyed during the marriage, and to prevent the [spouse] from becoming a public charge. *English v. English*, 565 P.2d [409] at 411 (Utah 1977)... Three factors... must be considered in

fixing a reasonable alimony award:

[1] the financial conditions and needs of the [spouse seeking support];

[2] the ability of the [spouse seeking support] to produce a sufficient income for [himself or] herself; and

[3] the ability of the [payor spouse] to provide support.

This legal standard has been reiterated by Courts on a regular basis in addressing alimony issues. Bell v. Bell, supra, Thronson v. Thronson, 810 P.2d 428, 435 (Utah App. 1991), Willey v. Willey, supra, Hill v. Hill, 869 P.2d 963 (Utah App. 1993) and Schaumberg v. Schaumberg, 240 Utah Adv. Rep. 11, 12 (1994).

After the trial in this case the 1995 Legislature codified the factors to consider in making an alimony determination. Section 30-3-5(7), Utah Code Annotated 1953, as amended, now provides:

(a) The court shall consider at least the following factors in determining alimony:

(i) the financial condition and needs of the recipient spouse;

(ii) the recipients' earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support; and

(iv) the length of the marriage.

In considering the criteria set forth above, there are compelling reasons why alimony should not have been awarded. Mrs. Colburn is a registered nurse earning \$2,900 per month at the time of trial. Exclusive of alimony, Mrs. Colburn has income of \$4,729 per month (\$2,900 employment; \$1,125 non-IRA earnings; \$704 child support). Her monthly expenses as set forth on her Financial Declaration dated August 16, 1994, which was introduced as Plaintiff's Exhibit 7 at trial lists her monthly expenses at

\$3,906.30.

In contrast, Mr. Colburn has actual earnings of \$1,695.00 per month (\$264 employment; \$1,125 non-IRA earnings and \$306 ULTRA earnings). Mr. Colburn's monthly expenses as set forth in his Financial Declaration dated August 19, 1994 which was introduced as Defendant's Exhibit 28 at trial total \$2,802.00. However, by adding an additional \$177.00 per month in child support to arrive at the court ordered total of \$704.00 and reducing expenses by \$800 for costs associated with Summit Financial Advisors Group, Mr. Colburn's total monthly expenses total \$2,179 without an alimony payment. These monthly expenses include: \$400 for rent, as opposed to Mrs. Colburn's \$1,500 rental obligation; \$200 for entertainment compared to Mrs. Colburn's \$600 per month entertainment allowance; and \$150.00 for auto expenses associated with a 1982 Volvo which is \$50 less than Mrs. Colburn's auto expense for her 1993 Subaru.

Based on the foregoing income and expense calculations, Mrs. Colburn has a positive cash flow of \$823.00 and Mr. Colburn has a negative cash flow of \$484.00 without taking into consideration the alimony ordered by the court. When alimony is factored into the calculations, Mrs. Colburn's positive monthly cash flow increases to \$1,823.00 each month and Mr. Colburn's negative cash flow increases to \$1,484.00 per month. Even with the court imputed income to Mr. Colburn of \$40,000 per year or \$3,333 per month, Mrs. Colburn's actual monthly income is only \$35 less than Mr. Colburn's monthly income.

The disparity in the respective financial conditions of the parties is magnified when taxes are taken into consideration. As set forth in the Affidavit of James Robert Colburn, he is subject to self employment, federal, state, SUTA and FUTA taxes which total 52.5% (R. 251). Accordingly, Mr. Colburn would have to earn \$80,311.58 per year just to meet his financial obligation of \$3,179 per month or \$38,148 per year (\$80,311.58 Gross Earnings less taxes of \$42,163.57 (52.5%)). (R. 251)

The parties accumulated significant assets during the marriage. As set forth in the Affidavit of James Robert Colburn, dated July 26, 1994, the parties equally divided the non-IRA accounts with each party receiving \$217,415.90. On April 18, 1995, the IRA portfolios were divided with each party receiving \$323,431.91. Accordingly, if Mrs. Colburn needs additional funds outside of her monthly income she has substantial assets to cover any possible reasonable expense. It is manifestly unfair for the court to require Mr. Colburn to deplete these funds each month to pay Mrs. Colburn alimony when she earns \$3,092.00 more than Mr. Colburn's actual monthly income and only \$35.00 less than Mr. Colburn's monthly income using imputed earnings of \$3,333 per month.

It is well established in Utah that alimony awards should to the extent possible equalize the parties' respective standards of living and maintain them at a level as close as possible to that standard of living enjoyed during the marriage. Howell v. Howell, 806 P.2d 1209 (Utah App 1991); Gardner v. Gardner, 748 P.2d 1076,

1081 (Utah 1988); Jones v. Jones, supra; Higley v. Higley, 676 P.2d 379, 381 (Utah 1983).

In Howell, supra, the husband was a pilot for Delta Airlines. At the time of divorce he had a gross monthly income of \$10,120 and monthly expenses of \$7,960. The wife was a homemaker who had worked only part time at unskilled labor jobs. At the time of trial, the wife had a temporary job where she earned \$649.80 per month and her expenses totaled \$5,021. The wife appealed the alimony award on the basis that the court did not properly consider all relevant factors resulting in an unjustifiable low alimony award. After citing the three factors outlined above the court quoted Gardner v. Gardner, supra, for the proposition that the alimony award in a long-term marriage should "to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to that standard of living enjoyed during the marriage". 806 P.2d at 1212. The Court after analyzing the alimony and child support award determined that when the child support obligation ceases approximately fifteen months after the divorce decree, the husband will have a gross monthly income of \$8,200 in comparison to defendant's gross monthly income of \$2,445. The court concluded:

The alimony set by the court does not come close to equalizing the parties' standard of living as of the time of the divorce, but allows plaintiff a two to four times advantage. We, therefore, hold that the alimony amount set by the court was clearly erroneous. 806 P.2d at 1213

In a footnote to the above language, the court stated:

Exact mathematical equality of income is not required, but sufficient parity to allow both parties to be on

equal footing financially as of the time of the divorce is required. 806 P.2d at 1213.

In Judge Bench's concurring opinion in Howell, he amplified the foregoing statement by indicating the alimony award should not reduce the standard of living of the paying spouse below that of the receiving spouse:

The alimony award, however, need not be large enough to maintain the receiving spouse at the standard of living enjoyed during the marriage if that amount of alimony would lower the standard of living of the paying spouse below that of the receiving spouse. Alimony may only raise the standard of living of the receiving spouse until it is roughly equal to that of the paying spouse. It is in this sense that alimony should seek "to the extent possible, [to] equalize the parties' respective post-divorce living standards." Rasband v. Rasband, 752 P.2d 1331, 1333 (Utah Ct.App.1988) (Emphasis added) 806 P.2d at 1216.

The court addressed the issue of alimony on page 9 and 10 of its ruling, a copy of which is attached hereto as Addendum 1. In reviewing this ruling, it appears that the court based its alimony award on the following three factors: (1) Mrs. Colburn's lack of a marital residence; (2) Mrs. Colburn's pursuit of a PHD degree; and, (3) Length of the marriage.

It is submitted that these factors do not justify the trial court's failure to equalize the parties' respective standard of living. Mrs. Colburn's lack of a marital residence should not be a factor inasmuch as neither party owned a marital residence at the time of the divorce. The real properties owned by the parties were sold during the marriage and the sale proceeds constitute a substantial part of the non-IRA portfolios. Either party has the ability to liquidate their non-IRA portfolio and use all or a

portion of the proceeds to purchase a marital residence. Further, pursuant to the Financial Declarations submitted by both parties, Mrs. Colburn has a \$1,500 per month rental expense whereas Mr. Colburn's rental expense is only \$400. With only a small down payment and a monthly mortgage payment of \$1,500 per month, Mrs. Colburn could purchase a comfortable marital residence. In contrast, Mr. Colburn would have to increase his housing expense by \$1,100 per month to obtain equivalent housing to that of Mrs. Colburn.

Mrs. Colburn's pursuit of a PHD degree does not justify an alimony award in this action. Mrs. Colburn has a college education and is employed in her occupation of choice with a salary of approximately \$35,000 per year. Assuming Mrs. Colburn pursues a PHD degree, the evidence presented at court is that it would be completed on a part-time basis so that her salary would continue. (Tr. 43) The court awarded Mrs. Colburn alimony of \$1,000 per month rather than \$500 per month for the first five years so that Plaintiff can obtain her PHD degree. This results in alimony of \$60,000 over the first five years after the divorce without any evidence that Plaintiff's income would increase with a PHD degree. Mrs. Colburn testified that her \$350.00 per month expense for "school, kids and graduate school" is for "her graduate school, the children's school supplies, books and miscellaneous". (Tr. 42). As set forth in the income and expense figures set forth above, Mrs. Colburn is in a position to cover her graduate school expenses should she desire to pursue the same without alimony payments.

There is no basis for the court to award an extra \$500.00 per month alimony for schooling where the evidence presented is that \$350.00 per month covers not only Mrs. Colburn's graduate school but the children's school supplies, books, etc..

It is submitted that length of marriage has no bearing on alimony in this case. While the parties were involved in a twenty-two year marriage, Mr. Colburn had only been employed at his current occupation for approximately one year as of the date of trial. Mrs. Colburn is ten years younger than Mr. Colburn and she should be able to generate earnings for ten years longer than Mr. Colburn. A long term marriage does not mean alimony should be paid. It only means that if alimony is justified, it should continue for a longer period.

The alimony award in the case at bar does not equalize the parties' respective standards of living. On the contrary, it increases Mr. Colburn's negative cash flow from \$484 to \$1,484 per month and increases Mrs. Colburn's positive cash flow from \$823 per month to \$1,823 per month. A discrepancy of \$3,307 per month or \$39,684 per year without even taking into consideration the tax consequence is clearly unwarranted.

POINT III.

THE COURT IMPROPERLY AWARDED MRS. COLBURN NAVY
RETIREMENT BENEFITS BASED ON YEARS OF MARRIAGE
RATHER THAN THE POINT SYSTEM UTILIZED BY THE NAVY.

Mr. Colburn served in the United States Navy from December 10, 1965 through March 31, 1987. He was on active duty during the first four years and in the Naval reserves thereafter. The United

States Navy utilizes the point system to determine the amount of retirement benefits. At the time of marriage, Mr. Colburn had acquired 1,470 or 61% of 2,409 retirement points accumulated at the time of retirement. The trial court awarded Mrs. Colburn 34% of Mr. Colburn's navy retirement based on the fact the parties were married during 68% of the years Mr. Colburn was acquiring retirement benefits. In so ruling, the court failed to take into consideration that Mr. Colburn was in active duty with the Navy prior to the marriage when the majority of the points were acquired and was on inactive status only during the marriage.

Mr. Colburn is not asserting that his wife is not entitled to a share in his military retirement. Utah Courts have clearly established that retirement benefits are to be divided between the parties in a divorce action. Greene v. Greene, 751 P.2d 827 (Utah App. 1988) Motes v. Motes, 786 P.2d 232 (Utah App. 1989) and Maxwell v. Maxwell, 796 P.2d 403 (1990). Mr. Colburn is appealing the trial court's decision to allocate the Navy retirement based on years of marriage rather than the point system utilized by the United States Navy.

While there are no Utah cases on this issue, In Re Marriage of Poppe, 97 Cal.App.3d 1, 158 Cal.Rptr. 500 (1979) is directly on point. In Poppe, the husband retired from the Navy with a total of 5,002 points of which only 1,632 were earned during the marriage. The majority of the points were earned while the husband was on active duty prior to the marriage. The husband contended that the trial court should impute the wife's interest in the pension by

multiplying one-half times the fraction 1632/5002 times the amount of the pension to arrive at her retirement benefit. However, the trial court determined that the husband's "qualifying" years totaled 31.50 and apportioned the pension on the basis of the "time rule" by dividing the 27.25 years between marriage and separation by the 31.5 "qualifying" years to arrive at the wife's benefit. The Court ruled that "apportionment on the basis of the time rule is appropriate only where the amount of the retirement benefits is substantially related to the number of years of service". The Court then indicated that the husband's pension is not substantially related to the number of years he served in the Naval Reserve. The Court stated:

...the amount of the pension is not a function of the number of years of service; the number of years of service during the marriage is not a fair gauge of the community contribution; and the court's apportionment of the pension on the basis of the number of "qualifying" years served as compared to the number of years of service during the marriage must be said to be unreasonable, arbitrary and an abuse of discretion. 158 Cal.Rptr. at 504.

Although it is fairly obvious that apportionment on the basis of points as urged by former husband would be appropriate, we would usurp the function of the trial court by modifying the judgment to apportion the retirement benefits on that basis. 158 Cal.Rptr. at 505.

(A copy of In Re Marriage of Poppe, supra, is included as part of the Appendix herein inasmuch as it is part of the California Reporter system which may not be readily available to the court.)

Similarly, In re Marriage of Davis, 113 Cal.App.3d 485, 169 Cal.Rptr. 863 (1980), the court scrutinized a military pension and concluding that the final ten years of the employee-spouse's

service contributed nothing to the retirement benefits since this period of service consisted of reserve duty rather than active duty. The court found that though the full thirty-year period was required in order to receive benefits, the final ten years were "merely a condition precedent The right to retired pay is earned solely by service on active duty." (Id. at p. 489, 169 Cal.Rptr. 863.)

In the case at bar, the trial court utilized years of marriage as a basis to divide the Navy retirement relying on Woodward v. Woodward, 656 P.2d 431 (Utah 1982). In Woodward, the husband argued that his wife should not share in his military retirement on the basis it was not a marital asset inasmuch as he had only worked fifteen years at Hill Air Force Base and he would need to work thirty years to receive maximum benefits under the retirement plan. The court in addressing the vesting issue stated:

....Whether that resource is subject to distribution does not turn on whether the spouse can presently use or control it, or on whether the resource can be given a present dollar value. The essential criterion is whether a right to the benefit or asset has accrued in whole or in part during the marriage. To the extent that the right has so accrued it is subject to equitable distribution.

In the instant case, the husband must work for another fifteen years to qualify for the maximum benefits under the pension plan. He will not qualify in the twenty-ninth year or in the next to the last month. Because he must work a total of thirty years, his pension benefits, including any contribution by the government, are as dependent on the first fifteen years as the last fifteen. Thus, the wife is entitled to share in that portion of the benefits to which the rights accrued during the marriage. We hold that the trial court did not err in making equitable distribution of the husband's retirement benefits. 656 P.2d at 432, 433

As set forth above, the non-working spouse is entitled to only share in "that portion of the benefits to which the rights accrued during the marriage". This principle was addressed in Dunn v. Dunn, 802 P.2d 1314 (Utah App. 1990) in the context of the husband's claim for projected earnings of \$90,908 on the \$43,173 portion of retirement benefits which accumulated prior to marriage. The Court held that Mr. Dunn should be credited with all premarital contributions as well as interest thereon. This decision was based on the "general rule...that equity requires that each party retain the separate property he or she brought into the marriage, including any appreciation of the separate property." 802 P.2d at 1320

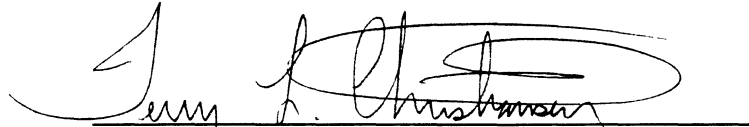
The trial court's decision to award the navy retirement on the basis of years of marriage did not take into consideration that over 60% of the retirement benefits accrued prior to marriage when Mr. Colburn was on active duty. Accordingly, the decision of the trial court should be reversed and Mrs. Colburn awarded retirement benefits computed by multiplying one-half times the fraction $939/2409$ times the amount of the pension or 19.5% of Mr. Colburn's Navy retirement.

CONCLUSION

This Court should vacate the alimony award on the basis that it was improper to impute income Mr. Colburn or, alternatively, that no alimony should be awarded where Mr. Colburn's imputed monthly income is only \$35 more than Mrs. Colburn's actual monthly income. Further, this court should award Mrs. Colburn 19.5% of Mr.

Colburn's United States Navy retirement benefit based on the navy point system rather than the years of marriage which does not accurately reflect the retirement rights accrued prior to marriage.

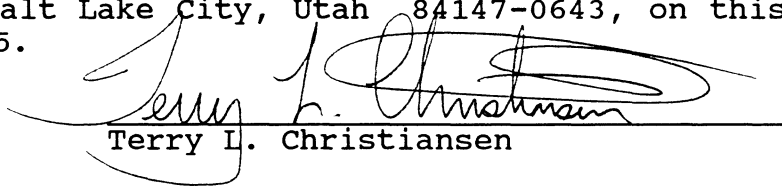
RESPECTFULLY SUBMITTED this 6th day of October, 1995.



Terry L. Christiansen
ADKINS & CHRISTIANSEN, P.C.
Attorney for Defendant/Appellant

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing Brief of Appellant, were mailed, postage prepaid, to John B. Anderson, Attorney for Plaintiff and Respondent, 623 East First South, P.O. Box 11643, Salt Lake City, Utah 84147-0643, on this 6th day of October, 1995.



Terry L. Christiansen

ADDENDUM

1. Transcript of Court's Ruling
2. Findings of Fact and Conclusions of Law
3. Decree of Divorce
4. In Re Marriage of Poppe

ADDENDUM 1

1 IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
2 IN AND FOR SUMMIT COUNTY, STATE OF UTAH

3 * * * * *

4 MARY ELIZABETH COLBURN,)
5 Plaintiff,)
6 VS.)
7 JAMES ROBERT COLBURN,)
8 Defendant.)

CASE NO. 944300069 DA

No.
FILED

SEP 26 1994

By Clerk of Summit County

11 BEFORE THE HONORABLE GLENN K. IWASAKI

12
13 REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS
14 (Bench ruling)

15
16 COALVILLE, UTAH

17
18 September 13, 1994

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COMPUTER-AIDED TRANSCRIPTION

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1 A P P E A R A N C E S

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11 Park City, UT 84068

12 COALVILLE, UTAH; SEPTEMBER 13, 1994; A.M. SESSION

13 THE COURT: The record will show that we are back
14 in session. I'm Ready to render a decision in this
15 matter.

16 To begin with jurisdiction and grounds have been
17 established in this matter and plaintiff is to receive a
18 decree of divorce in this matter. Custody to plaintiff,
19 reasonable visitation to defendant with a minimum of
20 statutory schedule. I encourage that there be very
21 extreme liberal visitation in addition to the statutory.
22 I think the children have benefited from both parents and
23 that will continue to be.

24 Some observations I'd like to make at this time.
25 There is no doubt that Mr. Colburn has been a very good

COMPUTER-AIDED TRANSCRIPTION

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1 provider for the children and the family. There is no
2 doubt that he has planned successfully, financially, in
3 this matter. That he has set apart for college, to a
4 large extent, which will cover most of the college
5 expenses in this matter. But that still doesn't mean that
6 because of his past good planning and good deeds that any
7 future award should be mitigated because of the past. I
8 just mention that to recognize that Mr. Colburn has done a
9 very good job in providing. I am impressed with the
10 amount of assets that have been amassed in this matter.

11 Let's get to the biggest issue, is voluntary
12 unemployment or under employment. Obviously he is not
13 unemployed when he is voluntarily under employed. I have
14 to look at different factors to consider and to render
15 findings pursuant to the Hall decision. If anything else,
16 the Hall decision stands for, you better make findings or
17 else we are going to reverse it.

18 The finding is that I do find that he is
19 voluntarily under employed. The factors that go to this
20 are as follows: The historical perspective of his income
21 going from a high in 1991 of \$140,000 a year, just on
22 salary, to a low of zero in 1993. There has been
23 obviously a substantial change. I'm not saying that he
24 had anything to do with being released from his latest
25 employment with Southern Aviation and Marina. That was

1 beyond his control. I do find that he did not voluntarily
2 quit that position. Even though the letter of resignation
3 says what it says, the parole evidence indicates and
4 explains to the court the reason why, the practicalities
5 are very reasonable and I accept the representations as
6 such.

7 However, I have to consider since his release
8 from employment of a high of \$140,000 a year what the
9 defendant has voluntarily chosen to do in this matter. He
10 has chosen to pursue the area of a certified financial
11 planner. He was even planning to do that prior to his
12 termination in 1988 or in 1992 by beginning classes in
13 that extent. There were many times in his testimony when
14 asked, upon cross-examination or even direct examination,
15 if he would choose to go in one area or another. There
16 were answers to the effect that: I chose to be a
17 certified financial planner. This is what I had received
18 my education in. This is what I want to develop.

19 He did that knowing that start-up time at a
20 minimum of four to five years will have to occur before
21 anything of fruition would come of his efforts. He
22 understood that in coming to an area such as Park City,
23 Summit County, that he would have to, using his words,
24 network to create a foundation.

25 He choose not to accept other employment or to

1 look at other employment. That, while initially, may be
2 more than \$246 a month, in his opinion would not afford
3 him, in the long term, any substantial income. And he
4 indicated that a co-pilot would not have much money,
5 somewhere in the area of 28 to mid-30,000 a year. But
6 even in his own estimation as to what he would be making
7 as a certified financial planner five years hence, he
8 opines that's possibly a very good income. Then when
9 pressed further he indicates somewhere in the area of 35
10 to 40,000 a year. Wherein he understood that there was a
11 start-up time.

12 The plaintiff and children should not have to
13 suffer from his development of his business in that regard
14 because they certainly have been part of his life up to
15 that point, and if he chose to take a salaried position,
16 if he chose to take some other position other than
17 something that is paying him \$246 a month, he very well
18 could have.

19 I have to also look at his qualifications as
20 exhibited by Exhibit Number 4, his resume. He is a
21 college graduate. He has had additional education as
22 certified financial planner. He has had armed services
23 duty, active duty as an officer. He was trained partially
24 as a pilot but did not complete pilot training but was an
25 active officer for the U.S. Navy and reserve officer

1 retiring as commander. In and of itself, extremely good
2 references and experience.

3 However, you take upon it, his substantial work
4 experience with National Aviation Underwriters, Southern
5 Marina and Aviation Underwriters, and the many years from
6 1970 to 1992, a period of 22 years, of which he has held
7 different positions supervised many people: Was a
8 vice-president, president, COO, other extremely important
9 positions in that area. It is true that there are no
10 comfortable positions available in that area but I must
11 consider what his assets are as to his work experience,
12 his education and the observations that the court makes of
13 the defendant in this matter.

14 He is 51 years old, appears to be in good health.
15 He is very articulate. His experience, as I indicated,
16 would lead one to believe that these skills and assets
17 that he has as has been indicated by Ms. Romboy
18 transferred to different other fields.

19 In examining the testimony of Ms. Romboy, she had
20 given a range of anywhere from mid-30,000 to \$72,000 a
21 years, she opined, as the national average of available
22 types of employment. Now that assumes obviously that
23 there is employment that is available of that nature.
24 Even being conservative in looking at Ms. Romboy's
25 testimony, it appears to the court that if Mr. Colburn,

1 with his vast experience, his education and his practical
2 aspects that I find of him to be attractive in that
3 nature, if he were just to apply himself in any other area
4 instead of persisting in the certified financial planning
5 area -- he could be selling insurance, although he says he
6 doesn't believe in the product, and that may have some
7 limitations on it; he could be selling -- working with
8 IDS, which was a product sales as well as service; he
9 could be doing stock brokerage, if he completes his
10 licensing, from six to eight months he indicated that it
11 would take; there would be no doubt in the court's mind
12 that he would be successful in, number one, completing
13 those classes, and number two, receiving his license, and
14 in the same way that he networks and contacts other
15 people, that those qualities that I find so admirable in
16 Mr. Colburn, could also be applied to that situation as a
17 stock broker, or as a trader or something of that nature.
18 He could, in my estimation, make an income of at least
19 \$40,000 a year, and I, therefore, impute an income of
20 \$40,000 per year to the defendant for the purposes of
21 determining child support. That comes out at \$3,333 a
22 month or thereabouts.

23 I find that the defendant returns between a six
24 percent computation of return on an IRA versus a five
25 percent, although percentage wise appears to be very small

1 when we are talking about amounts of money as we do.

2 Practically, it becomes large when you have to consider
3 the expenses of both parties involved here.

4 The six percent the court is adopting as a fair
5 amount. While Mr. Colburn has demonstrated a very keen
6 ability in the investment field, I think that six percent
7 return on income is something that although an art, he
8 artfully can accomplish, even though with the vagaries and
9 variables of the stock market. In that regard, he would
10 then have a \$1,125 a month non IRS, the Ultra account will
11 be awarded to him as his separate property.

12 Mr. Anderson was very candid in indicating that
13 he did not see any instance, other than the one instance
14 in which expenses, or living expenses were used from
15 Ultra. Even then that was a vacation. We would be hard
16 pressed to say that was a living expense. The Ultra is
17 awarded to defendant as sole property. But out of that, I
18 indicate that \$583 per month would be that amount that I
19 would impute, that I would include as to other income from
20 that fund, leaving a total of \$5,041 a month for the
21 plaintiff -- excuse me, for the defendant for purposes of
22 computing child support.

23 The plaintiff, on the other hand, has an income
24 of \$2,900 a month. I add to her income \$1,125, that would
25 be her half or her share of the non-IRA funds, giving her

1 a total of \$4,025 a month. Child support will be computed
2 on that basis.

3 In determining alimony, I do have to look at need
4 and ability to pay. I have to also look at the principal
5 that the alimony is used for the purpose of not having the
6 spouse and children become charges of the state. Not
7 having the spouse become a charge of the state, there is
8 very little likelihood in this instance that Mrs. Colburn
9 would ever have to ask for state assistance, however,
10 there does appear to be a need, there appears to be a need
11 for following reasons: Number one, there is no marital
12 residence in this matter. The marital residences were
13 sold and, true, the money was invested into non-IRA funds
14 of which she is receiving benefit, but the fact of the
15 matter is she has an 11-year old son, a 17-year old
16 daughter who may soon go off the school -- at least an
17 11-year old son which she has to raise for another seven
18 years without any marital residence. She is renting at
19 this time and it appears that there is a need to assist
20 her in her living arrangements as to having a house or
21 even -- her rent at the present time is \$1,500 a month.
22 She very well may be able to purchase a house with a
23 mortgage payment of \$1,500 a month. But regardless of
24 which, the court finds that there is a need.

25 There obviously is an ability to pay on behalf of

1 the defendant based upon the figures that have been
2 introduced today as to his share of the Ultra, as well as
3 his share of the non-IRA accounts.

4 The \$43.70 insurance premium has already been
5 stipulated to. That will also be paid as part -- as
6 alimony. Would that be part of alimony?

7 MR. CHRISTIANSEN: Child support.

8 MR. ANDERSON: Child support.

9 THE COURT: Yes, child support. Thank you.

10 Now what's the figure she has indicated -- the
11 plaintiff has indicated that she is pursuing her advance
12 degrees and that is laudable, indicating that a Ph.D would
13 take approximately five years to complete on a part-time
14 basis. Accordingly, I award her a thousand dollars a
15 month alimony for five years. Thereafter it will be
16 reduced to \$500 a month terminated upon any statutory
17 grounds being present. This is a long term marriage it's
18 a 22-years marriage. The parties have gone through good
19 and recently bad times. The \$500 a month will be ongoing.

20 The jewelry, the court has determined, are gifts.
21 There will be no credits as to those gifts.

22 The business start-up cost of \$11,600 will be
23 split. \$5,800 will be awarded to the plaintiff.

24 The automobiles, the court, for convenience will
25 put the Subaru at \$1,500. The Volvo at three --

1 MR. CHRISTIANSEN: \$15,000.

2 THE COURT: \$15,000. The Volvo at \$3,000. the
3 balance is \$12,000. Mr. Anderson, I applaud you as to
4 your creative accounting but I have to agree with
5 Mr. Christiansen, that 12,000 is what I see as the
6 difference, and the defendant will be given credit for
7 that \$12,000.

8 The Navy retirement as -- and I read over that
9 case and it in the number of cases -- divorce cases and
10 retirements that have come since Woodward. It amazes me
11 there hasn't been a case directly on point regarding Navy
12 retirement. Maybe it's because of my interpretation of
13 Woodward or the other courts' interpretation of Woodward
14 may have taken that into account, but I'm going to apply
15 Woodward as it is, which would come out to be, I believe,
16 34 percent. And I agree with Mr. Christiansen,
17 Mr. Anderson, if you want to fight the Navy and get all
18 that done, that's fine. If you can get some sort of cash
19 value, get credit, that probably is the best way, allowing
20 the defendant to maintain all of his with some credit as
21 to current value. That is up to you.

22 MR. ANDERSON: Thank you, your Honor.

23 THE COURT: Tax deduction is to be given to the
24 plaintiff, who obviously needs it the most at this time.
25 The taxable income, in the event that there comes a time

1 when the tax deduction would be more beneficial to the
2 defendant, then that would be subject to court order on
3 that.

4 One question that I had was that there was
5 unresolved issue of whether or not there should be a term
6 life insurance or life insurance naming the children as
7 beneficiaries of that insurance. This is going to be a
8 little bit unusual but I will explain my reasoning. The
9 defendant will maintain a \$75,000 term life insurance
10 naming the youngest child as beneficiary thereof up until
11 the age of 18. That will not begin until after the
12 daughter reaches majority and then there will be the
13 75,000 term insurance on the defendant's life naming the
14 beneficiary the youngest child. The reason I did that is
15 that in the event something does happen, catastrophically
16 to this whole situation, at least this youngest child will
17 have the college fund as well as additional \$75,000 term
18 insurance to be applied to his future needs and college.
19 I take that into consideration in comparing the daughter
20 now has approximately \$75,000 for college and that is why
21 I am doing it in that manner.

22 What have I left out?

23 MR. ANDERSON: Attorneys fees.

24 THE COURT: Attorneys fees. Each pay their own
25 attorneys fees. I did have that written down. Thank you

1 for reminding me.

2 MR. ANDERSON: Is there anything else we haven't

3 agreed to?

4 MR. CHRISTIANSEN: I think that's it.

5 THE COURT: Personal property will be divided. I

6 think they where in the process of doing that.

7 THE COLBURN: We finished.

8 THE COURT: Stipulated as to one-half uncovered

9 per statute. Plaintiff will get the return of the \$2,000

10 advance that was part of the agreed upon terms.

11 MR. ANDERSON: I think that's everything

12 according to -- did you wish that I prepare the finding

13 and decree?

14 THE COURT: I think if you want to make a stab at

15 that, Mr. Anderson, submit it to Mr. Christiansen for

16 approval prior to the court's signature.

17 MR. ANDERSON: Will do that.

18 MR. CHRISTIANSEN: Did you prepare a work sheet?

19 MR. ANDERSON: Yeah.

20 THE COURT: Anything else?

21 MR. CHRISTIANSEN: That's it.

22 THE COURT: We are in recess.

23 (Proceedings concluded.)

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REPORTER'S CERTIFICATE

STATE OF UTAH)
 : SS.
County of Salt Lake)

 I, Nora S. Worthen, do certify that I am a
Certified Shorthand Reporter and Official Court Reporter
in and for the State of Utah; that as such reporter, I
reported the occasion of the proceedings of the
above-entitled matter at the aforesaid time and place.
That the proceeding was reported by me in stenotype using
computer-aided transcription real-time technology
consisting of pages 3 through 12 inclusive. That the same
constitutes a true and correct transcription of the bench
ruling in said proceedings.

 That I am not of kin or otherwise associated with
any of the parties herein or their counsel, and that I am
not interested in the events thereof.

 WITNESS my hand at Salt Lake City, Utah, this
21st day of September, 1994.



Nora S. Worthen, RPR
Utah License No. 22-106373-7801

ADDENDUM 2

JOHN B. ANDERSON, ESQ. #091
Attorney for Plaintiff
623 East First South
P.O. Box 11643
Salt Lake City, Utah 84147-0643
Telephone: (801) 363-9345

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

MARY ELIZABETH COLBURN,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
Plaintiff,)	
)	
vs.)	
)	Civil No. 944300069DA
JAMES ROBERT COLBURN,)	Judge Glenn K. Iwasaki
)	
Defendant.)	

This case came on for trial in the above Court on September 13, 1994, the Honorable Glenn K. Iwasaki presiding. Plaintiff appeared and was represented by her counsel, John B. Anderson, and Defendant appeared and was represented by his counsel, Terry Christiansen. Prior to trial the parties had settled a number of issues, including, but not limited to, the following: (1) the question of child custody; (2) the proper division and distribution of certain IRA and non-IRA securities and savings accounts, which had been divided pursuant to a prior court order; (3) the division and distribution of the cash value of a life insurance policy owned by Defendant; and the division and distribution of certain personal property. The remaining issues were fully tried by the court, after presentation of witness testimony and other tangible

evidence. Being fully advised in the premises, the Court now enters its:

FINDINGS OF FACT

1. Plaintiff and Defendants were actual and bona fide residents of Summit County, State of Utah, for more than three months immediately preceding the commencement of this action.

2. Plaintiff and Defendant were married on September 1, 1973 in San Francisco, California, and since that time have been and now are wife and husband.

3. There are irreconcilable differences of this marriage. Plaintiff and Defendant have maintained separate residences since June of 1994, and there is no likelihood of reconciliation.

4. Plaintiff and Defendant have two children born as issue of this marriage, namely: MICHELLE RENEE COLBURN, born March 19, 1977, now age 17; and, JAMES ANDREW COLBURN, born April 12, 1983 now age 11. Plaintiff has had sole physical custody of the parties children since the parties last lived with each other, and Plaintiff is a fit and proper person to be awarded sole legal care, custody and control of the minor children as part of the decree of divorce in this case.

5. Defendant is self-employed as a certified financial planner currently earning approximately \$264.00 per month, having previously worked as a high level executive in the aviation insurance industry.

6. In June of 1992, Defendant resigned from his last place of employ, Southern Marine and Aviation. This resignation was submitted at the request of his employer, and was prompted by corporate downsizing.

7. Defendant's earned income in the aviation insurance business during his last three years of employment was as follows:

1990	\$129,802.00
1991	\$140,585.00
1992	\$126,286.00

8. Defendant attempted to locate employment as an executive in the aviation insurance industry for several months after losing his job at Southern Marine and Aviation Underwriters. However, there were no jobs available as a result of the contracting aviation underwriting industry. The only job offers Defendant received was selling life insurance for New York Life at \$13,000.00 per year and selling financial products/insurance for IDS at \$23,000 per year. Defendant voluntarily chose not to accept the job offers with New York Life or IDS or look for or accept other salaried employment.

8(a). The Defendant possesses job skills which could be transferred to other employment. However, Defendant voluntarily chose not to seek or accept employment in other areas. Defendant persists in pursuing a career as a certified financial planner which he began planning even before he left Southern Marine.

9. Defendant chose instead to relocate to Park City, Utah and establish a practice as a certified financial planner. Defendant had begun his education for a certificate in this field in 1986.

10. Defendant, who is a well educated college graduate and in good health, has other qualifications and skills, developed during his prior employment as a high level executive in the insurance industry and as an officer in the United States Navy, that could be transferred to different or other fields of employment.

11. At the time he relocated to Park City, Utah, Defendant knew that he would be unable to generate income comparable to his historical salary, and that it would take four (4) to five (5) years to establish a secure and profitable business. Based upon these facts, and the fact that Defendant voluntarily chose not to pursue or accept other salaried employment, the court specifically finds that Defendant is voluntarily underemployed.

12. Based upon his work history, historical income, occupational qualifications and prevailing earnings of people of similar backgrounds in this community, and the testimony of experts the court finds that Defendant could earn a minimum salary of \$40,000.00 per year, should he choose to remedy his voluntary underemployment.

13. Plaintiff is 42 years of age, in good health, and has a college education. Plaintiff is currently employed as a certified nurse at a salary of \$2,900.00 per month.

14. Plaintiff, who had been unemployed for a great part of the marriage, obtained this employment as a means of support after Defendant chose to set up a practice as a certified financial planner.

15. Pursuant to the mutual agreement of the parties and an order issued by the Honorable David Young, at a hearing to determine temporary support, the parties divided equally their non-IRA accounts, totaling approximately \$450,000.00, acquired during marriage; it is just and equitable that the court adopt that division and distribution.

16. A reasonable and expected rate of return on the above referenced non-IRA funds is six percent (6%) per annum. Accordingly, each party should earn \$1,125.00 per month in interest on those non-IRA funds, and this amount shall be added to each parties' income and used in calculating child support.

17. Defendant is the owner of an additional ULTRA investment account, which is his sole and separate property, having acquired the funds to purchase that account via an inheritance from his father. The account was worth approximately \$61,220.67, as of the date of trial. The imputed rate of return on that account, at six percent (6%) per annum, is \$306.10 per month, and that amount shall also be added onto Defendant's income for purposes of calculating child support.

18. The child support award for the parties' two (2) minor children should be based upon the following income figures: (1) Defendant's monthly income is \$4,764.43 (imputed income of \$3,333.33 due to voluntary underemployment, \$1,125.00 in interest income from non-IRA investment accounts, and \$306.10 in interest income from the ULTRA account) and Plaintiff's monthly income is \$4,025 (\$2,900.00 in salary and \$1,125.00 in interest income from non-IRA investment accounts).

19. The Defendant should pay \$703.57 per month as and for support of the parties' two minor children, or \$351.78 per month per child, until such time as the children reach eighteen (18) years of age and graduate from school in their normal and expected year of graduation, whichever is later. Payment of such support shall commence on October 1, 1994, and be due and payable to Plaintiff on the 1st day of each month thereafter.

20. Plaintiff is currently enrolled at the University of Utah pursuing an advanced degree. It will take Plaintiff approximately five (5) years to complete her education.

21. Without additional education Plaintiff will be unable to advance in her career or obtain the salary or wages necessary to support herself in the manner to which she has been accustomed

22. Plaintiff's expenses currently exceed her monthly income and Plaintiff has a specific need for alimony to support herself. The need for support will be greater while she obtains her advanced degree and it is just and equitable that Defendant pay to Plaintiff

the sum of \$1,000.00 per month as and for alimony. This obligation shall commence as of October 1, 1994, and shall be due and payable on the 1st day of each month thereafter. Alimony shall terminate upon Plaintiff's death, re-marriage or co-habitation with a person of the opposite sex.

23. At this time the parties have no marital residence, and the court finds that Plaintiff will need to purchase a home to replace the one the parties previously sold. An award of alimony is necessary to assist her in meeting these costs and in obtaining suitable living arrangements.

24. Defendant, who has been awarded property of significant value, including, but not limited to, non-IRA accounts valued at the approximate amount of \$225,000.00 and the ULTRA account valued at the approximately \$63,000.00, has the ability to pay such alimony to Plaintiff.

25. It is contemplated that Plaintiff will complete her advanced degree after five (5) years, and that at that time she will have a greater ability to support herself. Therefore in contemplation of the future increase in income and the fact that this is a long term marriage, after five (5) years Defendant's alimony obligation shall be reduced to \$500.00 per month, which amount shall be ongoing, unless terminated on statutory grounds.

26. The various items of jewelry listed on Plaintiff's financial statements were gifts to her, and are therefore her sole and separate property, free and clear from any claim by Defendant.

27. The parties recently invested \$11,600.00 in Defendant's business, Summit Financial Advisors Group, Inc., as start up costs. Defendant should pay over to Plaintiff the sum of \$5,800.00 as and for her share of the those costs. The Defendant is awarded the business free and clear from any claim of Plaintiff.

28. Plaintiff is awarded the 1993 Suburu automobile, which is valued at \$15,000.00, as her sole and separate property. Defendant is awarded the 1982 Volvo automobile, which is valued at \$3,000.00, as his sole and separate property. Defendant should be given a \$12,000.00 credit against sums he may owe to Plaintiff, to equalize the differences in value.

29. Defendant has a retirement benefit from his service in the Navy. Sixty eight percent (68%) of this benefit was earned during the period in which the parties were married. Applying the formula set out in Woodward, rather than the naval point system, Plaintiff should be awarded 34% of Defendant's naval retirement benefit as her sole and separate property.

30. Plaintiff, at her sole option, may either seek to obtain the present cash value of her interest in the naval pension from the department of the navy, if possible, or may elect to have a qualified domestic relations order, or its equivalent, issued permitting her to collect her share of the pension directly from the navy at the time Defendant begins drawing payments thereunder.

31. Defendant should cooperate with Plaintiff in obtaining the qualified domestic relations order if Plaintiff elects that option, and should also execute all documents necessary to preserve and protect Plaintiff's interest in the naval pension. Plaintiff shall be responsible for the preparation of any Qualified Domestic Relation Order regarding the Navy retirement and shall bear the costs associated therewith.

32. Plaintiff has the greater need for the state and federal tax exemptions provided for the parties' two (2) children. Plaintiff will also be better able to use the exemptions. In the event that there comes a time when the tax deduction would be more beneficial to the Defendant, then that would be subject to court order on that.

33. Defendant is the owner of a USSA life insurance policy, which policy was acquired during marriage. This policy should be sold each party shall receive one-half (1/2) of its present cash value, provided that no value has been lost or withdrawn since the date of trial.

34. The parties have reached a mutual and amicable agreement regarding a division of their personal property and household goods, and it would be just and equitable for the court to adopt and sanction that division. The specific items of personal property to be awarded to each party are set forth in Exhibit "A" and Exhibit "B", attached hereto and incorporated by reference.

35. During the course of the marriage the parties acquired IRA plans, which are currently held in Charles Schwab Accounts. The IRA held in Defendant's name has a current estimated value of \$580,000.00 and the IRA account held in Plaintiff's name has a current estimated value of \$28,000.00. It would be just and equitable that the two (2) accounts be divided equally between the parties, with each party to have a separate account.

36. During the course of the marriage, Defendant acquired interests in three (3) limited partnerships; identified in the pleadings as CalPlans Vinyards, Old Perin Square, and S. Presal Cottonwood Ltd. Defendant acquired these interests via inheritance from his father, and has not commingled them with any marital account.

37. Plaintiff has recently expended \$2,000.00 of her personal funds on educational purposes for the benefit of the parties' oldest child. The parties have established a uniform gift to minors account designed to cover such expenses, and it would be just and equitable for the Plaintiff to be reimbursed from the account in the amount of \$2,000.00.

38. Plaintiff has available through her place of employment medical insurance, which she purchases for the parties' two minor children. The total cost of the insurance that may be attributed to the children is \$87.40; accordingly Defendant's share of that cost is \$43.70. This amount should be paid with monthly child support.

39. It would be just and proper that the parties share equally all other medical, dental and optical costs incurred on behalf of the parties' children, until such time as the child reaches eighteen (18) years of age and graduates from high school in his or her normal year of graduation.

40. It would be just and equitable that Defendant purchase and/or maintain a life insurance policy in the amount of \$75,000.00, naming the parties' youngest child as the sole and exclusive beneficiary thereon, to provide for that child in the event that Defendant dies before that child reaches the age of majority.

41. The parties have established uniform gift to minors accounts on behalf of both of their children, and it would be just and equitable for Plaintiff to be named as an additional custodian on the accounts.

42. The parties each have sufficient resources to pay their own costs and attorney's fees incurred in this matter, and it would be just and equitable that each pay their own costs and fees.

43. The parties have no marital debt, and each should be solely responsible for any debt incurred after the date of separation in this matter, and hold each other harmless from any claims thereon. It would be just and equitable for Plaintiff to assume the lease payments on the home in Park City where she is residing.

CONCLUSIONS OF LAW

1. The court has subject matter jurisdiction over the complaint and personal jurisdiction over the parties hereto.

2. Plaintiff should be awarded a divorce from Defendant and Defendant should be awarded a divorce from Plaintiff.

3. The Decree of Divorce should become final and absolute immediately upon the Court signing it and the Clerk of the Court entering it in the Register of Actions.

4. Plaintiff should be awarded sole care, custody and control over the parties' two minor children, subject to Defendant's rights to reasonable visitation. Defendant's rights to visitation shall be determined by the mutual agreement of the parties; in the event that the parties are unable to agree, visitation shall be as set forth in Utah Code Ann., Section 30-5-5.

5. Defendant should pay child support to Plaintiff in the amount of \$703.57, commencing on October 1, 1994, and payable thereafter on the first day of each month. Such child support shall continue until the parties' minor children reach eighteen (18) years of age and graduate from school in their normal and expected year of graduation. This award shall be subject to a withhold and deliver order, pursuant to Utah Code Ann., Section 62A-11-501, et.seq.

6. Defendant should pay over to Plaintiff one half of all medical insurance costs incurred by Plaintiff on behalf of the parties' minor children. Currently Defendant's share of these

costs is \$43.70 per month, and this amount should be paid on the 1st day of each month, commencing October 1, 1994.

7. Plaintiff should purchase medical and accident insurance for and on behalf of the parties minor children, so long as it is available through her place of employment.

8. The parties shall share equally all other uncovered medical, dental, and optical costs incurred on behalf of their minor children, including deductibles, until such time as the children reach eighteen (18) years of age and graduate from high school in their normal and expected year of graduation.

9. Defendant should maintain a life insurance policy in the amount of \$75,000.00 naming the parties youngest child as the sole and exclusive beneficiary thereon, until such time as the parties' youngest child reaches eighteen years of age and graduates from high school in his normal and expected year of graduation.

10. Defendant shall pay to Plaintiff the sum of \$1,000.00 per month as and for alimony. This obligation shall commence on October 1, 1994, and shall be due and payable on the first day of each month thereafter. Defendant's alimony obligation shall be reduced to \$500.00 per month after five (5) years, and this amount shall be ongoing, unless Plaintiff re-marries dies, or cohabits with a person of the opposite sex.

11. Plaintiff should be awarded as her sole and separate property, free from any claim by Defendant, the 1993 Suburu automobile, and Defendant should be awarded as his sole and

separate property, free from any claim by Plaintiff, the 1982 Volvo automobile. Defendant should be awarded a credit of \$12,000.00 to equalize the differences in value.

12. Defendant should pay over to Plaintiff \$5,800.00 as her share of the start up costs the parties invested in Defendant's business venture. Defendant should be awarded as his sole and separate property, free from any claim by Plaintiff, all interest in Summit Financial Advisors Group, Inc.

13. Defendant should sell the USSA life insurance policy acquired during marriage, and pay over to Plaintiff one-half (1/2) of its present cash value, provided that no value has been lost or withdrawn since the date of trial. If value has been lost or withdrawn, then Defendant shall pay over to Plaintiff one-half of the value of the policy as of the date of the divorce.

14. Plaintiff is entitled to 34% of Defendant's naval retirement account, and may, at her sole option, either collect a cash equivalent of the present value of that interest, if permitted by the Navy, or obtain her interest in monthly increments once Defendant begins to collect the pension. Plaintiff should be responsible for obtaining a Qualified Domestic Relations Order or its equivalent from the Navy, at her sole cost and expense, and Defendant should cooperate in obtaining such an order and in protecting Plaintiff's interest in that retirement account.

15. The parties should immediately divide their IRA accounts held with Charles Schwab, with each party having a one-half (1/2) interest in the IRA account held in the others name.

16. Plaintiff should be reimbursed in the amount of \$2,000.00 for educational expenses she incurred on behalf of the parties oldest child. This \$2,000.00 should be drawn from the uniform gift to minors account that the parties have set up in the name of the parties' oldest child.

17. Plaintiff should be added as an additional custodian on the children's uniform gifts to minors accounts.

18. The court should sanction the division of personal property and household goods mutually agreed to by the parties, and as set forth in the findings of fact heretofore entered by the Court.

19. Each party should pay their own costs and attorney's fees incurred in prosecuting and defending this matter.

20. Plaintiff should be awarded the federal and state income tax exemptions available for the parties' minor children. In the event that there comes a time when the tax deduction would be more beneficial to the Defendant, then that would be subject to court order on that.

21. Plaintiff should be awarded all right, title and interest in her jewelry, free and clear from any claim of Defendant, the same being her separate property having acquired it by gift.

22. Defendant should be awarded all right, title and interest in the ULTRA investment account, the CalPlans Vinyards, Old Perin Square, and S. Presal Cottonwood Ltd., free and clear from any claim of Defendant, the same being his separate property having acquired them via inheritance from his father.

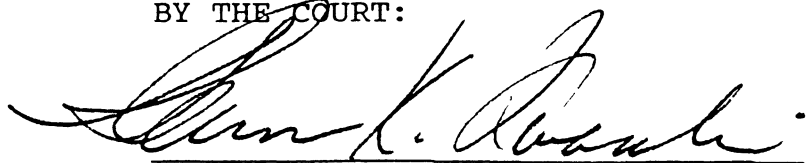
23. The parties, who had no marital debt at the time of separation, should each assume as their sole and separate debt any indebtedness incurred by them after the date of separation and hold each other harmless from any claim thereon. Plaintiff should assume the lease payments on her residence in Park City, and hold Defendant harmless from any claims thereon.

24. The court sanctions the division of the non-IRA accounts acquired by the parties during the course of the marriage, as ordered by the Honorable Judge David Young, and as previously accomplished by the parties.

25. Each party shall be responsible for any tax consequences that may arise as a result of the division of the assets and accounts awarded to them in this action, and should indemnify and hold the other harmless from any claim thereon.

DATED this 3RD day of MARCH, 1995.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Glenn K. Iwasaki", written over a horizontal line.

HONORABLE GLENN IWASAKI
District Court Judge

ADDENDUM 3

JOHN B. ANDERSON, ESQ. #091
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623 East First South
P.O. Box 11643
Salt Lake City, Utah 84147-0643
Telephone: (801) 363-9345

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

MARY ELIZABETH COLBURN,)	
)	DECREE OF DIVORCE
Plaintiff,)	
)	
vs.)	
)	Civil No. 944300069DA
JAMES ROBERT COLBURN,)	Judge Glenn K. Iwasaki
)	
Defendant.)	

This case came on for trial in the above Court on September 13, 1994, the Honorable Glenn K. Iwasaki presiding. Plaintiff appeared and was represented by her counsel, John B. Anderson, and Defendant appeared and was represented by his counsel, Terry Christiansen. Prior to trial the parties had settled a number of issues, including, but not limited to, the following: (1) the question of child custody; (2) the proper division and distribution of certain IRA and non-IRA securities and savings accounts, which had been divided pursuant to a prior court order; (3) the division and distribution of the cash value of a life insurance policy owned by Defendant; and the division and distribution of certain personal property. The remaining issues were fully tried by the court, after full presentation of the testimony of witnesses and other

tangible evidence. The Court being duly advised in the premises and having entered its findings of fact and conclusions of law:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff is awarded a divorce from Defendant and the bonds of matrimony heretofore existing between Plaintiff and Defendant are hereby dissolved.

2. This Decree shall become final and absolute immediately upon the Clerk of the Court entering it in the Register of Actions.

3. Plaintiff, the mother is hereby awarded the sole legal care, custody and control of the two (2) minor children born as issue of this marriage, namely: MICHELLE RENEE COLBURN, born March 19, 1977, now age 17; and, JAMES ANDREW COLBURN, born April 12, 1983 now age 11, subject to Defendant's rights to reasonable visitation. Defendant's rights to visitation shall be determined by the mutual agreement of the parties; in the event that the parties are unable to agree, visitation shall be as set forth in Utah Code Ann., Section 30-3-35.

4. Defendant shall pay child support to Plaintiff in the amount of \$703.57 per month, commencing on October 1, 1994, and payable thereafter on the first day of each month. Such child support shall continue until the parties' minor children reach eighteen (18) years of age and graduate from school in their normal and expected year of graduation. This award shall be subject to a withhold and deliver order, pursuant to Utah Code Ann., Section 62A-11-501, et.seq.

5. Defendant shall pay over to Plaintiff the sum of \$43.70 on the 1st day of each month, commencing October 1, 1994, as and for his share of the medical insurance costs incurred by Plaintiff on behalf of the parties' minor children.

6. Plaintiff shall purchase medical and accident insurance for and on behalf of the parties minor children, so long as it is available through her place of employment.

7. The parties shall share equally all other uncovered medical, dental, and optical costs incurred on behalf of their minor children, including deductibles, until such time as the children reach eighteen (18) years of age and graduate from high school in their normal and expected year of graduation.

8. Defendant shall purchase and/or maintain a term life insurance policy in the amount of \$75,000.00 naming the parties youngest child as the sole and exclusive beneficiary thereon, and shall maintain that policy until such time as the parties' youngest child reaches eighteen years of age and graduates from high school in his normal and expected year of graduation.

9. Defendant shall pay to Plaintiff the sum of \$1,000.00 per month as and for alimony. This obligation shall commence on October 1, 1994, and shall be due and payable on the first day of each month thereafter. Defendant's alimony obligation shall be reduced to \$500.00 per month after five (5) years, and this amount shall be ongoing. Notwithstanding the foregoing, alimony shall

automatically terminate at such time as Plaintiff dies, re-marries or cohabits with a person of the opposite sex.

10. Plaintiff shall be awarded as her sole and separate property, free from any claim by Defendant, the 1993 Suburu automobile, and Defendant should be awarded as his sole and separate property, free from any claim by Plaintiff, the 1982 Volvo automobile. Defendant should be awarded a credit of \$12,000.00 to equalize the differences in value.

11. Defendant shall pay over to Plaintiff \$5,800.00 as her share of the start up costs the parties invested in Defendant's business venture. Defendant shall be awarded as his sole and separate property, free from any claim by Plaintiff, all interest in Summit Financial Advisors Group, Inc., and shall indemnify and hold Plaintiff harmless from any claims made against that entity.

12. Defendant shall pay over to Plaintiff one-half (1/2) of the present cash value of in the USSA life insurance policy acquired during marriage, provided that value has not been lost or withdrawn from the policy since the date of the trial in this matter. In the event that value has been lost or withdrawn, Defendant shall pay over one-half (1/2) of the cash value of the policy as of the date of trial in this matter.

13. Plaintiff is entitled to 34% of Defendant's naval retirement account, and may, at her sole option, either collect a cash equivalent of the present value of that interest, if permitted by the Navy, or may obtain her interest in monthly increments once

Defendant begins to collect the pension. Defendant and the United States Navy will execute any and all documents necessary to protect, preserve and distribute Plaintiff's interest in the naval retirement account. Plaintiff's counsel will obtain and prepare all necessary documents, at Plaintiff's sole cost and expense.

14. The parties shall immediately divide their IRA accounts held with Charles Schwab, with each party having a one-half (1/2) interest in the IRA account held in the others name.

15. Plaintiff shall be reimbursed in the amount of \$2,000.00 for educational expenses she incurred on behalf of the parties oldest child. This \$2,000.00 shall be drawn from the uniform gift to minors account that the parties have set up in the name of the parties' oldest child. Plaintiff will be responsible for any tax consequences that may arise from these transactions.

16. Plaintiff shall be added as an additional custodian on the children's uniform gifts to minors accounts.

17. The court shall sanction the division of personal property and household goods mutually agreed to by the parties, and as set forth in the findings of fact heretofore entered by the Court.

18. Each party should pay their own costs and attorney's fees incurred in prosecuting and defending this matter.

19. Plaintiff should be awarded the federal and state income tax exemptions available for the parties' minor children. In the

event that there comes a time when the tax deduction would be more beneficial to the Defendant then that shall be subject to court order on that.

20. The court sanctions the division of the non-IRA accounts as ordered by the Honorable Judge David Young, and as previously accomplished by the parties.

21. The Plaintiff is awarded all of her jewelry as her sole and separate property, free of any claim from Defendant, the same having been acquired by gift.

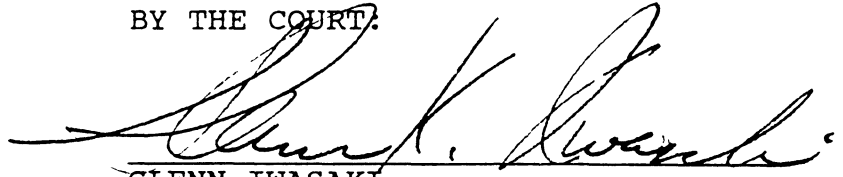
22. Defendant is awarded as his sole and separate property, free from any claim of Plaintiff, the ULTRA investment account, the interest in CalPlans Vineyards, Old Perin Square, and S. Presal Cottonwood Ltd., the same having been acquired by inheritance from his father.

23. The parties had no marital debt at the time of separation, and any debt incurred by either party since the date of separation shall be the sole responsibility of that party, and each should hold the other harmless from any claim thereon. Plaintiff is required to assume the lease payments on the Park City home where she is residing.

24. Each party shall be responsible for any tax consequences that may arise as a result of the assets and accounts awarded to them in this action.

DATED this 3rd day of April, 1995.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Glenn K. Iwasaki", written over a horizontal line.

GLENN IWASAKI
District Court Judge

writ of certiorari are granted and the judgment of the Court of Appeals is reversed. The case is remanded with instructions that it be returned to the District Court for entry of a judgment of acquittal." (*Watts v. United States*, *supra*, 394 U.S. p. 708, 89 S.Ct. p. 1402, 22 L.Ed.2d pp. 667-668.)

The trial court's conclusion as a matter of law that Rubin's remarks were not a "true" solicitation in violation of Penal Code section 653f but were embraced in the First Amendment as permitted speech, in my opinion follows the law thus enunciated.

I would affirm.

Hearing denied; BIRD, C. J., and MOSK, J., dissenting.



97 Cal.App.3d 1

In re the MARRIAGE of Daniel G. POITTE and Josephine A. Poppe.

Daniel G. Poppe, Petitioner
and Appellant,
and

Josephine A. Poppe, Respondent.
Civ. 20642.

Court of Appeal, Fourth District,
Division 2.

Sept. 17, 1979.

On requests by former husband and former wife for modification of provisions of the court's judgment in a marriage dissolution proceeding, the Superior Court, Orange County, James K. Turner, J., rendered judgment from which the former husband appealed. The Court of Appeal, Kaufman, J., held that: (1) notwithstanding certain statements by the court in earlier hearing, court's statement that wife had right to

apply for and obtain her portion of naval pension benefits was reservation of jurisdiction which permitted wife to thereafter apply for order quantifying her interest and permitted court to make appropriate apportionment; (2) apportionment made on basis of years in service during marriage before separation as compared to "qualifying" years in service, such apportionment bearing no substantial relationship to amount of the pension, was erroneous, and (3) proof of change in circumstances is required for modification of spousal support but converse is not necessarily true, and fact that daughter had departed from residence shared by mother and daughter did not require finding of abuse of discretion on part of trial court in declining to reduce amount of, or to terminate, spousal support.

Order reversed in part, with directions, and otherwise affirmed.

1. Divorce \Rightarrow 249.1

Notwithstanding statements by the court, in dissolution proceeding, that what husband had accumulated by points toward his navy pension prior to time of marriage was 100% his separate property and that wife was entitled to an amount based on number of years to date of separation that she had been married to him and was entitled to one half as community vested property interest as of such time, court's statement that wife had right to apply for and obtain her portion of the benefit was reservation of jurisdiction which permitted wife to thereafter apply for order quantifying her interest and permitted court to make appropriate apportionment.

2. Divorce \Rightarrow 252.3(4)

Apportionment of husband's naval pension made by trial court in marriage dissolution proceeding on basis of years in service during marriage before separation as compared to "qualifying" years in service, such apportionment bearing no substantial relationship to amount of the pension, was erroneous.

3. Divorce \Rightarrow 252.3(4)

The "time rule" is apparently method most frequently employed for apportioning retirement benefits between community and separate estates but is not the only acceptable method and is appropriate only where amount of retirement benefits is substantially related to number of years of service.

4. Divorce \Rightarrow 245(2, 3), 247

Proof of change in circumstances is required for modification of spousal support, but converse is not necessarily true, and fact that daughter had departed from residence shared by mother and daughter did not require finding of abuse of discretion on part of trial court in declining to reduce amount of, or to terminate, spousal support.

5. Divorce \Rightarrow 252.3(4)

Basis for apportionment of naval reserve pension as between separate and community estates on dissolution of marriage was matter committed to judicial discretion of trial court, subject to requirement that apportionment be reasonable and fairly representative of relative contributions of community and separate estate.

James F. Rees, Long Beach, for petitioner and appellant.

James F. Leck, Newport Beach, for respondent.

16 OPINION

KAUFMAN, Associate Justice.

The marriage of the parties was dissolved by a final judgment on January 30, 1974, referring to and incorporating the provisions of an interlocutory judgment entered on November 9, 1973. Daniel G. Poppe (hereafter former husband) appeals from an order of the court dated September 18, 1978, denying his request that spousal support be decreased or terminated and granting the application of Josephine A. Poppe (former wife) for "modification" of the judgment by fixing her interest in the Naval Reserve pension being received by former husband on the basis of the "time rule" at one-half the fraction 27.25/31.50, the numerator being the number of years of re-

serve service during the marriage before separation and the denominator being the number of former husband's "qualifying" years of service, which amounts to \$253.60 of the total of \$592 per month presently being received.

Naval Reserve Pension

Former husband entered the Navy on July 1, 1937. He served on active duty from that date until July 18, 1946, at which time he became a member of the Naval Reserve. On February 23, 1946, the parties were married. The parties separated on June 16, 1973, and their marriage was subsequently dissolved as previously indicated. After the separation of the parties former husband continued serving in the Naval Reserve until he retired on October 31, 1977. He commenced receiving pension payments on November 30, 1977.

Retirement benefits paid to Navy personnel retiring from active duty are based on the number of years served and the amount of the retiree's salary during active service. Contrastingly, the amount of the pension paid to Naval Reserve retirees is a percentage of the base pay for the rank achieved arrived at on the basis of the number of points accumulated by the retiree during his service in the Naval Reserve. Essentially one point is earned for each drill attended. For example, 14 or 15 points would be earned during the annual two weeks' training duty. For periods of active duty, one point is credited for each day. To be eligible for retirement a Naval Reservist must have been credited with a minimum number of "qualifying" years of service, that is, years in which 50 or more points were earned. However, if the minimum "qualifying" years requirement is met, all points earned are counted in the calculation of the pension notwithstanding that in some years less than 50 points were earned.

Former husband retired with a total of 5,002 points of which more than 3,000 were earned during the period he was on active duty prior to the marriage. The number of points accumulated during the marriage was 1,632. The balance of former husband's points were earned by him for his

participation in the Naval Reserve after the separation of the parties. It was former husband's contention in the trial court that former wife's interest in the pension should be computed by multiplying one-half times the fraction $1632/5002$ times the amount of the pension, \$592 per month. Apportioning the pension in that fashion, former wife's share would amount to approximately \$95.50 per month, and former husband had been paying that sum to former wife. However, the trial court determined that former husband's "qualifying" years totaled 31.50 and apportioned the pension on the basis of the "time rule" by dividing the 27.25 years between marriage and separation by the 31.5 "qualifying" years so that former wife's share amounts to \$253.60 per month.¹

Former husband first contends that the Naval Reserve pension was divided by the court in the interlocutory judgment of dissolution in accordance with his point ratio theory, that that determination has long since become final and that the trial court lacked jurisdiction to alter the division long since and finally made. Not so.

In numbered paragraph 4 of the interlocutory judgment the court purported to divide the community property. It dealt with items "a" through "e," none of which was the Naval Reserve retirement benefits.

1. Former husband contends that even if the trial court's apportionment were otherwise correct, the denominator should have been the full 36 or 37 years he was in the service. Since we conclude the basis for apportionment employed by the court was inappropriate, we do not reach this question.

2. The dialogue in its entirety reads: "Now on this Naval time the Court has to order that at such time as you reach 60 or at such time as you apply—Mrs. Poppe, if this man never applies for Naval retirement, you never get it. I can't be more clear. You never get it if he never applies. All right. Because that's within his power and control. All right. Once he applies and once he gets it, then you're going to get an appropriate amount based on the number of years to the date of separation that you were married to him. You are entitled to one-half as a community vested property interest as of that time.

"Now Mr. Poppe, you continue on with Naval service. Everything hereafter you get full credit; it's all yours. So, he'll be getting more

Numbered paragraph 5 read: "The COURT FURTHER ORDERS that respondent [former wife] has a right to apply for and obtain one half of petitioner's [former husband's] military pension benefits accrued between February 23, 1946 and June 16, 1973 when petitioner [former husband] is eligible to obtain said benefits."

[1] Former husband contends that the court's intention to divide the retirement benefits in accordance with former husband's ratio theory is evident from a dialogue between the court and former husband near the conclusion of the dissolution hearing in which the court stated to former husband: "What you accumulated by points toward your pension prior to the time of marriage is a hundred percent your separate property." We cannot agree.

During the same dialogue the court stated, apparently to former wife: "Once he [former husband] applies and once he gets it [the pension], then you're going to get an appropriate amount based on the number of years to the date of separation that you were married to him. You are entitled to one-half as a community vested property interest as of that time." (Emphasis added.) We think it rather clear from the entire statement of the court² taken to- 12

than you get, but the Court will order that you pay that proportionate [share] at such time as you apply. And when you receive it and upon receipt, then that proportionate share you're going to have to pay over to your wife, this wife, Mrs. Poppe.

"MR. POPPE: I have a question. In figuring out the pension, it's based on points that you accumulate for the 25 year period.

"THE COURT: That's right.

"MR. POPPE: And so would this start when the marriage started and stop when the marriage separated?

"THE COURT: It starts—

"MR. POPPE: Anything before that, would that count?

"THE COURT: Were you in the service before you married?

"MR. POPPE: Yes, sir.

"THE COURT: And you have credit for that?

"MR. POPPE: Yes, sir.

"THE COURT: Then that's all yours. That's the reason you have to figure it out. That's another item counsel is going to have to figure out. When you prepare the decree, you figure

gether with the format and language of the interlocutory judgment that what the court did and intended to do was to adjudicate that the community property interest in the retirement benefits was that accruing between February 23, 1946 and June 16, 1973, that former wife was entitled to one-half of such community property interest if and when former husband should become eligible for and apply for the pension and that jurisdiction was reserved to permit the court to make an order for an "appropriate amount" out of the pension to be paid to former wife if and when pension payments should materialize. Our conclusion in this regard is confirmed by the fact that, so far as appears, no evidence was introduced at the dissolution trial as to how Naval Reserve retirement benefits were calculated and no mention of the point system was made at the hearing other than former husband's query to the court near the conclusion of the hearing (see fn. 2, *ante*). Further, had the court intended finally to divide the retirement benefits at the time of the dissolution its use of the language that former wife "has a right to apply for and obtain" her portion of the benefits would be rendered most inappropriate.

Thus, wife's application for a "modification" of the judgment of dissolution was in reality a request to the court to exercise its reserved jurisdiction to make an order specifying the proportion and amount of her interest in the Naval Reserve pension. The court having reserved jurisdiction by its order that former wife would have in the future the "right to apply for and obtain" her share of the pension, the court was not precluded from entertaining former wife's application and making an order quantifying her interest.

[2] Next former husband contends that the trial court's apportionment of the pension was legally erroneous. Alternatively he argues that the federal statute basing Naval Reserve pensions on a point system is

it out. What you accumulated by points toward your pension prior to the time of marriage is a hundred percent your separate property. It's only from the date of marriage that the wife has one-half interest in that. And then

preemptive of any state law that would apportion it upon dissolution of marriage on another basis or that apportionment on the basis of the "time rule" was arbitrary and unreasonable and constituted an abuse of judicial discretion. Former husband cites no relevant authority in support of his federal preemption argument, and we reject it. (Cf. *Gorman v. Gorman*, 90 Cal.App.3d 454, 460-462, 153 Cal.Rptr. 479.) However, we agree that the apportionment made by the trial court was erroneous because the basis upon which the apportionment was made, years of service during the marriage before separation compared to "qualifying" years in service, bears no substantial rational relationship to the amount of the pension.

[3] Former wife asserts that the "time rule" is the normal basis for apportioning retirement benefits earned in part during coverture and was appropriately employed by the court in the case at bench. Although the "time rule" is not the only acceptable method for apportioning retirement benefits between the community and separate estates (see *In re Marriage of Adams*, 64 Cal.App.3d 181, 186, fn. 6, 187, fn. 8, 134 Cal.Rptr. 298), it is apparently the method most frequently employed. (See, e. g., *In re Marriage of Judd*, 68 Cal.App.3d 515, 522, 137 Cal.Rptr. 318; *In re Marriage of Adams*, *supra*, 64 Cal.App.3d at pp. 181, 184, 134 Cal.Rptr. 298, et seq; *In re Marriage of Anderson*, 64 Cal.App.3d 36, 39-40, 134 Cal.Rptr. 252; *In re Marriage of Freiberg*, 57 Cal.App.3d 304, 310, 127 Cal.Rptr. 792.)

However, apportionment on the basis of the "time rule" is appropriate only where the amount of the retirement benefits is substantially related to the number of years of service. The rule and its rationale were aptly stated in *In re Marriage of Judd*, *supra*, 68 Cal.App.3d at pp. 522-523, 137 Cal.Rptr. 318, 321. "The most effective method of accomplishing the above result would be to determine the community in-

from the time of separation, not divorce but separation, then that ends. All right. Is there any item now of property that the Court has not disposed of?"

terest to be that fraction of retirement assets, the numerator of which represents the length of service during the marriage but before the separation, and the denominator of which represents the total length of service by the employee-spouse. Such disposition would comport with what we have termed the 'time rule.' [Citation.] [¶] . . . The reason why California courts have accepted this manner of division as properly implementive of the 'equal division' requirement of Civil Code section 4800 is apparent: *Where the total number of years served by an employee-spouse is a substantial factor in computing the amount of retirement benefits to be received by that spouse, the community is entitled to have its share based upon the length of service performed on behalf of the community in proportion to the total length of service necessary to earn those benefits. The relation between years of community service to total years of service provides a fair gauge of that portion of retirement benefits attributable to community effort.* (Emphasis added.) Thus it is that in each and all of the cited cases the amount to be received in retirement benefits depended upon or was substantially related to the number of years of service rendered. (See *In re Marriage of Judd*, supra, 68 Cal.App.3d at pp. 519, 522-523, 137 Cal.Rptr. 318, 321; *In re Adams*, supra, 64 Cal.App.3d at p. 186, 134 Cal.Rptr. 298; *In re Marriage of Anderson*, supra, 64 Cal.App.3d at p. 39, 134 Cal.Rptr. 252; *In re Marriage of Freiberg*, supra, 57 Cal.App.3d at p. 308, 127 Cal.Rptr. 792.)

In the case at bench the amount of former husband's pension is not substantially related to the number of years he served in the Naval Reserve. The only relationship between the number of years of service and the pension is that to be eligible for the pension former husband must have served a minimum number of "qualifying" years, years in which he earned 50 or more points. That condition having been satisfied, all points earned, whether in a "qualifying" year or not, counted in fixing the amount of his pension. The number of points that can be earned in a year may be as high as 364 or as low as 1, depending on the nature and frequency of the service rendered, not the

number of years served. Thus the amount of the pension is not a function of the number of years of service; the number of years of service during the marriage is not a fair gauge of the community contribution; and the court's apportionment of the pension on the basis of the number of "qualifying" years served as compared to the number of years of service during the marriage must be said to be unreasonable, arbitrary and an abuse of discretion.

The argument that without the reserve service during the marriage no pension at all would be received is correct, but it is of no significant help in resolving the problem. There would likewise be no pension but for former husband's service before the marriage and after the separation of the parties. To the extent service during the marriage contributed to former husband's rank and thus increased his base pay, former wife has no cause for complaint. The pension is based on the increased base pay, and she thus receives the benefit of the increased base pay. Indeed, she receives the benefit also of any increase in base pay resulting from former husband's reserve service after separation of the parties.

Spousal Support

The spousal support order made at the time of the dissolution required former husband to pay to former wife \$200 per month for one year, thereafter \$150 per month for one year and thereafter \$100 a month until further order of the court. At that time former wife was unemployed, and the court indicated to her that one reason it was making the stepdown order was to give her incentive to find employment.

¹⁰Subsequently she did find employment and on May 7, 1974, former husband filed an order to show cause re modification in which he sought the termination of support. After hearing the court ordered the amount of the monthly payment reduced from \$150 to \$100 one year in advance of the time table set forth in the original order.

The instant proceedings were commenced by former husband's filing another order to show cause re modification for the termination of spousal support. This time his re-

quest for termination was based on the fact that the daughter of the parties born December 9, 1957, had married and moved from the residence which she had shared with former wife up to that time.

Former husband points out that at the hearing former wife admitted in her testimony that her expenses would be somewhat reduced because of the daughter's marriage and departure from the residence they shared. Former husband concludes that a change of circumstances was shown, and the trial court abused its discretion in declining to reduce the amount of or terminate spousal support. Not so.

[4] In the first place, former husband's premise that a change of circumstances was shown does not support his conclusion that a modification or termination of spousal support was thereby required. A modification of spousal support cannot be granted in the absence of proof of a change in circumstances. However, the converse is not true; a showing of changed circumstances does not necessarily mandate a modification of spousal support.

In any event, there is no showing whatever that the trial court abused its discretion in requiring former husband to continue to pay spousal support in the amount of \$100 per month. Former wife is employed, but her gross earnings approximate \$692 per month. In addition her financial declaration disclosed income of \$100 per month in public assistance and \$95.33 per month paid to her by former husband on account of her interest in the Naval Reserve pension. She thus had gross income of \$887.33 per month and a monthly net of \$714.53. Her listed monthly expenses, which appear to be quite modest, amounted to \$816 per month, \$102 per month in excess of her net earnings. By contrast, husband's net monthly income was declared by him to be \$1,572 per month, and his monthly expenses were listed as \$1,355 per month. Thus, by his own figures former husband's net income exceeded his expenses by more than \$200 per month. The duration of the marriage was in excess of 12¹¹ years, and former wife is entitled to maintain a standard of living not substantially different from that of former hus-

band, especially when former husband's own figures indicate that he is well able to pay the required support.

The court acted with propriety in declining to modify the amount of spousal support.

[5] Having concluded that the apportionment of the Naval Reserve pension made by the trial court is erroneous, the question remains what disposition to make. The requirement is that the apportionment of retirement benefits between the separate and community property estates must be reasonable and fairly representative of the relative contributions of the community and separate estates. (See *In re Marriage of Judd*, *supra*, 68 Cal.App.3d at pp. 522-523, 137 Cal.Rptr. 318; *In re Marriage of Adams*, *supra*, 64 Cal.App.3d at p. 187, 134 Cal.Rptr. 298; cf. *In re Marriage of Freiberg*, *supra*, 57 Cal.App.3d at p. 312, 127 Cal.Rptr. 792.) The basis for apportionment, however, is a matter committed to the judicial discretion of the trial court. (See *In re Marriage of Judd*, *supra*, 68 Cal.App.3d at p. 522, 137 Cal.Rptr. 318; *In re Marriage of Adams*, *supra*; cf. *In re Marriage of Freiberg*, *supra*.) The discretion to be exercised is that of the trial court, not a reviewing court. (See *In re Marriage of Judd*, *supra*.) Although it is fairly obvious that apportionment on the basis of points as urged by former husband would be appropriate, we would usurp the function of the trial court by modifying the judgment to apportion the retirement benefits on that basis.

Accordingly, the order is reversed insofar as it establishes former wife's interest in the Naval Reserve pension, with directions to the trial court to redetermine the respective interests in the pension in a manner and on a basis consistent with this opinion. In all other respects the order appealed from is affirmed. In the interests of justice former wife shall recover costs on appeal, but the parties shall bear their own respective attorney fees on appeal.

TAMURA, Acting P. J., and McDANIEL, J., concur.