

1995

Gerber v. Gerber : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

~~SECRET NO. 1~~

950613-77

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LOWELL GERBER,	:	
	:	
Plaintiff/Appellant,	:	Case No. 950613-CA
	:	
v.	:	Priority No. 15
	:	
MARY JO GERBER,	:	
	:	
Defendant/Appellee,	:	District Court Case No.
	:	924905415
	:	

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BRIEF OF APPELLANT

AN APPEAL FROM FINAL FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND ORDER MODIFYING DECREE OF DIVORCE ENTERED BY
THE HONORABLE DOUGLAS L. CORNABY, ON JUNE 16, 1995
AND AN ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL
AND OBJECTIONS TO PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW SIGNED AND ENTERED
ON AUGUST 15, 1995, BY THE HONORABLE SANDRA N. PUELLER

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Appellee

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THE TRIAL COURT ABUSED ITS DISCRETION IN NOT REDUCING THE HUSBAND'S ALIMONY OBLIGATION BASED UPON THE WIFE'S FAILURE TO FULFILL HER OBLIGATIONS UNDER THE DECREE TO SEEK AND OBTAIN EMPLOYMENT AT THE HIGHEST ECONOMIC LEVEL AND HER FAILURE TO USE HER BEST EFFORTS TO REHABILITATE HERSELF FROM HER DISABILITY TO ACHIEVE HER BEST EMPLOYMENT OPPORTUNITIES

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Did the trial court abuse its discretion in failing to find that the wife was voluntarily underemployed for purposes of determining alimony?

2) Did the trial court abuse its discretion in failing to impute additional income to the wife for purposes of determining alimony?

3) Did the trial court abuse its discretion in making an award of alimony that exceeded the wife's reasonable needs after considering the wife's actual income?

4) Were the trial court's findings in error related to the wife's actual income?

5) Had there been a sufficient change in the wife's income and expenses to justify a reduction in the husband's alimony obligation?

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AND CONCLUSIONS OF LAW SIGNED AND ENTERED BY
THE HONORABLE SANDRA N. PUELLER ON AUGUST 15, 1995.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is conferred pursuant to the
provisions of §78-2A-3(2)(i) Utah Code Annotated (Supp. 1993).
This action involves the Plaintiff's appeal from Findings of Fact

and Conclusions of Law and an Order Modifying Decree of Divorce, entered by the Honorable Douglas J. Cornaby, on June 16, 1995, and an Order denying Plaintiff's Motion for New Trial and Objections to Proposed Findings of Fact and Conclusions of Law, signed and entered by the Honorable Sandra N. Pueller, on August 15, 1995. A timely Notice of Appeal was filed on September 11, 1995. No cross appeal has been filed.

DETERMINATIVE AUTHORITY

There are no specific statutes or cases which are identifiable as determinative authority. As support for Appellant's position, see statutes and cases, cited in the Table of Cases, page iii, of this Brief, infra.

STATEMENT OF THE CASE AND THE PROCEEDINGS BELOW

This case is a domestic relations case involving the husband's request for relief from alimony payments which he was making, pursuant to a Decree of Divorce entered approximately one year earlier.

Findings of Fact, Conclusions of Law and a Decree of Divorce were signed and entered on November 23, 1993 as a result of a settlement agreement reached by the parties when the original matter was pre-tried before a domestic relations commissioner in June of 1993. That agreement was read into the record, reduced to writing, and ultimately incorporated into the Findings, Conclusions and Decree.

A material part of the parties' original settlement agreement provided for a review of the alimony award in one year, or such earlier time as requested by either party, based upon the wife's claimed disability related to her thumb and her resulting inability to work as a dental hygienist.

On February 24, 1994, the husband filed a Petition to Modify the Decree of Divorce, requesting relief from the original alimony award. The wife had refused to undergo minor surgery to correct the problem with her thumb and had failed to obtain employment at the highest economic level possible as was agreed to under the original Settlement Agreement and ordered by the Decree. The wife responded to the husband's Petition, claiming that the alimony obligation should not be reduced.

A one day trial was held on the Petition to Modify on November 15, 1994. It was tried before the Honorable Douglas Cornaby, the judge assigned to handle the case for the Honorable Richard Moffat, the judge originally assigned to the case. At trial, both sides were represented by counsel, both parties testified and each called a physician to testify in support of their respective positions.

At the conclusion of the evidence, and after hearing argument from counsel, Judge Cornaby ruled from the bench and 1) kept the husband's alimony obligation at \$4,000 per month until December 1, 1995; 2) reduced the alimony obligation from \$4,000 to \$3,500 per month from December 1, 1995 to December 1, 1996, at which time it was to be reduced by an additional \$500 with that \$3,000 per month

alimony obligation to then continue permanently; and 3) required each side to pay their own attorney's fees and costs.

The husband then timely filed a Motion for New Trial and Objections to the Proposed Findings of Fact and Conclusions of Law submitted by the wife. Judge Cornaby denied that Motion and an Order to that effect was signed and entered by the Honorable Sandra N. Pueller, (on behalf of Judge Cornaby) on August 15, 1995. The husband timely filed a Notice of Appeal with this Court on September 11, 1995. No cross-appeal has been filed by the wife.

STATEMENT OF FACTS

This case involves the review of an initial alimony award as provided for under a Decree of Divorce, the terms of which resulted from a settlement agreement reached by the parties at the original pre-trial conference held in conjunction with the original divorce proceedings. (R-71)

Paragraph 3 of the Decree provides as follows:

Defendant is awarded alimony from plaintiff in the sum of \$4,000 a month commencing with the month of July 1993, based upon the current financial circumstances of the parties as shown in their Financial Declarations and under circumstances where defendant is currently unable to work based upon her present physical disability.

There shall be an automatic review of this alimony award in one year from the date of the entry of the Decree of Divorce, or earlier if circumstances warrant, based upon the anticipation that defendant will use her best efforts to seek and obtain employment at the highest economic level and will, further, use her best efforts to rehabilitate herself from her disability to help her achieve her best employment opportunities.

The issue is reserved as to whether defendant's employment should be full or part-time based upon the needs of the children. At the time of the review, each party shall have the right to express his or her respective position on this

issue, as plaintiff's position is that defendant should seek and obtain full time employment and defendant;s position is that she should seek and obtain part time employment due to the children's needs.

Plaintiff shall have the right to request defendant to obtain a physical examination by a hand expert currently, with a further examination six months from the entry of the Decree of Divorce and a second further examination one year from the entry of the Decree of Divorce to assist the Court in determining defendant's ability to obtain employment.

At the time of the review by the Court, if there has been a substantial change in financial circumstances or ability, then the Court may make adjustments in the alimony award based upon those changes. (R-76)

Other pertinent provisions of their agreement/the Decree, included:

- 1) The husband was to pay \$2,100 per month in child support for the support of the parties' three minor children, ages 15, 13 and 11. (R-77)
- 2) The wife received the marital residence in Park City, Utah. (R-77)
- 3) Both parties each received over \$150,000 in cash. (R-77)
- 4) Both parties received substantial IRA retirement funds. (R-77, 78)
- 5) Each party was to pay their own attorney's fees. (R-79)

At the time of the original divorce proceedings, the parties resided in Park City, Utah and the husband was a physician in private practice in Salt Lake City, specializing in cardiology.

The wife was not employed but had worked extensively as a dental hygienist in the past. She claimed she was unable to work in that field at the time of the settlement because a few months earlier, she had broken her wrist and in the process injured a

tendon in her thumb. This, she claimed, caused an immobility in her hand and precluded her from pursuing her career in dental hygienics.

In negotiating their agreement in relation to alimony, the wife's claimed disability was specifically addressed and the wife agreed to do her best to get back into the work force at the highest economic level possible, as soon as possible. That promise, on the part of the wife, was an integral and essential part of the husband's agreement to pay the wife alimony at the \$4,000 per month level for the first one year. It was felt that this would give the wife enough time to have the surgery, recover and begin earning the \$3,000 to \$4,000 per month which dental hygienists regularly earn.

After the Decree was entered, the wife did not seek employment in dental hygienics; did not seek corrective surgery for her hand/tendon; and chose to work as a part-time substitute teacher for \$5.67 per hour.

Because of this inaction/action on the part of the wife and the accompanying financial hardship placed on the husband, he filed a Petition to Modify the original alimony award, requesting a reduction in the award at least commensurate with what the wife was capable of earning as a dental hygienist.

After the Petition was filed, a one day trial was held in front of Judge Cornaby on November 15, 1994.

The testimony and documents presented by both parties at trial established the following facts, all of which have substantial bearing related to the issues raised on appeal.

Dr. Gerber is 45 years old and in good health. He is a cardiologist and was self employed as a private practitioner in Salt Lake City, Utah. (R-302) While the original divorce proceedings were pending, he received an offer to practice cardiology in Florida at a salary of \$200,000 per year. (R-246) The Financial Declaration, which he filed with the Court in the original divorce proceedings, reflected that \$200,000 per year salary, (\$16,660 per month gross) (R-57). This was the salary on which the original alimony and child support awards were calculated with the specific, express understanding that his wife would do what was necessary to improve or remedy the condition of her thumb so that she could pursue her profession as a dental hygienist. (R-76)

At the modification hearing, Dr. Gerber stated that the demands placed upon him by his new employer in Florida required him to work much harder than he had in the past. He works from 6:00 a.m. to 7:00 p.m. every weekday, and he is required to work one night per week on call. He also works two weekends per month, from Friday at 7:00 a.m. to Sunday at 12:00 noon. (R-252) His average work day consists of 12 to 14 hours and he regularly works over 80 hours per week. (R-253) Since his move to Florida, he has been required to work harder and spend more hours, or make less money.

He is currently only an employee of his Florida clinic. He is still in the three year probationary period of his employment contract with the clinic. (R-336) He has no stock ownership in the clinic (R-278) and is not participating in the clinic's pension plan. (R-278) His \$200,000 per year salary places him in the 34% tax bracket. (R-337)

Because of the additional time he spends at work, he incurs higher living expenses, and under his current circumstances, after he pays taxes and his child support obligation, he has little, if anything, to live on. (R-256; Ex P-1, P-2) He has had to use the savings which he was awarded in the original Decree to cover the shortfall. (R-256) He also used those savings to purchase a 2400 square foot house in Florida and had to incur additional installment debt in order to acquire and furnish his new residence. (R-266 and P-2) His former wife and three children continue to reside in the 5700 square foot house in Park City, Utah. (R-257)

Given his current economic circumstances, he is unable to put anything away for retirement or any monies away for the children's college education. (R-268) He indicated that he simply cannot continue to pay the \$4,000 per month in alimony he originally agreed to pay and stated that amount was intended to be temporary and specifically conditioned upon his wife maximizing her earning potential within a year so that the amount of alimony could be reduced or perhaps eliminated. Following the reaching of the agreement, Dr. Gerber kept his part of the bargain and paid \$2,100

per month in child support and \$4,000 per month in alimony that had been agreed upon. (R-270)

Ms. Gerber is in her early 40's and in good health but for a mobility problem with her thumb. (R-17) She graduated from the University of Chicago at Loyola in 1975 with a Bachelor's of Science in Dental Hygienics. (R-367) She was certified as a dental hygienist in several states but allowed her license and certification to lapse. (R-369, 272) She acknowledged that the parties' original agreement contemplated her recertifying as a dental hygienist. (R-410)

Ms. Gerber did nothing to attempt to recertify, as she had agreed to do, until after Dr. Gerber filed his Petition to Modify. (R-405) She then took the examination in June of 1994 and did not pass. (R-370) She received perfect scores on the written exam, patient presentation, and radiographic techniques, (R-407) but failed the patient portion of the exam. She needed 70 points to pass and received only 68 points. (R-412, Ex. D-18)

Since then, she has voluntarily elected not to take the test again, even though it is given at least bi-monthly at various locations throughout the western states. (R-405) She testified that she did not want to go out of state to take the exam because it took approximately 2 days and it would be "too traumatic" for her. (R-405) When questioned about her performance on the test, she stated that she did very well on the polishing portion of the exam but did not pass the scaling portion. (R-371) She said that she felt the reason she could not pass the scaling portion was that

it had been "so long since she had done that type of work". (R-372, 373) She stated that taking the test again possibly could make a difference but said she was not capable of practicing for the exam because she "did not have a license". (R-373) She admitted that she could earn substantially more as a dental hygienist (R-374) and acknowledged it would amount to approximately \$200 per day. (R-402) She said dental hygienists in the Salt Lake area were paid on the average of \$25 per hour. (R-402)

She described the problem with her hand as centered around mobility and tactility. "Tactility" means the ability to sense in the hand, the pressure being applied to the tooth or area around the tooth by the instrument. She then went on to say that mobility in her thumb was no longer a problem, inasmuch as she had been able to compensate by adjusting the position of her hand while working on patients, (R-374) but she still felt that there was a problem with sensitivity. Initially, she stated she did not believe an operation to the tendon in question would help, (R-374) but later admitted that such surgery help would remedy the problem. (R-374, 375) She said that she had voluntarily elected not to undergo the surgery because she "did not want to be cut open again". (R-363)

During cross examination, she changed her position and stated that while she believed she had a physical disability in June of 1993, (R-404) she admitted that she no longer had the disability. (R-403) She again acknowledged that the parties' agreement related to alimony was tied to the problem with her thumb and her promise to rectify the same. (R-404) When asked if she was going to

recertify as soon as possible, she did not respond. (R-406) She admitted that she could get her mobility and tactility back if she practiced and estimated that that might take several months to two years, but said that with practice she would improve. (R-408) She further admitted that she did not attempt to apply again to recertify because she has been busy with the children, (R-411) but indicated recertification tests were given bi-monthly throughout the intermountain area. She further admitted that in order to recertify, she would not have to go back to school and did not have to get another degree. (R-412) She simply has to pass the test, a test which she came within two points in passing, the one and only time she took it. (R-412) On further cross examination, she stated that she simply did not want to go back into the field of dental hygiene. (R-412)

During the hearing, the parties stipulated that if Ms. Gerber could work as a dental hygienist, she could earn \$1,000 per week and that work as a dental hygienist was available in the metropolitan Salt Lake area. (R-272-274) The trial court accepted that stipulation. (R-273)

Instead of doing what she agreed to do under the original Agreement, Ms. Gerber took a job as a substitute teacher, working four days per week, at \$45 per day. (R-376) This equates to \$5.67 per hour. (R-403) She said she was working 32 hours per week (R-413), and had Mondays off so that she could volunteer at the library. (R-387) She said she could work Mondays if necessary.

(R-413) She was working four full days a week at the time of trial.
(R-4140]

From the date of the Settlement Agreement until the time of trial, Ms. Gerber had submitted only one job application in a field related to dental hygiene and she was informed that job had been given to another applicant. (Ex. D-18) This occurred well after Dr. Gerber filed his Petition to Modify.

Ms. Gerber then said that because of the children's extra-curricular activities, she felt that she would be precluded from working full time, but was in fact working 32 hours per week as a substitute teacher at the time of trial, (R-389) earning \$780 per month. (R-377)

She testified that her needs for the \$4,000 per month alimony award and the \$2,100 per month child support award had not changed since the parties' original agreement. (R-393) However, at the time of the agreement, she was earning no income and claimed that she had monthly expenses of \$7,017. (R-390, Ex. D-21) She indicated that at the time the Petition for Modification was tried, her monthly expenses had decreased to the sum of \$5,800. (R-392, Ex. D-20) On cross examination related to the \$5,800 in expenses, she admitted that \$600 per month was allocated towards payment of her attorney's fees; the health insurance premium of \$186 was in fact \$96; and that the \$200 monthly computer expenses were related to the purchase of a computer and those payments would end in five months. (R-396) The total of those "extra" expenses amounted to \$890. She further admitted that she had \$71,000 (R-395) in non-

retirement investment accounts and could use those monies to eliminate the \$800 in monthly payments for attorney's fees and the computer. She also acknowledged that she had dividend and investment income of approximately \$3,600 per year, or \$300 per month. (R-401)

In December of 1992, just prior to the parties' original settlement agreement, Ms. Gerber broke her wrist and as a result of that fracture, she experienced a tear in a tendon, which runs along the top of the thumb down to the wrist. That tear was sutured and some scar tissue developed around the torn, but repaired tendon. The resulting scar tissue caused a restriction of mobility to Ms. Gerber's thumb. Both parties called physicians to testify as to the nature of this problem and what could be done to correct it.

Dr. Larry Leonard, Dr. Gerber's expert, testified that he was a specialist in reconstructive surgery and that his sub-specialty was hand surgery. He devoted 90% of his practice to that sub-specialty. (R-344) He indicated that tendon repair, resulting in restricted motion was very common (R-346) and that such restricted mobility could be remedied by a surgery known as Tenolysis. It is an outpatient surgery, requiring a regional anesthetic block and involving at best, one hour of surgery, requiring a small incision to be made above the tendon, allowing entry into the affected area for the purpose of cutting away the scar tissue and freeing the tendon. (R-348) He indicated that there was a 90% chance of improving the mobility and a 50% chance of returning mobility to normal function. (R-350) He indicated he felt the risk of any

complications related to the surgery was 5%, (R-354) and that there would be no improvement of Ms. Gerber's condition without surgical intervention. (R-358) He concluded by indicating that in his opinion, if Ms. Gerber wanted to go to work as a dental hygienist, she should have the surgery so that complete mobility of her thumb could be restored. (R-361)

Ms. Gerber called Dr. Boyd Cole, also a reconstructive surgeon, who indicated that approximately one half of his practice was devoted to hand surgery. (R-307) Dr. Cole said it was possible Ms. Gerber's condition might worsen as a result of the tenolysis surgery, but gave no percentages other than to conclude it was possible. (R-313) He acknowledged knowing Dr. Larry Leonard and considered him to be a good hand surgeon and a good diagnostician. (R-317) He also acknowledged that the problem could be remedied with tenolysis surgery which would be performed on an outpatient basis. (R-321 and 322)

Ms. Gerber's testimony about her thumb disability was at best inconsistent and contradictory. When questioned by her counsel, she said she had elected not to have the surgery (R-363). She said she did not believe the operation would help (R-374) but then immediately afterwards said it might help. (R-375) On cross examination she changed her testimony and said that she had compensated for the problem with her thumb and that "it was no longer a disability". (R-403) She went on to state that she felt she could get her mobility and tactility back if she practiced (R-

408) but that she had concluded that she did not want to be a dental hygienist. (R-41)

At the conclusion of the evidence, Judge Cornaby issued his ruling from the bench which included a finding that he felt Ms. Gerber could be a dental hygienist. (R-455-456) Rather than imputing any additional income to her as a result of that finding, Judge Cornaby found that she should continue devoting time to the children's extra-curricular activities and that it was acceptable for her to continue substituting teaching at \$780 per month instead of the \$3,000 per month she could earn working the same amount of time (32 hours per week) as a dental hygienist. The court then, without further rationale, gave Dr. Gerber no relief from the \$4,000 per month alimony award until December 1, 1995, at which time the Court directed that that award would be reduced to \$3,500 per month until December 1, 1996, with a further reduction of \$500 per month to \$3,000 per month thereafter, permanently. (R-449, 450)

Mr. Gerber's counsel prepared proposed Findings and Conclusions and an Order which Dr. Gerber objected to and moved for new trial. (R-120) Judge Cornaby overruled those objections and denied the Motion for New Trial. (R-149, 149 and R-176, 177)

RELIEF SOUGHT ON APPEAL

The husband seeks the following relief in connection with his appeal of the trial court's decision.

1) That the decision of the trial court, related to the alimony awarded, be vacated.

2) That this Court, pursuant to its equitable authority to review the evidence and facts presented at trial, impute a proper and fair amount of income to the wife, consistent with her education and earning abilities; and reduce the husband's alimony obligation to an amount deemed fair and appropriate by this Court.

3) That in any event, the husband's alimony obligation be reduced to at least \$2,500 per month, effective November, 1994, the date of trial, based upon the wife's actual income and expenses as presented by the wife at trial.

4) For such other and further relief as might be appropriate and proper under the circumstances of this case.

SUMMARY OF ARGUMENTS

Point I

When a spouse is voluntarily underemployed, it is both proper and required that the trial court impute a reasonable income to the underemployed spouse before fixing support obligations. This is true in cases involving child support and alimony and is applicable to both the paying and receiving spouse. The facts in this case clearly demonstrate that Ms. Gerber was voluntarily underemployed in terms of the amount of money she could make to contribute to her own support and the trial court erred in not so finding. As a result, the trial court also erred in not imputing the proper amount of income to Ms. Gerber and in not giving Dr. Gerber

immediate relief from the interim alimony award agreed to by the parties one and a half years earlier. That agreement was specifically premised on Ms. Gerber using her best efforts to secure the highest paying job possible. She failed to do that. The trial court arbitrarily disregarded Ms. Gerber's equitable and contractual obligations and as a result, treated Dr. Gerber unfairly in requiring him to make the ongoing alimony payments ordered.

Point II

The wife's own evidence demonstrated that her regular monthly living expenses were \$890 less than what she claimed and her income from earnings and investments had increased from \$0 to \$1074 per month since the entry of the Decree. This substantial and material change in financial circumstances justified at least a \$1,500 reduction in husband's original \$4,000 alimony obligation. The trial court abused its discretion in ignoring this evidence and not immediately reducing husband's alimony obligation.

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN NOT REDUCING THE HUSBAND'S ALIMONY OBLIGATION BASED UPON THE WIFE'S FAILURE TO FULFILL HER OBLIGATIONS UNDER THE DECREE TO SEEK AND OBTAIN EMPLOYMENT AT THE HIGHEST ECONOMIC LEVEL AND HER FAILURE TO USE HER BEST EFFORTS TO REHABILITATE HERSELF FROM HER DISABILITY TO HELP HER ACHIEVE HER BEST EMPLOYMENT OPPORTUNITIES

In domestic relations cases, trial courts are afforded considerable discretion in fashioning property and support remedies fair to both parties. Walters v. Walters, 812 P.2d 64 (Utah App.1991)

A decision of a trial court will not be disturbed on appeal unless it can be shown that the trial court abused its discretion and acted in an arbitrary or capricious manner. Walters, supra.

In this case, the trial court did not treat Dr. Gerber fairly and the outcome which occurred was necessarily unjust to him. He now respectfully requests this Court to remedy that injustice so that he too, as a litigant, will be treated fairly.

It is the prerogative of this Court to do exactly that and the facts in this case clearly justify such action. As was stated by Judge Davis, in the recent case of Willey v. Willey, 287 Utah Adv. Rep. 27, (Utah App. filed April 4, 1996).

[W]e approached the problem here presented in full awareness of the standard rules which favor the Findings, Judgments and Decrees of the trial court, particularly in divorce matters. Notwithstanding this, the right of review on appeal has its purposes . . . [This

Court] would be remiss in its responsibility and this assured right of appeal would be meaningless if it unquestioningly accepted all actions of the trial court and remained insensitive to pleas to rectify inequity or injustice. Consequently, the rule is that when it is made to appear that the court has failed to correctly apply principles of law or equity . . . or that the judgment has failed to do equity, that it manifests a clear abuse of discretion, this Court on review will take appropriate corrective action in the interests of justice. (citing Watson v. Watson, 561 P.2d 1072, 1073-74 (Utah 1977) (footnotes omitted))

The case presently before this Court is just the type of case about which Judge Davis was speaking. In considering the error of the trial court in this case, it is appropriate to review the cases in Utah which have dealt with the issue of alimony vis a vis voluntary underemployment and the subsequent imputation of income to the underemployed spouse.

In 1977, the Utah Supreme Court expressed its opinion on alimony and its purpose in the case of English v. English, 565 P.2d 409 (Utah 1977). In English, the trial court awarded the wife \$2,000/monthly as permanent alimony, in addition to \$500 per month in child support for the parties' two teenage daughters. At the time, the wife was working part time as a home economist by choice. The wife presented evidence as to her needs which was less than the total income she was to receive from earnings and support payments. In reducing the alimony award from \$2,000 to \$1,000 per month, the Court addressed the underlying purpose of alimony and stated:

There is a distinction between the division of assets accumulated during marriage, which should be distributed upon an equitable basis,

and the post- marital duty of support and maintenance.

"The purpose of alimony is to provide support for the wife and not to inflict punitive damages on the husband. Alimony is not intended as a penalty against the husband nor a reward to the wife. . ." (ft)

In Nace v. Nace, (ft) the court stated that the most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during marriage, and to prevent the wife from becoming a public charge. The court observed that criteria considered in determining a reasonable award for support and maintenance include the financial conditions and needs of the wife, the ability of the wife to produce a sufficient income for herself; and the ability of the husband to provide support. (ft)

In her testimony plaintiff could only substantiate a need for support in the amount of \$1,500 per month for the entire family. She merely thought she should receive the greater amounts. Id. at 411, 412 (Footnotes omitted; Emphasis that of the Courts')

Said in another way, the English Court concluded that alimony was intended to financially assist the wife in meeting her reasonable expenses to the extent she was unable to do so after using her best efforts to support herself.

Alimony has never been and should never be a vehicle to provide the wife with an annuity at the unjustified expense of the husband. Nor should an award of alimony be such that it creates on the part of the receiving spouse, a disincentive to work to the best of his/her abilities and ultimately become self supporting.

In making an alimony award today, a trial court is duty bound to consider:

- 1) The financial condition and needs of the wife;
- 2) The ability of the wife to produce sufficient income for herself; and
- 3) The ability of the husband to provide support. [(Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985); See also Willey v. Willey, 866 P.2d 547, 550 (Utah App. 1993)]

In the present case, the trial court erroneously focused its analysis entirely on the ability of the husband to pay and ignored the remaining two required considerations and the express terms of the parties' original agreement as was incorporated into the Decree of Divorce.

Said in a more direct way, the underlying rationale of the trial court's decision was "Dr. Gerber makes a lot of money, therefore he can afford to pay a lot of money to his wife as alimony." Such an approach to an alimony analysis is wrong and not acceptable.-

This point will focus on the trial court's failure to address Ms. Gerber's ability to produce sufficient income for herself and the fact that given the evidence which was before the court, a finding should have been made that Ms. Gerber was voluntarily under employed. Once that finding was made, the trial court should have then imputed income to her at the amount she acknowledged she was capable of making. Once that was done, the trial court could have then determined what alimony, if any, was appropriate after considering each parties' respective financial needs.

The trial court's failure to accurately determine Ms. Gerber's actual income and needs is dealt with in Point II of this Brief.

The concepts of voluntary underemployment and imputation of income are not new to Utah domestic relations law.

In a child support setting, §78-45-7.5 (Utah Code Ann. (1953)) addresses the issue of imputation of income for purposes of determining a person's income and states:

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

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

* * *

d) *Income may not be imputed if any of the following conditions exist:*

- i) *the reasonable costs of child care for the parent's minor children approach or equal the amount of income the custodial parent can earn;*
- ii) *a parent is physically or mentally disabled to the extent he cannot earn minimum wage;*
- iii) *a parent is engaged in career or occupational training to establish basic job skills; or*
- iv) *unusual emotional or physical needs of a child require the custodial parent's presence in the home. Id. Emphasis added.*

While this statute is not directly applicable to the issue before this Court, it does provide legislative guidelines as to the policy of Utah in relation to underemployment and imputation of income and specifies what should be examined when considering those issues. Likewise, the exceptions from imputation of income set

forth in the statute are designed to prevent an imputation when there is a real need which keeps a person from being employed to his fullest capacity.

Not only are there legislative provisions providing for the imputation of income in child support cases, but also the courts of Utah have recognized and approved of imputation of income in connection with underemployment for purposes of alimony and child support awards in divorce actions.

In Thronson v. Thronson, 810 P.2d 428 (Utah App. 1991), the wife, at the time of trial, was the primary caretaker of the parties' 8 year old child and a part-time pharmacist (before the child's birth the wife had been a full time pharmacist). Even though not employed full time, the trial court found the wife's earning capacity as a full time pharmacist to be \$35,000 per year and used that sum in determining the alimony to be awarded. The imputed income finding was based on evidence reflecting a mid point of an annual gross salary range for pharmacists \$31,000 to \$39,000 per year in income and assumed she was employed on a full time basis. The Utah Court of Appeals modified the term of the alimony award but upheld the amount of the imputation of income to the wife as an appropriate action for the trial court to take given her training and earning capacity.

In Hill v. Hill, 869 P.2d 963 (Utah App. 1994), this Court again approved of the trial court's imputation of income to the underemployed spouse. This case involved a child support dispute but its underlying principles have application to the case

presently before this Court. In upholding the trial court, Judge Greenwood, writing for the unanimous panel stated:

However, the court may impute gross income if it has first examined a parent's historical and current earnings to determine that underemployment or overemployment exists. Id. §78-45-7.5(5)(c), (6).

In this case, Mr. Hill did not stipulate to the amount imputed, and he argues the trial court did not make the required finding that he is voluntarily unemployed or underemployed.¹ See Hall v. Hall, 858 P.2d 1018, 1026 (Utah App. 1993) (stating that in determining whether to impute income due to underemployment, findings must address "the critical question of whether the drop in earnings was voluntary"). Id. at 965-966.

The issue of imputing income for purposes of alimony awards was also addressed in Cox v. Cox, 877 P.2d 1262 (Utah App. 1994) where this Court stated:

"Imputing income to an unemployed or underemployed spouse when setting an alimony award is conceptually appropriate as part of the determination of that spouse's ability to produce a sufficient income." Willey, 866 P.2d at 554. However, a court should not impute income for child or spousal support until it first determines, "as a threshold matter, that income should be imputed because the [spouse] is voluntarily unemployed or underemployed." Hall, 858 P.2d at 1024. Id. at 1267.

It is important to note that the voluntary unemployment/imputation of income concept does not nor should not make a distinction between a requesting spouse versus a paying spouse. Rather, the analysis should focus on each spouses' ability to produce sufficient income for herself [himself] Jones supra. Financial assistance from the other spouse should be ordered only

when the requesting spouse demonstrates in good faith that he/she is not capable of completely supporting himself/herself.

The Montana Supreme Court recently addressed a case with facts somewhat similar to the facts of this case however the genders of the paying/receiving spouses were reversed. In In Re Marriage of Bukadk, 907 P.2d 931 (Mont. 1995), the wife was a physician. The husband remained at home and served as the homemaker and cared for the parties' four children. In a subsequent divorce proceeding, the Court ultimately made an award of maintenance which the husband on appeal claimed was inadequate and based upon gender bias. In rejecting that claim, the Montana Supreme Court stated:

Ed's claim of gender bias is also unsupported. The court awarded maintenance in the sum of \$500 per month for one year, even though it expressed concerns that Ed had failed to take advantage of educational opportunities throughout his marriage and that Ed's unemployment at the time of the trial was not wholly unintentional. In addition, the record is clear that the court imputed income to Ed not on the basis of his gender but because Ed was capable of employment but had chosen to forsake several opportunities to be available full-time for his children. It is clear that gender was not the basis for the court's maintenance decision. Id at 937

Finally, in the recent case of Willey v. Willey, supra this Court affirmed the imputation of full time income to a wife who was working a part time job for which there were not full time positions available and further affirmed the trial court's implicit finding that the wife was voluntarily underemployed. Id. at 28

When all of the judicial/legislative pronouncements on this issue are condensed into a basic understandable equitable

principle, that principle should be; "Each spouse should act in good faith to maximize their respective earnings as quickly as possible after a divorce so that the requesting party will be as little a burden on the paying party as possible, and that the paying party will in good faith assist the requesting party with any real (not inflated) financial short fall."

Equity is not achieved by requiring one party to have two jobs or work unreasonably long hours so as to enable the other party to work part time and/or earn less than he/she is capable of earning unless there is an extremely good justification for doing so. No such justification exists in this case.

A

*THE WIFE, AT THE TIME OF TRIAL, WAS
UNDEREMPLOYED AND THAT FACT SHOULD
HAVE BEEN CONSIDERED BY THE TRIAL
COURT IN CONNECTION WITH THE ALIMONY
AWARD IT MADE*

The evidence which was presented to the trial court required it to make a finding that Ms. Gerber was voluntarily under employed and the trial court abused its discretion in not so finding.

More particularly, Ms. Gerber:

- 1) Was 43 years old (ExD-20)
- 2) Had three (3) children, ages 15, 13 and 11 all of whom were healthy and had no special needs.
- 3) Had a degree in Dental Hygiene from the University of Chicago. (R-367)

4) Worked 32 hours per week at \$5.67 per hour as a substitute teacher. (R-403, 413)

5) Could work as a Dental Hygienist for \$25.00 per hour after becoming relicensed. (R-402)

6) Applied only once to recertify and take the test, failing by only 2 points. (R-370, 412)

7) Said the tests were given bi-monthly in various regional locations but did not want to take it again because it was "too traumatic". (R-405, 411)

8) Said she was no longer disabled. (R-403)

9) Applied for only one other job in the field of dental hygiene, and that was after Dr. Gerber's Petition to modify was filed. (R-375)

10) Acknowledged that jobs were available in the field of dental hygiene. (R-274)

11) Agreed that she could make \$3,000 to \$4,000 per month working 32 to 40 hours per week as a dental hygienist. (R-402)

12) Said she now had concluded that she did not want to be a dental hygienist. (R-412)

13) Acknowledged that the original Settlement Agreement was premised upon her returning to the field of dental hygiene after she had time to correct the problem with her thumb. (R-410)

14) Said she did not know want to have the minor surgery to correct the mobility problem with her thumb. (R-363)

In spite of all of this undisputed evidence, the trial court simply missed the point and focused not on the fact that this

trained and college educated woman was, by choice, earning a little more than minimum wage, but rather on the extra curricular time she claimed she needed to spend with the children transporting them to and from their non-school activities.

Even taking those activities into account, the court found that her working 32 hours per week still allowed her to do what she said she had to do in connection with the children's extracurricular activities. (paragraph 16, Findings, R-156, 157)

It is clear that the trial court misunderstood the concept of "voluntary underemployment" and considered only one of the two criteria which must be looked at, (i.e., 1) the amount of time an individual can work and, 2) the amount of money an individual can earn given that individual's qualifications and job availability.) It was latter criteria that the trial court simply ignored and which should have been considered in depth, especially in light of the parties' earlier agreement upon which the initial alimony payment was based. Ms. Gerber had agreed to use her best efforts to maximize her earning potential so that the heavy financial burden on Dr. Gerber of the initial alimony award could be reduced as soon as possible.

The evidence before the trial court unequivocally showed that Ms. Gerber had not kept her part of the original bargain and that would be acceptable so long as Dr. Gerber is not unfairly penalized because of Ms. Gerber's voluntary decisions regarding what she wants to do; what she wants to be paid; and what number of hours she wants to work.

B

*THE TRIAL COURT ERRED IN NOT
IMPUTING ADDITIONAL INCOME TO THE
WIFE FOR PURPOSES OF DETERMINING
WHAT WOULD BE AN APPROPRIATE ALIMONY
AWARD UNDER THE FACTS OF THIS CASE*

It was incorrect for the trial court not to make a specific finding that Ms. Gerber was voluntarily underemployed. It has been demonstrated that she was. Once a determination of voluntary underemployment is made, the trial court is required to impute an appropriate amount of income to the underemployed spouse before so that the proper incomes of both of the parties can be considered in connection with the alimony analysis.

By not imputing income to Ms. Gerber, as was supported by the evidence, the trial court's decision regarding alimony was erroneous, patently unfair to Dr. Gerber and fatally defective.

The parties stipulated that a dental hygienist could earn \$25 per hour or \$3,000 to \$4,000 per month working a 32 to 40 hour week. (R-272) They also stipulated that work in the field of dental hygiene was available in Salt Lake and the general Wasatch Front area. (R-274). Ms. Gerber said she was no longer disabled so as to preclude her from working as a dental hygienist even without the surgery which Dr. Leonard had recommended (R-403). Ms. Gerber said the only thing preventing her from so working was the lack of a license which could be secured upon her successful completion of the recertification test (R-373), a test she took only once and failed by only two points; (R-412) a test which is given throughout the intermountain region every two months; (R-411)

a test she said she did not want to take again; (R-412) a test she felt she could pass if she only practiced a little. (R-373)

Ms. Gerber's position of not doing what was necessary to maximize her earning potential, while demanding that the \$4,000 per month alimony payments continue, placed an unjust financial burden on Dr. Gerber and left him with no alternative other than to request the Court to impute income to Ms. Gerber and reduce his alimony obligation commensurately. Dr. Gerber asked Judge Cornaby to give him some financial relief and the Judge unjustifiably refused to do so in spite of substantial uncontradicted evidence demonstrating that Ms. Gerber was voluntarily underemployed and capable of earning \$3,000 - \$4,000 per month if she had really wanted to.

Based upon the evidence in the record and the authority of this Court to not only review but make its own factual findings from the evidence in the record, Dr. Gerber would request that the trial court's findings be modified so as to impute income to Ms. Gerber in the amount of at least \$3,000 per month and that the alimony determination made by the trial be reduced accordingly.

POINT II

THE TRIAL COURT ERRED IN NOT
REDUCING THE HUSBAND'S MONTHLY
ALIMONY OBLIGATION BY AT LEAST
\$1,363.00 PER MONTH - THE AMOUNT
WHICH THE WIFE'S NET MONTHLY INCOME
EXCEEDED HER NET MONTHLY EXPENSES

Assuming only for the sake of argument that Ms. Gerber was not voluntarily underemployed and should not have additional income

imputed to her, the trial court still committed reversible error by ignoring undisputed income and expense evidence which justified a reduction of the husband's alimony obligation by at least \$1,363 per month.

The following facts were undisputed:

1) Dr. Gerber's monthly income was the same both at the time of the Decree and the modification hearing. (R-246, Ex D-10)

2) Ms. Gerber's monthly income at the time of the Decree was \$6,100 per month (\$4,000/month alimony and \$2,100 per month child support). (Ex D-21)

3) Ms. Gerber's monthly expenses at the time of the Decree were \$7,017. (Ex D-21)

4) At the time of the modification hearing, Ms. Gerber's monthly income had increased to \$7,180 [alimony \$4,000; child support \$2,100; earnings from teaching \$774 (R-377); earnings from investments- \$300]. (R-401)

5) At the time of the modification hearing, Ms. Gerber's monthly expenses were \$5,817 (Ex D-21) In addition, she also admitted that \$890 of those monthly expenses were not really regular monthly expenses. (i.e. the \$186 in health insurance was really only \$96; the \$200 per month in computer expenses had only 5 payments left; and the \$600 per month in attorney's fees) (R-396). She had over \$71,000 in savings which could be used to pay off these bills if necessary. (R-397) The trial court failed to accurately calculate and consider what financial change had

actually occurred. If it had done so, the following would have immediately become apparent:

Ms. Gerber's Monthly Income And Expense Comparison

	<u>Income/Date of Decree</u>	<u>Income/Date of Modification</u>
Alimony	\$4000	\$4000
Child Support	2100	2100
Wages	0	700
Investment Income	<u>0</u>	<u>300</u>
Total	\$6100	\$7180

Monthly Expenses
Date of Decree

\$7017

Monthly Expenses
Date of Modification

\$5817

Less:

1) Overstated
health insurance
premiums

(96)

2) Attorney's fee
payment

(600)

3) Computer payment

(200)
(890)

Wife's adjusted monthly
expenses date of
modification

\$4921

*Difference between income and expenses without adjustment
\$7,180 minus \$5,817 = \$1,363 excess*

*Difference between income and expenses with adjustment
\$7,174 minus \$4,912 = \$2,260 excess*

This undisputed evidence demonstrates that at the time of the modification Ms. Gerber was receiving at least \$1,363 more per month in income than was needed to meet the regular monthly expenses she claimed she was incurring. When that occurs, the

trial court is obligated to make an alimony award that does not exceed Ms. Berger's actual net needs, Bingham v. Bingham, 872 P. 2d 1065, (Utah App. 1994)

In this case, Ms. Gerber's evidence demonstrated that she did not have the financial needs to justify continuation of the \$4,000 per month alimony award and the trial court simply elected to ignore that evidence in denying husband's request to immediately reduce the monthly award by at least \$1,000. Such action constitutes an abuse of discretion by the trial court.

This error is further amplified and becomes more egregious when considered in conjunction with the fact that Ms. Gerber was underemployed and could have been earning \$24,000 to \$36,000 per year instead of the \$8,400 she was earning as a substitute teacher.

Further, the trial court's own findings on the issue of Ms. Gerber's income and expenses are clearly erroneous and not supported by the evidence presented.

Findings of Fact

6. The Defendant submitted a Financial Declaration in June of 1993, stating she had no income and filed a Financial Declaration in August of 1994, declaring an income of \$244.41 per month from substitute teaching. This, she testified, had increased to \$300.00 per month at the time of trial.

7. In June of 1993 the Plaintiff claimed living expenses of \$7,017.00 per month for herself and the minor children of the parties. In August of 1994, the Defendant claimed living expenses of \$5,817.00 per month for herself and the minor children with reservations of several anticipated capital expenditures.

8. The court finds no substantial change in the financial status or circumstances of the Defendant between the time of the agreement of the parties and the entry of the Decree of Divorce and the trial of this matter on November 15, 1994. (R-153, 154)

Finding of Fact 6 is simply wrong. Defendant's Financial Declaration dated August 9, 1994 (Ex D-20) stated she earned \$244.41 per month working part time. At trial, Defendant testified she was making \$5.67 per hour and working 32 hours per week. (R-402), which she said equated to \$700 per month in income, not the \$300 per month found by the trial court.

Likewise, Finding of Fact 8 is clearly erroneous regarding its conclusion that a \$474 per month increase in income and \$1,200 per month reduction in monthly living expenses were not a material change in circumstances justifying significant relief from the alimony award then in effect. Under no stretch of the imagination can a conclusion be reached that this change in financial circumstances was not substantial enough to justify an immediate and significant reduction in Dr. Gerber's alimony obligation.

It was inequitable and arbitrary for the trial court not to have immediately reduced husband's alimony obligation to wife by at least \$1,363 per month, based upon Ms. Gerber's own evidence and testimony.

CONCLUSION

In today's world, divorce is an unfortunate reality that necessarily carries with it adverse financial ramifications to the

individuals involved. Both parties have responsibilities towards one another to act in good faith in an attempt to reduce, as much as possible, the financial impact concomitant with a termination of their marriage.

In this case, Dr. Gerber fulfilled the responsibilities he agreed to undertake when the parties settled their case one and one half years earlier. He paid the support monies agreed to and had to work 80 hour weeks in order to do so.

On the other hand, Mrs. Gerber did not fulfill her responsibilities to use her best efforts to minimize the financial impact of this divorce and did not keep her part of the bargain which required her to use her best efforts to secure the highest paying job possible. What she may want to do with her life in terms of her future employment is basically up to her. But when she voluntarily makes a decision to not work to full capacity, Dr. Gerber should not be required to continue to contribute monies in order to make up the differences created by her decision to pursue other less financially rewarding endeavors.

The job of the trial court was to do equity based upon the evidence presented. That evidence undeniably and unequivocally demonstrated that Ms. Gerber did not do what she had earlier agreed to do under the parties' original agreement. The trial court arbitrarily chose to ignore that fact and in so doing failed to give Dr. Gerber the financial relief he was entitled to receive.

It is the job of this Court to rectify this substantial inequity and miscarriage of justice and Dr. Gerber respectfully requests this Court to do so.

Respectfully submitted this 17th day of May, 1996.

DART, ADAMSON & DONOVAN

By: 

Kent M. Kasting, of Counsel
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

The undersigned, a representative of Dart, Adamson & Donovan, hereby certifies that two (2) true and correct copies of the above and foregoing **Brief of Appellant** to David S. Dolowitz, dated May 20, 1996, was hand delivered to the following counsel of record:

David S. Dolowitz, Esq.
COHNE, RAPPAPORT & SEGAL
525 East First South 5th Floor
Salt Lake City, Utah 84102

By: 

Kent M. Kasting, co-counsel
for Appellant

APPENDIX

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Nov 23

Carolyn P. Gable

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

---ooo000ooo---

LOWELL GERBER,	:	
	:	DECREE OF DIVORCE
	:	2187694
v.	:	11-26-93 8:39am
MARY JO GERBER,	:	Civil No. 924905415DA
Defendant.	:	Hon. Richard H. Moffat Hon. Michael S. Evans

---ooo000ooo---

The above-entitled matter came on regularly for pretrial on the 23rd day of June, 1993, before Michael S. Evans, plaintiff appearing in person and by his attorney B. L. Dart, and defendant appearing in person and by her attorney David S. Dolowitz, and the parties having reached a stipulation settling all outstanding issues in this divorce action, and the parties having stipulated that each of the parties could be awarded a divorce one from the other on the grounds of irreconcilable differences, and the Court having considered the terms of the stipulation and finding them reasonable and the Court having made and entered its Findings of Fact and Conclusions of Law, now therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Each of the parties is entitled to and is hereby awarded a Decree of Divorce one from the other on the grounds of

200074

irreconcilable differences, which Decree shall be final upon signing and entry.

2. Plaintiff and defendant have three children as issue of this marriage, to wit: Rebecca, age 13; David, age 11 and Jonathan, age 9. Defendant is awarded the permanent care, custody and control of these children, subject to plaintiff's rights of visitation as follows:

a. One half of summer vacation, including the right to have any one or two children for a separate one-week period as part of his half summer with each child. Plaintiff shall provide defendant with at least two months notice of when he chooses to exercise his summer visitation.

b. Plaintiff shall have the right to have the children for one-half the Christmas break, with Christmas Eve and Christmas Day being alternated between plaintiff and defendant. Plaintiff shall have the children for Christmas Eve and Christmas Day and half the Christmas break in even-numbered years and defendant shall have the children for Christmas Eve and Christmas Day in odd-numbered years.

c. Plaintiff shall have the right to visit with the children anytime he is in Utah upon providing to plaintiff as much advance notice as he has of his trip to Utah. In the event the notice is less than 24 hours, plaintiff would respect any other scheduled activities the children have.

d. One half of holidays, to be alternated between the parties.

e. A weekend for each child within the week or two of that child's birthday.

3. Defendant is awarded alimony from plaintiff in the sum of \$4,000 a month commencing with the month of July, 1993, based upon the current financial circumstances of the parties as shown in their Financial Declarations and under circumstances where defendant is currently unable to work based upon her present physical disability.

There shall be an automatic review of this alimony award in one year from the date of the entry of the Decree of Divorce, or earlier if circumstances warrant, based upon the anticipation that defendant will use her best efforts to seek and obtain employment at the highest economic level and will, further, use her best efforts to rehabilitate herself from her disability to help her achieve her best employment opportunities.

The issue is reserved as to whether defendant's employment should be full or part-time based upon the needs of the children. At the time of the review, each party shall have the right to express his or her respective position on this issue, as plaintiff's position is that defendant should seek and obtain full-time employment and defendant's position is that she should seek and obtain part-time employment due to the children's needs.

Plaintiff shall have the right to request defendant to obtain a physical examination by a hand expert currently, with a further examination six months from the entry of the Decree of Divorce and a second further examination one year from the entry of the Decree of Divorce to assist the Court in determining defendant's ability to obtain employment.

At the time of the review by the Court, if there has been a substantial change in financial circumstances or ability, then the Court may make adjustments in the alimony award based upon those changes.

4. Plaintiff is ordered to pay to plaintiff as child support for the three minor children of the parties the sum of \$2,100 per month commencing with the month of July, 1993. Plaintiff is further ordered to provide health and accident insurance and be responsible for one-half of all non-insured medical, dental and orthodontia and reasonable counseling expenses which may be incurred for the children. Plaintiff is also ordered to be responsible for one-half of work related day care expenses incurred by defendant in her employment.

Defendant shall be entitled to have the children as her exemptions for tax purposes.

At such time as there is a reduction from three children to two minor children at home, plaintiff's obligation shall automatically be reduced to \$1,400 a month for two minor children and \$825 a month for one minor child.

5. The property of the parties shall be divided as follows:

	<u>Mary Jo</u>	<u>Lowell</u>
Park City home equity	\$176,000	
Bear Lake lot	10,000	
New Orleans condo		10,000
Household furniture	14,334	5,940

Vehicles:

1993 Ford Aerostar	20,000	
1992 Mitsubishi Diamante		22,000
1983 Porsche		-0-

Merrill Lynch accounts:

CMA #587-29077 \$197,171 (9/24/93)	139,814	57,357
WCMA #330-97271 (9/30/93)		77,259
IRA #587-83743 (9/24/93)	21,579	
IRA #584-83744 \$300,770 (9/24/93)	106,385	194,385

First Security accounts:

MMA #18101217 (8/31/93)		31,871
MMA #18101203 (8/31/93)	853	
MMA #217-80465-17 (9/30/93)	2,708	
MMA #217-80803-16 (9/30/93)		4,870
IRA #600030024692514 (w)	632	
IRA #600310024665916 (w)	8,563	
IRA #60003002466114 (h) (9/30/93)		34,282
IRA #600310024692417 (h) (9/30/93)		8,653

Other accounts/stocks:

Keystone Account (8/31/93)		5,585
North Carolina NG	1/2	1/2
GTE	1/2	1/2
Paine Olsen #503431	11,250	
Merit Medical stock	1/2	1/2
Wilmac Partnership T0864		44,958

Insurance Policies:

Travellers #073347-2269320 (8/31/93)		5,257
Minnesota #1-781-6363		2,284
#1-782-958		6,013
Beneficial #BL1083753		-0-

Lowell Gerber, P.C.		9,404
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Medical receivables	1/2	1/2
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Idaho Falls Antitrust Suit		(8,000)
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Park City Doctors Suit		---
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TOTAL VALUES	\$512,118	\$512,118
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6. Each party is ordered to be responsible for the payment of his or her own attorney's fees and costs.

7. Each party is ordered to execute any documents and perform any acts necessary to effectuate the terms of this Decree of Divorce when it is entered.

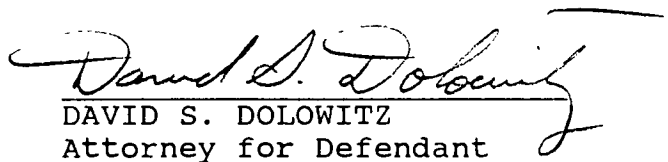
DATED this 23 day of November, 1993.

BY THE COURT:



HON. MICHAEL S. EVANS
Commissioner

APPROVED AS TO FORM:



DAVID S. DOLOWITZ
Attorney for Defendant

B. L. DART (818)
Attorney for Plaintiff
310 South Main Street, Suite 1330
Salt Lake City, Utah 84101
(801) 521-6383

FILED
DISTRICT COURT

DEC 11 11:00 AM '94

[Handwritten signature]

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

---ooo000ooo---

LOWELL GERBER, :
Plaintiff, : PETITION FOR MODIFICATION
v. :
MARY JO GERBER, : Civil No. 924905415DA
Defendant. : Judge Richard H. Moffat

---ooo000ooo---

Plaintiff represents to the Court and alleges as follows:

1. The parties were previously married to each other and at a pretrial hearing held in June, 1993, entered into a settlement agreement which was finally incorporated into the Findings of Fact and Conclusions of Law and Decree of Divorce entered in this case on November 26, 1993.

2. Under the terms of the Findings of Fact and Decree of Divorce defendant was awarded alimony from plaintiff in the sum of \$4,000 a month, commencing with the month of July, 1993, based upon the then current financial circumstances of the parties as shown in their financial declarations and under circumstances where defendant was currently unable to work based upon her physical disability.

3. The Findings of Fact provided that,

"There should be an automatic review of this alimony award in one year from the date of the entry of the Decree of Divorce or, earlier if circumstances warrant, based upon the anticipation that defendant will use her best efforts to seek and obtain employment at the highest economic level and will further use her best efforts to rehabilitate herself from her disability to help her achieve her best employment opportunities."

4. Under the terms of the Findings and Decree it further provided for an examination by an orthopedic hand specialist, Dr. Larry Leonard, of defendant's hand. That examination has now occurred and a report letter has been received from Dr. Leonard. In addition, Dr. Leonard has provided supplemental information by telephone.

5. Defendant's physical disability is created by a tendon which is locked down by scar tissue which does not allow defendant to fold her thumb into her hand. This tendon can be freed by a simple operation under local anesthetic with the expected result that the hand will be much more functional which will assist defendant in both her household activities and in her employment endeavors. Without the hand surgery the condition will not be corrected.

6. Defendant informed Dr. Leonard that she does not intend to have the surgery to correct the tendon condition and it is plaintiff's further understated that she has stated that she has no intention of going to work and does not want to have her hand fixed because she would then have to go to work and, therefore, does not want the surgery to fix the hand.

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7. Defendant's actions constitute a voluntary continuation of her disability condition which are the basis for the review of the alimony award at this time in light of defendant's failure and refusal to meet the terms of the Findings and Decree as stipulated to in June of 1993.

8. As a further entitlement for review, plaintiff asserts that his income is not providing sufficient income to meet his current living expenses. He currently receives a net take-home check each half month of \$4,700, a total of \$9,400 a month. From this he is required to pay defendant alimony and child support in the amount of \$6,100. In addition, he is required to pay his disability insurance which was his understanding would be covered by the clinic by which he is employed. This understanding was in error and plaintiff is having to pay this premium out of his own salary at a cost of \$800 a month. The remaining amount of \$2,300 a month is not sufficient to meet plaintiff's needs in an appropriate fashion.

WHEREFORE, plaintiff prays judgment as follows:

1. For a modification of the alimony award terminating defendant's entitlement to alimony based upon defendant's failure to comply with the terms of the Decree of Divorce and the circumstances which have changed since the entry of the Decree of Divorce.

2. For plaintiff's attorney's fees in bringing this proceeding.

3. For such other relief as the Court deems appropriate.

DATED this 23 day of February, 1994.

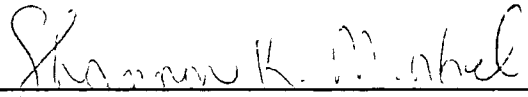


B. L. DART

MAILING CERTIFICATE

I hereby certify that on the 24 day of February, 1994,
I mailed a copy of the foregoing to:

David S. Dolowitz
Attorney for Defendant
525 East 100 South, #500
Salt Lake City, Utah 84102



DAVID S. DOLOWITZ (0899)
COHNE, RAPPAPORT & SEGAL
525 East First South
Fifth Floor
P.O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone (801) 532-2666
Attorney for Defendant

FILED
DISTRICT COURT

MAR 2 3 47 PM '94

BY: R. G. (Gretchen)

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

-----ooo000ooo-----

LOWELL GERBER,)	
	)	ANSWER TO PETITION FOR
Plaintiff,	)	MODIFICATION AND REQUEST
	)	FOR ATTORNEY'S FEES
)	
vs.	)	Civil No. 924905415DA
)	
MARY JO GERBER,	)	Judge: Richard H. Moffat
)	
Defendant.)	
)	

-----ooo000ooo-----

Defendant, **Mary Jo Gerber**, answers Plaintiff's Petition for Modification as follows:

FIRST DEFENSE

The Petition fails to state a claim upon which relief can be granted in that it states no circumstances which Plaintiff did not claim existed at the time this matter came on for trial and therefore presents no substantial change in circumstances.

SECOND DEFENSE

1. Defendant admits the allegations of Paragraphs 1, 2, and 3 of Plaintiff's Petition.

2. Defendant admits the allegations of Paragraph 4 of Plaintiff's Petition wherein Defendant has undergone an examination

of Dr. L. Leonard, but has no knowledge of the alleged supplemental telephone information provided by Dr. Leonard and therefore denies said allegation.

3. Defendant denies the allegations of Paragraphs 5, 6 and 7 of Plaintiff's Petition.

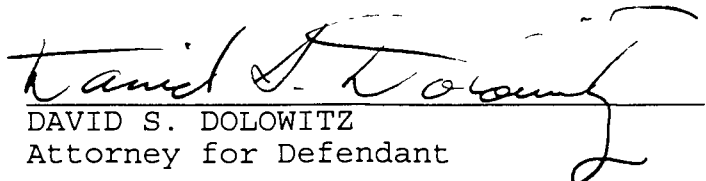
4. Defendant denies the allegations of Paragraph 8 of Plaintiff's Petition since she is without knowledge of his assertion and no verifying documentation has been submitted.

THIRD DEFENSE AND CLAIM FOR ATTORNEY'S FEES AND COSTS

This action is not pursued by the Plaintiff in good faith in that there has been no substantial change in his financial situation from that which he asserted at the time of the pretrial settlement conference when he agreed to the terms and conditions of the Decree of Divorce. Defendant is pursuing employment opportunities and complying with the terms of the Decree of Divorce. -- In addition, as there has been no change of circumstances justifying a modification of the decree of divorce this court should require the Plaintiff to pay all court costs and attorney's fees incurred in this matter.

WHEREFORE, Defendant request Plaintiff take nothing by this action and pay all court costs and attorney's fees incurred by the Defendant and for such further and other relief as the court deems just and appropriate when advised in the premises.

DATED this 2nd day of March, 1994.


DAVID S. DOLOWITZ
Attorney for Defendant

B. L. DART (818)
Attorney for Plaintiff
310 South Main Street, Suite 1330
Salt Lake City, Utah 84101
(801) 521-6383

APR 25 1995

B. K. Grapen

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---ooo000ooo---

LOWELL GERBER,	:	OBJECTIONS TO PROPOSED
	:	FINDINGS OF FACT AND
Plaintiff,	:	CONCLUSIONS OF LAW AND
	:	ORDER

v.

MARY JO GERBER,	:	Civil No. 924905415DA
Defendant.	:	Judge Sandra N. Peuler

---ooo000ooo---

Plaintiff, Lowell Gerber, specifically objects to the defendant's proposed Findings of Fact as being inconsistent with the evidence in this case or the ruling made by the Court at the time of the trial as follows:

1. Plaintiff objects to paragraph 4 of the Findings of Fact for the reason that states that plaintiff's expenses have not increased and were not being fully expended. This is contrary to plaintiff's Exhibit 2, showing that plaintiff's expenses had increased by approximately \$2,000, including expenses for disability insurance and for installment debts for purchase of furniture and furnishings in order to establish a new home. As such, the finding is an incorrect statement of the evidence at trial.

2. Plaintiff objects to paragraph 5 of the Findings of Fact in that said paragraph relies upon the finding in paragraph 4 of the Findings of Fact and for the same reason it is objected to.

3. Plaintiff objects to paragraph 8 of the Findings of Fact in its conclusion that no substantial change in the financial circumstances of the defendant have occurred. This is directly contrary to the finding in paragraph 7 of the proposed Findings of Fact that defendant's expenses have reduced by at least \$1,000 since the time of trial from \$7,017 to \$5,817 a month.

4. Plaintiff objects to paragraph 9 of the Findings of Fact for the reasons set forth in the next three foregoing paragraphs which demonstrate that there has, in fact, been a change in financial circumstances of the plaintiff.

5. Plaintiff objects to paragraph 11 of the Findings of Fact as it sets forth a theory of contract not raised by defendant at trial or in the original settlement of this case. This case was settled on the basis that defendant was disabled and that her income capacity would be reviewed within one year.

6. Plaintiff objects to paragraph 16 of the Findings of Fact which sets forth a rationale approving defendant's current part-time employment as a substitute teacher which was not expressed by the Court in its ruling and is not consistent with the evidence. The evidence was that part-time dental hygienist employment is available and at the rates available to dental

hygienists this would provide to defendant working part-time an income of \$2,000 a month. There was no testimony that part-time employment as a dental hygienist would not be consistent with the schooling situation of the children.

7. Defendant objects to Findings of Fact paragraph 18 for the reasons set forth in paragraph 6 above and for the further reason that it is inconsistent with the Court's finding that defendant is not employable as a dental hygienist because of her problems with "tactility", which don't allow her to pass the test for dental hygienists. Defendant's testimony was that it is not possible to gain this tactility as she cannot work on patients and there isn't a training situation available to allow her to gain tactility. The paragraph is further objected to as the last sentence is incomprehensible.

8. Plaintiff objects to paragraph 2 of the Conclusions of Law as being inconsistent with the ruling of the trial court. The trial court found that based upon the current needs of the children defendant should not have to work more than part-time at the present time. The Court further found that defendant could not work as a dental hygienist as she is unable to pass the licensing test due to lack of tactility and, as such, she is doing all that she can. There is no support either in the testimony or in the ruling of the Court that defendant, if she were licensed as a dental hygienist, could not work part-time and still meets the

needs of the children earning a substantially higher income than she currently earns.

DATED this 24th day of April, 1995,




B. L. DART

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 24th day of April, 1995,
I mailed a copy of the foregoing to:

David S. Dolowitz
Attorney for Defendant
525 East 100 South, #500
Salt Lake City, Utah 84102



DAVID S. DOLOWITZ (0899)
COHNE, RAPPAPORT & SEGAL
525 East First South
Fifth Floor
P.O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone (801) 532-2666
Attorney for Defendant

JUN 20 1995

R. J. Rappaport

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

-----ooo000ooo-----

LOWELL GERBER,)	
)	
Plaintiff,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
)	
vs.	)	Civil No. 924905415DA
)	
MARY JO GERBER,	)	Judge: Richard H. Moffat
)	
Defendant.)	
)	

-----ooo000ooo-----

The above-entitled matter came before the court on November 15, 1994, the Honorable Douglas L. Cornaby presiding for trial of the Plaintiff's Petition to Modify the Decree of Divorce. The Plaintiff was present in person, and represented by counsel, B. L. Dart. The Defendant was present in person and represented by counsel David S. Dolowitz. The court heard the testimony of the parties and the witnesses, produced by each of the parties, received into evidence exhibits offered by the parties and being advised in the premises, now makes and enters the following as its

FINDINGS OF FACT

1. The parties were divorced by a Decree of Divorce entered November

23, 1993. The Decree was based upon a Stipulation of the parties made in open court.

2. Paragraph 5 of the Findings of Fact and paragraph 3 of the Decree of Divorce effecting the agreement of the parties were entered on November 23, 1993.

They provide:

"Defendant should be awarded alimony from the Plaintiff in the sum of \$4,000.00 per month commencing with the month of July, 1993, based upon the current financial circumstances of the parties as shown in their Financial Declarations and under circumstances where Defendant is currently unable to work based upon her present physical disability.

There should be an automatic review of this alimony award in one (1) year from the date of the entry of the Decree of Divorce, or earlier if circumstances warrant, based upon the anticipation that Defendant will use her best efforts to seek and obtain employment at the highest economic level, and will further use her best efforts to rehabilitate herself from her disability to help her achieve her best employment opportunity.

The issue is reserved as to whether Defendant's employment should be full or part-time based upon the needs of the children. At the time of the review, each party should have the right to express his or her respective position on this issue, as Plaintiff's position is that Defendant should seek and obtain full time employment and Defendant's position is that she should seek and obtain part-time employment due to the children's needs.

Plaintiff should have the right to require Defendant to obtain a physical examination by a hand expert, currently, with a further examination six (6) months from the entry of the Decree of Divorce, and a second further examination one year from entry of Decree of Divorce to assist the court in determining the Defendant's ability to obtain employment.

At the time of the review by the court, if there has been a substantial change in the financial circumstances or ability, then the court may make adjustments in the alimony

award based on those changes."

3. The Plaintiff in his Financial Declaration of June of 1993 declared he had an income of \$16,666.67 per month. In his Financial Declaration of August, 1994, he declared income of \$16,669.23 per month.

4. At the time the Plaintiff submitted his Financial Declaration in June of 1993, he had already moved from Utah to Florida, established a residence, entered into practice and declared monthly living expenses of \$6,344.00 per month. At the time he filed his August, 1994 Financial Declaration, the Plaintiff claimed living expenses of \$6,370.00 per month, which when tested in cross-examination, he admitted he was not fully expending.

5. Considering the Financial Declaration submitted by the Plaintiff in June of 1993, upon which the settlement of the matters reached by the parties were made and that submitted in August of 1994, as well as his testimony of November 15, 1994, the court finds no substantial change in the financial status or circumstances of the Plaintiff between the date of the agreement of the parties, the entry of the Decree of Divorce and the trial of this matter on November 15, 1994.

6. The Defendant submitted a Financial Declaration in June of 1993, stating she had no income and filed a Financial Declaration in August of 1994, declaring an income of \$244.41 per month from substitute teaching. This, she testified, had increased to \$300.00 per month at the time of trial.

7. In June of 1993 the Plaintiff claimed living expenses of \$7,017.00 per month for herself and the minor children of the parties. In August of 1994, the

Defendant claimed living expenses of \$5,817.00 per month for herself and the minor children with reservations of several anticipated capital expenditures.

8. The court finds no substantial change in the financial status or circumstances of the Defendant between the time of the agreement of the parties and the entry of the Decree of Divorce and the trial of this matter on November 15, 1994.

9. The court determines that there was and has been no substantial change in the financial circumstances of the parties which would justify a modification of a Decree of Divorce between the time of the entry of their Agreement in June of 1993 and the trial of this matter in November of 1994.

10. The court finds that the issue which it heard on November 15, 1994 was the reserved issue under paragraph 5 of the Findings of Fact and paragraph 3 of the Decree of Divorce which was whether or not the Defendant's employment should be full time or part time based upon the needs of the children, and the position of each in this regard, was specifically reserved for trial, which the court heard and now determines.

11. The court finds that the parties entered into an Agreement and the Plaintiff agreed at that time that based upon his earnings, he had the ability to pay the Defendant \$4,000.00 per month as alimony and the Defendant had a need for \$4,000.00 per month as alimony and had no income at that time from which to contribute to her own support and while Defendant claimed she needed a greater sum than \$4,000.00 per month in order to maintain the standard of living that she had enjoyed during the course of the marriage, she accepted that sum as a compromise of those claims in the belief that she could maintain an appropriate standard of living accepting that sum.

12. The parties are in conflict with the Plaintiff desiring his children to obtain religious instruction and participate in swimming, and other sport activities. It takes transportation and parental direction for those goals to be achieved. They do not just happen. Children are motivated largely by parents who are at home, not by a neighbor who picks them up and takes them some place. In order to have the children pursue their religious and sports activities, it is necessary that the Defendant be involved with them in doing so. Consequently, while the Plaintiff desires the Defendant to work full time, he also wants her to provide the direction, support, and transportation the children need for their religious and sports training and activities. Practically speaking, if the Defendant is working full time and keeping up a household, she does not have the time to provide transportation and support for the children in the religious and sports activities the Plaintiff wishes the children to pursue.

13. Plaintiff desires the Defendant to work full time as a dental hygienist and represents to the court that she could earn \$4,000.00 per month if she were doing so. The Defendant does not disagree with the potential earnings asserted by the Plaintiff but has pointed out to the court that she must work for a dentist and work the hours the dentist dictate that she work if she works as a dental hygienist. If she does this she will not be able to provide the transportation and support required by the children to carry out their religious training, sports and activities.

14. The Defendant cannot be both a full time dental hygienist and look after the children and provide the support for their children in their religious and sports training as both Plaintiff and Defendant want her to do. The court heard testimony from

physicians offered by each party as to whether or not the Defendant will require surgery to be able to function as dental hygienist. It is the Defendant's position that she could function as a dental hygienist if she could practice and get tactile sensitivity restored to her injured wrist. Surgery will not affect the tactility problem that exists. Surgery may increase her mobility, but it will not affect her ability to feel which she testified is necessary if she is to function as a dental hygienist.

15. The court finds that the Defendant excelled in the dental hygienist examination in those portions of the test that were written, achieving a perfect score. She failed those portions that were practical because she did not have the tactile ability to function as required in order to be a dental hygienist. The Defendant testified she did not know of any program where she could practice working with patients which is necessary in order to get her tactile functioning restored if it is possible to do so. A program might be available to do this, but it appears to the court that the real issue is what are the needs of the children and measure this against the fiscal requirements to maintain the standard of living established in the Decree. This issue was specifically reserved in the Findings of Fact and Decree effecting the agreement of the parties.

16. The Defendant is employed as a substitute school teacher and she has been able to work on a consistent basis those hours where her children are in school and this work is the most the Defendant is going to be able to undertake and provide the religious and sports training support and transportation that she has provided to the children during the marriage of the parties and since the entry of the Decree. The Defendant would not be able to secure similar hours as a dental hygienist because a

dentists hours do not coincide with school hours as do those of the substitute teaching in which the Defendant has been engaging. The Defendant transports the children to their religious training, their swimming, their ball games, scouting and all of the various activities in which they are involved. This does not give her freedom to work more than she is already working. She is working 32 hours per week, and that is what the court finds that she could work and provide for the children as she has.

17. The court finds from hearing the testimony of the Plaintiff and the Defendant, and considering the positions taken by them in their pleadings, that the Plaintiff requests this court to choose to sacrifice the children and order the Defendant to work. The Defendant has chosen not to sacrifice the interests of the children, but to put them in a paramount position and to work on a secondary basis, and in working 32 hours per week, is working all that she can work and still provide the support to the children that they need to continue with their activities.

18. The court has determined that the Defendant could earn \$25.00 per hour instead of \$5.90 if she were working as a dental hygienist rather than as a substitute teacher, but to do so would require her to not provide the parental support to the minor children of the parties that both Plaintiff and Defendant desire her to provide. If she does not increase her earnings above their present level, she will over the course of the court's Order as is hereinafter provided, decrease her income by \$1,000.00 per month in order to provide that assistance to her children.

19. The court finds that the parties entered into a Stipulation for payment of child support of \$2,100.00 for three children, that the income of the Plaintiff is

substantially in excess of the Utah Uniform Child Support Guidelines, that the parties, concomitantly with their agreement for support, entered into an agreement for visitation and did not provide in their agreement for any abatement of child support during the visitation. Evaluation of the child support shows it is not a standard award, nor is it statistical variation of the child support guidelines. The agreed upon child support is a negotiated figure between the parties entered into for the best interests of the children.

20. Each of the parties have employed counsel to bring this matter before the court and the issues litigated by them through their counsel are those issues that were reserved in paragraph 5 of the Findings of Fact and paragraph 3 of the Decree of Divorce.

From the foregoing FINDINGS OF FACT, the court now makes and enters the following,

CONCLUSIONS OF LAW

1. There has been no substantial change of circumstances since the entry of the Decree of Divorce in this case.

2. The alimony set in the Decree of Divorce effects the decisions of the parties to provide for the religious and sports training and activities of their children and still require the Defendant to participate in self support. If Defendant elects to continue as a substitute teacher, she will not be able to earn the same income that she could earn as a dental hygienist and her income will decrease. She will thus be presented with the choice of earning some or all of the income that she could earn as dental hygienist with that she will earn as a teacher. The alimony award thus made considers and effects the

fact that the Plaintiff earns in excess of \$200,000.00 per year and has produced an affluent lifestyle for himself and the Defendant, that the Defendant has given up her career as a dental hygienist in order to care for the children of the parties by mutual agreement, that even though Defendant has suffered a debilitating injury, she could probably still function as a dental hygienist provided that she did not have to provide care for the children, but the parties have elected a lifestyle which included a substantial time commitment from the Defendant to be involved in the religious and sports training activities for the children, and as the parties live in Park City, and many of these activities are in Salt Lake City, the Defendant must spend substantial time transporting the children. The court has determined that the Defendant has sought employment on her own and has secured employment as a substitute teacher, that considering the needs of the Defendant if she is to maintain the lifestyle that the parties enjoyed during their marriage and her own ability to produce income, this court should continue the alimony as set at \$4,000.00 per month until December 1, 1995 when it should be reduced by \$500.00 per month until December 1, 1996 when it should be reduced by an additional \$500.00 per month and continue thereafter at \$3,000.00 per month until the death or remarriage of the Defendant or further order of the court. As this adjustment considers and effects what the Defendant can earn herself in order to assist herself in maintaining the standard of living enjoyed by the parties during their marriage and the ability of the Plaintiff to produce income to both maintain his lifestyle and contribute to meet the needs of the Defendant.

3. The parties entered into an agreement for child support at \$2,100.00

per month per child and this should not abate during the summer or any period of extended visitation as it is not a standard child support order and is not based on a calculation from the child support guidelines. This child support was agreed to based on the needs of the children at the time the agreement was entered into and therefore no abatement should occur during visitation.

4. There has been no substantial change in circumstances in this matter which would justify any modification of the Decree of Divorce. The matter tried by the court was one reserved by the parties in paragraph 3 of the Decree of Divorce.

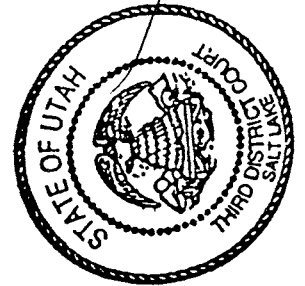
5. Each of the parties should assume and bear their own costs and attorney's fees.

DATED this 16 day of June, 1995.

BY THE COURT:

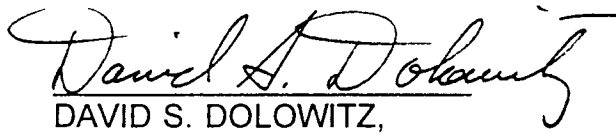


DOUGLAS L. CORNABY,
DISTRICT COURT JUDGE



APPROVED AS EFFECTING
THE RULING OF THE COURT:

B. L. DART, Counsel
for Plaintiff



DAVID S. DOLOWITZ,
Counsel for Defendant

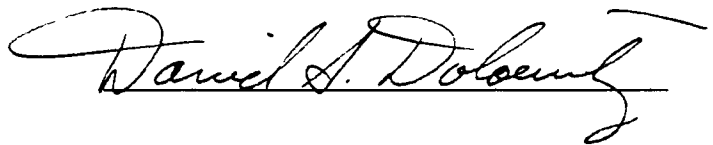
ADDRESS AND SOCIAL SECURITY
NUMBER FOR DEBTOR:

Mr. Lowell Gerber
Social Sec. No. 350-40-2033
8540 College Parkway
Fort Myers, FL 33919

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed this 17 day of April, 1995, a true and correct copy of the foregoing Findings of Fact and Conclusions of Law to the following individual:

B. L. Dart, Esq.
DART, ADAMSON & DONOVAN
310 South Main, Ste. 1330
Salt Lake City, Utah 84101

A handwritten signature in cursive script, appearing to read "Daniel S. Dolan", written over a horizontal line.

(dsd\mb\Gerber. JOF)

JUDGEMENT

DAVID S. DOLOWITZ (0899)
COHNE, RAPPAPORT & SEGAL
525 East First South
Fifth Floor
P.O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone (801) 532-2666
Attorney for Defendant

JUN 20 1995

By K. Rappaport

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

-----ooo000ooo-----

LOWELL GERBER,	)	2187694
)	
Plaintiff,	)	ORDER MODIFYING DECREE
	)	OF DIVORCE
)	
vs.)	Civil No. 924905415DA
)	
MARY JO GERBER,)	Judge: Richard H. Moffat
)	
Defendant.)	
)	

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The above-entitled matter came before the court on November 15, 1994, the Honorable Douglas L. Cornaby presiding for trial of the Plaintiff's Petition to Modify the Decree of Divorce. The Plaintiff was present in person and represented by counsel, B. L. Dart. The Defendant was present in person and represented by counsel David S. Dolowitz. The court heard the testimony of the parties and the witnesses, produced by each of the parties, received into evidence exhibits offered by the parties and being advised in the premises, the court made and entered its Findings of Fact and Conclusions of Law, now therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

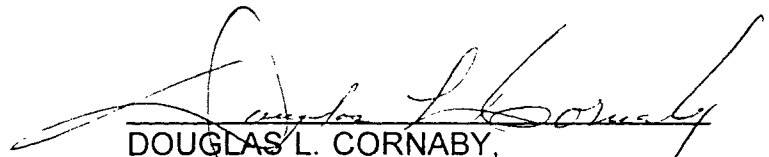
1. Alimony shall continue to be paid by the Plaintiff to the Defendant at the rate of \$4,000.00 per month until December 1, 1995 at which time it shall be reduced by \$500.00 per month to the sum of \$3,500.00 per month and continue at that rate until December 1, 1996 when it shall be reduced by an additional \$500.00 per month to the sum of \$3,000.00 per month at which sum it shall remain or continue until the death or remarriage of the Defendant or further order of the court.

2. Child support shall be paid by the Plaintiff to the Defendant at the rate of \$2,100.00 per month and it shall not abate during the summer or any period of extended visitation.

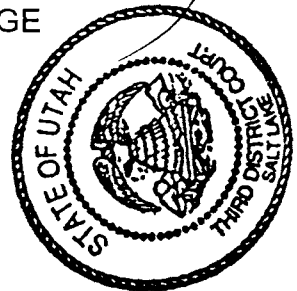
3. Each of the parties shall assume and bear their own costs and attorney's fees.

DATED this 16 day of June, 1995.

BY THE COURT:

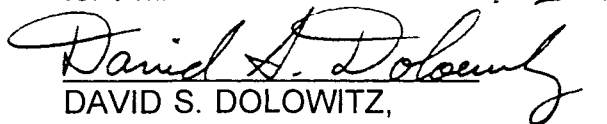


DOUGLAS L. CORNABY,
DISTRICT COURT JUDGE



APPROVED AS EFFECTING THE
RULING OF THE COURT:

B. L. DART, Counsel
for Plaintiff



DAVID S. DOLOWITZ,
Counsel for Defendant

DEBTOR'S ADDRESS AND
SOCIAL SECURITY NO.
Lowell Gerber
Social Sec. No. 350-40-2033
8540 College Parkway
Fort Myers, FL 33919

E CASTLE Agriolepis

STATE OF UTAH

Defendant.

Civil No. 924905415DA

The Plaintiff wants the Defendant to work full time and earn \$4,000 per month as a dental hygienist. Presumably, if she did earn \$4,000 he would not have to pay alimony. The Court looked at this problem at the trial on November 15, 1994. The Defendant had contacted the Dental Hygiene School at Weber State University. No program was available. The affidavit of the Director, Dr. Bonnie Branson, states that there still is no program for the Defendant. A program could possibly be designed to help the Defendant. Dr. Branson cautions, however, that the Defendant may not qualify for the admission requirements of the school. If she is admitted to work in a special program at the school and completes the training the Defendant would still not

be guaranteed certification. The Defendant testified at trial that she still does not have the tactile ability to function as required in order to be a dental hygienist.

A new trial could not prove that the Defendant has the tactile ability to be a dental hygienist. It could not prove that the Defendant would qualify for admission to Weber's Dental Hygiene School, that a special program would in fact be designed, that after completing the program the Defendant would have the tactile ability to function as a dental hygienist, and that the Defendant would in fact be certified.

The Court at trial concluded that the Defendant should be able to earn more than her current monthly income of \$300 per month. The Court gave her until December, 1995, to increase her income by \$500 per month, and until December, 1996, to increase her income by another \$500 per month. The Court knew this would be full time work and would not be in the children's best interest. The Plaintiff, however, insisted upon it.

A new trial would not resolve any compelling issues in this case. The request for a new trial is denied. If at any time in the future the Defendant in fact works and earns in excess of \$1,300 per month, then it will be appropriate for the Plaintiff to request an alimony modification hearing.

The Plaintiff has objected to the findings of fact and conclusions of law. His objections really go to the Court's failure to find the facts favorable to him. For example, he objects to paragraph 4 of the Findings because he claims his expenses have increased in Florida. The Court does not doubt that the Plaintiff has the ability to spend the entire \$4,000 now ordered by the Court to go to the Defendant as alimony. The Plaintiff is expected to live within his income just as the Defendant is expected to live within the \$4,000 per month alimony.

The Court finds no errors in the Findings of Fact and Conclusions of Law. They in fact reflect the rulings of the Court. The Court does not see that justice would be served by changing them at this time. The Court approves them and is signing them at the same time as this ruling.

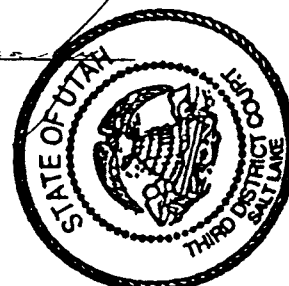
The Defendant is awarded a reasonable attorney fee for defending against these proceedings.

Dated June 16, 1995.

By the Court:


JUDGE

cc: Counsel



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000340

DAVID S. DOLOWITZ (0899)
COHNE, RAPPAPORT & SEGAL
525 East First South
Fifth Floor
P.O. Box 11008
Salt Lake City, Utah 84147-0008
Telephone (801) 532-2666
Attorney for Defendant

AUG 15 1995

R. Grotapay

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---ooo000ooo---

LOWELL GERBER,

Plaintiff,

vs.

MARY JO GERBER,

Defendant.

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ORDER

Civil No. 924905415DA

Judge: Douglas L. Cornaby

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The above-entitled matter came before the Court for consideration of Plaintiff's Motion for New Trial and Objections to the proposed Findings of Fact and Conclusions of Law prepared by Defendant's counsel to effect the ruling of the Court after the trial held on November 15, 1994. The Court considered the pleadings submitted by each of the parties in support of their position and issued its Ruling, declaring its basis for its decision that Plaintiff's Motion for New Trial and Objections to the proposed Findings of Fact and Conclusions of Law were not well taken.

Accordingly,

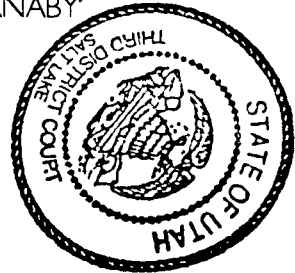
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's request for a new trial is denied.
2. The proposed Findings of Fact and Conclusions of Law do reflect the rulings of the Court and the Court has approved and executed them.
3. Defendant is awarded reasonable attorney's fees incurred by her in defending these proceedings. She shall submit appropriate application and support therefor for further consideration by this Court.

DATED 15 day of August, 1995.

BY THE COURT:

Dandra Decker for
HONORABLE DOUGLAS J. CORNABY
Third Judicial District Court



APPROVED AS TO
FORM AND CONTENT:

B. L. Dart 7/31/95
B. L. DART
Attorney for Plaintiff

David S. Dolowitz
DAVID S. DOLOWITZ
Attorney for Defendant

mary\gerber\order



STATEMENT OF MONTHLY INCOME
LOWELL GERBER
(From Year-to-date Paystub attached, 9.69 Months)

	Paystub 9.69 mo.	Monthly Average
Gross monthly salary (\$200,000/year)	\$7,692.31	\$16,666.66
Less:		
FICA	\$(6,157.70)	(635.39)
Federal taxes	(37,571.59)	(3,877.36)
Alimony	---	(4,000.00)
Child Support	---	<u>(2,100.00)</u>
 NET EXPENDABLE MONTHLY INCOME		 \$6,053.91

THWEST FLORIDA HEART GROUP, P.A. FORT MYERS FL 33919

Period: 10/01/94 - 10/14/94

Type	Hours	Earn	Amount	Ded	Amount
------	-------	------	--------	-----	--------

Regular	80.00				
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021340



21340

Current

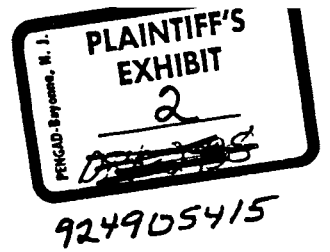
Y-T-P
9/6/94

Gross	\$7,692.31	\$161,538.53
FICA	\$111.54	\$6,157.70
FED-S	\$2,352.06	\$37,571.59

Check #: 21340 Date: 10/19/94

Check Amount:

\$5,228.71



STATEMENT OF MONTHLY LIVING EXPENSES
LOWELL GERBER

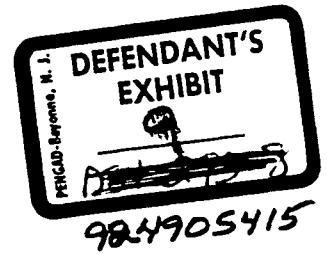
Mortgage payment	\$2,005
Homeowners insurance--\$560/year	47
Flood insurance--\$105/year	9
Homeowners association fee--\$1,200/year	100
Maintenance--Home, lawn, pool	225
Utilities	200
Telephone, including cellular	250
Food and household supplies	400
Housekeeper	86
Laundry/dry cleaning	80
Clothing	150
Dental	60
Disability insurance	613
Automobile and boat insurance	230
Health club	20
Entertainment	250
Cable TV	50
Travel costs--	
Children's visitation, 3x year @\$650 x 3 children	487
Lowell	300
Child care--summer camp and babysitter during visits	100
Automobile expenses (personal portion)	150
Gifts: Birthdays, Barmitzvas, Christmas, other family holidays	400

Accounting (tax advice/tax returns)	100
Legal	200
Incidentals	50
Installment payments @10%/month--see list below*	1,277
College prepayment plan beg. 1/95 (2 children)	600
	<hr/>
TOTAL MONTHLY EXPENSES	\$8,439

 *Installment debts:

Robin Stuckey/furniture	\$4,300
Circuit City/computer	3,500
Save-On Furniture	1,800
VISA/airfare	<u>3,175</u>
Total installment debts	\$12,775

B. L. DART (818)
DART, ADAMSON & DONOVAN
Attorneys for Plaintiff
310 South Main, Suite 1330
Salt Lake City, Utah 84101
(801) 521-6383



IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

---ooo0ooo---

LOWELL GERBER, :

Plaintiff, : FINANCIAL DECLARATION

v. : Civil No. 924905415

MARY JO GERBER, : Dated: June, 1993

Defendant. : Hon. Richard H. Moffat

: Hon. Michael S. Evans

---ooo0ooo---

Husband: LOWELL GERBER
Address: 5260 S. Landings Dr.
#501
Ft. Myers, FL 33919
Soc. Sec. #: 350-40-2033
Occupation: Physician
Employer: Southwest Florida Heart Group
Birthdate: 8-22-49

STATEMENT OF INCOME, EXPENSES, ASSETS AND LIABILITIES

(Note: To arrive at monthly figures when income is received and deductions are made weekly, multiply by 4.3; if figures are on a biweekly basis, multiply by 2.167)

	HUSBAND	WIFE
1. Gross monthly income from:		
Salary and wages, including commissions, bonuses, allowances and overtime	\$16,666.67 ¹	Imputed \$2,000.00 ²
TOTAL MONTHLY INCOME	\$16,666.67	\$2,000.00

¹Plaintiff's salary commencing May 1, 1993.

²Defendant has a college degree and has been certified as a dental hygienist. The income capacity of a dental hygienist is between \$150-200 per day or \$3,000-4,000 per month. Even working part-time, defendant has the capacity to earn \$2,000 which should be imputed to her.

2. Monthly deductions from gross income:

Income taxes: State/Federal \$(4,759.36)

Number of Exemptions taken:

Social Security \$(1,275.19)

Medical or other insurance (describe)

Union or other dues

Retirement or pension fund

Savings plan

Credit union

TOTAL MONTHLY DEDUCTIONS \$(6,034.55)

3. NET MONTHLY INCOME \$10,632.12

4. DEBTS AND OBLIGATIONS:

<u>Creditor's Name/Purpose</u>	<u>Balance</u>	<u>Monthly Payment</u>
(H) Elam, Burke, Boyd/Idaho Antitrust	\$8,326.55	\$500.00
(H) Robb Stucky/furniture	\$8,060.00	300.00
(H) Sun Bank/car loan	18,000.00	500.00
(J) First Security/Park City mortgage	206,000.00	\$2,546.00

5. ALL PROPERTY OF THE PARTIES known to me owned individually or jointly.

	Current Value	Owed Thereon	
(a) Household furniture/furnishings, appliances, equipment:			
(W) Family Affairs appraisal	\$14,334		
(H) \$4,000 + 10,000 new purchase	14,000	(8,060)	
(b) Automobiles:			
(W) 1993 Ford Aerostar	20,000		
(H) 1993 Mitsubishi	22,000		
(H) 1983 Porsche	18,000	(18,000)	
(c) Securities, stocks, bonds:			
(H) North Carolina NG	2,502		
(H) GTE	1,200		
(W) Payne Olsen #503431 (est) (Need current statement from defendant)	14,000		
(W) Stocks in safe deposit box (Defendant was to inventory)	?		
--			
(d) Cash and deposit account:			
See list attached.			
(e) Life Insurance:			
<u>Name of Company</u>	<u>Policy No.</u>	<u>Face Amt.</u>	<u>Cash value</u>
(H) Minnesota #1-781-6363		359,598	2,284
	#1-782-958	800,000	6,013
(H) Beneficial #BL1083753		750,000	-0-
(f) Profit Sharing or Retirement Accounts/IRA's:			
			Value and Amount Now Vested
<u>Name of Plan or Where Held</u>			
See list attached re IRA's.			

(g) Other Personal Property and Assets and Values: None

(h) Real Estate:

Address: 3028 Meadows Dr. Park City, UT	Type of Property: Residence
Original Cost: \$350,000	Date Acquired: 8/89
Cost of Additions:	Present Value: \$382,000
Total Cost:	Basis of Valuation: Webber appraisal
Mortgage Balance: \$206,000	
Other Liens:	
Equity: \$176,000	
Monthly Payment: \$ 2,546	To Whom: First Securirty
Taxes/year: \$ 4,201	
Comments: Refinancing in progress; will lower payment to approximately \$1,800.	

Address: Bear Lake	Type of Property: Lot
Original Cost:	Date Acquired:
Cost of Additions:	Present Value: \$10,000
Total Cost:	Basis of Valuation: Comparable sales
Mortgage Balance: -0-	
Other Liens:	
Equity:	
Monthly Payment:	To Whom:
Taxes/year:	
Individual Contributions:	

Address: New Orleans	Type of Property: Condo/Timeshare
Original Cost:	Date Acquired:
Cost of Additions:	Present Value: \$10,000
Total Cost:	Basis of Valuation: Opinion based on cost.
Mortgage Balance:	
Other Liens:	
Equity:	
Monthly Payment:	To Whom:
Taxes/year:	
Individual Contributions:	

(i) Business Interest:

(H) Lowell Gerber, P.C. checking acct	\$ 9,404	(6/22/93)
(H) Medical receivables	6/22/93	12,894 ³

³Accounts are over 120 days and basically not collectible.

6. MONTHLY EXPENSES:

Rent	\$1,350
Power	100
Phone	250
Water	25
Food and household supplies	400
Clothing	150
Laundry	80
Auto insurance	100
Automobile expenses: gasoline, maintenance	150
Life insurance	300
Health insurance (family coverage)	419
Children's psycnologist	120
Entertainment	600
Health club	40
Travel (travel cost in connection with children's visitation 2x/year each)	700
Haircuts	15
Newspaper/Magazines	20
Gifts, including Christmas	150
Incidentals	75
Debt service	1,300
	<hr/>
TOTAL MONTHLY LIVING EXPENSES	\$6,344
Currently also paying Park City mortgage	<u>2,546</u>
TOTAL CURRENT EXPENSES	\$8,890

(j) Other Assets:

(H) Wilmac Partnership T0864 (formerly in Pension Plan)	\$44,958
(H) Idaho Falls Antitrust Suit (Case settled on "walk-away" basis; no monies reco Attorney's fees still owed by plaintiff of \$8,000	Settled
(H) Park City Doctors Suit	?

FINANCIAL AND IRA ACCOUNTS
Gerber v. Gerber

Merrill Lynch Accounts:

(J)	CMA #587-29077 (1/31/93)	\$177,874
(H)	WCMA #330-97271 (1/31/93)	75,978
(W)	IRA #587-83743 (12/31/92)	18,534
(H)	IRA #584-83744 (1/31/93)	279,525

First Security Accounts:

(J)	FSB #18101217 (6/21/93)	1,216
(W)	MMA #18101203 (6/21/93)	847
(W)	MMA #217-804650-17 (6/21/93)	2,683
(J)	MMA #217-80803-16 (6/21/93)	4,836
(W)	IRA #600030024692514 (1/31/93)	632
(W)	IRA #600310024665916 (1/31/93)	8,475
(H)	IRA #60003002466114 (1/31/93)	32,574
(H)	IRA #600310024692417 (1/31/93)	8,475

Other accounts:

(H)	Keystone IRA (1/31/93)	5,519
(H)	Travellers IRA #973347-21269320	5,185

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)


I hereby certify that the matters stated herein are true and correct.

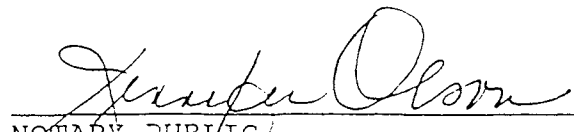


LOWELL GERBER, Plaintiff

SUBSCRIBED AND SWORN TO before me this 22 day of

June, 1993.

 Notary Public
JENNIFER OLSON
310 South Main #1330
Salt Lake City, Utah 84101
My Commission Expires
March 23, 1997
State of Utah
Commission expires _____



NOTARY PUBLIC
Residing at _____

Husband's (X)

Wife's ()

PROPOSED SETTLEMENT OF PENDING
DIVORCE LITIGATION

Child Support: \$700/child Total (per month) \$2,100*

Alimony: \$3,000 Total (per month) \$3,000**

*At such time as only two minor children reside at home, support would automatically reduce to \$1,400, and when only one minor child is at home, support would reduce to \$825.

**Alimony at \$3,000 per month for period of one year, then to automatically reduce to \$2,000 per month, until such time as plaintiff remarries, cohabits, dies or there is a change of financial circumstances of the parties warranting reduction.

PROPERTY DISTRIBUTION:

1. Defendant to be awarded custody of the three minor children subject to plaintiff's visitation as follows:

a. One half of summer vacation, including the right to have any one or two children for a separate one-week period as part of his half summer with each child. Plaintiff would provide defendant with at least two months notice of when he is choosing to exercise his summer visitation.

b. Plaintiff should have the right to have the children for one-half the Christmas break with Christmas Eve and Christmas Day being alternated between plaintiff and defendant. Plaintiff shall have the children for Christmas Eve and Christmas Day and half the Christmas break in even-numbered years and defendant shall have the children for Christmas Eve and Christmas Day in odd-numbered years.

c. Plaintiff should have the right to visit with the children anytime he is in Utah upon providing to plaintiff as much advance notice as he has of his trip to Utah. In the event the notice is less than 24 hours, Dr. Gerber would respect any other scheduled activities the children have.

d. One half of holidays, to be alternated between the parties.

e. A weekend for each child within the week or two of that child's birthday.

2. Plaintiff will maintain health insurance coverage on the minor children so long as they qualify as dependents.

3. Plaintiff should be awarded the income tax exemptions for the children based on his paying child support in excess of the Guidelines.

4. Assets divided as set forth on attached "Proposed Distribution of Assets".

5. Each party to pay his or her own respective attorney's fees and costs.

6/22/93

PROPOSED DISTRIBUTION OF ASSETS
Gerber v. Gerber

	<u>Mary Jo</u>	<u>Lowell</u>
¹ Park City home equity	\$176,000	
Bear Lake lot	10,000	
New Orleans condo		10,000
² Household furniture	14,334	5,940
³ Vehicles:		
1993 Ford Aerostar	20,000	
1992 Mitsubishi Diamante		22,000
1983 Porsche		-0-
Merrill Lynch accounts:		
⁴ CMA #587-29077 \$177,874 (1/93)	71,227	106,647
WCMA #330-97271 \$75,978 (1/93)		75,978
IRA #587-83743 (12/92) (w)	18,534	
IRA #584-83744 \$279,525 (1/93) (h)	139,763	139,763
First Security accounts:		
⁵ MMA #18101217 (6/21/93)		1,216
MMA #18101203 (6/21/93)	847	
MMA #217-80465-17 (6/21/93)	2,683	
MMA #217-80803-16 (6/21/93)		4,836
⁶ IRA #600030024692514 (w)	632	
IRA #600310024665916 (w)	8,475	
IRA #60003002466114 (h)		32,574
IRA #600310024692417 (h)		8,475
Other accounts/stocks:		
Keystone IRA 1/31/93		5,519
North Carolina NG		2,502
GTE		1,200
⁷ Payne Olsen #503431 (est.)	14,000	
⁸ Stocks in safe deposit box	?	
Wilmac Partnership T0864		44,958

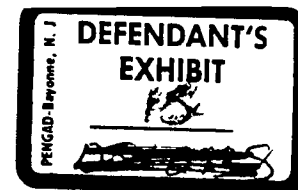
	Mary Jo	Lowell
Insurance Policies:		
¹⁰ Travellers #073347-2269320		5,185
¹¹ Minnesota #1-781-6363		2,284
#1-782-958		6,013
¹² Beneficial #BL1083753		-0-
¹³ Lowell Gerber, P.C.		9,404
¹⁴ Medical receivables	1/2	1/2
¹⁵ Idaho Falls Antitrust Suit		(8,000)
¹⁶ Park City Doctors Suit		---
	_____	_____
TOTAL VALUES	\$476,495	\$476,494

Explanatory notes:

1. Webber appraisal \$382,000 less outstanding mortgage \$206,000 = equity \$176,000.
2. Furniture in Mary Jo's possession from Family Affairs appraisal.

Since the parties' separation, Dr. Gerber purchased \$3-4,000 worth of furniture prior to moving to Florida. Since moving to Florida, he has purchased another \$10,000 on which he owes \$8,060.
3. Vehicle values are based on purchase prices.

The 1983 Porsche has just been acquired for \$18,000 and is financed by an \$18,000 credit line owed to Sun Bank.
4. This account is being used as the "plug figure" to achieve parity of the overall marital estate.
5. Money market account balances per telephone quote to Jennifer Olson from First Security Bank 6/21/93.
6. Balances 1/31/93. Each to take IRA's in own name.
7. Defendant was to obtain a statement on current value.
8. Defendant was to provide inventory of stocks in deposit box.
9. Steps being taken to contact Bill Maeck in Idaho Falls to arrive at current value.
10. This is an IRA.
 1. Face values \$359,598 and \$800,000 respectively.
 2. Face \$750,000.
 3. Current balance 6/22/93 in P.C. checking account.
 4. Collectibility of receivables is doubtful as all are over 120 days old. Defendant proposes receivables be accounted for as received after payment of expenses including salary of Lynn Pace and fees for collection agency. Net receivables should be divided between parties with each to bear tax consequences of their share.
 5. This case was settled on a walk-away basis with no monies received. Plaintiff presently still owes \$8,000 in attorney's fees related to the suit.
 6. Filing of suit is imminent. Plaintiff would agree to take this asset subject to any liabilities; otherwise would divide equally with defendant with her to share liabilities. It is plaintiff's belief that the Park City situation is a negative and any recovery would only be offset against liability exposure for the remaining 2-1/2 years of the lease.



B. L. DART (818)
DART, ADAMSON & DONOVAN
Attorneys for Plaintiff
310 South Main, Suite 1330
Salt Lake City, Utah 84101
(801) 521-6383

IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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LOWELL GERBER,	:	
Plaintiff,	:	FINANCIAL DECLARATION
v.	:	Civil No. 924905415DA
MARY JO GERBER,	:	Dated: August, 1994
Defendant.	:	Hon. Richard H. Moffat Hon. Michael S. Evans

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Husband: LOWELL GERBER	Wife:
Address: 4120 Steamboat Bend E	Address:
Apt. 306	
Ft. Myers, FL 33919	
Soc. Sec. #: 350-40-2033	Soc. Sec. #:
Occupation: Physician	Occupation:
Employer: Southwest Florida	Employer:
Heart Group	
Birthdate: 8/22/49	Birthdate:

STATEMENT OF INCOME, EXPENSES, ASSETS AND LIABILITIES

(Note: To arrive at monthly figures when income is received and deductions are made weekly, multiply by 4.3; if figures are on a biweekly basis, multiply by 2.167)

	HUSBAND	WIFE
1. Gross monthly income from:		
Salary and wages, including commissions, bonuses, allowances and overtime, payable biweekly (see paystub attached)	\$16,669.23	

pension and retirement	
social Security	
disability and unemployment	
public assistance	
child support from any prior marriage	
dividends and interest	
rents	
other sources:	
TOTAL MONTHLY INCOME	\$16,669.23
2. Monthly deductions from gross income:	
Income taxes: Federal/state	(3,042.14)
Number of Exemptions taken:	
Social Security	(1,275.19)
Medical or other insurance (describe)	
Union or other dues	
Retirement or pension fund	
Savings plan	
Credit union	
Other (specify)	
TOTAL MONTHLY DEDUCTIONS	\$(4,317.33)
3. NET MONTHLY INCOME	\$12,351.90

4. DEBTS AND OBLIGATIONS:

<u>Creditor's Name/Purpose</u>	<u>Balance</u>	<u>Monthly Payment</u>
Robb & Stucky/Furniture	\$4,481.78	\$250.00
Heritage Bank/Construction Loan	\$52,000.00	\$2,100.00

5. ALL PROPERTY OF THE PARTIES known to me owned individually or jointly.

PLEASE NOTE: The parties were divorced in July 1993 and divided their property interests at that time, and there are no property issues relevant to this modification proceeding.

6. MONTHLY EXPENSES:

Mortgage payment (Mortgage rate will rise 1-2% next year)	\$2,100
Maintenance and homeowners association fee	300
Food and household supplies	400
Utilities	200
Telephone	150
Laundry/cleaning	80
Clothing	150
Dental	100
Insurance (disability)	800
Child care--summer camp and babysitter during visitation periods	100
Health club	40
Entertainment	500
Incidentals	50
Travel costs--children's visitation	800
Automobile expenses	350
Installment payment: Furniture	250
Florida college prepayment plan (2 children)	<u>600</u>
TOTAL	\$6,370

STATE OF FLORIDA)
): ss.
COUNTY OF _____)

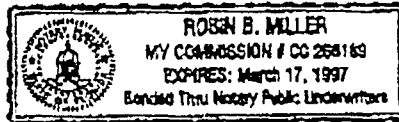
I hereby certify that the matters stated herein are true and correct.

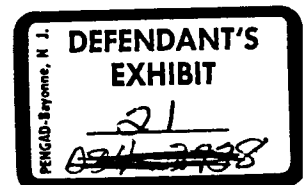
Lowell I. Gerber
LOWELL I. GERBER, Plaintiff

SUBSCRIBED AND SWORN TO before me this 11th day of
August, 1994.

Rosen B. Miller
NOTARY PUBLIC
Residing at 17321 Lee Rd
St. Petersburg FL 33912

Commission expires: _____





STATEMENT OF INCOME, EXPENSES, ASSETS AND LIABILITIES

(Note: To arrive at monthly figures when income is received and deductions are made weekly, multiply by 4.3; If figures are on a bi-weekly basis, multiply by 2.167)

	<u>HUSBAND</u>	<u>WIFE</u>
1. GROSS MONTHLY INCOME FROM:		
Salary and wages, including commissions, bonuses, allowances and over-time, payable: _____ (pay period)	16,666.00	-0-
Pensions and retirement: _____		
Social Security: _____		
Disability and unemployment insurance: _____		
Public Assistance (welfare, AFDC payments, etc.): _____		
Child support from any prior marriage		
Dividends and interest: _____		
Rents: _____		
All other sources (specify) _____		

TOTAL MONTHLY INCOME:		
2. ITEMIZE MONTHLY DEDUCTIONS FROM GROSS INCOME:		
State and federal income taxes: _____		
Number of exemptions taken: _____		
Social Security: _____		
Medical or other insurance (describe fully): _____		
Union or other dues: _____		
Retirement or pension funds: _____		

Savings Plan: _____		
Credit Union: _____		
Other (specify): _____		

TOTAL MONTHLY DEDUCTIONS:		
3. NET MONTHLY INCOME - TAKE HOME PAY:		

4. **DEBTS AND OBLIGATIONS:**

Creditor's Name	For	Date Payable	Balance	Monthly Payment
First Security	1st Mortg.		\$206,000	*\$2,546.00
TOTAL:			\$_____	\$_____

*Is in process of being refinanced.

5. **ALL PROPERTY OF THE PARTIES know to me owned individually or jointly (indicated who holds or how title held: (H) Husband, (W) Wife, or (J) Jointly). WHERE SPACE IS INSUFFICIENT FOR COMPLETE INFORMATION OR LISTING PLEASE ATTACH SEPARATE SCHEDULE.**

	<u>Plaintiff</u>	<u>Defendant</u>
(a) Household furnishings, furniture, appliances, and equipment: _____	-?-	14,334.00
(b) Automobile (Year-Make): _____		
1993 - Ford Aerostar	-0-	20,000.00
1993 - Mitsubishi	22,000.00	-0-
(c) Securities - stocks, bonds: _____		
See attached Exhibit "C"		
(d) Cash and deposit accounts (banks, savings & loans, credit unions - savings & checking: _____		
See attached Exhibit "C"		

(e) **Life Insurance:**

<u>Name of Company</u>	<u>Policy No.</u>	<u>Face Amt.</u>	<u>Cash Value, accumulated dividend, or loan amt.</u>
See attached Ex. "C"			

(f) Profit Sharing or Retirement Accounts Value of Interest and Amount Presently Vested

Name: See attached Ex. "C"
Name: _____
Name: _____

(g) Other Personal Property and Assets (Specify):

(h) Real Estate (Where more than one parcel of real estate owned, attach sheet with identical information for all additional property):

Address: <u>3028 Meadows Drive</u>	Type of Property: <u>Single Family</u>
<u>Park City, Utah 84060</u>	Date of Acquisition: <u>Aug. 1989</u>
Original Cost: \$ <u>350,000.00</u>	Total Present Value: <u>\$382,000.00</u>
Cost of Additions: \$ _____	Basis for Valuation: <u>Appraised by</u>
Total Cost: \$ <u>350,000.00</u>	<u>Jerry Webber</u>
Mtg. Balance: \$ <u>206,000.00</u>	_____
Other Liens: \$ <u>-0-</u>	_____
Equity: \$ <u>17,700.00</u>	_____
Monthly Amortization \$ <u>2,546.00</u>	And to Whom: <u>First Security</u>
Taxes: \$ <u>4,201.00</u>	_____
Individual Contributions: _____	_____

*Bear Lake lot to Defendant and New Orleans time share to Plaintiff.

(i) Business Interest (indicate name, share, type of business, value less indebtedness):

(j) Other Assets (Specify):

5. **TOTAL MONTHLY EXPENSES:** *(Specify which party is the custodial parent and list names and relationship of all members of the household whose expenses are included)

Rent or Mortgage Payments (residence) _____	2,546.00*
Real property taxes (residence) <u>(4,992.00/vr)</u>	416.00
Real property insurance (residence) <u>(\$1,080/yr)</u>	90.00
Maintenance (residence) _____	500.00
Food and household supplies _____	900.00
Utilities inc. water, electricity, gas & heat <u>electricity, \$80.00; Mtn. Fuel, \$140; water,</u> <u>garbage, \$53.00</u>	273.00
Telephone _____	85.00
Laundry and cleaning _____	
Clothing _____	100.00
Medical <u>(defendant only)(\$250/ded. + \$40/mth)</u>	60.83
Dental <u>(defendant only)</u>	
Insurance (life, health, accident, comprehensive liability) exclude payroll deducted <u>(COBRA)</u>	171.00
Child Care _____	
Payment of child spousal support prior marriage School _____	?
Entertainment (includes clubs, social obliga- tions, travel recreation) <u>Travel, \$150; Clubs</u> <u>\$50.00</u>	200.00
Incidentals (grooming, tobacco, alcohol, gifts and donations) <u>(Grooming, \$60; Gifts, \$60)</u>	120.00
Transportation (other than automobile) _____	
Auto expense (gas, oil, repair, insurance) _____ <u>(gas, \$160; insurance, \$80.30)</u>	240.30
Auto payments _____	
Installment payment(s). (Insert total and attach itemized schedule if not fully set forth in (d) on the first page hereof) _____	
Other expenses (Insert total and specify on attached schedule) <u>See attached Schedules</u> <u>for Rebecca (\$409.29), David (\$421.87); Jonathan</u> <u>\$407.20)</u>	1,238.36
Cable T. V. _____	65.00
Professional Dues (\$150.00/yr) _____	12.50
Anticipated taxes: _____	?

TOTAL EXPENSES:

\$7,017.99

*Is being refinanced to approximately \$1,800.00.

Gerber v. Gerber

Additional Monthly Expenses for Minor Children

NAME: Rebecca Age: 13 Sex: Female
(11-17-79)

Doctor: (\$250.00 deductible)	\$ 20.83
Dentist: \$150.00/yr. minimum	\$ 12.50
Optometrist	\$?
*Orthodontist	\$ -0-
Drugs/prescriptions	\$ 7.00

School Lunches (\$1.25 x 5 x 4.3)	\$ 21.50
**Allowance	\$ 40.00

Lessons:

- piano	\$ 40.00
- religious lessons (\$400.000/yr)	\$ 33.33

Activities:

- Skiing = \$100.00/yr.	\$ 8.33
- Swim team = \$480.00/yr.	\$ 40.00
- Weight training = \$6.00/week	\$ 25.80

Clothing:	\$ 75.00
Shoes: (\$300.00/yr)	\$ 25.00

Other:

- Grooming	\$ 40.00
- Books	\$ 10.00
- Gifts for friends (\$120.00/yr.)	\$ 10.00

Total monthly expenses	\$409.29
------------------------	----------

*At present provided by Defendant's father

**Will be putting half of allowance in savings

Gerber v. Gerber

Additional Monthly Expenses for Minor Children

NAME: David Age: 11 Sex: Male
(2-26-82)

Doctor: (\$250.00 deductible/yr.)	\$ 20.83
Dentist (\$150.00/yr. minimum)	\$ 25.50
Optometrist	\$
*Orthodontist	\$ -0-
Dugs/prescriptions	\$ 7.00

School lunches (\$1.25 x 5 x 4.3)	\$ 21.50
**Allowance	\$ 40.00

Lessons:	
- piano	\$ 40.00
- religious lesson (\$400.00/yr.)	\$ 33.33
- clarinet (rental)	\$ 15.00

Activities:

- skiing	= \$100.00/yr	\$ 8.33
- scouting	= \$175/yr	\$ 14.58
- swim team	= \$480/yr	\$ 40.00
- weight training	= \$6.00/wk	\$ 25.80

Clothing:	\$ 75.00
Shoes (\$300/yr.)	\$ 25.00

Other:	
- Grooming	\$ 15.00
- Books	\$ 10.00
- Gifts for friends (\$60.00/yr.)	\$ 5.00

Total monthly expenses \$421.87

*At present provided by Defendant's father
**Will be putting half of allowance in savings.

Gerber v. Gerber

Additional Monthly Expenses for Minor Children

NAME: Jonathan Age: 10 Sex: Male
(6-14-83)

Doctor: (\$250.00/yr. deductible)	\$ 20.83
Dentist: (\$150.00/yr minimum)	\$ 12.50
Optometrist	\$?
*Orthodontist	\$ -0-
Drugs/prescriptions	\$ 7.00
 School lunches (\$1.25 x 5 x 4.3)	\$ 21.50
**Allowance	\$ 40.00
 Lessons:	
- piano	\$ 40.00
- religious lessons = \$400/yr.	\$ 33.33
- band instrument rental	\$ 15.00
 Activities:	
- Skiing = \$100.00/yr.	\$ 8.33
- Swim team = \$480.00/yr.	\$ 40.00
- Scouting = \$100.00/yr.	\$ 8.33
- Basketball = \$ 55.00/yr	\$ 4.58
- Weight training = \$6.00/wk.	\$ 25.80
Clothing:	\$ 75.00
Shoes: (\$300.00/yr)	\$ 25.00
 Other:	
- grooming	\$ 15.00
- books	\$ 10.00
- gifts for friends (\$60.00/yr.)	\$ 5.00

Total monthly expenses \$407.20

*At present provided by Defendant's father.

**Will be putting half of allowance in savings.

mb\dsd\gerber\anticipated monthly expenses

*PROPOSED SETTLEMENT OF PENDING
DIVORCE LITIGATION*

Child Support \$ 2,100.00

Total (per month) \$2,100.00

Alimony \$ 4,000.00

Total (per month) \$4,000.00

Property Distribution:

CUSTODY: Defendant to be awarded sole custody of three minor children. Plaintiff to have reasonable visitation.

VISITATION: Plaintiff to be awarded four (4) weeks each year/each child; one-half of Christmas and such other times as mutually agreed upon when Plaintiff is in Utah with sufficient prior notice to Defendant.

CHILD SUPPORT: (Worksheet attached) \$2,100.00 reducing to \$1,550.00 and then \$1,112.00 as each child reaches the age of majority. (Exhibit "A").

HEALTH INSURANCE: Plaintiff to keep minor children covered through his place of employment. Defendant to be covered by COBRA.

TAX EXEMPTIONS: To be awarded to Defendant.

ALIMONY: \$4,000.00/month to be reviewed when Defendant has obtained employment. Re-training may be necessary because of medical problem.

HOME: Defendant to be awarded possession of the marital home until youngest child has reached 18. At that time it would be sold and Plaintiff would receive his share of equity (see attached appraisal - Exhibit "B".)

OTHER REAL PROPERTY: Bear Lake lot to Defendant and New Orleans condo to Plaintiff.

VEHICLES: 1993 Mitsubishi to Plaintiff; 1993 Ford Aerostar to Defendant.

BANK ACCOUNTS: As per attached Exhibit "C".

STOCKS AND SECURITIES: As per attached Exhibit "C".

RETIREMENT/PENSION PLAN: As per attached Exhibit "C".

PERSONAL PROPERTY: As divided (see attached appraisal, Exhibit "D").

OTHER PROPERTY: -0-

LIFE INSURANCE: As per attached Exhibit "C".

DEBTS: -0-

OTHER: -0-

ATTORNEY'S FEES: Plaintiff to pay Defendant's attorney's fees.

I, Mary Jo Gerber, propose the above settlement.

Mary Jo Gerber
MARY JO GERBER

If this matter requires a trial, it will take approximately 6
hours and 3 witnesses will be called for this party.

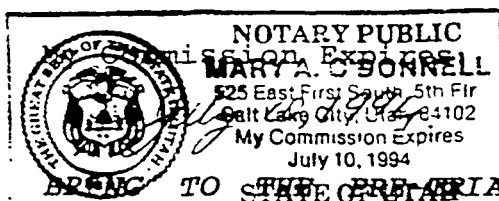
STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

I swear that the matters stated herein are true and correct.

Mary Jo Gerber
MARY JO GERBER/Defendant

Subscribed and sworn to before me this 14 day of June,
1993.

Mary O'Donnell
NOTARY PUBLIC
Residing at: Salt Lake City, Utah.



~~BROAC TO THE STATE OF UTAH~~ HEARING ALL DOCUMENTS AND OTHER SUPPORTING
INFORMATION NECESSARY TO VERIFY OR EXPLAIN THE STATEMENTS MADE IN THIS
DECLARATION, INCLUDING BUT NOT LIMITED TO, PAYROLL STUBS FOR THE MOST
RECENT 90 DAYS, 3 MOST RECENT TAX RETURNS, CREDIT UNION SHARE STATEMENTS,
PASSBOOKS, CHECKBOOKS, CANCELLED CHECKS, CERTIFICATES, POLICIES AND OTHER
RELEVANT AND MATERIAL DOCUMENTATION.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member of and/or employed in the law firm of COHNE, RAPPAPORT & SEGAL, P.C., 525 East First South, Suite 500, P.O. Box 11008, Salt Lake City, Utah 84147-0008, and that in said capacity, I caused a true and correct copy of the foregoing *FINANCIAL DECLARATION* to be mailed to the person(s) named below:

B.L. Dart, Esq.
310 South Main Street, Ste. 1330
Salt Lake City, Utah 84101
Counsel for Plaintiff

on this 14 day of June, 1993.

David T. Dobson

(mb\dsd\Gerber.Fin)

DAVID S. DOLOWITZ (Bar No. 0899)
 of and for
 COHNE, RAPPAPORT & SEGAL, P.C.
 525 East First South
 Suite 500
 P.O. Box 11008
 Salt Lake City, Utah 84147-0008
 Telephone (801) 532-2666

FILED
 JUN 19 1 23 PM '93
 CLERK

Attorney for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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LOWELL GERBER)	CHILD SUPPORT OBLIGATION
)	WORKSHEET
Plaintiff,)	{Sole Custody and Paternity}
)	
vs.	)	Civil No. 924905415
)	
MARY JO GERBER	)	Commissioner Michael S. Evans
)	
Defendant.)	

-----ooo0ooo-----

	MOTHER	FATHER	COMBINED
1. Enter the combined number of natural children and adopted children of this mother and father	\\\\\\\\\\\\\\\\\\\\	\\\\\\\\\\\\\\\\\\\\	3
2a. Enter the father's and mother's gross monthly income. Refer to instructions for definition of income	\$ -0-	\$ 16,666	\\\\\\\\\\\\\\\\\\\\
2b. Enter previously ordered alimony that is actually paid. (Do not enter alimony ordered for this case)	-	-	\\\\\\\\\\\\\\\\\\\\
2c. Enter previously ordered child support (Do not enter obligations ordered for the children in this case)	-		\\\\\\\\\\\\\\\\\\\\
2d. Optional: Enter the amount from Line 12 of the Children In Present Home Worksheet for either parent.	-		\\\\\\\\\\\\\\\\\\\\
3. Subtract Line 2b, 2c, and 2d from 2a. This is the Adjusted Monthly Gross Gross for child support purposes.	\$ -0-	16,666	\$ 16,666
4. Take the COMBINED figure in Line 3 and the number of children in Line 1 to the Support Table. Find the Base Combined Support Obligation.	\\\\\\\\\\\\\\\\\\\\	\\\\\\\\\\\\\\\\\\\\	\$ 2,100

EXHIBIT A

5. Divide each parent's adjusted monthly gross in Line 3 by the COMBINED adjusted monthly gross in Line 3.	-0- %	100%	//////////
6. Multiply Line 4 by Line 5 for each parent's share of the Base Support Obligation.	\$	\$2,100.00	//////////
7. Enter the children's portion of monthly medical and dental insurance premiums paid to insurance company.	\$ -0-	\$ -0-	//////////
8. Enter the monthly work or training related child care expense for the children in Line 1.	//////////	//////////	\$ -0-
9. BASE CHILD SUPPORT AWARD Bring down the amount in Line 6 for the Obligor parent.			\$2,100.00
10. Adjusted Base Child Support Award. Subtract the Obligor's Line 7 from Line 9.			\$
11. Adjusted Base Child Support Award per Child. Divided Line 10 by Line 1.			\$
12. CHILD CARE AWARD. Multiply Line 8 by .50 to obtain Obligor's share of child care expenses. Add Line 10 only when expense is actually incurred.			\$

\$10,000.00 = \$1,808.00

\$ 6,666.00 = \$ 300.00 (60 x \$5.00)

 = \$2,108.00

Property Address 3028 MEADOWS DRIVE		Census Tract		LENDER DISCRETIONARY USE	
City PARK CITY		County SUMMIT		State UT Zip Code 84060	
Legal Description LOT 29, RIDGEVIEW SUBDIVISION		Map Ref RV 29		Sale Price \$	
Owner/Occupant GERBER		PNOP RIGHTS APPRAISED		Date	
Sale Price \$		Date of Sale		Mortgage Amount \$	
Loan charges/concessions paid by seller \$		<input checked="" type="checkbox"/> Fee Simple		Mortgage Type	
R.E. Taxes \$ 4,156.63 PD Tax Year 1992 HOA \$/Mo NONE		<input type="checkbox"/> Leasehold		Discount Points and Other Concessions	
Lender/Client DAVID S. DOLOWITZ AND B. L. DART		<input type="checkbox"/> Condominium (RUDVA)		Paid by Seller \$	
ATTORNEYS AT LAW		<input type="checkbox"/> De Minimis PUD		Source	

LOCATION	<input type="checkbox"/> Urban	<input checked="" type="checkbox"/> Suburban	<input type="checkbox"/> Rural	NEIGHBORHOOD ANALYSIS	Good	Avg	Fair	Poor
BUILT UP	<input type="checkbox"/> Over 75%	<input checked="" type="checkbox"/> 25-75%	<input type="checkbox"/> Under 25%	Employment Stability	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
GROWTH RATE	<input type="checkbox"/> Rapid	<input checked="" type="checkbox"/> Stable	<input type="checkbox"/> Slow	Convenience to Employment	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
PROPERTY VALUES	<input type="checkbox"/> Increasing	<input checked="" type="checkbox"/> Stable	<input type="checkbox"/> Declining	Convenience to Shopping	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
DEMAND/SUPPLY	<input type="checkbox"/> Shortage	<input checked="" type="checkbox"/> In Balance	<input type="checkbox"/> Over Supply	Convenience to Schools	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
MARKETING TIME	<input type="checkbox"/> Under 3 Mos	<input checked="" type="checkbox"/> 3-6 Mos	<input type="checkbox"/> Over 6 Mos	Adequacy of Public Transportation	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
PREDOMINANT LAND USE %	Single Family 55	Not Likely	<input checked="" type="checkbox"/> OCCUPANCY	Recreation Facilities	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
LAND USE CHANGE	2-4 Family	Likely	Owner <input checked="" type="checkbox"/>	Adequacy of Utilities	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Multi-family	In process	Tenant <input type="checkbox"/>	Property Compatibility	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Commercial	To: NA	Vacant (0-5%) <input checked="" type="checkbox"/>	Protection from Detrimental Conditions	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Industrial		Vacant (over 5%) <input type="checkbox"/>	Police & Fire Protection	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Vacant 45		Predominant	General Appearance of Properties	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
			PRICE 350 AGE 8	Appeal to Market	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Note: Race or the racial composition of a neighborhood are not considered reliable appraisal factors.

COMMENTS: A SINGLE FAMILY AREA LOCATED ABOUT 3.5 MILES NE OF HISTORIC PARK CITY. MOST HOMES IN THE IMMEDIATE AREA ARE CUSTOM BUILT. MANY HAVE BEEN BUILT IN THE PAST 2 YEARS. PARK CITY IS A YEAR ROUND RECREATIONAL AREA DEPENDENT UPON SKIING AND TOURISM FOR ITS ECONOMIC BASE. AS SUCH REAL ESTATE VALUES FLUCTUATE GREATLY. IN THE PAST YEAR THE RESALE MARKET HAS IMPROVED GREATLY.

Dimensions 89.10 X 131.23 X 67 X 24.68 X 142.79	Topography	SLOPES DOWN TO EAST
Site Area 12,608 SQUARE FEET OR .29 AC	Size	TYPICAL FOR AREA
Corner Lot NO	Shape	RECTANGULAR
Zoning Classification RESIDENTIAL, SINGLE FAMILY	Drainage	AVERAGE
Zoning Compliance YES	View	GOOD
HIGHEST & BEST USE: Present Use YES Other Use NO	Landscaping	GOOD
UTILITIES	Driveway	CONCRETE
Electricity <input checked="" type="checkbox"/>	Apparent Easements	TYPICAL UTILITY
Gas <input checked="" type="checkbox"/>	FEMA Flood Hazard	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>
Water <input checked="" type="checkbox"/>	FEMA Map/Zone	
Sanitary Sewer <input checked="" type="checkbox"/>		
Storm Sewer <input type="checkbox"/>		
Alley <input type="checkbox"/>		

COMMENTS (Apparent adverse easements, encroachments, special easements, etc.): TYPICAL BELOW GROUND UTILITY EASEMENTS DO NOT ADVERSELY AFFECT THE SITE. NO SOIL OR SUB SOIL CONDITIONS ARE KNOWN TO EXIST IN THE AREA THAT WOULD ADVERSELY AFFECT THE SITE OR EXISTING IMPROVEMENTS.

GENERAL DESCRIPTION	EXTERIOR DESCRIPTION	FOUNDATION	BASEMENT	INSULATION
Units ONE	Foundation CONCRETE	Slab NO	Area Sq. Ft. 2,065	Roof AVE <input checked="" type="checkbox"/>
Stories TWO	Exterior Walls FRAME	Crawl Space YES	% Finished 90	Ceiling AVE <input checked="" type="checkbox"/>
Type (Det/Val) DETACHED	Roof Surface CEDAR	Basement FULL	Ceiling PAINTED	Walls AVE <input checked="" type="checkbox"/>
Design (Style) TWO STORY	Outlets & Drains FULL	Sump Pump NONE	Walls PAINTED	Floor <input type="checkbox"/>
Existing YES	Window Type WOOD SASH	Dampness NO EVID	Floor CARPET	None <input type="checkbox"/>
Proposed NO	Storm Sash YES	Settlement NO EVID	Outside Entry TO EAST	Adequacy AVE <input checked="" type="checkbox"/>
Under Construction NO	Screen YES	Infiltration NO EVID	WALKOUT TO EAST	Energy Efficient Home:
Age (Yrs.) 8 YEARS	Manufactured House TYPICAL			INSUL GLASS
Effective Age (Yrs.) 8 YEARS	TYPE CONSTRUCTION			

ROOMS	Foyer	Living	Dining	Kitchen	Den	Family Rm	Rec. Rm	Bedrooms	# Baths	Laundry	Other	Area Sq. Ft.
Basement						1		3	1			2,065
Level 1		1	1	1	1				.5	1		2,065
Level 2								4	2			1,640

Finished area above grade contains: 9 Rooms, 4 Bedroom(s), 2.5 Bath(s), 3,705 Square Feet of Gross Living Area				
SURFACES	HEATING	KITCHEN EQUIP	ATTIC	IMPROVEMENT ANALYSIS
Floors CARPET/GOOD	Type FWA	Refrigerator <input type="checkbox"/>	None <input type="checkbox"/>	Quality of Construction
Walls PLASTER/PAINT	Fuel GAS	Range/Oven <input checked="" type="checkbox"/>	Baths <input type="checkbox"/>	Condition of Improvements
Trim/Finish WOOD/GOOD	Condition AVE	Disposal <input checked="" type="checkbox"/>	Drop Slat <input type="checkbox"/>	Room Sizes/Layout
Bath Floor CARPET/TILE	Adequacy AVE	Dishwasher <input checked="" type="checkbox"/>	Scuttle <input checked="" type="checkbox"/>	Closets and Storage
Bath Wainscot CERAMIC TILE	COOLING	Fan/Hood <input checked="" type="checkbox"/>	Floor <input type="checkbox"/>	Energy Efficiency
Doors WOOD/AVERAGE	Central NONE	Compressor <input checked="" type="checkbox"/>	Heated - <input type="checkbox"/>	Plumbing - Adequacy & Condition
STAINED WOOD TRIM	Other NONE	Washer/Dryer <input type="checkbox"/>	Finished <input type="checkbox"/>	Electrical - Adequacy & Condition
	Condition AVE	Microwave <input type="checkbox"/>	NONE <input checked="" type="checkbox"/>	Kitchen Cabinets - Adequacy & Condition
Fireplace(s) 1/REFR, MASONRY, 2	Adequacy AVE	Intercom <input type="checkbox"/>		Competibility to Neighborhood
CAR STORAGE:	Attached <input checked="" type="checkbox"/>	Adequate <input checked="" type="checkbox"/>	House Entry <input checked="" type="checkbox"/>	Appeal & Marketability
No Cars 3	Detached <input type="checkbox"/>	Inadequate <input type="checkbox"/>	Outside Entry <input checked="" type="checkbox"/>	Estimated Remaining Economic Life 40 YEARS
Condition AVE	Built In <input type="checkbox"/>	Electric Door <input checked="" type="checkbox"/>	Basement Entry <input type="checkbox"/>	Estimated Remaining Physical Life 45 YEARS

Additional features: YARD IS PARTIALLY FENCED, LANDSCAPED AND AUTO SPRINKLERED. COVERED FRONT PORCH IS 8 X 24. WOOD DECK IS 40 X 10 PLUS 14 X 24.

OVERALL REPAIR AND CONDITION IS REFLECTIVE OF A HOME OF 8 YEARS EFFECTIVE AGE. HOME WAS CUSTOM BUILT WITH MANY EXTRAS AND UPGRADES. OVERALL MARKET APPEAL AND DEMAND IS GOOD DUE TO QUALITY OF CONSTRUCTION AND ACTIVE SINGLE FAMILY MARKET IN PARK CITY.

General market conditions and prevalence and impact in subject market area regarding loan discounts, interest buydowns and concessions: RESALE OF EXISTING HOMES IN THE AREA HAS BEEN GOOD. IN THE PAST 12 MONTHS THE OVERALL MARKET FOR HOMES IN IN PARK CITY HAS IMPROVED. MANY NEW HOMES ARE UNDER CONSTRUCTION WITH LOT SALES ACTIVE. IN THE AREA 115 HOMES HAVE BEEN OFFERED FOR SALE WITH 66 SOLD DURING 1992, AVE PRICE \$295,209.

DAVID S. DOLOWITZ (0899)
Attorney for Defendant
of and for
COHNE, RAPPAPORT & SEGAL, P.C.
525 East First South
Fifth Floor
P. O. Box 11008
Salt Lake City, Utah 84110-0008
Telephone: [801] 532-2666

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

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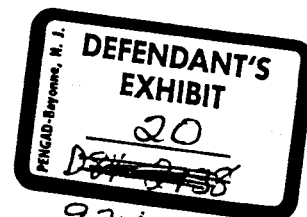
LOWELL GERBER,)	FINANCIAL DECLARATION
)	
Plaintiff,)	
)	Civil No. 924905415
vs.)	
)	Date: August 10, 1994
MARY JO GERBER,)	
)	
Defendant,)	

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Husband: Lowell Gerber
Address: _____
Soc. Sec. No. 350-40-2033
Occupation: _____
Employer: _____
Birth Date: _____

Wife: Mary Jo Gerber
Address: 3028 Meadows Drive
Park City, Utah 84060
Soc. Sec. No. 529-72-9417
Occupation: Substitute teacher
Employer: Park City School Dist.
Birth Date: 7/6/51

NOTE: THIS DECLARATION MUST BE FILED WITH THE DOMESTIC CALENDAR CLERK 5 DAYS PRIOR TO THE PRE-TRIAL HEARING. FAILURE BY EITHER PARTY TO COMPLETE, PRESENT, AND FILE THIS FORM AS REQUIRED WILL AUTHORIZE THE COURT TO ACCEPT THE STATEMENT OF THE OTHER PARTY AS THE BASIS FOR ITS DECISION. ANY FALSE STATEMENT MADE HEREON SHALL SUBJECT YOU TO THE PENALTY FOR PERJURY AND MAY BE CONSIDERED A FRAUD UPON THE COURT.



STATEMENT OF INCOME, EXPENSES, ASSETS AND LIABILITIES

(Note: To arrive at monthly figures when income is received and deductions are made weekly, multiply by 4.3; If figures are on a bi-weekly basis, multiply by 2.167)

HUSBAND WIFE

1. GROSS MONTHLY INCOME FROM:

Salary and wages, including commissions, bonuses, allowances and over-time, payable: <u>\$1,466.46/6mnts</u> (pay period)	244.41
Pensions and retirement: _____	
Social Security: _____	
Disability and unemployment insurance: _____	
Public Assistance (welfare, AFDC payments, etc.): _____	
Child support _____	2,100.00
Dividends and interest: _____	
Rents: _____	
All other sources (specify) <u>(alimony)</u>	4,000.00

TOTAL MONTHLY INCOME:

2. ITEMIZE MONTHLY DEDUCTIONS FROM GROSS INCOME: **6,344.41**

State and federal income taxes: _____ (State, \$2,400/yr. Federal, \$4,800/yr)	600.00
Number of exemptions taken: _____	4
Social Security: _____	
Medical or other insurance (describe fully): _____	
Union or other dues: _____	
Retirement or pension funds: _____	
Savings Plan: _____	
Credit Union: _____	
Other (specify): <u>On gross pay of</u> <u>\$1,466.46 Fed. Tax = \$3.80; State</u> <u>\$880; FICA \$112.18, over 6 months =</u> <u>\$20.79.</u>	20.79

TOTAL MONTHLY DEDUCTIONS: **620.79**

3. NET MONTHLY INCOME - TAKE HOME PAY: **5,723.62**

4. **DEBTS AND OBLIGATIONS:**

Creditor's Name	For	Date Payable	Balance	Monthly Payment
G.E. Capital	1st Mortgage	10th Month	\$198,628	\$1,735) PIT)
TOTAL:			\$	\$1,735.00

5. **ALL PROPERTY OF THE PARTIES know to me owned individually or jointly (indicated who holds or how title held: (H) Husband, (W) Wife, or (J) Jointly). WHERE SPACE IS INSUFFICIENT FOR COMPLETE INFORMATION OR LISTING PLEASE ATTACH SEPARATE SCHEDULE.**

	VALUE	OWED THEREON
(a) Household furnishings, furniture, appliances, and equipment: _____		
(b) Automobile (Year-Make): _____		
(c) Securities - stocks, bonds: _____		
(d) Cash and deposit accounts (banks, savings & loans, credit unions - savings & checking: _____		
(e) Life Insurance:		

Name of Company	Policy No.	Face Amt.	Cash Value, accumulated dividend, or loan amt.
None			

(f) Profit Sharing or Retirement Accounts Value of Interest and Amount Presently Vested

Name: _____
Name: _____)

(g) Other Personal Property and Assets (Specify):

Bear Lake Lot = \$10,000.00

(h) Real Estate (Where more than one parcel of real estate owned, attach sheet with identical information for all additional property):

Address: _____	Type of Property: _____
_____	Date of Acquisition: _____
Original Cost: \$ _____	Total Present Value: \$ _____
Cost of Additions: \$ _____	Basis for Valuation: _____
Total Cost: \$ _____	_____
Mtg. Balance: \$ _____	_____
Other Liens: \$ _____	_____
Equity: \$ _____	_____
Monthly Amortization \$ _____	And to Whom: _____
Taxes: \$ _____	_____
Individual Contributions: _____	_____

(i) Business Interest (indicate name, share, type of business, value less indebtedness):

- None

(j) Other Assets (Specify):

None

6. **TOTAL MONTHLY EXPENSES:** *(Specify which party is the custodial parent and list names and relationship of all members of the household whose expenses are included)

Rent or Mortgage Payments (residence) (PIT)	1,735.00
Real property taxes (residence)	-0-
Real property insurance (residence)	-0-
Maintenance (residence)	150.00
Food and household supplies	900.00
Utilities inc. water, electricity, gas & heat	239.00
Telephone	60.00
Laundry and cleaning	20.00
Clothing (Def. and 3 children)	225.00
Medical (Def. and 3 children-uninsured portion)	50.00
Dental	-0-
Insurance (Health ins. premium Plaintiff and 3 children)	186.00*
School (Jewish Religious lessons for 3 minor children = \$1,000/yr)	85.00
Entertainment (eat out, allowances, movies, video rentals, books and any and all misc. expenses for Defendant and 3 minor children)	470.00
Incidentals (swim meets, Boy Scout camps, travel and other activities for 3 minor children)	450.00
Grooming, gifts (X-mas & Birthdays, donations,	125.00
Auto expense (gas, oil, repair, insurance, taxes, and registration)	300.00
Other expenses	
Income taxes	<600.00>
Professional Fees (Board exams & trying to find employment.	100.00
Veterinary expenses (\$262/yr)	22.00
Accounting and Legal Fees	600.00
Computer repairs, supplies, updating	200.00
TOTAL EXPENSES:	5,817.00

*Premium for 3 children = \$90.00/month Plaintiff was ordered to pay. He has not paid (10 x \$90 = \$900).

PROPOSED SETTLEMENT OF PENDING
DIVORCE LITIGATION

Child Support \$ 2,100.00

Total (per month) \$ 2,100.00

Alimony \$ 4,000.00

Total (per month) \$ 4,000.00

Property Distribution:

1. In the Decree of Divorce entered November, 1993, Defendant was awarded \$4,000/month alimony based on the financial circumstances of the parties. This was to be reviewed in 12 months, i.e., November, 1994 or earlier if circumstances warranted such a review. Defendant was to use her best efforts to seek and obtain employment. Defendant suffered damage in February, 1993 to her right thumb and it is anticipated that she will not be able to resume her career as a dental hygienist. Defendant took her dental hygiene board examinations in June of 1994 for her licensing but failed to pass due to her inability to properly "fee" on the scaling of teeth. Defendant has lost sensitivity and dexterity in her thumb and it is unlikely to improve beyond her present capabilities even after more than a full year of physical therapy. Defendant has been doing substitute teaching in the Park City School District and is paid \$40.00/day.

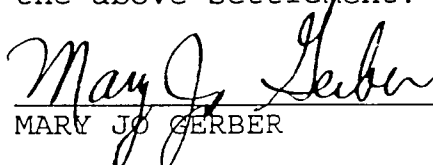
2. Plaintiff claims that he is unable to continue to pay alimony in the amount of \$4,000.00 since he is now required to pay \$800.00 per month in disability premiums and he did not anticipate that the cost of housing in Florida would be as high as he is now paying. Plaintiff's salary, however, still remains at \$200,000.00 per year, the same rate he was receiving when he was ordered to pay \$4,000/month alimony.

3. Defendant will be unable to resume employment as a dental hygienist because of the injury to her hand. Defendant is seeking to increase the number of days of substitute teaching until she can obtain a "full time" teaching position and therefore alimony should continue until Defendant has obtained such a position.

4. Plaintiff should be ordered to pay Defendant's attorney's fees of \$2,839.28 (approx.) incurred in having to respond to his Petition to Modify.

GRAND TOTAL PER MONTH:

I, MARY JO GERBER, propose the above settlement.



MARY JO GERBER

If this matter requires a trial, it will take approximately 3 hours and 3 witnesses will be called for this party.

STATE OF UTAH)
 :SS.
COUNTY OF SALT LAKE)

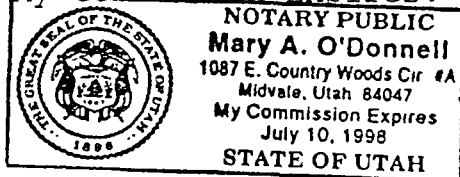
I swear that the matters stated herein are true and correct.

Mary Jo Gerber
MARY JO GERBER

Subscribed and sworn to before me this 9 day of August, 1994.

Mary A. O'Donnell
NOTARY PUBLIC
Residing at: Salt Lake City, Utah

My Commission Expires:



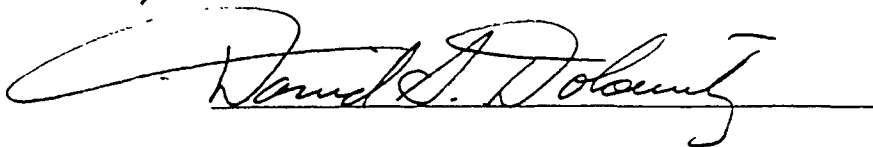
BRING TO THE PRE-TRIAL HEARING ALL DOCUMENTS AND OTHER SUPPORTING INFORMATION NECESSARY TO VERIFY OR EXPLAIN THE STATEMENTS MADE IN THIS DECLARATION, INCLUDING BUT NOT LIMITED TO, PAYROLL STUBS FOR THE MOST RECENT 90 DAYS, 3 MOST RECENT TAX RETURNS, CREDIT UNION SHARE STATEMENTS, PASSBOOKS, CHECKBOOKS, CANCELLED CHECKS, CERTIFICATES, POLICIES AND OTHER RELEVANT AND MATERIAL DOCUMENTATION.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member of and/or employed in the law firm of COHNE, RAPPAPORT & SEGAL, P.C., 525 East First South, Suite 500, P.O. Box 11008, Salt Lake City, Utah 84147-0008, and that in said capacity, I caused a true and correct copy of the foregoing FINANCIAL DECLARATION to be mailed to the person(s) named below:

B. L. Dart, Esq.
DART, ADAMSON & DONOVAN
310 South Main, Ste. 1330
Salt Lake City, Utah 84101
Counsel for Plaintiff

on this 9th day of August, 1994.

A handwritten signature in cursive script, appearing to read "Donald S. Donovan", is written over a horizontal line.

(mb\dsd\Gerber.Fin)