

1995

Monders v. Monders : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CHERYL MONDERS,

Plaintiff/Appellee,
vs.

KENNETH WAYNE MONDERS,

Defendant/Appellant.:

Case No. 950261-CA

Priority No. 15

* * * *

BRIEF OF APPELLEE

* * * *

Appeal from a judgment entered by the Seventh Judicial
District Court in and for Grand County, State of Utah
Honorable Lyle R. Anderson, presiding

UTAH COURT OF APPEALS
BRIEF

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FILED

Utah Court of Appeals

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Marilyn M. Branch
Clerk of the Court

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JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Annotated, Section 78-2(a)-3(2)(h) as this is an appeal from a final judgment and order in a domestic relations action.

STATEMENT OF ISSUES

1. The Trial Court did not impose sanctions or order the sale of property because there was no justification to do so.

2. The Trial Court did not error in finding a value for The Outlaw Saloon based upon the testimony presented at trial.

3. The Trial Court's division of the marital assets is equitable when the comparative contributions and circumstances of the parties are considered.

4. The Trial Court did not error in granting the cause of action for the Option Agreement to the Appellee.

STANDARD OF REVIEW

As more fully discussed in Point I of the Argument, the sound discretion of the Trial Court in establishing the values for assets in a marriage and the distribution of said assets will not be overturned unless the Trial Court's Findings are clearly erroneous or are a clear abuse of discretion. Rule 52(a), Utah Rules of Civil

Procedure; also see authorities cited in Point I of this brief.

Conclusions of Law are reviewed for correctness and are given no special deference on appeal. Also see authorities cited in Point I of this brief.

RECORD ON APPEAL

References to the Trial Transcript will be made as follows: (TT ____). References to the Findings of Fact entered by the Trial Court will be made as follows: (FF ____). References to exhibits entered at trial will be made as follows: (Ex. ____). Addenda in the brief will be referred to as follows: (Add. ____).

STATUTORY PROVISIONS AND DETERMINATIVE CASELAW

Section 30-3-5, Utah Code Ann.:

Section 30-3-5, Utah Code Annotated, provides authority to a divorce court to make equitable distributions of the property accumulated by the parties during the marriage.

Caselaw:

There is no specific case which is determinative of the issues in the case at bar.

STATEMENT OF CASE

This is an appeal from a Decree of Divorce entered by the Seventh Judicial District Court in and for

Grand County, State of Utah. Various Pre-Trial Hearings were conducted and interim orders were entered concerning support, property division and the control of the Outlaw Saloon operation. Trial was originally scheduled on December 2, 1994. The Court was unable to hear the matter on said date although the parties and their witnesses, including an expert witness, were present and prepared to proceed. By stipulation of the parties, the trial was rescheduled for and actually conducted on January 3, 1995. The Court took the matter under advisement and entered its Memorandum Decision on January 5, 1995. The Findings of Fact (hereinafter FF), Conclusions of Law and Decree of Divorce were entered on February 17, 1995 (Add. A).

Defendant/Appellant filed Notice of Appeal in the present case on March 20, 1995.

STATEMENT OF FACTS

Appellee offers the following statement of relevant facts in the present case:

1. The Plaintiff/Appellee (hereinafter referred to as "Cheryl" and the Defendant/Appellant (hereinafter referred to as "J.W.", a nickname used by Defendant Kenneth Wayne Monders) were married on April 25, 1987 at Law Vegas, Clark County, Nevada (FF 2).

2. The parties separated in November of 1993 and have lived separate and apart since that time (FF3).

3. There were no children born as issue of the marriage (FF5).

4. At the time of their marriage, Cheryl was employed at a motel and restaurant in Moab, Utah and she also owned and operated a bar in Moab known as the Outlaw Saloon. The assets of the bar had been purchased with Cheryl's money. She operated the bar in a rented building (FF 6).

5. At the time of the marriage, Cheryl had invested about \$20,000 of her money in establishing the original Outlaw Saloon. She also had \$9,090.00 in currency in a safety deposit box, the sum \$15,524.00 in a savings account at Williamsburg Bank, the sum of \$9,000.00 in an IRA account, the sum of \$685.30 in her checking account, an ounce of gold, motel stock worth \$11,445.00 and a \$10,000.00 tax exempt bearer bond (FF 7).

6. J.W. brought no assets into the marriage except a 1975 Thunderbird automobile and his clothing (FF 8).

7. At the time of the marriage, J.W. was employed at a approximately \$4.00 per hour as a janitor (TT 271). Following the marriage, J.W. worked regularly in the bar,

except for three (3) months when he attempted to start a business for himself (FF 10). Cheryl managed and also worked in the bar during the same time period (FF 10).

8. Due to the scheduled demolition of the building where the original bar was located, Cheryl began looking for an alternative cite for her bar (FF 11). On October 2, 1990, Cheryl contracted to purchase a lot and building from her uncle for a total cost of \$80,000. She paid \$23,000 as a down payment which came from her pre-marital and/or inherited property (FF 12). Cheryl inherited \$16,600 in cash from her father's estate in 1988 and \$3,316.00 in cash plus \$183.00 per month for seven (7) years from her mother's estate in 1991. On the same day, her uncle granted Cheryl and J.W. an option to purchase an adjacent lot for \$10,000 provided the option was exercised within one (1) year (FF 12).

9. Cheryl began remodeling and improving the existing building to create a place for the operation of her bar. All of the remodeling funds came from Cheryl's pre-marital or inherited property (FF 13).

10. Cheryl had incorporated the Outlaw Saloon in 1988. She was its sole shareholder and, in exchange for the shares, she conveyed all of the property and assets of the original Outlaw Saloon into said corporation.

Throughout the marriage, she has remained the sole owner of all of the shares of the corporation (FF 14).

11. In an attempt to get some contribution from J.W., Cheryl entered into a written agreement on March 2, 1992 whereby she agreed to sell one-half of the business and property known as The Outlaw Saloon to J.W. The agreement estimates the value of Cheryl's investment in the business and property at \$60,000 and provides for J.W. to buy a one-half interest in same for \$30,000 under terms and conditions outlined in the agreement (FF 21). The agreement was breached by both parties but the Court found the agreement helpful in determining the state of mind of the parties in valuing their assets prior to the commencement of the divorce action (FF 22).

12. Every tax return showed Cheryl as the sole proprietor of the bar before its incorporation and every tax return showed Cheryl as the sole owner of the corporation and the person responsible for filing the corporate tax returns after the corporation was created (FF 16).

13. At the time of the entry of the Decree of Divorce, The Outlaw Saloon building was providing living quarters for Cheryl and it also provided her sole source

of employment (TT 205). J.W. was residing in Salt Lake City and was employed there (TT 275-276).

14. The Court found that the value of The Outlaw Saloon was \$155,000. The parties still owed Cheryl's uncle \$43,000 (FF 23). The net value of The Outlaw Saloon operation was the sum of \$112,000. The Court found that Cheryl had invested \$60,000 of her separate pre-marital or inherited property in the business as of March of 1993 (FF 25). The Court found that she should recover all of that investment (FF 25).

15. The Court found that the bar has been a joint marital venture but that Cheryl alone had made a substantial financial investment in that venture (FF 22). The Court found that the bar was a marital asset but that an equitable distribution would require that Cheryl receive more than one-half of that asset (FF 22). Additionally, the Court found that there were two (2) significant factors which also required a less than even distribution of the asset, namely, that Cheryl was 51 years old and suffered from an injury that had seriously limited her ability to work while J.W. was 38 years old, able-bodied and did not have as great a need for the marital assets as did Cheryl (FF 26). Additionally, the actual increase in the value of the business operation

was attributable to the increased property values in Grand County which had occurred as a result of economic changes in the area rather than the efforts of the parties themselves (FF 26).

16. Cheryl had \$11,000 in contributions and accumulated interest in her IRA account during the marriage. One-half of the amount of the IRA account was awarded to J.W., namely \$5,500.00 (FF 28 and 29).

17. J.W. was awarded one-fourth ($1/4$) of the increased equity in The Outlaw Saloon operation and its property which was the sum of \$13,000. Cheryl was awarded three-fourths ($3/4$) of the increased equity (FF 26 and 27).

18. The Court awarded J.W. a total property settlement in the sum of \$18,500.00 bearing interest at the legal rate of seven (7%) percent per annum from January 1, 1995 until fully paid. The Court secured the property settlement against the real estate and set payments at the rate of \$250.00 per month, amortized over eight (8) years (FF 29).

19. Although the parties may initially have had a chance of legally compelling Cheryl's uncle to consummate the sale of the adjacent lot, prospects of success were dimmed by their failure to pursue their claim. The Court

found that their claim to the adjacent lot had little or no value and awarded the claim to Cheryl because she had the best chance of being able to deal with her uncle for the adjacent lot, she had been awarded the building which partially encroached onto the lot, and she was currently renting the lot (FF 24).

20. The Trial Court entered its Findings of Fact, Conclusions of Law and Decree of Divorce on February 17, 1995.

21. J.W.'s Notice of Appeal was timely filed.

SUMMARY OF ARGUMENT

The Trial Court did not impose sanctions or order the sale of the property because there was no justification or reason for so doing. Appellant contends that he was unfairly prejudiced at trial because, during his cross-examination of the Appellee, she testified that she desired not to sell The Outlaw Saloon. Since her "desires" are immaterial to the determination of the value of The Outlaw Saloon as of the date of the trial, and since no sanctions, continuances or requests for the sale of property were even made to the Trial Court, there can be no basis for imposing sanctions or ordering a sale of the property.

The Trial Court received testimony concerning the value of The Outlaw Saloon property and the lack of value associated with bar type businesses in Moab, Utah. The trial testimony was consistent with all of the information provided by the Appellee during responses to discovery. The Appellant failed to provide any testimony concerning the value of the business and/or the real estate upon which same was located, claiming that he "assumed" that some future sale of the property might be used to establish a value. Since the Trial Court has to establish a value at the time of the Decree in order to determine an equitable distribution of assets, the Trial Court did not error in setting the values based upon the only competent testimony presented at trial.

The Trial Court's division of marital assets was equitable when the comparative contributions and circumstances of the parties were taken into consideration. The Appellee is 51 years old and suffers from a severe injury which affects her earning capacity. She also provided all of the investment capital that developed the business. The Appellant is 38 years of age, able-bodied, employed and contributed nothing by way of investment capital to the business. The Trial Court's

division cannot be found to be an abuse of discretion and, therefore, should be affirmed.

The Trial Court did not error in granting the Appellee the cause of action for the Option Agreement. The cause of action had little or no value. The property was owned by the Appellee's uncle. Appellee was awarded the adjacent property and the building which encroached upon the optioned land. At the time of Trial she was renting the optioned property and paying consideration therefore. The Trial Court's award cannot be found to be clearly erroneous and, therefore, should be affirmed.

ARGUMENT

I

SINCE THE APPELLANT FAILED TO MARSHAL ALL OF THE EVIDENCE WHICH SUPPORTED THE FINDINGS OF THE TRIAL COURT AND, DESPITE SUCH EVIDENCE, DEMONSTRATE THAT THE FINDINGS WERE CLEARLY ERRONEOUS, THE APPELLATE COURT SHOULD REFUSE TO CONSIDER AN ATTACK ON THE TRIAL COURT'S DISTRIBUTION OF PROPERTY.

A review of Appellant's argument indicates that the Appellant is really attacking the Trial Court's Findings of Fact and not just its Conclusions of Law. The Trial Court entered numerous and express Findings of Fact in the case at bar. Those Findings should be reviewed in light of the guidelines found in Rule 52(a), Utah Rules of Civil Procedure. Rule 52(a) provides, in relevant part, as follows:

Rule 52: Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury..., the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A;...Findings of Fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court...

[Emphasis added by Order of the Utah Supreme Court on October 30, 1986 and became effective on January 1, 1987.]

An analysis of the 1987 modification of Rule 52(a) demonstrates a clear intent to avoid retrying the facts of the case at the Appellate level. Since a divorce action is an equitable case, the Trial Courts have been given broad discretion in making awards. Riche v. Riche, 784 P.2d 465 (Utah App. 1989); Sukin v. Sukin, 842 P.2d 922 (Utah App. 1992); Maughan v. Maughan, 770 P.2d 156 (Utah App. 1989); Myers v. Myers, 768 P.2d 979 (Utah App. 1989); Shioji v. Shioji, 712 P.2d 197 (Utah 1985). Appellate Courts have traditionally granted great deference to the Trial Court's Findings of Fact and do

not overturn them unless they are clearly erroneous. The Appellate Courts accord substantial deference to the Trial Court's Findings and give the Trial Court considerable latitude in fashioning an appropriate relief. Watson v. Watson, 837 P.2d 1 (Utah App. 1992); Woodward v. Woodward, 709 P.2d 393 (Utah 1985). Additionally, Appellate Courts have traditionally deferred to the Trial Court for purposes of judging the credibility of witnesses. Rule 52(a), Utah Rules of Civil Procedure; Myers, supra; Shioji, supra; Riche, supra.

In Riche v. Riche, supra, this Court stated:

Husband, in his brief on appeal, refers this court to evidence which conflicts with the trial court's findings and supports his contention that he should have been awarded custody of the four children. However, Husband does not "marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" Bartell, 776 P.2d at 886 (quoting Walker, 743 P.2d at 193). See also Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985); Harker v. Condominiums Forest Glen, Inc., 740 P.2d 1361, 1362 (Utah Ct. App. 1987). Therefore, we decline to further consider Husband's attack on the court's findings as to custody. (Riche, supra p. 468). [Emphasis added].

In Shioji, the Supreme Court has also expressly provided:

On appeal from a judgment of the Trial Court, our [Appellate Court] role is not to substitute our own findings for those of the Trial Court, but to examine the record for evidence supporting the judgment.

(Shioji, supra, at 201) [Emphasis added]

Given that express statement of the role of the Appellate Court, the Appellant is charged with the responsibility of (1) marshaling all the evidence in support of the Findings, and (2) demonstrating that, despite that evidence, the Trial Court's Findings are so lacking in support as to be against the clear weight of the evidence.

In the case at bar, J.W. contends that the Trial Court erred in establishing its valuation of The Outlaw Saloon, in its division of the marital assets and in its award of the cause of action for the option property to Cheryl. A review of J.W.'s actual argument (more fully discussed in Points II through V of this brief) reveals that J.W. is actually attacking the Findings of Fact of the Trial Court and, therefore, he has not applied the proper Standard of Review. He has not marshaled all of the evidence which was presented to the Trial Court nor made any attempt to evaluate the Court's reasoning nor has he demonstrated that the reasoning or the Findings based thereon were clearly erroneous. Since the Appellant

has failed to marshal all of the evidence and, despite such evidence, demonstrate that the Court's Findings concerning the valuation of the marital assets and the distribution of same were clearly erroneous, this Court should refuse to consider any further attack on the Trial Court's award of said items. Hagan v. Hagan, 810 P.2d 478 (Utah App. 1991).

Conclusions of Law are reviewed for correctness and are given no special deference on appeal. Howell v. Howell, 806 P.2d 1209 (Utah App. 1991); Smith v. Smith, 793 P.2d 407 (Utah App. 1990).

II

THE TRIAL COURT DID NOT IMPOSE SANCTIONS OR ORDER THE SALE OF PROPERTY BECAUSE THERE WAS NO JUSTIFICATION TO DO SO.

The Appellant J.W. contends that he was unfairly prejudiced at trial because the Appellee Cheryl testified that she did not desire to sell the Outlaw Saloon. An examination of the actual facts of the case demonstrates that the Appellant's position is incorrect. J.W. submitted numerous rounds of discovery in this case. Cheryl responded to the first set of interrogatories and then a second set of interrogatories. In the Second Set of Interrogatories, Interrogatory No. 19 asked, "describe in detail all efforts undertaken by you, or anyone on

your behalf, to sell, or offer for sale, the business known as The Outlaw Saloon, and the real property on which the Outlaw Saloon is located..." (Add. B). Cheryl indicated that she had told many people that the business would be for sale upon the completion of the divorce. In Interrogatory 20 she was asked "please identify any appraisals, property evaluations or re-evaluations conducted on the real property and the business known as The Outlaw Saloon..." (Add. B). In responding Cheryl referred to work previously done by Bob Muir which had set a value of the business and property at between \$150,000 and \$160,000. It expressly made reference to the fact that the business portion was worth only 6% of one year's profit (Add. B Interrogatory 20). Mr. Muir died and was not available for trial. In Interrogatory 16 of said second set, Cheryl had designated Joe Kingsley as an expert with respect to the market value of The Outlaw Saloon (Add. B Interrogatory 16). Additionally, Plaintiff provided information concerning the valuation of the business by Joe Kingsley as soon as it was available which was prior to the originally scheduled trial date on December 2, 1994. J.W.'s counsel acknowledges that he had that information when he cross-examined Joe Kingsley at the time of trial (TT 21, 25). Mr. Kingsley's

testimony established a valuation of the real estate package at approximately \$155,000. He then went on to indicate that while he had not examined the business records to value the business itself, bar businesses in Moab had very little value (TT 12-13, 28-29, 32-34). Additionally, in Plaintiff's Response to Defendant's Second Request for Admissions (Add. C), Cheryl stated that she was "willing to sell the business known as The Outlaw Saloon, including all of the personal property used in said business, together with the real estate on which the business is located and all of her rights to the option agreement for sums between \$150,000 and \$175,000 provided that certain problems concerning title to the adjacent piece of property upon which a portion of the bar actually sits could be resolved for various sums of money (See Add. C Admission 1-3). All of this information was disclosed by Cheryl well in advance of trial. From the discovery it was clearly understood that Cheryl had consulted with experts and was prepared to use them at trial and that she believed that the business and all of its properties, including the real estate and the Option Agreement, would value between \$150,000 and \$160,000. Cheryl stated nothing at trial or in her case-

in-chief that changed any of the information that had been provided during discovery.

During cross-examination, J.W.'s attorney questioned Cheryl concerning her desires about selling the business. At that time, Cheryl testified that she did not want to sell the business because it was her only form of support (TT 205). Those remarks were elicited by J.W.'s counsel during cross-examination. At that time, counsel expressed surprise (TT 205-210). The Court asked why this was relevant and gave a substantial lecture about the need for each of the parties to present their own evidence (TT 205-210). The Court expressly asked J.W.'s counsel what he wanted to do (TT 209). At no time was a continuance requested, contrary to the statements now made in the appeal brief. At no time were sanctions requested, as now indicated in the appeal brief. At no time was a finding of contempt requested, contrary to the statements now made in the appeal brief. No request for an order forcing the sale of the property was ever made. The only thing requested by J.W. was that the Court consider Cheryl's changes in testimony as affecting Cheryl's credibility (TT 205-210).

As pointed out by the Trial Judge (TT 208), the purpose of the trial is to establish the value of the

assets, to determine whether portions thereof are pre-marital or marital, and to make an equitable distribution of same. The judge expressly asked why some future sale of the property would be relevant to any of those issues (TT 205-210). J.W. never established any need for or relevance of some future sale for the property.

In reality, both parties entered the Courtroom on the day of trial knowing that the caselaw required them to establish the value of the assets as of the date of the divorce. Howell, supra. Each party has the burden of proof to go forward with his or her case and establish the value of the assets, the character of same and an equitable distribution. J.W. now contends that he was surprised because he expected that the Court would order a sale of the property. Some future sale which may not have occurred for years, would not have given the Court the information it needed as of the date of the trial. The existence of a future buyer, or the lack thereof, the economic conditions at the time of some future sale, the distress or lack thereof of the parties, all such matters could affect a future sale and yet none would have any bearing on the value of the property at the time of the divorce and the trial judge so noted (TT 205-210).

Cheryl offered the testimony of Joe Kingsley at the time of trial. Mr. Kingsley established a valuation for the real estate. He also testified that bar businesses in Moab had little, if any, value. The extensive discovery which had been provided by Cheryl was consistent with all the testimony which was offered in Cheryl's case-in-chief.

Irrespective of any sale, J.W. had no evidence to contradict anything that had been offered by Cheryl in her case-in-chief. He offered no evidence of the value of the business. He offered no evidence of the value of the real estate. He offered no expert to evaluate the likelihood of success of a legal action concerning the option property. In short, J. W. offered no case at all. Even his own testimony was filled with contradiction and was woefully lacking in any documentary evidence at all. He could not even identify his own tax returns (TT 261).

Since Cheryl had fully responded to all of the discovery requests put to her and since nothing was said in her case-in-chief which altered the discovery materials in any way, there was no reason for the Court to determine that she had failed to fully cooperate in discovery. Rule 26(e), Utah Rules of Civil Procedure, only requires that responses to discovery be supplemented

if a party knows that a response, though correct when made, is no longer true and "the circumstances are such that a failure to amend the response is in substance a knowing concealment". The fact that Cheryl testified during cross-examination that she did not want to sell the bar because it was her only source of income does not constitute a "knowing concealment" within the meaning of Rule 26(e). In fact, J.W.'s counsel himself solicited those remarks. Had he not done so, there would have been nothing in the record indicating that she desired or did not desire to sell the property. Either way, it was immaterial as the Court could have ordered a sale of the property had it been necessary or advisable, irrespective of the desires of the parties.

J.W. then tries to disguise his own lack of preparation by claiming that Cheryl was "springing" this evidence on him at trial. How could Cheryl have ever anticipated that her husband would come to trial with no expert witnesses or evidence to establish the value of the assets, considering that all of the caselaw required him to do so in order to carry his burden of proof if he contended that the value of the business was anything different than that disclosed by Cheryl during discovery?

J.W. contends that because he believed both parties wanted to sell the property "it was only logical to assume that the best way to optimize the value of the assets was to put them on the market" (Appellant's Brief at pg. 13). Such logic ignores the fact that the Trial Court had to establish the value of the property at the time of trial in order to be able to determine an equitable distribution of same (Howell, supra). J.W.'s "logical assumption" was based upon his mistaken beliefs that he was going to get half of the value of the property and that the property might sell within some reasonably foreseeable time period. From the evidence, it was much more likely that the Court would find that J.W. had little or no marital interest in The Outlaw Saloon and, therefore, it would have been totally unnecessary to order a sale, particularly a forced sale which could have driven the value even lower.

Appellee agrees that the cases cited by the Appellant are an expression of the caselaw, although somewhat outdated, as it applies to specific fact situations. Appellee contends, however, that the facts in the cited cases are not material to the issues in this case. In Preston v. Preston, 646 P.2d 705 (Utah 1982), the Supreme Court was dealing with a case that involved

a finding of contempt by the Trial Court. There was no finding that Cheryl committed any contempt in the case at bar and, in fact, J.W. never even requested such a finding. J.W. contends that Read v. Read, 594 P.2d 871 (Utah 1979), requires the Appellate Court to remand this case for the taking of further evidence; however, the Read case does not stand for such a proposition. In Read the Appellate Court found that the Trial Court's property award might reflect a degree of punishment against the husband for his extramarital conduct. That belief was based upon a very disparate and apparently inequitable division of the assets which awarded the wife over 90% of clearly marital assets. The case has no application to the case at bar as no issues of punitive awards or extramarital conduct were raised and any disparity in the distribution of property was justified at length by the Trial Court. J.W. then cites Naranjo v. Naranjo, 751 P.2d 1144 (Utah App. 1988). He contends that Naranjo requires an Appellate Court to make changes in the Trial Court's ruling if there was a misunderstanding or misapplication of law resulting in substantial and prejudicial error. J.W. has failed to establish that anything in the Trial Court's decision was based upon a substantial or prejudicial error or an abuse of discretion. Indeed, none

of the fact situations in the cases cited by the Appellant have any bearing at all on the fact situation in the case at bar.

Cheryl presented a coherent case-in-chief at the time of trial. She offered expert testimony and substantial documentation to support her position. She established and traced a considerable amount of pre-marital property into the assets being valued by the Court. The Court found that it was equitable to return her investment to her and give her a proportional share of the appreciation on her investment which had occurred due primarily to the economy (See, Burke v. Burke, 733 P.2d 133 (Utah 1987) wherein the Supreme Court affirmed the Trial Court award to the wife of all of the appreciated value of her sole and separate property even though the appreciation had occurred during the marriage because it resulted primarily from economic changes). The Court entered findings that established the value of the assets. Those values were consistent with all of the evidence and with the material that had been provided by Cheryl during discovery.

By contrast, J.W. offered himself. He testified that his sparkling personality had built the business and was justification for an award of one-half of the entire

value of the business (TT 250). He offered nothing else. He acknowledged that he came into the marriage with nothing and that he never contributed any money or property to the enterprise at all (TT 53-54; 264-265). The Court awarded him one-fourth of the appreciation of the business property and one-half of the marital contributions to Cheryl's IRA account by way of a property award. Such an award actually exceeds the evidence presented by J.W. at the time of trial. The Court entered the only reasonable findings it could have entered given the complete lack of preparation and testimony offered by J.W. at trial.

III

THE TRIAL COURT DID NOT ERROR IN FINDING A VALUE FOR THE OUTLAW SALOON BASED UPON THE TESTIMONY PRESENTED AT TRIAL.

Appellant is required to marshal all of the evidence in favor of the Trial Court's Findings of Fact and, having done so, he is further charged with the responsibility of demonstrating that the Findings were clearly erroneous. In the case at bar, J.W. has not only failed to marshal all of the evidence but has actually ignored it. The Court entered the following Findings of Fact with respect to the valuation of The Outlaw Saloon and the property upon which it was located (Add. A):

- FF 12 On October 2, 1990, Cheryl contracted to purchase a building lot from her uncle for \$23,000 down and the balance of \$57,000 to be financed at the rate of 10% per annum over ten years. (The balance of this Finding is omitted as it does not expressly deal with the valuation of the real estate).
- FF 13 Cheryl then began to remodel and improve the existing building to create a place to operate her bar. All of the remodeling funds came from Cheryl's pre-marital or inherited property.
- FF 21 On March 2, 1992, Cheryl and J.W. signed an agreement. That agreement estimated Cheryl's investment in the business at \$60,000 and provided that J.W. would reimburse her for one-half of that amount or the sum of \$30,000. (The balance of this Finding is omitted as it is not applicable to the issue of valuation).
- FF 23 Cheryl's evidence about the value of the Outlaw Saloon was not countered by evidence from J.W. Cheryl's expert opined that the total value of the property is ONE HUNDRED FIFTY-FIVE THOUSAND (\$155,000.00) DOLLARS. The Court accepts this value. Cheryl and J.W. still owe her uncle FORTY-THREE THOUSAND (\$43,000.00) DOLLARS for the property.
- FF 25 The Court finds that the net value of all of these assets (refers to last sentence in preceding Finding) is the sum of \$112,000.
- FF 26(B) Most, if not all, of the appreciation in the value of the business and property is due to an overall increase in Moab property values and not to any efforts of either party to make the business a success. In fact, bars like The Outlaw Saloon are not a "growth industry" in

Moab today. The bar is worth more mainly because the land on which it sits has become more valuable due to the economic changes in the area.

After reviewing the Court's Findings of Fact, it is next necessary to determine whether any evidence exists to support the Findings. If such evidence exists, the Findings should not be disturbed. The parties purchased the property in the fall of 1990 for a total purchase price of \$80,000 (TT 103-108; Ex 13). The \$23,000 used as the down payment came from Cheryl's sole and separate property (TT 103-108) as did the remodeling funds (TT 118-119). Cheryl included all of those funds when she determined that she had invested \$60,000 into the business and property at the time she entered the written contract with J.W. which would have allowed him to purchase one-half of the business and property (TT 129-133). Joe Kingsley testified that the property and the building had a market value of \$155,000 (TT 20, 40). He went on to testify that the bar itself had very little value in Moab (TT 31/34). He provided testimony as to his experience as a bar owner as well as his involvement as a real estate agent handling properties where bars were located (TT 12-14). Even with the remodeling, the building was only worth \$10,000 (TT 20). Plaintiff's Response to Defendant's Second Request for Admissions

also established values for the "business known as The Outlaw Saloon, including all of the personal property used in said business, together with the real estate on which the business is located, and the rights of the option agreement," for total sums that would have netted approximately \$150,000, depending upon the status of title to the adjacent property and the costs associated with same (Add. C, Admissions 1-3). Additionally, Plaintiff's Answers to Defendant's Second Set of Interrogatories provided in answer to Interrogatory No. 20 that Bob Muir had valued the entire property and business at between \$150,000 to \$160,000 and that the business portion would be worth approximately 6% of one year's profits which would have placed a very low valuation on the business portion as the tax returns in evidence clearly demonstrate that the business had very little profit (TT 31-34; Exhibits P 16, P 26-30).

Even without reviewing Cheryl's own testimony, the overview outlined above shows evidence which supports the Trial Court's Findings of Fact with respect to the valuation of the enterprise known as The Outlaw Saloon and its properties. J.W. offered nothing in rebuttal. Whether the property might have been sold or not sold at some point in the future, the Court still needed evidence

of value at the time of the entry of the Decree of Divorce (Howell, supra). No Court can be expected to come up with an equitable division when it cannot establish a value for the property.

If J.W. had been so concerned about a sale of the property and felt it could not be valued without a sale, then he should have raised a motion for the sale of same at the time of the origin of the case approximately one year before the actual trial date. J.W. knew the property was not on the market for sale and he had made no attempt to request same. He knew when he entered the Courtroom for the first scheduled trial on December 2, 1994 as well as the actual trial date of January 3, 1995, that no sale was pending and yet he was not prepared to offer the Court one scintilla of evidence to establish a value.

Since the Appellant has failed to marshal all of the evidence in support of the Trial Court's Findings of Fact and, despite such evidence, demonstrate that the Findings were clearly erroneous, the Trial Court's Findings with respect to the valuation of the enterprise known as The Outlaw Saloon and its properties should be affirmed.

IV

THE TRIAL COURT'S DIVISION OF MARITAL ASSETS IS EQUITABLE WHEN THE COMPARATIVE CONTRIBUTIONS AND CIRCUMSTANCES OF THE PARTIES ARE CONSIDERED.

The Trial Court's division of assets was based upon specific Findings of Fact which are deemed to be accurate unless proven clearly erroneous. Appellant has failed to marshal any of the facts that supported the Trial Court's Findings and thus its division of assets. Instead, his brief has concentrated on controverted testimony and self-serving conclusory language that he made "substantial contributions", that he spent "a very substantial portion of the marriage working full time or nearly so", that it was "uncontroverted at trial" that he devoted a substantial portion of his time to the business (Appellant's Brief p. 16-17). In reality, the evidence supports none of those statements.

Cheryl testified that the Defendant rarely worked more than 20 to 25 hours a week when he was at the business (TT 59-60). She also testified that he had a negative impact on the business and often angered people. Only the Defendant seemed to think that his charming personality was the basis for the business (TT 250). The only uncontroverted facts at trial were the facts that J.W. came into the marriage with the clothes on his back

and an 11 year-old car and that he never put one dime into any asset in this marriage (TT 53-54, 216-217, 264-265). Appellant's failure to marshal all the evidence in support of the Court's Findings should require that this Court refuse to consider his attack upon the Trial Court's Findings any further (Hagan, supra).

In the alternative, a review of the Trial Court's Findings of Fact offers the following with respect to the issue of the distribution of property:

- FF 2 The parties were married on the 25th day of April, 1987 at Las Vegas, Clark County, State of Nevada and have been husband and wife since that date.
- FF 3 The parties separated on or about November, 1993 and have lived separate and apart since that time.
- FF 6 At the time of their marriage, the Plaintiff (hereinafter called "Cheryl") was employed at a motel and restaurant in Moab, Utah and she also owned and operated a bar in Moab known as the Outlaw Saloon. The assets of the bar had been purchased with Cheryl's money. She operated the bar in a rented building.
- FF 7 At the time of the marriage, Cheryl had invested about TWENTY THOUSAND (\$20,000.00) DOLLARS of her money in establishing the original Outlaw Saloon. She also had NINE THOUSAND NINETY (\$9,090.00) DOLLARS in currency in a safety deposit box, the sum of FIFTEEN THOUSAND FIVE HUNDRED TWENTY-FOUR (\$15,524.00) DOLLARS in a savings account at Williamsburg Bank, the sum of NINE THOUSAND (\$9,000.00) DOLLARS in an individual retirement account, the sum of

SIX HUNDRED EIGHTY-FIVE DOLLARS THIRTY CENTS (\$685.30) in her checking account, an ounce of gold, motel stock worth ELEVEN THOUSAND FOUR HUNDRED FORTY-FIVE (\$11,445.00) DOLLARS and a TEN THOUSAND (\$10,000.00) DOLLAR tax exempt bearer bond.

FF 8 The Defendant (hereinafter called "J.W.") brought no assets into the marriage except a 1975 Thunderbird automobile and his clothing.

FF 9 At the time of the marriage, Cheryl's employer was providing meals, lodging and health insurance for her as a benefit of her employment. After the marriage, those benefits continued and were also extended to J.W. as a benefit of Cheryl's employment.

FF 10 A few months before the marriage, J.W. terminated his minimum wage employment as a custodian for another motel and began working in the bar. From that point forward, J.W. worked regularly in the bar, except for three (3) months when he attempted to start a business for himself. He continued to work in the bar until the parties separated in November of 1993. Cheryl managed and also worked in the bar during the same period of time.

FF 12 On October 2, 1990, Cheryl contracted to purchase a lot and building from her uncle for TWENTY-THREE THOUSAND (\$23,000.00) DOLLARS down and the balance of FIFTY-SEVEN THOUSAND (\$57,000.00) DOLLARS to be financed at the rate of ten (10%) percent per annum over ten (10) years. J.W. was a party to the contract but furnished none of the down payment. The down payment came from the pre-marital and inherited property of Cheryl. (Cheryl inherited SIXTEEN THOUSAND SIX HUNDRED (\$16,600.00) DOLLARS in cash from her father's estate in 1988 and THREE

THOUSAND THREE HUNDRED SIXTEEN (\$3,316.00) DOLLARS in cash plus a right to ONE HUNDRED EIGHTY-THREE (\$183.00) DOLLARS per month for seven (7) years from her mother's estate in 1991.) On the same day, the uncle granted Cheryl and J.W. an option to purchase the adjacent lot for TEN THOUSAND (\$10,000.00) DOLLARS. Said option was to be exercised within one (1) year.

- FF 13 Cheryl then began to remodel and improve the existing building to create a place to operate her bar. All of the remodeling funds came from Cheryl's pre-marital or inherited property.
- FF 14 Cheryl had incorporated the Outlaw Saloon in 1988. She was its sole shareholder and, in exchange for the shares, she had conveyed all of the property and assets of the original Outlaw Saloon into said corporation. Throughout the marriage, she has remained the sole owner of all of the shares of said corporation.
- FF 15 Cheryl loaned the remodeling funds to the corporation from her sole and separate property. Cheryl claims to have loaned a total of FIFTY-SEVEN THOUSAND (\$57,000.00) DOLLARS to the corporation for the remodeling. However, the 1991 corporate tax returns list stockholder loans to the corporation of only TWENTY-FIVE THOUSAND FIVE HUNDRED (\$25,500.00) DOLLARS as of the end of 1991. Cheryl has presented no other documentation of that investment. Cheryl has shown that she sold her motel stock in 1991, presumably to finance the remodeling effort. At the time of its sale, the motel stock was worth FIFTEEN THOUSAND (\$15,000.00) DOLLARS.
- FF 16 J.W. and Cheryl filed joint tax returns for 1987 through 1992 and Cheryl filed corporate tax returns from 1989 through 1992. Every tax return showed Cheryl as

the sole proprietor of the bar before its incorporation and the sole owner of the corporation after its creation. Cheryl is the only shareholder in the corporation although J.W. served as a director and a nominal secretary.

FF 18 The new bar included living quarters for Cheryl and J.W. During the course of the marriage, J.W.'s meals, lodging, insurance and transportation needs were provided as a condition of Cheryl's employment or in conjunction with the operation of the business. J.W. received no separate compensation until 1989 for his work in the business.

FF 21 On March 2, 1992, Cheryl and J.W. signed an agreement. That agreement estimated Cheryl's investment in the business at SIXTY THOUSAND (\$60,000.00) DOLLARS and provided that J.W. would reimburse her for one-half of that amount or the sum of THIRTY THOUSAND (\$30,000.00) DOLLARS. The agreement also divided responsibility for the operation of the bar, set salaries for Cheryl and J.W., and outlined a means for preserving the marital union. J.W. did not make more than the first few payments under this agreement and did not sell his trailer and pay over the proceeds as he had agreed. He explained this breach as a natural consequence of the failure of the corporation to pay all of the salary provided by the agreement.

FF 22 The 1992 agreement is not useful as a legal document because it was breached by both parties. Agreements between the parties to a marriage are not usually binding on a divorce court. (Antenuptial and postnuptial agreements can be enforceable in Utah but only under conditions that this agreement made no effort to meet.) The agreement is most helpful as an expression of the states of mind of Cheryl and J.W. at a time when the pre-divorce legal posturing had not

yet begun. The agreement reflects a recognition by both parties that the bar has been a joint marital venture but that Cheryl alone had made a substantial financial investment in that venture. Based on this agreement and the circumstances outlined above, the Court finds that the bar is a marital asset but that equitable division will require that Cheryl receive more than one-half of this marital asset.

FF 25 The Court finds that the net value of all of these assets is the sum of ONE HUNDRED TWELVE THOUSAND (\$112,000.00) DOLLARS. Cheryl had invested SIXTY THOUSAND (\$60,000.00) DOLLARS of her separate pre-marital or inherited property in the business as of March 1993. The Court finds that she is entitled to recover all of that investment. The Court must then determine an equitable distribution for the remaining value of the property.

FF 26 The usual presumption is that marital property should be divided equally after pre-marital contributions are returned; however, there are two (2) facts that suggest the need for a different division in this case;

A. Cheryl is fifty-one (51) years old. J.W. is thirty-eight (38) years old. Cheryl has also suffered an injury to her leg that seriously limits her ability to work. She has a greater need for marital assets than does J.W.

B. Most, if not all, of the appreciation in the value of the business and property is due to an overall increase in Moab property values and not to any efforts of either party to make the business a success. In fact, bars like the Outlaw Saloon are not a "growth industry" in Moab today. The bar is

worth more mainly because the land on which it sits has become more valuable due to economic changes in the area.

FF 27 The Court finds that one-fourth (1/4) of the increased equity or the sum of THIRTEEN THOUSAND (\$13,000.00) DOLLARS should be awarded to J.W. as his equitable portion of the property. The remainder of the increased equity is awarded to Cheryl.

FF 28 J.W. concedes that there is no other marital asset, except the portion of Cheryl's IRA accumulated during the marriage. Cheryl contributed EIGHT THOUSAND NINE HUNDRED (\$8,900.00) DOLLARS to her IRA during the marriage and those contributions had accumulated interest at an average rate of six point five (6.5%) percent per annum for an average of four (4) years. The Court finds that the value of the marital portion of the IRA is ELEVEN THOUSAND (\$11,000.00) DOLLARS. One-half of this amount should be awarded to J.W.

FF 29 J.W.'s total property award (THIRTEEN THOUSAND (\$13,000.00) DOLLARS of the increased equity in the property and FIVE THOUSAND FIVE HUNDRED (\$5,500.00) DOLLARS from the increased value of the IRA) is the sum of EIGHTEEN THOUSAND FIVE HUNDRED (\$18,500.00) DOLLARS. Said property award shall bear interest at the rate of seven (7%) percent per annum from January 1, 1995. The Court finds that Cheryl does not have the capacity to readily borrow said sum of money and, therefore, she will need to make payments on the property award. The Court finds that the sum of approximately TWO HUNDRED FIFTY (\$250.00) DOLLARS per month would allow a payoff of the property settlement over a period of approximately eight (8) years. Said monthly payments shall commence on February 1, 1995. As long as

the payments are current, no execution shall issue but J.W. shall be entitled to a lien on the real estate under the bar in the amount of the property award until same has been fully paid, together with interest thereon.

Given the express Findings of Fact of the Trial Court, it was J. W.'s job to marshal all of the evidence and, despite the evidence, demonstrate that the Court's Findings were clearly erroneous. A brief survey of the record demonstrates a considerable amount of evidence to support each of the Findings. Most importantly, there is evidence to support the Findings of value and distribution. Once the Court established the value of The Outlaw Saloon with its adjacent properties at \$155,000 minus the obligation thereon at \$43,000, the Court found a net value of \$112,000. All of the evidence and documentation supported the fact that Cheryl had invested at least \$60,000 of her separate pre-marital or inherited property into the business (Add. D, Ex. P-4) and that J.W. had never contributed a dime by way of any pre-marital or inherited property (TT 53-54, 216-217). The Court found that Cheryl should recover all of her investment. The remaining equity was the sum of \$52,000.

The Court then reasoned that the usual presumption was that marital property should be divided equally after the pre-marital contributions were returned (FF 26).

Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988). In the case at bar, however, the Court found that there were two factors which suggested that a different division was appropriate: (1) The comparative physical conditions of the parties and (2) The basis for the increased appreciation in the asset being divided. First, the Court made note of the fact that Cheryl was substantially older than J.W. Cheryl was 51 and J.W. was 38 years old. Cheryl had suffered an injury to her leg which seriously limited her ability to work, while J.W. was in excellent health. The Court found that Cheryl had a greater need for marital assets than did J.W. (FF 26A). Those Findings were supported by the evidence. Cheryl testified as to her age, her serious injury and inability to stand for long periods of time. She testified about her past work history and the impact of her injury on her ability to perform her normal work (TT 62-63). Her prospects for employment outside of the bar did not appear good (TT 205). By contrast, 38-year-old J.W. had gained employment at the highest rate of pay he had ever earned, namely, \$6.00 per hour (TT 275). That was up from \$4.00 per hour at the time he came into the marriage (TT 271). His vigorous personal appearance on the witness stand evidenced his health and his ability to earn. All of

these facts were before the Court and provided a basis for the Court's Findings.

Additionally, Joe Kingsley had testified about the appreciated value of the property from the time it was purchased in 1991 for \$80,000 to the time of the divorce when it was valued at \$155,000. He testified that most, if not all, of the increased value of the property was due to the overall increase in property values in Moab due to the economy (TT 31). He testified that bars did not do well but that the property itself had appreciated substantially due to the economy (TT 31-34). That evidence was uncontroverted. It also provides a basis for the Court's Finding of Fact 26B.

Because of those factors, the Court found that it would not be equitable to divide equally the appreciation associated with The Outlaw Saloon. In Finding of Fact 27, the Court found that 25% of the marital equity was the sum of \$13,000 and should be awarded to J.W. ($\$112,000 - \$60,000$ returned to Cheryl = $\$52,000 \times .25\% = \$13,000$) and the remaining 75% of the marital equity should be awarded to Cheryl ($\$52,000 \times .75 = \$39,000$).

The Court then went on to value the only other marital asset, namely, the marital portion of Cheryl's IRA account. The uncontroverted testimony at trial

established that the marital portion of the IRA account together with interest was \$11,000. The Court found that one-half of that amount, namely, \$5,500 should be awarded to J.W.

J.W. was awarded a property interest for his one-half of the IRA and his one-fourth of the marital equity in the Outlaw Saloon which totaled \$18,500. The evidence supported Cheryl's need for additional assets and the fact that her original investment caused most of the appreciated value in the business. The Court's distribution cannot be found to be clearly erroneous nor can it be found to be inequitable and, therefore, the findings of the Trial Court should be affirmed.

V

THE TRIAL COURT DID NOT ERROR IN AWARDING THE APPELLEE THE CAUSE OF ACTION FOR THE OPTION AGREEMENT.

The testimony at trial established that the parties signed an Option Agreement with Cheryl's uncle to purchase an adjacent lot for the sum of \$10,000 on October 2, 1990 (FF 12). The option had to be exercised within one year (FF 12). With respect to the value of the option, if any, the Court entered the following Findings of Fact:

FF 19 On October 2, 1991, when the opinion to purchase the adjacent lot was due to expire, Cheryl decided to exercise the option and contacted her uncle for that purpose. Her uncle rejected her tender and told her that she and J.W. would do better to put their money into a home. The record reflects no further effort to acquire the adjacent lot until October 25, 1993 when Cheryl's lawyer wrote a letter to Cheryl's uncle in an attempt to persuade him to go through with the sale. That effort failed and Cheryl decided to abandon the effort. A portion of the Saloon building actually sits on the adjacent lot and a significant portion of the parking lot is located on part of said parcel. Cheryl presently pays her uncle ONE HUNDRED (\$100.00) DOLLARS per month for the right to occupy said property but has no written agreement with him.

FF 24 Although either Cheryl or J.W. may initially have had a chance of legally compelling the uncle to consummate the sale of the adjacent lot, prospects of success have been dimmed by their failure to pursue their claim. The Court finds that their claim to the adjacent lot has little or no value. Because Cheryl has the best chance of being able to deal with her uncle for the adjacent lot, the Court finds that it is most appropriate that the business, the real estate, the claim to the adjacent lot, if any, be awarded to Cheryl.

The Findings of Fact of the Trial Court should be affirmed unless they are clearly erroneous. J.W. is required to marshal all of the evidence from the

transcript in support of the Trial Court's Findings of Fact. He has ignored that responsibility. This Court should refuse to consider any further attack on the Trial Court's Finding because of that failure (Hagan, supra).

In Arguendo, a brief review of a portion of the trial testimony will indicate the justification for the Trial Court's Findings. First, the parties have no interest in the real property other than a "claim" or cause of action based upon an Option Agreement entered on October 2, 1990 (FF 19 and 24). J.W. talks about the property as though he was in possession of same and claims a value of at least \$25,000. The testimony at trial established that J.W. had abandoned any claim for enforcement of the Option. He had never hired an attorney to even render an opinion much less enforce the Option Agreement (TT 219). He presented no expert witness at trial to establish the merit of any alleged claim. He never initiated a law suit to establish what, if any, legal claim he might have on the property (TT 219-220). On the date the Option contract was due and the sum of \$10,000 had to be paid, J.W. had no money whatsoever from which he could have paid for the Option (TT 273).

By contrast, Cheryl had actually attempted to exercise the Option on October 2, 1991 (TT 110-116). She

did have funds from her own separate monies with which to have exercised the Option (TT 110-116). If she had been able to exercise the Option, she would have used sole and separate property to do so and, therefore, J.W. would not have had a claim anyway. When the Cheryl's uncle refused the tender, Cheryl waited over two years to seek any legal advice (TT 110-116). In August of 1993, she did consult with an attorney on her behalf only (TT 110-116). Counsel advised Cheryl of the limited likelihood of success and the considerable cost associated with trying to enforce the Option (TT 110-116; 218-220). Cheryl went home and discussed the matter with J.W. who was unwilling and unable to provide any funds to help enforce the contract (TT 114-116). Cheryl took no further steps to enforce the Option (TT 219). There is no other testimony in the record. There is nothing whatsoever to establish a legal basis to believe that the parties have any valid claim for enforcement of the Option and the Trial Court so found (FF 24). The Court went on to find that if there was some dim hope of success, it should be awarded to Cheryl (FF 24) as she had the best ability to deal with her uncle and also had a building sitting on a portion of the property. Additionally, she had a Rental Agreement which authorized

her to use the property and for which she was paying monthly consideration.

Given the complete lack of evidence presented by J.W., it is not unreasonable to assume nor inaccurate for the Trial Court to find that the Option had little or no value. Since the Appellant failed to marshal all of the evidence in support of the Trial Court's Findings, and despite such evidence, demonstrate that the Trial Court's Findings were clearly erroneous, the Trial Court should be affirmed with respect to its award of the cause of action for the Option Agreement.


CONCLUSION

Appellant has attacked the failure of the Trial Court to impose sanctions or order the sale of The Outlaw Saloon claiming that he was surprised by the Appellee's desires not to sell the saloon at the time of trial. Since Appellant failed to prepare and present any independent testimony on valuation of assets which was necessary for a determination of the issues at trial and since Appellee's "desires" concerning a possible sale of the business were irrelevant and immaterial to the issues before the Court and since the Appellant never requested a continuance, sanctions, penalties or a sale of property

before or during the Trial, there was no reason for the Trial Court to consider such a course of action.

Appellant has attacked the Trial Court's Findings with respect to the valuation of The Outlaw Saloon and the award of the cause of action for the Option Agreement. In each instance, the Court entered specific Findings of Fact. Appellant did not marshal all of the evidence that would have supported the Court's Findings of Fact but, instead, ignored the supporting evidence and pointed to his own disputed evidence. Rule 52(a) Utah Rules of Civil Procedure, requires the Appellant to marshal all of the evidence and then demonstrate, despite such evidence, that the findings of the Court are clearly erroneous. The Appellant has failed in that burden of proof and, therefore, the Trial Court's decision and the Findings of Fact, Conclusions of Law and Decree of Divorce entered thereon should be affirmed.

Respectfully submitted this 6th day of November,
1995.



JOANE PAPPAS WHITE
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed two (2) true and correct copies of the foregoing BRIEF OF APPELLEE, by posting in the United States mail, postage prepaid, on this 6th day of November, 1995 to the following:

JAMES C. LEWIS
George S. Diument, II
DIUMENTI & LEWIS
505 South Main Street
Bountiful, Utah 84010



JOANE PAPPAS WHITE

ADDENDUM A

Findings of Fact, Conclusions of Law
and Decree of Divorce

ORIGINAL

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SEVENTH DISTRICT COURT
Grand County

FILED FEB 17 1995

CLERK OF THE COURT
BY _____
Deputy

IN THE SEVENTH DISTRICT COURT IN AND FOR
GRAND COUNTY, STATE OF UTAH

)	
	)	FINDINGS OF FACT AND
CHERYL MONDERS,	)	CONCLUSIONS OF LAW
)	
Plaintiff,)	
Vs.)	
)	
KENNETH WAYNE MONDERS,	)	Civil No. 9447-8
)	
Defendant.)	

The above-entitled matter came on regularly for trial before the Court on the 3rd day of January, 1995, the Honorable LYLE R. ANDERSON, District Court Judge, presiding. Plaintiff was personally present and accompanied by her attorney JOANE PAPPAS WHITE. Defendant was personally present and accompanied by his attorney JAMES C. LEWIS. The Court received sworn testimony and exhibits and took the matter under advisement. Having been fully advised in the premises, the Court issued a Memorandum Decision and now, finds as follows:

FINDINGS OF FACT

1. The Plaintiff was an actual and bona fide resident of Grand County, State of Utah, and had been for more than three (3) months immediately next prior to the commencement of this action.

2. The parties hereto were married on the 25th day of April, 1987 at Las Vegas, Clark County, State of Nevada and have been husband and wife since that date.

3. The parties hereto separated on or about November, 1993 and have lived separate and apart since that time.

4. The Court finds that irreconcilable differences have developed between the parties which makes it impossible for them to maintain a marital relationship and, therefore, the Plaintiff should be granted a Decree of Divorce terminating her marriage to the Defendant on the grounds of irreconcilable differences.

5. There have been no children born as the issue of this marriage and, none are expected.

6. At the time of their marriage, the Plaintiff (hereinafter called "Cheryl") was employed at a motel and restaurant in Moab, Utah and she also owned and operated a bar in Moab known as the Outlaw Saloon. The assets of the bar had been purchased with Cheryl's money. She operated the bar in a rented building.

7. At the time of the marriage, Cheryl had invested about TWENTY THOUSAND (\$20,000.00) DOLLARS of her money in establishing the original Outlaw Saloon. She also had NINE THOUSAND NINETY (\$9,090.00) DOLLARS in currency in a safety deposit box, the sum of FIFTEEN THOUSAND FIVE HUNDRED TWENTY-FOUR (\$15,524.00) DOLLARS in a savings account at Williamsburg Bank, the sum of NINE THOUSAND (\$9,000.00) DOLLARS in an individual retirement account, the sum of SIX HUNDRED EIGHTY-FIVE DOLLARS THIRTY CENTS (\$685.30) in her checking account, an ounce of gold, motel stock worth ELEVEN THOUSAND FOUR HUNDRED FORTY-FIVE (\$11,445.00) DOLLARS and a TEN THOUSAND (\$10,000.00) DOLLAR tax exempt bearer bond.

8. The Defendant (hereinafter called "J.W.") brought no assets into the marriage except a 1975 Thunderbird automobile and his clothing.

9. At the time of the marriage, Cheryl's employer was providing meals, lodging and health insurance for her as a benefit of her employment. After the marriage, those benefits continued and were also extended to J.W. as a benefit of Cheryl's employment.

10. A few months before the marriage, J.W. terminated his minimum wage employment as a custodian for another motel and began working in the bar. From that point forward, J.W. worked regularly in the bar, except for three (3) months when he attempted to start a business for himself. He continued to work in the bar

until the parties separated in November of 1993. Cheryl managed and also worked in the bar during the same period of time.

11. In late 1990, Cheryl became aware that the motel and restaurant where she worked were scheduled to be torn down. Construction of a new motel would require the use of the space where she had been operating the bar. She, therefore, began looking for another location.

12. On October 2, 1990, Cheryl contracted to purchase a lot building from her uncle for TWENTY-THREE THOUSAND (\$23,000.00) DOLLARS down and the balance of FIFTY-SEVEN THOUSAND (\$57,000.00) DOLLARS to be financed at the rate of ten (10%) percent per annum over ten (10) years. J.W. was a party to the contract but furnished none of the down payment. The down payment came from the pre-marital and inherited property of Cheryl. (Cheryl inherited SIXTEEN THOUSAND SIX HUNDRED (\$16,600.00) DOLLARS in cash from her father's estate in 1988 and THREE THOUSAND THREE HUNDRED SIXTEEN (\$3,316.00) DOLLARS in cash plus a right to ONE HUNDRED EIGHTY-THREE (\$183.00) DOLLARS per month for seven (7) years from her mother's estate in 1991.) On the same day, the uncle granted Cheryl and J.W. an option to purchase the adjacent lot for TEN THOUSAND (\$10,000.00) DOLLARS. Said option was to be exercised within one (1) year.

13. Cheryl then began to remodel and improve the existing building to create a place to operate her bar. All of the

remodeling funds came from Cheryl's pre-marital or inherited property.

14. Cheryl had incorporated the Outlaw Saloon in 1988. She was its sole shareholder and, in exchange for the shares, she had conveyed all of the property and assets of the original Outlaw Saloon into said corporation. Throughout the marriage, she has remained the sole owner of all of the shares of said corporation.

15. Cheryl loaned the remodeling funds to the corporation from her sole and separate property. Cheryl claims to have loaned a total of FIFTY-SEVEN THOUSAND (\$57,000.00) DOLLARS to the corporation for the remodeling. However, the 1991 corporate tax returns list stockholder loans to the corporation of only TWENTY-FIVE THOUSAND FIVE HUNDRED (\$25,500.00) DOLLARS as of the end of 1991. Cheryl has presented no other documentation of that investment. Cheryl has shown that she sold her motel stock in 1991, presumably to finance the remodeling effort. At the time of its sale, the motel stock was worth FIFTEEN THOUSAND (\$15,000.00) DOLLARS.

16. J.W. and Cheryl filed joint tax returns for 1987 through 1992 and Cheryl filed corporate tax returns from 1989 through 1992. Every tax return showed Cheryl as the sole proprietor of the bar before its incorporation and the sole owner of the corporation after its creation. Cheryl is the only shareholder in

the corporation although J.W. served as a director and a nominal secretary.

17. The Outlaw Saloon ceased operation at its original location in August of 1991 and the new bar opened in October of 1991.

18. The new bar included living quarters for Cheryl and J.W. During the course of the marriage, J.W.'s meals, lodging, insurance and transportation needs were provided as a condition of Cheryl's employment or in conjunction with the operation of the business. J.W. received no separate compensation until 1989 for his work in the business.

19. On October 2, 1991, when the option to purchase the adjacent lot was due to expire, Cheryl decided to exercise the option and contacted her uncle for that purpose. Her uncle rejected her tender and told her that she and J.W. would do better to put their money into a home. The record reflects no further effort to acquire the adjacent lot until October 25, 1993 when Cheryl's lawyer wrote a letter to Cheryl's uncle in an attempt to persuade him to go through with the sale. That effort failed and Cheryl decided to abandon the effort. A portion of the Saloon building actually sits on the adjacent lot and a significant portion of the parking lot is located on part of said parcel. Cheryl presently pays her uncle ONE HUNDRED (\$100.00) DOLLARS per month for the

right to occupy said property but has no written agreement with him.

20. After their separation in November, 1993, the parties entered into a struggle for control of the bar and the living quarters therein. At the time of trial, Cheryl had prevailed and was living in and managing the bar without any help from J.W.

21. On March 2, 1992, Cheryl and J.W. signed an agreement. That agreement estimated Cheryl's investment in the business at SIXTY THOUSAND (\$60,000.00) DOLLARS and provided that J.W. would reimburse her for one-half of that amount or the sum of THIRTY THOUSAND (\$30,000.00) DOLLARS. The agreement also divided responsibility for the operation of the bar, set salaries for Cheryl and J.W., and outlined a means for preserving the marital union. J.W. did not make more than the first few payments under this agreement and did not sell his trailer and pay over the proceeds as he had agreed. He explained this breach as a natural consequence of the failure of the corporation to pay all of the salary provided by the agreement.

22. The 1992 agreement is not useful as a legal document because it was breached by both parties. Agreements between the parties to a marriage are not usually binding on a divorce court. (Antenuptial and postnuptial agreements can be enforceable in Utah but only under conditions that this agreement made no effort to

meet.) The agreement is most helpful as an expression of the states of mind of Cheryl and J.W. at a time when the pre-divorce legal posturing had not yet begun. The agreement reflects a recognition by both parties that the bar has been a joint marital venture but that Cheryl alone had made a substantial financial investment in that venture. Based on this agreement and the circumstances outlined above, the Court finds that the bar is a marital asset but that equitable division will require that Cheryl receive more than one-half of this marital asset.

23. Cheryl's evidence about the value of the Outlaw Saloon was not countered by evidence from J.W. Cheryl's expert opined that the total value of the property is ONE HUNDRED FIFTY-FIVE THOUSAND (\$155,000.00) DOLLARS. The Court accepts this value. Cheryl and J.W. still owe her uncle FORTY-THREE THOUSAND (\$43,000.00) DOLLARS for the property.

24. Although either Cheryl or J.W. may initially have had a chance of legally compelling the uncle to consummate the sale of the adjacent lot, prospects of success have been dimmed by their failure to pursue their claim. The Court finds that their claim to the adjacent lot has little or no value. Because Cheryl has the best chance of being able to deal with her uncle for the adjacent lot, the Court finds that it is most appropriate that the business,

the real estate, the claim to the adjacent lot, if any, be awarded to Cheryl.

25. The Court finds that the net value of all of these assets is the sum of ONE HUNDRED TWELVE THOUSAND (\$112,000.00) DOLLARS. Cheryl had invested SIXTY THOUSAND (\$60,000.00) DOLLARS of her separate pre-marital or inherited property in the business as of March 1993. The Court finds that she is entitled to recover all of that investment. The Court must then determine an equitable distribution for the remaining value of the property.

26. The usual presumption is that marital property should be divided equally after pre-marital contributions are returned; however, there are two (2) facts that suggest the need for a different division in this case:

A. Cheryl is fifty-one (51) years old. J.W. is thirty-eight (38) years old. Cheryl has also suffered an injury to her leg that seriously limits her ability to work. She has a greater need for marital assets than does J.W.

B. Most, if not all, of the appreciation in the value of the business and property is due to an overall increase in Moab property values and not to any efforts of either party to make the business a success. In fact, bars like the Outlaw Saloon are not a "growth industry" in Moab today. The bar is worth more mainly

because the land on which it sits has become more valuable due to economic changes in the area.

27. The Court finds that one-fourth (1/4) of the increased equity or the sum of THIRTEEN THOUSAND (\$13,000.00) DOLLARS should be awarded to J.W. as his equitable portion of the property. The remainder of the increased equity is awarded to Cheryl.

28. J.W. concedes that there is no other marital asset, except the portion of Cheryl's IRA accumulated during the marriage. Cheryl contributed EIGHT THOUSAND NINE HUNDRED (\$8,900.00) DOLLARS to her IRA during the marriage and those contributions had accumulated interest at an average rate of six point five (6.5%) percent per annum for an average of four (4) years. The Court finds that the value of the marital portion of the IRA is ELEVEN THOUSAND (\$11,000.00) DOLLARS. One-half of this amount should be awarded to J.W.

29. J.W.'s total property award (THIRTEEN THOUSAND (\$13,000.00) DOLLARS of the increased equity in the property and FIVE THOUSAND FIVE HUNDRED (\$5,500.00) DOLLARS from the increased value of the IRA) is the sum of EIGHTEEN THOUSAND FIVE HUNDRED (\$18,500.00) DOLLARS. Said property award shall bear interest at the rate of seven (7%) percent per annum from January 1, 1995. The Court finds that Cheryl does not have the capacity to readily

borrow said sum of money and, therefore, she will need to make payments on the property award. The Court finds that the sum of approximately TWO HUNDRED FIFTY (\$250.00) DOLLARS per month would allow a payoff of the property settlement over a period of approximately eight (8) years. Said monthly payments shall commence on February 1, 1995. As long as the payments are current, no execution shall issue but J.W. shall be entitled to a lien on the real estate under the bar in the amount of the property award until same has been fully paid, together with interest thereon.

30. Neither party has requested alimony during the proceeding and the Court awards no alimony herein.

31. Each party is ordered to bear his or her own Court costs and attorney's fees in this matter.

32. The Plaintiff has sustained the allegations of her Complaint by adequate evidence.

The Court having entered the foregoing Findings of Fact now concludes as follows:

CONCLUSIONS OF LAW

1. The Plaintiff is granted a divorce from the Defendant.

2. The parties hereto have accumulated certain real and personal property during this marriage and said property is awarded as follows:

A. The Plaintiff is awarded the Outlaw Saloon bar together with all of its assets, and the building and property where same is located, free and clear of all claims of the Defendant with the exception that the Defendant shall be entitled to a lien against the real property until the property settlement awarded to the Defendant has been fully paid. Said property is located in Moab, Grand County, State of Utah and is more particularly described as follows:

BEG 6 RD N & 150 FT W OF NE CORNER BLK 25 MSS, W 67.5 FT,
N 243 FT, E 67 ½ FT, S 243 FT TO BEG. ALT # 26-21-1-93.
ACRES; 0.38

The Plaintiff is ordered to assume and pay the outstanding indebtedness to her uncle, Clair Tangren, for the underlying obligation on said property and hold the Defendant harmless therefrom.

B. The Plaintiff is awarded any claim or chose-in-action which the parties may have, free and clear of all claims of the Defendant, against the Plaintiff's uncle Clair Tangren with respect to the adjacent lot located in Moab, Grand County, State of Utah and more particularly described as follows:

BEG 99 feet North and 193 feet East of the Northwest Corner Block 25 MSS, thence North 243 feet; thence East 50 feet; thence South 243 feet; thence West 50 feet to the place of beginning. Together with all improvements thereon and appurtenances thereunto belonging.

C. The Defendant is awarded a property settlement in the total sum of EIGHTEEN THOUSAND FIVE HUNDRED (\$18,500.00) DOLLARS, bearing interest at the rate of seven (7%) percent per annum from January 1, 1995 until fully paid. Said property settlement shall be paid by the Plaintiff to the Defendant at the rate of TWO HUNDRED FIFTY-TWO DOLLARS TWENTY-THREE CENTS (\$252.23) per month commencing February 1, 1995 and continuing each and every month thereafter for a period of eight (8) years or until said property settlement together with accumulated interest thereon has been fully paid. Said property settlement shall be a lien on the real property located under the Outlaw Saloon bar until the property award has been fully paid. The Plaintiff is ordered to pay said property settlement to the Defendant under the terms and conditions outlined herein. As long as said payments are current, no execution on the property settlement shall issue but the Defendant shall receive a lien on said real property as provided for herein.

D. The Plaintiff is awarded all of her IRA account free and clear of all claims of the Defendant.

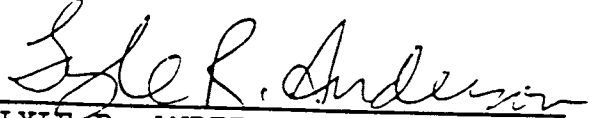
E. Each party is awarded his or her pre-marital property free and clear of all claims of the other.

F. Each party is awarded those items of marital personal property in his or her possession as of the date of trial on January 3, 1995.

3. Neither party is awarded any alimony.

4. Each party is ordered to pay his or her own Court costs and attorney's fees in this matter.

DATED this 17th day of February, 1995.


LYLE R. ANDERSON
District Court Judge

SEVENTH DISTRICT COURT
Grand County

JOANE PAPPAS WHITE #3445
Attorney Defendant
Fifth Street Plaza, Suite 1
475 East Main Street
Price, Utah 84501
Telephone: (801) 637-0177

FILED FEB 17 1995

CLERK OF THE COURT
BY Jeffrey
Deputy

IN THE SEVENTH DISTRICT COURT IN AND FOR
GRAND COUNTY, STATE OF UTAH

CHERYL MONDERS,)	
)	
	)	DECREE OF DIVORCE
)	
Plaintiff,)	
)	
Vs.)	
)	
KENNETH WAYNE MONDERS,	)	Civil No. 9447-8
)	
Defendant.)	

The above-entitled matter came on regularly for trial before the Court on the 3rd day of January, 1995, the Honorable LYLE R. ANDERSON, District Court Judge, presiding. Plaintiff was personally present and accompanied by her attorney JOANE PAPPAS WHITE. Defendant was personally present and accompanied by his attorney JAMES C. LEWIS. The Court received sworn testimony and exhibits and took the matter under advisement. Having been fully advised in the premises, the Court issued a Memorandum Decision and having entered the foregoing Findings of Fact and Conclusions of Law now, therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Plaintiff is granted a divorce from the Defendant.

2. The parties hereto have accumulated certain real and personal property during this marriage and said property is awarded as follows:

A. The Plaintiff is awarded the Outlaw Saloon building together with all of its assets, and the building and property where same is located, free and clear of all claims of the Defendant with the exception that the Defendant shall be entitled to a lien against the real property until the property settlement awarded to the Defendant has been fully paid. Said property is located in Moab, Grand County, State of Utah and is more particularly described as follows:

BEG 6 RD N & 150 FT W OF NE CORNER BLK 25 MSS, W 67.5 FT, N 243 FT, E 67 1/2 FT, S 243 FT TO BEG. ALT # 26-21-1-93. ACRES; 0.38

Together with all improvements thereon and appurtenances thereunto belonging.

The Plaintiff is ordered to assume and pay the outstanding indebtedness to her uncle, Clair Tangren, for the underlying obligation on said property and hold the Defendant harmless therefrom.

B. The Plaintiff is awarded any claim or chose-in-action which the parties may have, free and clear of all claims of the Defendant, against the Plaintiff's uncle Clair Tangren with

respect to the adjacent lot located in Moab, Grand County, State of Utah and more particularly described as follows:

BEG 99 feet North and 193 feet East of the Northwest Corner Block 25 MSS, thence North 243 feet; thence East 50 feet; thence South 243 feet; thence West 50 feet to the place of beginning. Together with all improvements thereon and appurtenances thereunto belonging.

C. The Defendant is awarded a property settlement in the total sum of EIGHTEEN THOUSAND FIVE HUNDRED (\$18,500.00) DOLLARS, bearing interest at the rate of seven (7%) percent per annum from January 1, 1995 until fully paid. Said property settlement shall be paid by the Plaintiff to the Defendant at the rate of TWO HUNDRED FIFTY-TWO DOLLARS TWENTY-THREE CENTS (\$252.23) per month commencing February 1, 1995 and continuing each and every month thereafter for a period of eight (8) years or until said property settlement together with accumulated interest thereon has been fully paid. Said property settlement shall be a lien on the real property located under the Outlaw Saloon bar until the property award has been fully paid. The Plaintiff is ordered to pay said property settlement to the Defendant under the terms and conditions outlined herein. As long as said payments are current, no execution on the property settlement shall issue but the Defendant shall receive a lien on said real property as provided for herein.

D. The Plaintiff is awarded all of her IRA account free and clear of all claims of the Defendant.

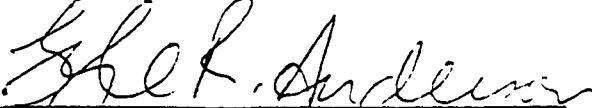
E. Each party is awarded his or her pre-marital property free and clear of all claims of the other.

F. Each party is awarded those items of marital personal property in his or her possession as of the date of trial on January 3, 1995.

3. Neither party is awarded any alimony.

4. Each party is ordered to pay his or her own Court costs and attorney's fees in this matter.

DATED this ^{21st} ~~17th~~ day of February, 1995.


LYLE R. ANDERSON
District Court Judge

ADDENDUM B

Plaintiff's Answers to Defendant's
Second Set of Interrogatories, Document Requests

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Telephone: (801) 637-0177

IN THE SEVENTH DISTRICT COURT IN AND FOR
GRAND COUNTY, STATE OF UTAH

CHERYL MONDERS,)	
)	
Plaintiff,	)	PLAINTIFF'S ANSWERS TO
Vs.	)	DEFENDANT'S SECOND SET OF
	)	INTERROGATORIES, DOCUMENT
KENNETH WAYNE MONDERS,	)	REQUESTS
)	
Defendant.	)	Civil No. 9447-8

COMES NOW the Plaintiff, being first duly sworn upon oath, and hereby responds to Defendant's Interrogatories and Request for Production of Documents, pursuant to Rules 33 and 34 of the Utah Rules of Civil Procedure, as follows:

INTERROGATORY NO. 1 Describe in detail all compensation you have received from the business known as The Outlaw Saloon during the calendar year 1994. (In responding to this interrogatory, Plaintiff should include all direct and indirect compensation, including personal payments made on Plaintiff's behalf by the business).

ANSWER TO INTERROGATORY NO. 1: With the exception of February 1994, I was injured and not able to be here. Housing is provided by the Outlaw Saloon Inc., for a night

watchman. I elected to be here so as to not hire outside help.

INTERROGATORY NO. 2 Indicate all of the periods during the calendar year 1994 during which you were unable to work due to the injury to your knee cap. Also indicate all of the periods in 1994 during which you have worked as a manager or a bartender of the Outlaw Saloon.

ANSWER TO INTERROGATORY NO. 2: I was and still am the owner and manager of the Outlaw Saloon Inc., since its inception in 1986 to date. I was off work and still am as a bartender from January 12, 1994 and to date have not been released.

INTERROGATORY NO. 3 Please indicate whether or not your doctors have released you to work, and, if so, indicate the date of such release, and whether you are willing to produce a copy of said release.

ANSWER TO INTERROGATORY NO. 3: I have not been released back to work. As of October 4, 1994 my case was closed by Dr. Patterson. I am not signing any release until I try bartending which will be the end of November 1994.

INTERROGATORY NO. 4 Describe all workers compensation benefits you have received as a result of your injury during the 1994 calendar year, and, in that regard, indicate the following:

(a) the monthly payments received by you; the date such payments commenced; and the date such payments terminated, if applicable;

(b) the name of the workers compensation fund paying such benefits.

ANSWER TO INTERROGATORY NO. 4:

(a) \$167.00 per week; January 13, 1994 through March 24, 1994. See attached Compensation Agreement.

(b) Worker's Compensation Fund of Utah.

INTERROGATORY NO. 5 Indicate whether or not any of the assets contained in your safety deposit box at First Security Bank of Utah, Moab, Utah, 84532, #470, as identified in Plaintiff's answer to Interrogatory Number 14 of Defendant's First Set of Interrogatories, were acquired during the course of the marriage. If so, identify what assets were acquired during the marriage.

ANSWER TO INTERROGATORY NO. 5: A title to the Outlaw Saloon Inc., Ford 1984 Ford Escort, bought with a part of my inheritance money 1988, two (2) birth certificates for my children (acquired by a former marriage), one (1) Kougann, acquired in 1982 and miscellaneous photos.

INTERROGATORY NO. 6 Identify with specificity the "miscellaneous items" identified in subparagraph (a) in Plaintiff's answer to Interrogatory Number 14 of Defendant's First Set of Interrogatories.

ANSWER TO INTERROGATORY NO. 6: A title to the Outlaw Saloon Inc., Ford 1984 Ford Escort, bought with a part of my inheritance money 1988, two (2) birth certificates for my children (acquired by a former marriage), one (1) Kougann, acquired in 1982 and miscellaneous photos.

INTERROGATORY NO. 7 Indicate all of the dates you have lived in the apartment unit located on the real property on which the Outlaw Saloon is located, since the separation of the parties.

ANSWER TO INTERROGATORY NO. 7: I did live in the caretakers apartment alone starting November 9, 1993 until January 14, 1994. I was then thrown out of my bar and house on a fraudulent ex-parte order and did not get back into the apartment until March 15, 1994. I have been there ever since.

INTERROGATORY NO. 8 Indicate whether you have personally paid for each and every personal expense identified in response to Interrogatory Number 16 of Defendant's First Set of Interrogatories, or whether some or any of those expenses have been paid by the Outlaw Saloon. If the Outlaw Saloon has paid some of such expenses, please identify which expenses it has paid.

ANSWER TO INTERROGATORY NO. 8: R e n t w a s furnished by the Outlaw Saloon Inc., in the caretaker's apartment, but if I chose not to stay another party would have been paid. Lights, water and laundry facilities are included in the apartment for the service of caretaking. All other

expenses are paid for personally. The Plaintiff is still paying for the Defendant's medical insurance.

INTERROGATORY NO. 9 Indicate the original purchase price of the shares of Canyonlands Cafe and Motel identified by Plaintiff in response to Interrogatory Number 25 of Defendant's First Set of Interrogatories.

ANSWER TO INTERROGATORY NO. 9 In June of 1986, ten (10) months prior to my marriage, I purchased shares in the Canyonlands Motel and Cafe Inc. This stock was owned by me prior to my marriage and was sold for FIFTEEN THOUSAND (\$15,000.00) DOLLARS and was deposited into the Outlaw Saloon Inc., checking account for the purpose of building the present Outlaw Saloon Inc., #2. The original purchase price was TEN THOUSAND FIVE HUNDRED FORTY-FIVE (\$10,545.00) DOLLARS which has already been answered in the first set of Interrogatories.

INTERROGATORY NO. 10 Indicate the source of funds for the purchase of the shares of Canyonlands Cafe and Motel.

ANSWER TO INTERROGATORY NO. 10 The stock was purchased prior to my marriage. Plaintiff objects to providing information on the source of the funds as the shares were premarital.

INTERROGATORY NO. 11 Please describe what you mean by your response of "recalled 1988-approx." in response to Interrogatory Number 25 of Defendants's First Set of Interrogatories.

ANSWER TO INTERROGATORY NO. 11 This was a tax free Missouri Authority Bond bought in 1982. Five (5) years prior to my marriage. It was recalled in 1988 and the TEN THOUSAND (\$10,000) DOLLARS received was then placed in my checking account.

INTERROGATORY NO. 12 Please indicate whether you are willing to provide a copy of the financial statement or statements referred to in response to Interrogatory Number 28 of Defendant's First Set of Interrogatories, located at Nate Knight Accounting, or whether Defendant will be required to incur the cost and inconvenience of subpoenaing such records. Please indicate the same with respect to the financial statement or statements located at the office of Clara Wilburg.

ANSWER TO INTERROGATORY NO. 12 Y e s , s e e attached.

INTERROGATORY NO. 13 Please describe in detail the "many heirlooms" you claim Defendant possesses in response to Interrogatory Number 30 of Defendant's First Set of Interrogatories

ANSWER TO INTERROGATORY NO. 13 A patchwork quilt from my mother around 1962. It was hand made and my grandmother helped make it. Both are now deceased. Value priceless, (\$10,000.00); Rocker high back spindle (era 1898) irreplaceable, value unknown priceless. (\$700.00) given to me by my mother twenty (26) years ago in 1967; High back

straight chair, value unknown (\$500.00), acquired in 1980 gift from my mother; and one (1) pair of diamond earrings, a birthday gift to me from my mother in 1985, small gold rose bud with a diamond center, valued at (\$550.00).

INTERROGATORY NO. 14 Please provide the specific information requested in subparagraphs (a-e) to Interrogatory Number 36 of Defendant's First Set of Interrogatories, which information was omitted in Plaintiff's first response to said Interrogatory.

ANSWER TO INTERROGATORY NO. 14 Please see Financial Summary attached hereto.

INTERROGATORY NO. 15 Please indicate to whom you reported that assets were stolen, as indicated in subparagraph 12 of plaintiff's response to Interrogatories Numbers 36 and 37 of Defendant's First Set of Interrogatories.

ANSWER TO INTERROGATORY NO. 15 Moab City Police Department, Steve Ross, February 26, 1994.

INTERROGATORY NO. 16 Indicate whether or not there were any other individuals, in addition to the individuals identified in plaintiff's answer to Interrogatory Number 38 of Defendant's First Set of Interrogatories, who may testify at the trial of this action, and indicate the matters upon which it is anticipated such individual(s) may testify.

ANSWER TO INTERROGATORY NO. 16 Plaintiff Cheryl Monders will testify on all issues raised by her Complaint; Sharon Sellers, employee of the Outlaw Saloon, Inc., who will

testify concerning the operation of the Saloon and J.W. violence towards Cheryl; Debra Edwards, employee of the Outlaw Saloon, Inc., who will testify concerning the operation of the Saloon and J.W. violence towards Cheryl; Joe Kingsley who will testify with respect to the market value of the Outlaw Saloon; Mary Lou Shupe, Abuse; Dennis Nielson, abuse; Dennis Wilberg, Abuse; Mike Gillispie, abuse; Dan Black, Outlaw Saloon Inc, #1 and #2; Don Covey, Canyonlands Motel and Outlaw Saloon; Jeane Couchman, Canyonlands Motel and Outlaw Saloon; Marla Fergurson, Outlaw Saloon, Inc. #1 and #2; Willie Tucker, Canyonlands Motel, Outlaw Saloon #1 and abuse.

JOANE REVIEW

INTERROGATORY NO. 17 Indicate whether you are willing to obtain a copy of your payroll records which show your earnings from January 1, 1994 to the present from Smuin, Rich and Marsing, as identified in answer to Defendant's request number 1 of Defendant's First Request for Production of Documents. Alternatively, indicate whether you are willing to sign a release or consent, authorizing the release of such records to Defendant.

ANSWER TO INTERROGATORY NO. 17 See attached Employer's Quarterly Wage List. Yes, I am willing to sign a consent to release such records.

INTERROGATORY NO. 18 Indicate whether your personal tax returns and tax returns for the business for the Outlaw Saloon, for the calendar year 1993, have been

completed. If so, indicate whether you will provide a copy of said tax returns.

ANSWER TO INTERROGATORY NO. 18 Yes, they were completed and sent in. Yes I will provide a copy.

INTERROGATORY NO. 19 Describe in detail all efforts undertaken by you, or anyone on your behalf, to sell, or offer for sale, the business known as the Outlaw Saloon, and the real property on which the Outlaw Saloon is located. In responding to this Interrogatory, please identify all individuals with whom contact has been made regarding a prospective sale to the business, including the names and addresses of prospective buyers, the names and addresses of real estate brokers or agents involved in such prospective sale, and any other individuals who may have been involved in any such prospective transaction.

ANSWER TO INTERROGATORY NO. 19 I have told a thousand people that this business will be for sale upon the completion of this divorce. The names, addresses and telephone numbers is too lengthy to list at this time. These efforts to sell to these various people are in an unofficial nature pending the finality of this action.

INTERROGATORY NO. 20 Please identify any appraisals, property evaluations or reevaluations conducted on the real property and the business known as the Outlaw Saloon. In responding to such Interrogatory, indicate the name, address and telephone number of any person or firm who

was involved in such appraisal, evaluation or reevaluation, and indicate what information was provided to any such party by you or anyone on your behalf to enable such party to complete their appraisal, evaluation or reevaluation.

ANSWER TO INTERROGATORY NO. 20 B o b M u i r
estimated value based on structure, size, type, age and the quality of the construction. The value was between ONE HUNDRED FIFTY to ONE HUNDRED SIXTY THOUSAND DOLLARS (\$150,000.00 to \$160,000.00) - Closed door business. The business was worth six (6%) percent of one (1) years profit. He is now deceased. Grand County Assessors Office.

INTERROGATORY NO. 21 Indicate the source of the deposit of \$37,912.35 into your Golden Passbook Savings Account, #18378423, on September 19, 1990.

ANSWER TO INTERROGATORY NO. 21 See Financial
Summary attached hereto.

INTERROGATORY NO. 22 Indicate where the funds from the withdrawal on October 2, 1990 in the amount of \$23,000.00, from the account referred to in the above paragraph, were transferred.

ANSWER TO INTERROGATORY NO. 22 T h e y w e r e
transferred to M. C. Tangren for a down payment on the property, quonset hut, building and lot. See attached document for production #9.

INTERROGATORY NO. 23 Indicate whether you are willing to sell the business known as the Outlaw Saloon,

together with the real property on which it is located, and all of your rights to purchase the adjacent lot #95, pursuant to an option agreement with your uncle. If the answer to this Interrogatory is "yes," indicate the price at which you would be willing to sell these properties and assets.

ANSWER TO INTERROGATORY NO. 23 Yes, I am willing to sell the business known as the Outlaw Saloon Inc., of which I am 100% stockholder and president together with the real property on which it is located of which I am a joint tenant with the Defendant whom has not contributed any monies for the purpose of said lot. No I cannot sell something I do not have on the adjacent lot #95. I do not have an option.

INTERROGATORY NO. 24 Indicate whether you would be willing to split with defendant the cost of an appraisal for the business and real property on which the Outlaw Saloon is located, if such appraisal can be completed prior to the trial date. In responding to this Interrogatory, indicate all conditions you and your counsel would require to such an arrangement.

ANSWER TO INTERROGATORY NO. 24 NO.

INTERROGATORY NO. 25 Indicate if you are willing to have a real estate expert engaged by Defendant, inspect the premises, and receives all of the pertinent books and records of the Outlaw Saloon. If so, indicate what, if any, books and records of the business you are not willing to allow such person to review.

ANSWER TO INTERROGATORY NO. 25 No.

INTERROGATORY NO. 26 Please describe in detail all monies you claim are owed to you by the Outlaw Saloon, or Defendant. In responding to such Interrogatory, describe the date(s) such monies were advanced by you to the Outlaw Saloon or Defendant, the source of such monies, and any documentation, instruments, or papers evidencing such obligation or transfer of monies.

ANSWER TO INTERROGATORY NO. 26 EIGHTY-NINE THOUSAND ONE HUNDRED NINETY-THREE (\$89,193.00) DOLLARS plus interest. Amount of money documented. No return on this money has been made. This money was put up by the Plaintiff as the financier of the Outlaw Saloon #1 and #2. These monies would have earned the Plaintiff THIRTY-FIVE THOUSAND (\$35,000.00) DOLLARS in the period of time had this money been placed in other endeavors. See financial Summary attached hereto.

INTERROGATORY NO. 27 For each of the Requests for Admission set forth in this set of discovery which you deny, set forth in detail the factual basis for such denial, and identify any documents or witnesses who provide support for such denial.

ANSWER TO INTERROGATORY NO. 27 These will be supplemented.

INTERROGATORY NO. 28 Describe in detail all outstanding indebtedness or obligations of the Outlaw

Saloon, including date the indebtedness or obligation was incurred, name and address of the creditor, amount of indebtedness outstanding, and payment terms.

ANSWER TO INTERROGATORY NO. 28 Cheryl Monders, indebtedness, ONE HUNDRED TWENTY-FOUR THOUSAND ONE HUNDRED NINETY-THREE (\$124,193.00) DOLLARS. M.C. Tangren, FORTY THOUSAND FOUR HUNDRED EIGHTY-THREE DOLLARS AND SIXTY-NINE (\$40,483.69) CENTS, monthly payment SEVEN HUNDRED FIFTY-SIX DOLLARS AND TWENTY-SIX (\$456.26) CENTS, payment on terms on Cheryl ten (10%) percent interest increasing compounded.

INTERROGATORY NO. 29 Identify any individual or firm which you have engaged, or which you anticipate engaging, to testify at trial regarding the value of the business known as the Outlaw Saloon, the real property on which it is located, and/or lot 95. In responding to this Interrogatory, describe in detail the matters on which it is anticipated such individual(s) or firm(s) will testify, and describe in detail all documents, papers, materials, and other information that has been provided or which it is anticipated will be provided, to such individual(s) or firm(s), to enable such party or parties to perform such work.

ANSWER TO INTERROGATORY NO. 29 Joe Kingsley

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1 Please provide copies of the bank statements for the Outlaw Saloon, covering the period beginning from the date of inception of the

business through September 30, 1994. (These documents were previously requested in Defendant's First Set of Discovery, but bank statements covering only Plaintiff's personal accounts were produced in response to this request.

ANSWER TO REQUEST FOR PRODUCTION NO. 1 B a n k statements from 1986, 1988 - 1989 are missing. 1991 to present are sketchy. See attached.

REQUEST FOR PRODUCTION NO. 2 Please provide a copy of the cash register receipts from the Outlaw Saloon, for each day from January 1, through September 30, 1994. Alternatively, Plaintiff can make these receipts available for inspection at a mutually convenient time, and indicate when such documents may be available.

ANSWER TO REQUEST FOR PRODUCTION NO. 2 C a s h register receipts can be made available to Defendant's counsel at the Outlaw Saloon. Please advise which day would be convenient through Plaintiff's counsel.

REQUEST FOR PRODUCTION NO. 3 Please provide a copy of any contracts, correspondence or documents pertaining to any remodeling, improvements, refurbishing or other construction performed on the real property and business known as the Outlaw Saloon.

ANSWER TO REQUEST FOR PRODUCTION NO. 3 Construction has not started.

REQUEST FOR PRODUCTION NO. 4 Please provide any documentation, papers and writings which support your

claim that you contributed pre-marital monies or assets to the business known as the Outlaw Saloon and the real property on which it sits.

ANSWER TO REQUEST FOR PRODUCTION NO. 4 See attached Financial Summary.

REQUEST FOR PRODUCTION NO. 5 Please provide monthly personal bank statements for any and all checking or other accounts which would show your personal expenditures during the calendar year 1994.

ANSWER TO REQUEST FOR PRODUCTION NO. 5

REQUEST FOR PRODUCTION NO. 6 Please provide copies of any contracts, correspondence, and other documents pertaining to the option agreement with Marvin Tangren, and the real property owned by Marvin C. Tangren, located adjacent to the property on which the Outlaw Saloon is located, commonly known as Lot 95. Such response should include any correspondence between your counsel and Mr. Tangren, and from Mr. Tangren to you or your counsel.

ANSWER TO REQUEST FOR PRODUCTION NO. 6 These items were stolen. I reported them to Moab City Police on February 26, 1994. See police report on production no. 12.

REQUEST FOR PRODUCTION NO. 7 Please provide copies of all corporate documents of the Outlaw Saloon, Inc., including articles of incorporation and bylaws, as amended; minutes of meetings of, or action taken by, the board of

directors, officers, and shareholders, and contracts between the corporation and any third parties.

ANSWER TO REQUEST FOR PRODUCTION NO. 7 See attached hereto.

REQUEST FOR PRODUCTION NO. 8 Please provide copies of any exhibits you anticipate introducing at trial.

ANSWER TO REQUEST FOR PRODUCTION NO. 8 I will supplement.

REQUEST FOR PRODUCTION NO. 9 Please provide copies of any documents or writings which reflect any outstanding indebtedness or obligation of The Outlaw Saloon.

ANSWER TO REQUEST FOR PRODUCTION NO. 9 See attached hereto.

REQUEST FOR PRODUCTION NO. 10 Please provide copies of all paystubs or other documentation which evidences any compensation, direct or indirect, received by you from The Outlaw Saloon during 1994.

ANSWER TO REQUEST FOR PRODUCTION NO. 10 Attached hereto.

REQUEST FOR PRODUCTION NO. 11 Please provide copies of all financial statements of The Outlaw Saloon prepared by Nate Knight Accounting, Clara Wilburg, or any other person or firm on behalf of you or The Outlaw Saloon.

ANSWER TO REQUEST FOR PRODUCTION NO. 11 See attached hereto.

REQUEST FOR PRODUCTION NO. 12 Please provide a copy of any reports of stolen assets, as described in Interrogatory Number 15.

ANSWER TO REQUEST FOR PRODUCTION NO. 12 S e e
attached hereto.

REQUEST FOR PRODUCTION NO. 13 Please provide copies of any tax returns, annual or quarterly, for 1993 and 1994, filed for either you personally or The Outlaw Saloon.

ANSWER TO REQUEST FOR PRODUCTION NO. 13 S e e
attached hereto.

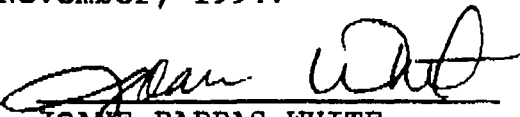
REQUEST FOR PRODUCTION NO. 14 Please provide a copy of any appraisal, evaluation or assessment of the business of The Outlaw Saloon, and/or the real property on which it is located, and Lot 95.

ANSWER TO REQUEST FOR PRODUCTION NO. 14 T h e
appraisal from Bob Muir was asked for. Sizes, facts and business figures were brought up but it was never completed. He passed away.

REQUEST FOR PRODUCTION NO. 15 Please provide a copy of any other documents identified in response to the Interrogatories set forth.

ANSWER TO REQUEST FOR PRODUCTION NO. 15 Attached hereto.

DATED this 29th Day of November, 1994.

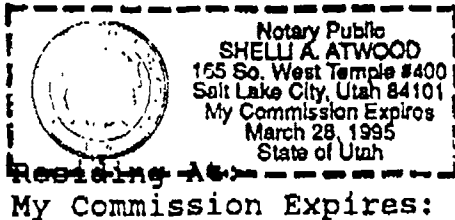

JOANNE PAPPAS WHITE
Attorney for Plaintiff

STATE OF UTAH)
 : ss.
County of Carbon)

CHERYL MONDERS, being first duly sworn upon oath, deposes and states that she is the Defendant in the above-entitled action; that she has read the above and foregoing and knows the contents thereof, and that the same is true and correct to the best of her knowledge, except as to those matters therein stated upon information and belief, and as to such matters believes the same to be true.

Cheryl Monders
CHERYL MONDERS

Subscribed and sworn to before me this 30th day of November, 1994.



Shell A. Atwood
NOTARY PUBLIC
Price UT
March 28, 95

ADDENDUM C

Plaintiff's Response to Defenant's
Request for Admissions

JOANE PAPPAS WHITE #3445
Attorney for Plaintiff
Fifth Street Plaza, Suite 1
475 East Main
Price, Utah 84501
Telephone: (801) 637-0177

CHERYL MONDERS,)
)
 Plaintiff,)
 Vs.)
)
 KENNETH WAYNE MONDERS,)
)
 Defendant.)

PLAINTIFF'S RESPONSE TO
DEFENDANT'S REQUEST FOR
ADMISSIONS

Civil No. 9447-8

ANSWER TO ADMISSION NO. 2 Deny Admission No. 2.

ADMISSION NO. 3 Admit that it is your belief that you have a valid option contract with MARVIN C. TANGREN, for the purchase of the real property adjoining the property on which the Outlaw Saloon is located, known as Lot 95, and that it is your belief that such contract is enforceable.

ANSWER TO ADMISSION NO. 3 Admits that CHERYL MONDERS only has an agreement with MARVIN C. TANGREN for the purchase of real property adjoining the Outlaw Saloon which he has refused to honor. Admits that CHERYL MONDERS has one legal opinion which indicates that the contract may be enforceable but that the expenses associated with such a suit would run between TEN and FIFTEEN THOUSAND (\$10,000 and \$15,000) DOLLARS. Denies all of the balance of the allegations in Admission No. 3.

ADMISSION NO. 4 Admit that you intend to pursue legal action to enable you to exercise the option agreement.

ANSWER TO ADMISSION NO. 4 Deny Admission No. 4.

ADMISSION NO. 5 Admit that Defendant is a party to the option agreement described in the preceding two paragraphs, and that such option agreement was entered into during the marriage between Plaintiff and Defendant.

ANSWER TO ADMISSION NO. 5 Deny Admission No. 5.

ADMISSION NO. 6 Admit that the value of the property which is the subject of the option agreement, is worth substantially more than the option price of \$10,000 provided in paragraph 1 of such agreement.

ANSWER TO ADMISSION NO. 6 Objects to Admission No, 6 on the grounds that it is an attempt to value the existing value of real estate as compared to an original option price for same many years ago during an economic depression and, therefore it is immaterial to the current proceedings.

ADMISSION NO. 7 Admit that you are unwilling to sell the business known as "The Outlaw Saloon", together with the real estate on which the business is located, and your rights to the option agreement, for the total sum of \$150,000.

ANSWER TO ADMISSION NO. 7 The Plaintiff is unable to respond to Admission No. 7 on the grounds that no information concerning the alleged sale price has been made available with respect to methods of payments etc. and, therefore, same are denied.

ADMISSION NO. 8 Admit that you are unwilling to sell the property described in the preceding paragraph, for the total sum of \$175,000.

ANSWER TO ADMISSION NO. 8 The Plaintiff is unable to respond to Admission No. 8 on the grounds that no information concerning the alleged sale price has been made available with respect to methods of payments etc. and, therefore, same are denied.

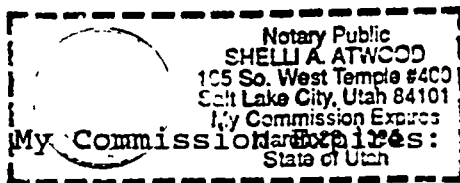
ADMISSION NO. 9 Admit that you are unwilling to sell the property described in the preceding two paragraphs, for the total sum of \$200,000.

ANSWER TO ADMISSION NO. 9 The Plaintiff is unable to respond to Admission No. 9 on the grounds that no information concerning the alleged sale price has been made available with respect to methods of payments etc. and, therefore, same are denied.

DATED this 21ST day of October, 1994.

Cheryl Monders
CHERYL MONDERS, Plaintiff

Subscribed and sworn to before me this 21st day of October, 1994.



Shelli A. Atwood
NOTARY PUBLIC
Residing At:

DATED this 31 day of October, 1994.

Joane Pappas White
JOANE PAPPAS WHITE
Attorney for Plaintiff

ADDENDUM D

Trial Exhibit P-4



ORIGINAL

CHERYL'S ASSETS AT TIME OF MARRIAGE

1.	Cash in safety deposit box	\$ 9,090.00
2.	Savings at Williamsburg Bank	15,524.00
3.	IRA (opened 1978)	9,000.00
4.	Checking account	685.30
5.	1 Krugrand	382.00
6.	Motel Stock	11,445.00
7.	Missouri Bond	10,000.00
8.	The First Outlaw Saloon (cost basis) (Value \$50,000)	<u>22,600.00</u>
	TOTAL	<u>\$78,726.30</u>

CHERYL'S SEPARATE ASSETS ACQUIRED AFTER MARRIAGE

1.	Inheritance from father (1988)	16,600
2.	Inheritance from mother 3,316 in cash and payments of \$183.00 per month for seven years (\$15,372)	<u>18,688</u>
	TOTAL	<u>\$35,288</u>

PLUS ACCUMULATED INTEREST ON ALL ACCOUNTS FROM DATE OF MARRIAGE