

1995

# Karen Penrose v. Jeffrey Penrose : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

UTAH  
COURT  
OF  
APPEALS

DOCKET NO. 93490224 DA

IN THE UTAH COURT OF APPEALS

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KAREN PENROSE,	:	
	:	
Plaintiff/Appellant,	:	BRIEF OF APPELLANT
	:	
vs.	:	
	:	
JEFFREY PENROSE,	:	93490224 DA
	:	
Defendant/Appellee.	:	Case No. 93490224DA
	:	
	:	Priority No. 15
	:	

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APPEAL FROM THE DECREE OF DIVORCE ENTERED BY THE  
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,  
STATE OF UTAH, JUDGE SANDRA N. PEULER

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FILED

JUN 14 1996

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IN THE UTAH COURT OF APPEALS

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### JURISDICTION

The Utah Court of Appeals has jurisdiction to decide this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(i) (Supp. 1994).

### STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion in the amount of alimony it awarded to Ms. Penrose. The standard of appellate review is a "clear and prejudicial abuse of discretion." Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986); accord Chambers v. Chambers, 840 P.2d 841 (Utah Ct.App. 1992).

2. Did the trial court abuse its discretion in its valuation and division of property and debts awarded to the parties. The standard of appellate review is a clear abuse of discretion. Schaumberg v. Schaumberg, 875 P.2d 598 (Utah Ct.App. 1994).

3. Did the trial court abuse its discretion in the amount of child support it awarded to Ms. Penrose for the benefit of the parties' minor child. The standard of appellate review is a clear abuse of discretion. Jensen v. Bowcut, 892 P.2d 1053 (Utah Ct.App. 1995).

4. Did the trial court abuse its discretion by not awarding Ms. Penrose any of her attorney fees and costs. The standard of appellate review is a clear abuse of discretion. Wells v. Wells, 871 P.2d 1036 (Utah Ct.App. 1994).

### DETERMINATIVE STATUTES

1. Utah Code Ann. § 30-3-5. See Addendum A for a complete recitation of that section.

3. Utah Code Ann. § 78-45-7.12. See Addendum A for a complete recitation of that section.

4. Utah Code Ann. § 78-45-7.14. See Addendum A for a complete recitation of that section.

5. Utah Code Ann. § 78-45-7(3). See Addendum A for a complete recitation of that section.

### STATEMENT OF THE CASE

#### A. Course of Proceedings.

Karen Penrose ("Ms. Penrose") filed for divorce on June 8, 1993, to dissolve her thirteen year marriage to Jeffrey Penrose ("Mr. Penrose"). The case was tried before Judge Sandra N. Peuler in the Third Judicial District Court on June 14, 15, and 16, 1995. The court entered its Findings of Fact and Conclusions of Law and Decree of Divorce on October 18, 1995. The Decree of Divorce provided for the following:

1. The parties were awarded joint legal custody of their minor son. Ms. Penrose was awarded primary physical custody. Mr. Penrose was awarded reasonable rights of visitation.

2. Mr. Penrose was ordered to pay child support in the amount of \$669.00 per month.



3. Mr. Penrose was ordered to pay alimony for an indefinite period of time in the amount of \$1,331.00 per month.

4. Mr. Penrose was awarded the parties' business, Designers Carpet Showroom. The parties divided approximately \$178,000.00 maintained in an escrow account from the sale of the parties' marital residence, of which Ms. Penrose ultimately was awarded \$109,000.00, and Mr. Penrose was awarded \$69,000.00. Mr. Penrose was awarded a Bronco valued at \$8,000.00, two snowmobiles at a combined valued of \$13,000.00, and a trailer valued at \$2,000.00. Ms. Penrose was awarded a BMW which she leases. The court ascribed a value of \$12,000.00 to the BMW, the value of the vehicle Ms. Penrose sold to obtain the BMW. Mr. Penrose was awarded a \$69,000.00 Certificate of Deposit which the court valued at \$29,000.00 for purposes of property division. The parties' 40% interest in Utah Water Sports was divided equally, with no present value ascribed. The court ordered Mr. Penrose to repay a \$40,000.00 debt to his grandmother, and Ms. Penrose to repay all debts to her father, which total over \$100,000.00.

5. The parties were ordered to bear their own attorneys fees and costs.

On November 13, 1995, Ms. Penrose filed her Notice of Appeal.

B. Statement of Facts.

1. The parties were married on August 24, 1982, in Salt Lake City, Utah, and divorced on October 18, 1995, a marriage of approximately 13 years. (Exhibit A ¶ 2; Tr. Vol. I, p. 21).

2. At the time of trial, Ms. Penrose was 34 years old. (Tr. Vol. I, p. 23).

3. During the marriage the parties had one child, a son, born as issue of the marriage. At the time of trial, their son was six years of age. (Tr. Vol. I, p. 21).

4. The parties were awarded joint legal custody of their son, with primary physical custody awarded to Ms. Penrose. (Exhibit B ¶ 2).

5. Ms. Penrose's role within the family since the birth of their son has primarily been that of full-time wife and mother. (Exhibit A ¶ 5; Tr. Vol. I, p. 27).

6. Ms. Penrose is not employed, and has not been employed since the birth of the parties' son, with the sole exception of limited unpaid work performed for the parties' business, Designer's Carpet Showroom. (Exhibit A ¶ 5; Tr. Vol. I, p. 27).

7. Ms. Penrose's post-high school education consists of approximately one year of college and a study abroad program. (Exhibit A ¶ 5; Tr. Vol. I, pp. 24-25).

8. Ms. Penrose has been advised by her physician that she will require significant surgery in the foreseeable future. (Tr. Vol. I, pp. 34-35).

9. Approximately one month after their marriage, the parties moved to Hawaii, where they began and operated a jet ski rental business. They sold the business in 1988 for \$350,000.00.<sup>1</sup> (Exhibit A ¶ 5; Tr. Vol. I, p. 44).

10. After the purchase of the parties' next business, Designers Carpet Showroom, in 1988, Ms. Penrose's primary source of income was money given to her by Mr. Penrose. (Tr. Vol. I, pp. 33-34).

11. Despite evidence presented by Ms. Penrose that her current monthly expenses, for herself and the parties' minor son, totalled \$5,974.04, the court found that Ms. Penrose's "reasonable" monthly expenses were approximately \$3,800. (Exhibit A ¶ 9).

12. Despite the fact that Ms. Penrose had not been employed on a full-time basis since the birth of the parties' son, the court found that she could obtain full-time work at approximately \$7.00 per hour. The court further found that Ms. Penrose could contribute approximately \$900.00 net per month to her own living

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<sup>1</sup> There is some discrepancy as to what amount the Penroses actually received from the sale. Ms. Penrose testified to \$80,000.00, Mr. Penrose testified to \$60,000.00. (Tr. Vol. I, p. 44; Tr. Vol. II, p. 267).

expenses. The court also found that Ms. Penrose received approximately \$900.00 per month from stock accounts.

(Exhibit A ¶ 5).

13. The court established Mr. Penrose's gross monthly income at \$8,932.00. (Exhibit A ¶ 5).

14. Mr. Penrose's income allowed the parties to acquire a home with a resale value of \$500,000.00, as well as items such as two snowmobiles, and luxury automobiles including a Porsche 914, purchased for approximately \$30,000.00, and a Mercedes-Benz 560SL convertible, purchased for approximately \$50,000.00. (Tr. Vol. I., pp. 73-74).

15. The parties enjoyed a luxurious lifestyle, including extensive travel to Europe, Asia, California, Hawaii, and the Caribbean, frequent snowmobiling and waterskiing trips, and season tickets to Utah Jazz basketball games, at a cost of approximately \$2,200.00 per year. (Tr. Vol. I, p. 77, 79).

16. Mr. Penrose's income enabled Ms. Penrose to spend a significant amount of money on personal items, including approximately \$2,500.00 per month on clothing. Ms. Penrose also had regular manicure and haircare appointments, custom designed furniture, and outside assistance with childcare and housework. The parties purchased significant gifts for each other, including

jewelry, furs, artwork, and electronic equipment. (Tr. Vol. I, pp. 77-78, 149-155).

17. Although Mr. Lloyd Hansen, Ms. Penrose's father, did contribute to the parties' income from time to time, particularly while they were living in Hawaii at the beginning of their marriage, Mr. Penrose's income provided the parties with the luxuries and lifestyle they enjoyed. (Tr. Vol. II, pp. 384-388).

18. Based upon a monthly income of \$8,932.00, the court fixed Mr. Penrose's monthly child support obligation at \$669.00. (Exhibit B ¶ 3).

19. The court likewise found that due to the fact that Ms. Penrose has been out of the job market for a number of years, and considering Mr. Penrose's income, Ms. Penrose was to be awarded permanent alimony; (Exhibit A ¶ 9) but that she could contribute approximately \$1,200.00 per month toward her own support. (Exhibit A ¶ 5).

20. Despite the fact that (i) Ms. Penrose has not been employed outside the home since the parties' move to Utah, with the exception of limited work at the parties' business (Exhibit A ¶ ; Tr. Vol. I, pp. ); (ii) Ms. Penrose has very limited formal training and education (Exhibit A ¶ 5; Tr. Vol. I, pp. 24-25); (iii) Ms. Penrose's documented monthly obligations total in excess of \$5,974.04 (Tr. Vol. I, p. 204); (iv) Mr. Penrose has monthly

expenses that are insignificant in amount (Tr. Vol. II, p. 388); (v) Mr. Penrose's monthly income was found to be \$8,932.00 (Exhibit A ¶ 5); the trial court awarded Ms. Penrose alimony in the amount of only \$1,331.00 per month (Exhibit A ¶ 9).

21. Pursuant to the stipulation of the parties, the parties' business, Designers Carpet Showroom, was valued at \$194,000.00. (Tr. Vol. I, p. 136).

22. The court awarded Designers Carpet Showroom to Mr. Penrose. Despite the fact that the business "has significant value," the court valued the business "at \$0 for purposes of distributing the parties' property," due to a tax liability, the amount of which has not yet been conclusively determined. (Exhibit A ¶ 13(a)).

23. The court ordered Mr. Penrose to repay a \$40,000.00 debt to his grandmother from the proceeds of a \$69,000.00 Certificate of Deposit awarded to Mr. Penrose. (Exhibit A ¶ 13(c)).

24. The court ordered Ms. Penrose to repay all debts to her father, which total \$107,891.31, but did not grant her an asset with which to do so. (Tr. Vol. I, p. 170; Exhibit A ¶ 14).

25. The court valued the \$69,000.00 Certificate of Deposit awarded to Mr. Penrose at \$29,000.00 for purposes of property distribution due to the offset in the amount of \$40,000.00

represented by the debt owing to Mr. Penrose's grandmother. (Exhibit A ¶ 13 (c)).

26. The court divided approximately \$178,000.00 maintained in an escrow account from the sale of the parties' marital residence between the parties. Ms. Penrose ultimately was awarded \$109,000.00, and Mr. Penrose was awarded \$69,000.00. (Exhibit A, ¶ 13(g)).

27. Mr. Penrose was awarded a Bronco valued at \$8,000.00, two snowmobiles at a combined valued of \$13,000.00, and a trailer valued at \$2,000.00. Ms. Penrose was awarded a BMW which she leases, for which a value of \$12,000.00 was ascribed. (Exhibit A, ¶ 13(g)).

28. The court ordered both parties to pay their own attorney fees and costs. (Exhibit A ¶ 15).

#### SUMMARY OF ARGUMENTS

The trial court clearly abused its discretion in four areas. First, the amount of alimony awarded to Ms. Penrose is insufficient to allow her to continue the standard of living enjoyed during the course of the marriage. The evidence at trial established that Mr. Penrose's income, which did not change substantially during the course of the marriage, allowed the parties to become accustomed to a lifestyle that included luxury homes, cars, and substantial travel. Ms. Penrose, who acquired few marketable skills, is unable

to continue this standard of living on the trial court's alimony award of only \$1,331.00 per month. In addition, the alimony award does not achieve parity of income between the parties.

Second, the property distribution and division of debts is inequitable and constitutes an abuse of discretion on the part of the trial court. The court required both parties to repay debts to family members; however, it granted only Mr. Penrose an asset with which to do so, despite the fact that Ms. Penrose's debt to her father is much larger, and Mr. Penrose has much greater earning capacity. The valuation of the property awarded is erroneous; the Certificate of Deposit awarded Mr. Penrose was valued at only \$29,000.00, despite its face value of \$69,000.00, and the parties' business was valued at \$0, despite its history of steady growth and increasing income.

Third, the child support award is inadequate in light of Mr. Penrose's established monthly income of \$8,932.00 per month, and the parties' combined income of \$11,032.00 per month.

Finally, the trial court erred in requiring the parties to bear their own attorney fees and costs without considering the factors required by Utah law; specifically, Ms. Penrose's need, Mr. Penrose's ability to pay, and the reasonableness of the fees.



## ARGUMENT

### I.

#### THE TRIAL COURT ABUSED ITS DISCRETION IN SETTING THE ALIMONY AWARD

##### A. THE TRIAL COURT'S AWARD OF ALIMONY FAILS TO ENABLE MS. PENROSE TO MAINTAIN THE SAME STANDARD OF LIVING SHE ENJOYED DURING THE PARTIES' MARRIAGE

Utah courts have clearly set forth the purposes of an award of alimony. The paramount purpose is to:

enabl[e] the receiving spouse to maintain, as nearly as possible, the standard of living enjoyed during the marriage, and preventing the receiving spouse from becoming a public charge.

Munns v. Munns, 790 P.2d 116, 121 (Ut.Ct.App. 1990).

Although there are circumstances where there is simply not enough to go around, that is not the case here. The court made the express finding that Mr. Penrose had a monthly income of \$8,932.00. That income allowed the parties to acquire substantial assets, including a successful business which the parties built together, a home valued at \$500,000.00, snowmobiles, luxury automobiles, substantial travel, and luxurious gifts.

The evidence further established that Mr. Penrose's personal expenses were minimal in amount. At the time of the divorce, he was not making any mortgage payments or car payments, and had a rent obligation of approximately \$300.00 per month. Finally, the evidence established that Ms. Penrose's monthly expenses totalled

not less than \$5,974.04, and that she lacked formal training or education, and had been dependent on Mr. Penrose for support since the birth of the parties' son.

Mr. Penrose's income, which allowed the parties to enjoy a well-to-do standard of living, had not materially diminished during the course of the marriage, nor had Mr. Penrose incurred expenses which would materially affect his ability to provide support for Ms. Penrose. Ms. Penrose, on the other hand, is not capable of providing any significant level of support for herself, certainly not a level sufficient to meet her established monthly needs.

Simply stated, the Penroses established a very comfortable standard of living during their marriage which Ms. Penrose is not capable of maintaining on her own. Mr. Penrose, however, continues to be able to provide Ms. Penrose the financial support necessary to allow her to continue her established lifestyle. Mr. Penrose's established income, and the parties' established marital standard of living are undisputed. Accordingly, there is no reason why Ms. Penrose is not entitled to a continuation of the same level of support she enjoyed during the marriage.

The only remaining question is whether the trial court's award is sufficient to provide Ms. Penrose the alimony to which she is legally and factually entitled. The answer is an unequivocal no! The trial court found that Ms. Penrose's average monthly expenses

were approximately \$3,800.00, despite the fact that the evidence established that her monthly expenses, based upon her marital standard of living, totalled not less than \$5,974.04. The court offered no explanation for this reduction, stating only that Ms. Penrose's claimed expenses were "excessive." (Exhibit "A," ¶ 9). The court failed to address that fact that Ms. Penrose's uncontroverted<sup>2</sup> testimony established expenses of \$5,974.04. The court's award of a total level of support of \$2,000.00 per month (\$669.00 in child support and \$1,331.00 in alimony) is clearly inadequate to allow Ms. Penrose to maintain her marital standard of living. The trial court's inadequate award is particularly objectionable in light of the fact that Mr. Penrose's income is sufficient to allow Ms. Penrose to do so.

In Howell v. Howell, 806 P.2d 1209 (Ut.Ct.App. 1991), this Court affirmed that, in allowing the receiving spouse to maintain the marital standard of living, the alimony award should also be based upon the receiving spouse's station in life and the payor spouse's ability to pay. This Court found that

the court should set alimony . . . to approximate the parties' standard of living during the marriage as closely as possible. It follows that if the payor spouse's resources are adequate, alimony need not be

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<sup>2</sup> Although Mr. Penrose stated that he thought some of Ms. Penrose's claimed expenses were "high," he offered no support for this conclusion, and had not seen any of her bills. (Tr. Vol. II, p. 244-246.)

limited to provide for only basic needs, but should also consider the recipient spouse's "station in life."

Id. at 1212; see also Sampinos v. Sampinos, 750 P.2d 615 (Ut.Ct.App. 1988) (alimony award should be affirmed to allow wife of twelve years to maintain her marital standard of living, in light of the fact that she had no professional training and few marketable skills, and defendant was clearly able to pay); Morgan v. Morgan, 854 P.2d 559 (Utah Ct.App. 1993) (alimony award upheld where receiving spouse's role was that of homemaker, income from property division would not allow her to maintain her marital standard of living, and payor spouse had ability to pay).

Here, the trial court abused its discretion by awarding alimony in an amount which will not allow Ms. Penrose to continue her marital standard of living, despite Mr. Penrose's proven ability to provide such support.

B. THE ALIMONY AWARD FAILS TO EQUALIZE MR. PENROSE AND MS. PENROSE'S STANDARDS OF LIVING

One of the primary objectives of an alimony award is to equalize the parties' standards of living. This Court has instructed that "alimony should, as far as possible, equalize the parties' respective standards of living." Munns v. Munns, 790 P.2d 116, 121 (Utah Ct.App. 1991) (citing Naranjo v. Naranjo, 751 P.2d 1144, 1146 (Ut.Ct.App. 1988)). Here, the trial court's alimony

award fails to realize this goal, and leaves the parties with grossly disproportionate standards of living.

Based upon a monthly gross income of \$8,932.00, Mr. Penrose will have a pre-tax disposable income of \$6,932.00 after meeting his child support and alimony obligations. Ms. Penrose, on the other hand, will have a pre-tax disposable income of \$4,100.00, based upon the trial court's total support award of \$2,000.00, her stock income, and the trial court's imputed gross income of \$1,200.00 per month. This is assuming, of course, that Ms. Penrose is able to secure such employment. The trial court's award, then, leaves Mr. Penrose with approximately \$2,832.00 more than Ms. Penrose in monthly gross income.

In determining an award of alimony in a divorce, the trial court is obligated to divide the income equitably. As the Utah Supreme Court has plainly stated:

The overarching aim of a property division, and of the decree of which it and the alimony award are subsidiary parts, is to achieve a fair, just and equitable result between the parties.

Noble v. Noble, 761 P.2d 1369, 1373 (Utah 1988) (emphasis added) See also Munns v. Munns, 790 P.2d 116, 121 (Utah Ct.App. 1990) (one of the primary considerations in achieving such fairness and equity is to equalize the parties' respective standards of living).

This Court has not hesitated to remand alimony awards which fail to equalize the parties' standards of living. In Howell v.

Howell, 806 P.2d 1209 (Utah Ct.App. 1991), the defendant testified to monthly expenses of approximately \$5,000.00. The plaintiff had a monthly income of \$10,000.00 per month. The court awarded alimony and child support in the amount of \$3,163.00, and found that the defendant had the ability to earn a salary of \$645.00 per month.

This Court held that this award was insufficient, noting that, "[t]he alimony set by the court does not come close to equalizing the parties' standard of living as of the time of the divorce, but allows plaintiff a two to four times advantage." Id. at 1213.

Here, Mr. Penrose receives almost \$3,000.00 more gross income per month than Ms. Penrose. Mr. Penrose earns a substantial salary from his property award of a successful business. He testified that his monthly obligations are minimal, consisting mainly of \$300.00 per month in rent. Ms. Penrose, on the other hand, introduced evidence of a number of financial obligations. The inequity of the trial court's distribution of income is stark and undeniable. The award of alimony must be overturned on this basis alone, and an award entered which meets the required goal of equalizing the parties' standards of living.

## II.

### THE DIVISION OF MARITAL DEBTS AND PROPERTY IS INEQUITABLE

#### A. THE DIVISION OF DEBTS IS INEQUITABLE

The trial court abused its discretion by directing both parties to repay debts to family members, and awarding Mr. Penrose a \$69,000.00 asset with which to do so, without doing the same for Ms. Penrose.

The trial court directed Mr. Penrose to repay a \$40,000.00 loan from his grandmother. Ms. Penrose was ordered to repay debts to her father, which total over \$100,000.00. The court then awarded Mr. Penrose a certificate of deposit in the amount of \$69,000.00, and required him to repay his grandmother from that asset. However, the court gave Ms. Penrose no asset with which to repay her \$100,000.00 debt. (Exhibit A, ¶ 13(c), 14).

This division of debts is facially inequitable and a clear abuse of the discretion by the trial court. The evidence presented at trial showed that Ms. Penrose had little formal education and virtually no formal training. She has not been employed for some years, and, should she be able to find employment, could be expected to earn only about \$2,100.00 per month. Mr. Penrose, on the other hand, earns a substantial salary. In Baker v. Baker, 866 P.2d 540 (Utah Ct.App. 1993), this Court noted that it is entirely proper to consider the parties' relative income and earning power

when dividing debts. "'[T]he law contemplates a fair and equitable, not an equal, division of the marital debts' . . . [g]iven the relative earning capacities and current state of employment of the Bakers, the trial court properly placed the burden of the marital debt on Mr. Baker . . . ." Id. at 543 (citing Sinclair v. Sinclair, 718 P.2d 396, 398 (Utah 1986)).

Here, the court awarded Mr. Penrose an asset with which to repay his family debts without doing the same for Ms. Penrose. The Court failed, however, to consider or address the parties' differing earning capacities and employment situations. The court's division of debts under these circumstances is a clear abuse of discretion.

B. THE VALUATION OF PROPERTY IN THE DIVISION OF ASSETS IS IMPROPER.

The trial court's valuation of the assets awarded to Mr. Penrose is an abuse of discretion. The court significantly undervalued the certificate of deposit and the parties' business, Designers Carpet Showroom, Inc., both of which were awarded to Mr. Penrose.

In its Findings of Fact and Conclusions of Law, the court awarded Designers Carpet Showroom to Mr. Penrose. Due to a contingent sales tax liability associated with the business, the court assigned a value of \$0 to the asset, despite the fact that it



"has significant value as evidenced by historical and present earnings." (Exhibit A, ¶ 13(a)).

The valuation of the business at \$0 is contrary to the evidence presented at trial and to Utah law. The parties stipulated to Mr. Stephen Nicolatus's valuation of the business at approximately \$194,000.00. Although it is true that the business bears a sales tax liability to the State of Utah, the amount of this liability had not been conclusively determined. It is patently unjust to award Mr. Penrose an asset valued at \$0 which may actually be worth much more. This is particularly true here, since the court's own Finding of Fact imply that the tax liability is not expected to destroy the value of the business. The court noted that "[d]efendant will have the ability to pay the indebtedness and continue to earn income consistent with the pattern of historical earnings and business growth." (Exhibit A, ¶ 13(a)).

Furthermore, the trial court awarded Mr. Penrose the Key Bank Certificate of Deposit valued at \$69,000.00. However, for purposes of property distribution, the court assigned a value of only \$29,000.00 to that asset. The court then awarded Ms. Penrose \$109,000.00 from the parties' escrow account; however, the court valued the asset at its full cash value, despite the fact that Ms. Penrose is required to repay approximately \$100,000.00 to her

father presumably from that asset.<sup>3</sup> The net effect of the trial court's valuation was to award Mr. Penrose a \$69,000.00 asset and a successful business capable of generating significant future income, with a combined valuation of only \$29,000.00 for property distribution purposes. Ms. Penrose, on the other hand, received only a \$109,000.00 asset, from which she must repay a debt totalling nearly that same amount, and a leased vehicle valued at \$12,000.00. Without question, such an award is patently unequitable and unsupportable.

### III.

#### THE CHILD SUPPORT AWARD WAS NOT APPROPRIATELY DETERMINED

- A. THE TRIAL COURT WAS REQUIRED TO CONSIDER THE FACTORS OF U.C.A. § 78-45-7(3).

Utah law requires the trial court to fashion a just and equitable child support award when the adjusted gross income of the parents exceeds the statutory guidelines. This mandates the consideration of the factors enumerated in U.C.A. § 78-45-7(3). Here, the trial court's Findings of Fact and Conclusions of Law offer no consideration of these factors.

The trial court found that the parties' adjusted gross monthly income was \$11,032.00, and ordered Mr. Penrose to make child

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<sup>3</sup> At least the property distribution ordered by the Court awarded no other asset to Ms. Penrose from which the debt could be paid.

support payments of \$669.00 per month. This amount is consistent with the amount provided in the child support guideline table for an adjusted gross monthly income of \$10,001.00 to \$10,100.00. U.C.A. § 78-45-7.14 (Supp.Vol. 1995). However, the court failed to recognize that this is the minimum amount allowable, and to enter an award commensurate with the parties' income.

Utah Code Ann. § 78-45-7.12 provides

[i]f the combined adjusted gross income exceeds the highest level specified in the table, an appropriate and just child support amount *shall* be ordered on a case-by-case basis, but the amount ordered may not be less than the highest level specified in the table for the number of children due support.

U.C.A. § 78-45-7.12 (Supp.Vol. 1995) (emphasis added).

This language, effective July 1, 1994, must be distinguished from the previous statute, which provided only that an appropriate and just amount *may* be ordered on a case-by-case basis. The replacement of "may" with "shall" evidences a legislative intent to require the court to consider the parties' true income, rather than mechanically apply the highest level of the table.

Although there has been no Utah law interpreting the revised statute, the Colorado Court of Appeals interpreted a similar statute in In Re Marriage of LeBlanc, 800 P.2d 1384 (Colo.App. 1990). The LeBlanc court found that the trial court erred by awarding the minimum presumptive amount of support where the parties' combined income exceeded the highest guideline level. The

trial court was required, but failed to consider the relevant factors of Colorado law<sup>4</sup>. The court remanded the decision, directing the trial court to make further findings regarding "the standard of living and financial needs of the children . . . ." Id. at 1388.

Here, section 78-45-7(3) provides a list of the factors to be considered in fashioning an appropriate and just child support award under section 78-45-7.12. The factors include, but are not limited to

- (a) the standard of living and situation of the parties;
- (b) the relative wealth and income of the parties;
- (c) the ability of the obligor to earn;
- (d) the ability of the obligee to earn;
- (e) the needs of the obligee, the obligor, and the child;
- (f) the ages of the parties; and
- (g) the responsibilities of the obligor and the obligee for the support of others.

Utah Code Ann. § 78-45-7(3) (Supp.Vol. 1995).

Noticeably absent from the Findings of Fact and Conclusions of Law in this case is any reference to these factors. Although consideration of the factors was not required under the previous version of Utah Code Ann. § 78-45-7.12<sup>5</sup>, the mandatory language of

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<sup>4</sup> C.R.S. § 14-10-115(1) (1987 Repl.Vol. 6B).

<sup>5</sup> In Baker v. Baker, 866 P.2d 540 (Utah Ct.App. 1993), this Court held that these factors should be applied only when there is sufficient evidence to rebut the guidelines. However, Baker was decided before the revision of U.C.A. § 78-45-7.12 (Supp.Vol. 1995).

the revised statute, which requires the court to fashion an appropriate award when income exceeds the guidelines, makes consideration of these factors compulsory. The trial court abused its discretion by applying the highest guideline amount for child support without considering any of the factors required by Utah law.

B. THE EVIDENCE INTRODUCED IN THIS CASE REQUIRED DEPARTURE FROM THE GUIDELINES

Assuming, arguendo, that the revision of U.C.A. § 78-45-7.12 does not mandate consideration of the statutory factors, a departure from the guidelines was plainly justified in this case. Utah courts, along with other states, have consistently held that a child support award should be entered so as to allow the children to experience the same standard of living that they would have experienced had there been no divorce.

In Savage v. Savage, 658 P.2d 1201 (Utah 1983), the Supreme Court of Utah upheld a child support award over the defendant's objections, noting that the parties and their children "enjoyed a very high standard of living during the marriage." Id. at 1205. The Savage court considered the ages of the children, their prior standard of living, and the defendant's income, and held that

[w]here a marriage is of long duration and the earning capacity of one spouse greatly exceeds that of the other, as here, it is appropriate to order alimony and child support at a level which will insure that the supported spouse and children may maintain a standard of living not unduly

disproportionate to that which they would have enjoyed had the marriage continued.

Id. at 1205 (emphasis added).

Here, considerable evidence was presented at trial regarding the parties' standard of living during their marriage, a lifestyle that included considerable travel, recreational opportunities, and private education for their son. Should the parties have remained married, in all probability their son would have continued to enjoy these opportunities. However, it is highly unlikely, and very difficult to imagine how Miles may continue such a lifestyle on a child support award of \$669.00 per month. The trial court erred by entering a child support award which is inadequate to allow the parties' minor son to experience the same standard of living that he would have experienced had there been no divorce.

#### IV.

#### THE COURT'S ORDER REGARDING ATTORNEY FEES DOES NOT ADDRESS THE CONSIDERATIONS REQUIRED BY UTAH LAW

The trial court ordered the parties to bear their own attorney fees. This order does not conform to the requirements of Utah law, which compels consideration of the parties' need and ability to pay for attorney fees.

Utah Code Ann. § 30-3-3 allows a court in a divorce action to order a party to pay the attorney fees of the other party. In Bell v. Bell, 810 P.2d 489 (Utah Ct.App. 1991), this Court listed the

factors to be considered in determining the propriety of an attorney fee award. "The award must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees." Id. at 493.

In determining reasonableness of the requested fees, a court may consider "the difficulty of the litigation, the efficiency of the attorneys, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved." Id. at 493-94.

Noticeably absent from the trial court's decision in the present case is any consideration of the Bell factors. The court merely stated that "plaintiff has sufficient monetary assets based on the property division" to pay her attorney fees. (Exhibit A, ¶ 15). The court did not address Ms. Penrose's other debts, including debts to her father which total \$75,338.61 exclusive of legal fees advanced by Mr. Hansen, her lack of employment, or the fact that Mr. Penrose has a significant monthly income and limited expenses, which would enable him to bear the cost of Ms. Penrose's fees without substantial difficulty.

Nor did the court mention the reasonableness of the fees requested, despite the fact that considerable evidence was

presented at trial on this issue. The Bell court remanded a similar holding, noting "the court's failure to address Wife's need or Husband's ability to pay her attorney fees leaves us with no adequate explanation for the court's award." Id. at 494. The trial court abused its discretion by requiring Ms. Penrose to bear her own attorney fees without considering the requisite factors. [See me on the most recent case and how to deal with it.]

#### CONCLUSION

The trial court abused its discretion in setting an award of alimony which fails to realize the goals of alimony under Utah law. The award fails for two reasons. It fails to allow Ms. Penrose to maintain the same standard of living she enjoyed during her marriage, and it fails to equalize the parties' disposable income.

The trial court's division of debts and property is inequitable. The court required both parties to repay debts to family members, but granted only Mr. Penrose an asset with which to do so. The valuation of the property awarded is erroneous; the Certificate of Deposit awarded Mr. Penrose was valued at only \$29,000.00, despite its face value of \$69,000.00, and the parties' business was valued at \$0, despite its history of steady growth and increasing income and a finding of the Court to support that conclusion.



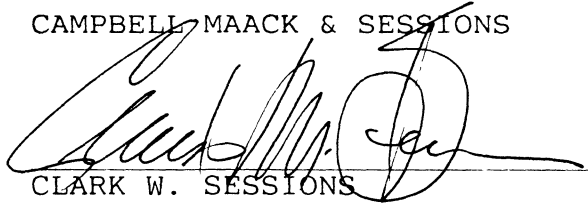
The child support award is inadequate in light of Mr. Penrose's established monthly income of \$8,932.00 per month, and the parties' combined income of \$11,032.00 per month, which exceeds the statutory guidelines.

Finally, the court erred in requiring the parties to bear their own attorney fees without considering the factors required by Utah law; specifically, Ms. Penrose's need, Mr. Penrose's ability to pay, or the reasonableness of the fees.

Ms. Penrose requests an award of attorneys fees and costs incurred in this appeal.

DATED this 14<sup>th</sup> day of June, 1996.

CAMPBELL MAACK & SESSIONS

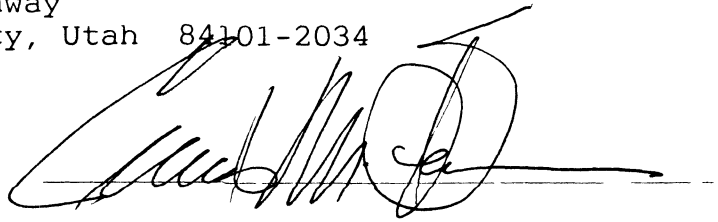
A handwritten signature in black ink, appearing to read "Clark W. Sessions", is written over a horizontal line.

CLARK W. SESSIONS  
DEAN C. ANDREASEN  
KRISTINE EDDE  
Attorneys for Appellant  
Karen Penrose

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June 1996, a true and correct copy of the foregoing **BRIEF OF APPELLANT** was mailed, postage prepaid, first-class, to:

Ellen Maycock  
KRUSE, LANDA & MAYCOCK  
Eighth Floor, Bank One Tower  
50 West Broadway  
Salt Lake City, Utah 84101-2034

A handwritten signature in black ink, appearing to be "C. M. J.", written over a horizontal line.

IN THE UTAH COURT OF APPEALS

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KAREN PENROSE,	:	
	:	
Plaintiff/Appellant,	:	
	:	
vs.	:	
	:	
JEFFREY HALES,	:	
	:	
Defendant/Appellee.	:	Case No. 93490224DA
	:	
	:	

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ADDENDUM TO BRIEF OF APPELLANT

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EXHIBIT A	-	FINDINGS OF FACT AND CONCLUSIONS OF LAW
EXHIBIT B	-	DECREE OF DIVORCE
EXHIBIT C	-	UTAH CODE ANN. § 30-3-5
		UTAH CODE ANN. § 78-45-7.12
		UTAH CODE ANN. § 78-45-7.14
		UTAH CODE ANN. § 78-45-7(3)
EXHIBIT D	-	ORDER OF THE UTAH COURT OF APPEALS, DATED APRIL 4, 1996

Tab A

**Third District Court**  
**Third Judicial District**

**OCT 18 1995**

**SALT LAKE COUNTY**

By \_\_\_\_\_  
Deputy Clerk

**ELLEN MAYCOCK - 2131**  
**KRUSE, LANDA & MAYCOCK, L.L.C.**  
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Salt Lake City, Utah 84101-2034  
Telephone: (801) 531-7090

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

---

KAREN PENROSE,	)	
Plaintiff,	)	<b>FINDINGS OF FACT AND</b>
		<b>CONCLUSIONS OF LAW</b>
vs.	)	
JEFFREY PENROSE,	)	Civil No. 93 490 2224
Defendant.	)	Judge Sandra N. Peuler
		Commissioner Thomas N. Arnett, Jr.

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The above-entitled matter came before the court for trial on June 14, 15, and 22, 1995. Plaintiff was present and represented by her counsel, Clark W. Sessions, and defendant was present and represented by his counsel, Ellen Maycock. The Honorable Sandra N. Peuler presided. At the time of trial, the parties recited their stipulation concerning custody and visitation. The court then heard evidence concerning the granting of the divorce, the amount and duration of alimony, income of the parties to be used for purposes of calculating child support and alimony, property division, and attorneys' fees. The court heard the testimony of witnesses, received exhibits, and heard arguments of counsel. The court thereafter made a minute entry

dated August 9, 1995. Based on the foregoing, and good cause appearing, the court now makes and enters the following:

**Findings of Fact**

1. **Residence.** Plaintiff and defendant were *bona fide* residents of Salt Lake County, Utah, for more than three months prior to the filing of this action.
2. **Marriage.** Plaintiff and defendant are wife and husband, having been married on August 24, 1982, in Salt Lake County, Utah.
3. **Grounds for Divorce.** During the marriage, the parties had arguments that resulted in their separation and ultimately resulted in irreconcilable differences that made the continuation of the marriage impossible. A decree of divorce should be granted to both parties. The decree should be final on entry.
4. **Custody and Visitation.** The parties have stipulated and the court finds that it is appropriate for the parties to be awarded joint legal custody of their minor child, Miles Penrose, with primary physical custody to be awarded to plaintiff. Defendant should be entitled to visit with the minor child on every other weekend, every Tuesday overnight, and on alternating Thursdays overnight.

Holiday visitation should be exercised pursuant to the Utah Uniform Visitation Schedule as set forth at UTAH CODE ANN. § 30-3-35. Holidays should take precedence over weekend visitation, and changes should not be made to the regular rotation of the alternating weekend visitation schedule. If a holiday visit by defendant falls on a regularly scheduled school day, defendant should be responsible for the child's attendance at school for that school day. If a holiday falls on a weekend or on a Friday or Monday, and the total holiday period extends beyond that time so that the child is free from school when the parent is free from work,

defendant should be entitled to the lengthier holiday period. Holidays should be exercised as follows:

(a) In years ending in an odd number, defendant should be entitled to the following holidays:

(1) Miles' birthday on the day before or after the actual birth date beginning at 3:00 p.m. until 8:00 p.m.;

(2) Human Rights Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;

(3) Easter holiday beginning at 6:00 p.m. on Friday before the holiday until Sunday at 7:00 p.m., unless the holiday extends for a longer period of time to which defendant should be completely entitled;

(4) Memorial Day beginning at 6:00 p.m. Friday until Monday at 7:00 p.m., unless the holiday extends for a longer period of time to which defendant should be completely entitled;

(5) July 24th holiday beginning at 6:00 p.m. the day before the holiday until 11:00 p.m. on the holiday;

(6) Veterans Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday; and

(7) The first portion of the Christmas school vacation. "Christmas School Vacation" is defined as beginning on the evening the child gets out of school for the Christmas school break until the evening before the child returns to school, except for Christmas Eve, Christmas Day, and New Year's Day. This visitation should include Christmas Eve and Christmas Day until 1:00 p.m., and Christmas School Vacation should be equally divided.

(b) In years ending in an even number, defendant should be entitled to the following holidays:

(1) The child's birthday on his actual birth date beginning at 3:00 p.m. until 9:00 p.m.;

(2) New Year's Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;

(3) Presidents' Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;

(4) July 4th holiday beginning at 6:00 p.m. the day before the holiday until 11:00 p.m. on the holiday;

(5) Labor Day beginning at 6:00 p.m. on Friday until Monday at 7:00 p.m., unless the holiday extends for a longer period of time to which defendant should be completely entitled;

(6) Fall school break, if applicable, commonly known as UEA weekend, beginning at 6:00 p.m. on Wednesday until Sunday at 7:00 p.m., unless the holiday extends for a longer period of time to which defendant should be completely entitled;

(7) Columbus Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;

(8) Thanksgiving holiday beginning Wednesday before the holiday at 7:00 p.m. until Sunday at 7:00 p.m.; and

(9) The second portion of the Christmas School Vacation, as defined above, plus Christmas Day beginning at 1:00 p.m. until 9:00 p.m., again so long as the entire Christmas School Vacation is equally divided between the parties.



(c) Father's Day should be spent with defendant every year beginning at 9:00 a.m. until 7:00 p.m. on the holiday;

(d) Mother's Day should be spent with plaintiff every year beginning at 9:00 a.m. until 7:00 p.m. on the holiday;

(e) Each of the parties should have the right to have Miles on their own birthdays from 3:00 p.m. until 8:00 p.m.

Defendant should be awarded four weeks of visitation during the summer or one-half of "off track" periods if the minor child is in year round school. Each party should be entitled to at least two weeks of uninterrupted time with Miles for the purpose of vacations and other activities. Each party should give at least thirty days notice of his or her intent to exercise this uninterrupted time with Miles. The uninterrupted vacation time may occur at any time during the year, so long as it does not interfere with Miles' school schedule.

Defendant should have reasonable telephone visitation.

Further, the parties have stipulated and the court finds that it is appropriate that neither party should have the child in his or her presence overnight in their residence in the presence of a guest of the opposite sex to whom they are not married or related.

The pick up and return of the minor child for visitation should be curbside. Neither party should enter the residence of the other party.

Defendant should provide to plaintiff as much notice as possible of any time when he will not exercise visitation at a scheduled time. In the event that plaintiff travels out of town, she should offer defendant the opportunity to care for the parties' child before obtaining surrogate care.

All clothing and personal effects of the minor child provided by plaintiff for visitation periods should be returned by defendant at the end of the visitation period.

If visitation is exercised overnight, defendant shall prepare the minor child for school the next morning or notify plaintiff whether he will deliver the child to school.

5. Incomes of the Parties. Plaintiff is 34 years old and a high school graduate. She had one year of post high school study in Art and History. She has no other formal training or education. Prior to her marriage, plaintiff worked as a secretary in her father's business for a brief period of time and operated her own business, a balloon greeting business. Plaintiff has skills developed during her involvement with the parties' businesses throughout the marriage, including hiring and training personnel, payroll, sales, and purchasing. Plaintiff worked extensively in the parties' business which they established and operated in Hawaii immediately following their marriage. She was also employed at Designers Carpet Showroom, the parties' current business. Due to her pregnancy and the birth of her child, she has only worked periodically at that business. She has not been employed in any way from the time of the parties' separation in May of 1993, to the time of trial.

Plaintiff's health is good. Although she had a surgical procedure planned, the same surgery was recommended to her six years ago following the birth of her child and she elected not to have surgery at that time. There is no evidence that there was any condition relating to plaintiff's health that would interfere with her ability to obtain employment. The parties' child Miles will begin kindergarten this fall and will be out of the home for one-half day during the school year.

Connie Romboy, a vocational evaluator, testified. That testimony indicated that with plaintiff's skills, she could obtain employment with an hourly wage ranging from approximately \$4.50 to \$7.40 per hour. Based on plaintiff's experience in business management, Ms. Romboy testified that plaintiff should expect a wage in the higher portion of that range.

Based on the foregoing, plaintiff's health, her age, her abilities and skills, the court finds that plaintiff is able to work on a full time basis at approximately \$7.00 per hour (\$1,200 gross per month). If plaintiff were fully employed, she could contribute approximately \$900 net per month to her own living expenses and needs. Further, prior to her marriage, plaintiff received stock from her family during the marriage and continuing to the present. Plaintiff has received regular income from that stock on a monthly basis. Although the amount has fluctuated, plaintiff presently receives about \$900 per month.

During the parties' marriage, they had a lavish lifestyle. They traveled both in and out of the United States, were able to give one another expensive gifts of jewelry, clothing, and furs, and they owned luxury cars and expensive homes. Much of the parties' lifestyle was financed by plaintiff's parents, who gave the parties money, paid for trips, and provided all their financial living requirements for almost four years during their marriage. At the time the parties married, neither party was employed. They traveled to Hawaii in October 1992, where they lived in a beach front condominium owned by plaintiff's parents for approximately three and one-half years. During this period, they paid no rent or mortgage payments, no utilities, no taxes, and no insurance. Plaintiff's parents paid all of those expenses. Plaintiff's parents also furnished a vehicle to the parties, which was maintained and for which gas and oil was provided at no cost to the parties. The parties were able to concentrate all of their energy and resources on developing a jet ski rental business in Hawaii. During the first part of their marriage, based on the plaintiff's parents financing their living expenses, the parties were able to build a financially successful business, ultimately selling the business at a profit and able to save a large sum of money.

When the parties returned to Utah, both the proceeds from the sale of their business and money saved from the profits of the business were used to purchase the first of the parties' homes and luxury cars. During the continuation of the marriage, plaintiff's parents continued to

provide gifts and other financial assistance to the parties that allowed them to maintain a lifestyle beyond what they could have afforded by their own efforts. The parties' lifestyle greatly exceeded the income actually derived from their businesses. Both parties also testified that, in recent years, in their marriage, they had spent everything they earned and had not set anything aside as savings.

Defendant's income, including salary and benefits from the parties' business, from 1991 through 1994, averaged approximately \$126,000 per year based on the expert testimony of Steve Nicolatus. During those years, the parties expended the average sum of \$126,000 on themselves. However, during that same time period, 1991 through 1993, the parties had failed to properly pay sales tax from their business profits to the extent of approximately \$46,000 per year. If that amount had been appropriately deducted, the parties' income from their business, Designers Carpet Showroom, would have averaged closer to \$80,000 per year. It is clear that the parties spent more money than that on themselves; however, it is appropriate to deduct the legally required sales tax in order to arrive at a true picture of the business income for those years. In 1994, defendant's income from Designers Carpet Showroom from salary and benefits was \$107,188, based on the testimony of the parties' expert, Steve Nicolatus. Sales tax for 1994 was properly deducted and paid by the business. Payment of worker's compensation premiums may affect defendant's income in the future. However, at the time of trial, defendant had not been required to make those payments and the amount required was disputed. Therefore, the court has not offset any amount for worker's compensation.

Since 1990, Designers Carpet Showroom has experienced consistent growth. Gross sales have increased approximately 19% per year through 1994. Given the income the parties were legally entitled to receive through 1993, after offsets for sales tax, and given that growth, the 1994 income is not inconsistent with historical income. Based on that evidence, the court finds

that the appropriate income for purposes of calculating child support and alimony is defendant's 1994 income of \$107,188, or an average of \$8,932 per month.

6. Child Support. Based on plaintiff's gross monthly income from stock dividends and her ability to earn an additional \$1,200 per month gross income, her income for purposes of calculating child support is \$2,100 per month. Based on defendant's income of \$8,932 per month, defendant should pay base child support to plaintiff for the benefit of the parties' minor child in the sum of \$669 per month. Child support should be paid one-half on the fifth day and one-half on the twentieth day of each month, effective upon entry of the decree of divorce. Child support should continue until the parties' child reaches the age of eighteen or graduates from high school in the normal course, whichever last occurs.

7. Child Care Expenses. Defendant should be ordered to pay one-half of any future work-related or career training child care expenses actually incurred by plaintiff.

8. Income Withholding. It is not necessary for the court to implement immediate withholding of child support pursuant to UTAH CODE ANN. § 62A-11-501 based on defendant's voluntary and timely payment of child support. However, if defendant falls thirty or more days in arrears in his child support obligation, plaintiff should be entitled to immediate mandatory income withholding relief pursuant to UTAH CODE ANN. § 62A-11-401.

9. Alimony. The court's findings as to plaintiff's and defendant's incomes are set forth in paragraph 5 above. As to plaintiff's expenses, plaintiff's reasonable living expenses are approximately \$3,800 per month. Both parties claimed excessive expenses which their incomes will not support. In part, this is based on the lifestyle they enjoyed during their marriage, which was financed not only by the parties' own income from their businesses, but savings accrued from their Hawaiian business, and by plaintiff's parents who assisted with the parties' ability to enjoy an extravagant lifestyle. As to plaintiff's stated monthly expenses, she presently pays no

real property taxes or insurance on the residence in which she resides. She is renting that home from her father and she testified that she pays rent when she is able to do so. Defendant further testified and the court finds credible that plaintiff's father pays for the maintenance on the home. Plaintiff currently pays no medical or dental insurance premiums, and the court further finds that her telephone expense and other expenses, such as entertainment, grooming, installment payments, and income taxes, are excessive.

Based on plaintiff's needs and the parties' abilities to earn as set forth above, defendant should be ordered to pay alimony to plaintiff in the sum of \$1,331 per month, to commence upon entry of the decree of divorce. Alimony should be paid one-half on the fifth day and one-half on the twentieth day of each month. Further, based on the duration of the parties' marriage, the length of time that plaintiff has been out of the job market, and the parties' disparate abilities to earn income, the duration of alimony should be permanent, but not to exceed the length of the marriage consistent with UTAH CODE ANN. § 30-3-5. Alimony should terminate upon plaintiff's remarriage, cohabitation, or death, or upon further order of the court, or at the expiration of thirteen years from the date of the trial herein, June 15, 1995, whichever first occurs.

10. Restraining Order. Both parties should be permanently enjoined from harassing, annoying, or threatening the other, and from making any derogatory remarks about the other in the presence of their minor child.

11. Health Insurance. Defendant should be ordered to maintain health and medical insurance for the benefit of the parties' minor child with a deductible amount no greater than \$500. In the event that defendant wishes to maintain health and medical insurance for the child with a deductible greater than \$500, he should be solely responsible for the payment of any additional deductible costs incurred. Consistent with UTAH CODE ANN. § 78-45-7.15, each party should pay one-half of the out-of-pocket cost of the premium actually paid for the child's portion

of the health insurance. Each party should be ordered to pay one-half of all reasonably and necessary uninsured medical expenses, including copayments and deductibles, incurred for the parties' minor child.

12. Preschool Tuition. The parties agreed at the time of their separation to share equally the cost of minor child's private preschool tuition. Defendant has not paid his entire share and should pay the amount of \$564 to plaintiff, representing the balance of his share of those costs.

13. Property Division:

(a) Designers Carpet Showroom. During the parties' marriage, they purchased and operated a business known as Designers Carpet Showroom. Based on the testimony of the expert witness jointly engaged by the parties, Steve Nicolatus, the fair market value of that business is \$194,000. The Utah State Tax Commission has assessed \$213,000 against the business based on the parties' failure to remit sales taxes for the years 1991 through 1993. Defendant testified that he expects to be able to reduce that amount by approximately \$30,000 through negotiation or through providing evidence to the Tax Commission that certain designers have paid sales tax on the transactions at issue. In addition, there has been assessed against the business a worker's compensation premium payment, the amount of which is presently in dispute. Based on the foregoing, the court finds that the value of the business is approximately \$194,000, and the debts owed by the business are approximately the same amount. The court awards Designers Carpet Showroom to defendant. Thus, although the business is valued at zero for purposes of distributing the parties' property, the court finds that it has significant value as evidenced by historical and present earnings. Defendant will have the ability to pay

the indebtedness and continue to earn income consistent with the pattern of historical earnings and business growth.

(b) Utah Water Sports. Defendant testified that he obtained a 40% interest in the business based on his initial investment in the sum of \$12,000. The \$12,000 was marital funds generated from the business owned by the parties. Because the court is not able to determine the present value of the 40% interest, the court concludes that the interest in Utah Water Sports should be divided between the parties equally.

(c) Key Bank Certificate of Deposit. The parties own a Key Bank certificate of deposit with a current value of approximately \$69,000. Defendant pledged that certificate of deposit to secure the Utah Water Sports line of credit to allow Utah Water Sports to purchase inventory. Forty thousand dollars of that amount was borrowed from defendant's grandmother and should be returned to defendant so that he can repay that loan. The balance, approximately \$29,000, is awarded to defendant.

(d) Furniture and Furnishings. The parties divided their furniture at the time they separated. Plaintiff has valued items she took at \$18,000, while defendant values the same items at \$25,000. Defendant retained a portion of the furniture and furnishings, although he testified their value was minimal. On the other hand, plaintiff testified that defendant's furniture had a value of approximately \$34,000. Based on the parties' testimony and a review of the list of items provided in defendant's exhibits, the court concludes that each party received approximately \$25,000 in value in furniture and furnishings and those items should be retained by the party who presently has them. Further, both parties received gifts of jewelry from the other, and each party should be awarded those items.



(e) Vehicles. Defendant has in his possession a Bronco with a value of approximately \$8,000, two snowmobiles valued at \$13,000, a trailer for the snowmobiles valued at \$2,000. Those items should be awarded to him. Plaintiff has a BMW which she currently leases which should be awarded to her. At the time the parties separated, plaintiff had a Mercedes Benz, which she sold or traded in on the BMW. Although plaintiff testified that the BMW has no value to her because she cannot purchase the car at the end of the lease, the court finds that it has a value of approximately \$12,000, since a marital asset valued at approximately \$12,000 was used to allow her to obtain the BMW.

(f) Bank Accounts. Each party should be awarded his or her respective checking account. The furniture account which the parties had prior to their separation was used by both parties through May of 1993. At that time, the amount in this account was between \$4,500 and \$6,000. The parties separated in approximately February of 1993 and a temporary order for child support and alimony was not entered until September of that year. Plaintiff testified that she used the balance of the funds in the furniture account to provide support for herself and the parties' child. The court finds that that use is reasonable and declines to set any value on the account for purposes of property distribution.

(g) Escrowed Funds. The parties have funds in escrow obtained from the sale of their marital residence, which sale occurred after their separation. The current balance in the account is approximately \$178,000. In order to equalize the property distribution, the court finds that plaintiff should be awarded from the escrow account the sum of \$109,000, and defendant should be awarded the sum of \$69,000. If the amount of the

escrow funds is in excess of \$178,000, the excess should be equally divided between the parties.

14. Debts and Obligations. Defendant should assume and pay all debts and obligations owed in connection with Designers Carpet Showroom. In addition, defendant should repay the \$40,000 borrowed from his grandmother. Each party should assume and pay any credit card debt or loan incurred by him or her during their separation. Plaintiff should be ordered to assume and pay all debts owed to her father, which includes in substantial part, the attorneys' fees she has incurred in connection with this action.

15. Attorneys' Fees and Costs. The court finds that plaintiff has sufficient monetary assets based on the property division to pay the debt for her attorneys' fees. She should be ordered to pay that amount, except the amount defendant was previously ordered to pay by temporary order in this matter.

16. Life Insurance. The court finds that defendant has a life insurance policy with a face amount between \$300,000 and \$350,000. Based on his agreement, the court finds that it is reasonable for defendant to name plaintiff and the parties' minor child as beneficiaries of the policy for the time periods during which he is obligated to pay child support and alimony.

17. Motion To Seal File. Plaintiff's motion to seal the file should be granted.

18. Tax Provisions:

(a) Defendant should be awarded the right to claim the minor child of the parties as an exemption for federal and state income tax purposes. In the event that plaintiff obtains employment and child support is adjusted, the court shall reconsider the award of this tax exemption.

(b) In the event any joint income tax return of the parties is audited or amended, defendant should be solely liable for the payment of any additional tax, penalty, or interest assessed, or should be awarded any refund.

From the foregoing findings of fact, the court now makes and enters the following:

**CONCLUSIONS OF LAW**

1. The court has jurisdiction over the parties of this action and the subject matter of this action.
2. Each party is entitled to a decree of divorce from the other party on grounds of irreconcilable differences.
3. The decree of divorce should conform to the foregoing findings of fact.

DATED this 18 day of October, 1995.

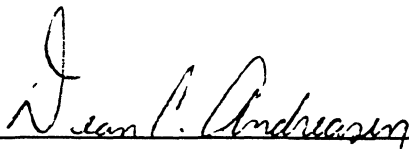
BY THE COURT:



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JUDGE SANDRA N. PEULER

Approved as to form:



---

CLARK W. SESSIONS

Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that I mailed a true and correct copy of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW** to the following, postage prepaid, this 13 day of October, 1995:

Clark W. Sessions, Esq.  
Campbell, Maack & Sessions  
One Utah Center, Thirteenth Floor  
201 South Main Street  
Salt Lake City, Utah 84111-2215

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Tab B

OCT 18 1995

SALT LAKE COUNTY

By \_\_\_\_\_ Deputy Clerk

**ELLEN MAYCOCK - 2131**  
**KRUSE, LANDA & MAYCOCK, L.L.C.**  
Attorneys for Defendant  
Eighth Floor, Bank One Tower  
50 West Broadway  
Salt Lake City, Utah 84101-2034  
Telephone: (801) 531-7090

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

---

KAREN PENROSE,	)	
Plaintiff,	)	<b>DECREE OF DIVORCE</b>
vs.	)	
JEFFREY PENROSE,	)	Civil No. 93 490 2224
Defendant.	)	Judge Sandra N. Peuler
	)	Commissioner Thomas N. Arnett, Jr.

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The above-entitled matter came before the court for trial on June 14, 15, and 22, 1995. Plaintiff was present and represented by her counsel, Clark W. Sessions, and defendant was present and represented by his counsel, Ellen Maycock. The Honorable Sandra N. Peuler presided. At the time of trial, the parties recited their stipulation concerning custody and visitation. The court then heard evidence concerning the granting of the divorce, the amount and duration of alimony, income of the parties to be used for purposes of calculating child support and alimony, property division, and attorneys' fees. The court heard the testimony of witnesses, received exhibits, and heard arguments of counsel. The court thereafter made a minute entry

dated August 9, 1995. Based on the foregoing, and the court having made and entered its findings of fact and conclusions of law,

**NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** as follows:

1. Decree of Divorce. Each party is granted a decree of divorce from the other party on grounds of irreconcilable differences and decree will be final upon signing and entry.

2. Custody and Visitation. Plaintiff and defendant are awarded joint legal custody of their minor child, Miles Penrose, with primary physical custody to be awarded to plaintiff. Defendant is entitled to visitation with the minor child on every other weekend, every Tuesday overnight, and on alternating Thursdays overnight.

Holiday visitation shall be exercised pursuant to the Utah Uniform Visitation Schedule as set forth at UTAH CODE ANN. § 30-3-35. Holidays shall take precedence over weekend visitation, and changes shall not be made to the regular rotation of the alternating weekend visitation schedule. If a holiday visit by defendant falls on a regularly scheduled school day, defendant shall be responsible for the child's attendance at school for that school day. If a holiday falls on a weekend or on a Friday or Monday, and the total holiday period extends beyond that time so that the child is free from school when the parent is free from work, defendant is entitled to the lengthier holiday period. Holidays shall be exercised as follows:

(a) In years ending in an odd number, defendant is entitled to the following holidays:

(1) Miles' birthday on the day before or after the actual birth date beginning at 3:00 p.m. until 8:00 p.m.;

(2) Human Rights Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;

(3) Easter holiday beginning at 6:00 p.m. on Friday before the holiday until Sunday at 7:00 p.m., unless the holiday extends for a longer period of time to which defendant is completely entitled;

(4) Memorial Day beginning at 6:00 p.m. Friday until Monday at 7:00 p.m., unless the holiday extends for a longer period of time to which defendant is completely entitled;

(5) July 24th holiday beginning at 6:00 p.m. the day before the holiday until 11:00 p.m. on the holiday;

(6) Veterans Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday; and

(7) The first portion of the Christmas school vacation. "Christmas School Vacation" is defined as beginning on the evening the child gets out of school for the Christmas school break until the evening before the child returns to school, except for Christmas Eve, Christmas Day, and New Year's Day. This visitation should include Christmas Eve and Christmas Day until 1:00 p.m., and Christmas School Vacation shall be equally divided.

(b) In years ending in an even number, defendant is entitled to the following holidays:

(1) The child's birthday on his actual birth date beginning at 3:00 p.m. until 9:00 p.m.;

(2) New Year's Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;

(3) Presidents' Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;



(4) July 4th holiday beginning at 6:00 p.m. the day before the holiday until 11:00 p.m. on the holiday;

(5) Labor Day beginning at 6:00 p.m. on Friday until Monday at 7:00 p.m., unless the holiday extends for a longer period of time to which defendant is completely entitled;

(6) Fall school break, if applicable, commonly known as UEA weekend, beginning at 6:00 p.m. on Wednesday until Sunday at 7:00 p.m., unless the holiday extends for a longer period of time to which defendant is completely entitled;

(7) Columbus Day beginning at 6:00 p.m. the day before the holiday until 7:00 p.m. on the holiday;

(8) Thanksgiving holiday beginning Wednesday before the holiday at 7:00 p.m. until Sunday at 7:00 p.m.; and

(9) The second portion of the Christmas School Vacation, as defined above, plus Christmas Day beginning at 1:00 p.m. until 9:00 p.m., again so long as the entire Christmas School Vacation is equally divided between the parties.

(c) Father's Day shall be spent with defendant every year beginning at 9:00 a.m. until 7:00 p.m. on the holiday;

(d) Mother's Day shall be spent with plaintiff every year beginning at 9:00 a.m. until 7:00 p.m. on the holiday;

(e) Each party shall have the right to have Miles on his or her own birthday from 3:00 p.m. until 8:00 p.m.

Defendant is awarded four weeks of visitation during the summer or one-half of "off track" periods if the minor child is in year round school. Each party is entitled to at least two

weeks of uninterrupted time with Miles for the purpose of vacations and other activities. Each party shall give at least thirty days notice of his or her intent to exercise this uninterrupted time with Miles. The uninterrupted vacation time may occur at any time during the year, so long as it does not interfere with Miles' school schedule.

Defendant is awarded reasonable telephone visitation.

Neither party should have the child in his or her presence overnight in their residence in the presence of a guest of the opposite sex to whom they are not married or related.

The pick up and return of the minor child for visitation shall be curbside. Neither party shall enter the residence of the other party.

Defendant is ordered to provide to plaintiff as much notice as possible of any time when he will not exercise visitation at a scheduled time. In the event plaintiff travels out of town, she is ordered to offer defendant the opportunity to care for the parties' child before obtaining surrogate care.

Defendant is ordered to return all clothing and personal effects of the minor child provided by plaintiff for visitation at the end of the visitation period.

If visitation is exercised overnight, defendant shall prepare the minor child for school the next morning and notify plaintiff whether he will deliver the child to school.

3. Child Support. Defendant is ordered to pay child support to plaintiff for the benefit of the parties' minor child in the sum of \$669 per month. Child support shall be paid one-half on the fifth day and one-half on the twentieth day of each month, effective upon entry of the decree of divorce. Child support shall continue until the parties' child reaches the age of eighteen or graduates from high school in the normal course, whichever last occurs.

4. Child Care Expenses. Defendant is ordered to pay one-half of any future work-related or career training child care expenses actually incurred by plaintiff.

5. Income Withholding. It is not necessary for the court to implement immediate withholding of child support pursuant to UTAH CODE ANN. § 62A-11-501 based on defendant's voluntary and timely payment of child support. However, if defendant falls thirty or more days in arrears in his child support obligation, plaintiff is entitled to immediate mandatory income withholding relief pursuant to UTAH CODE ANN. § 62A-11-401.

6. Alimony. Defendant is ordered to pay to plaintiff alimony in the sum of \$1,331 per month, to commence upon entry of the decree of divorce. Alimony shall be paid one-half on the fifth day and one-half on the twentieth day of each month. The duration of alimony should be permanent, but not to exceed the length of the marriage consistent with UTAH CODE ANN. § 30-3-5. Alimony shall terminate upon plaintiff's remarriage, cohabitation, or death, or upon further order of the court, or at the expiration of thirteen years from the date of the trial herein, June 15, 1995, whichever first occurs.

7. Restraining Order. Both parties are permanently enjoined from harassing, annoying, or threatening the other, and from making any derogatory remarks about the other in the presence of their minor child.

8. Health Insurance. Defendant is ordered to maintain health and medical insurance for the benefit of the parties' minor child with a deductible amount no greater than \$500. In the event that defendant wishes to maintain health and medical insurance for the child with a deductible greater than \$500, defendant shall be solely responsible for payment of any additional deductible costs incurred. Consistent with UTAH CODE ANN. § 78-45-7.15, each party is ordered to pay one-half of the out-of-pocket cost of the premium actually paid for the child's portion of the health insurance. Each party is ordered to pay one-half of all reasonably and necessary uninsured medical expenses, including copayments and deductibles, incurred for the parties' minor child.

9. Preschool Tuition. Defendant is ordered to pay the amount of \$564 to plaintiff, representing the balance of his share of the preschool tuition costs.

10. Property Division:

(a) Designers Carpet Showroom. Defendant is awarded the business Designers Carpet Showroom, free and clear of any claim of plaintiff.

(b) Utah Water Sports. The interest in Utah Water Sports is awarded to the parties equally.

(c) Key Bank Certificate of Deposit. The Key Bank certificate of deposit valued at approximately \$69,000 is awarded to defendant, free and clear of any claim of plaintiff.

(d) Furniture and Furnishings. Each party is awarded the furniture, furnishings, jewelry, and personal property items presently in his or her possession, free and clear of any claim of the other party.

(e) Vehicles. Defendant is awarded the Bronco, two snowmobiles, and a trailer for the snowmobiles, free and clear of any claim of plaintiff. Plaintiff is awarded the BMW which she currently leases, free and clear of any claim of defendant.

(f) Bank Accounts. Each party is awarded his or her respective checking account.

(g) Escrowed Funds. Plaintiff is awarded the sum of \$109,000 from the escrow account and defendant is awarded the sum of \$69,000. If the amount of the escrow funds is in excess of \$178,000, the excess shall be equally divided between the parties.

11. Debts and Obligations. Defendant is ordered to assume and pay all debts and obligations owed in connection with Designers Carpet Showroom. In addition, defendant is

ordered to repay the \$40,000 borrowed from his grandmother. Each party is ordered to assume, pay, and hold the other party harmless from any credit card debt or loan incurred by him or her during their separation. Plaintiff is ordered to assume and pay all debts owed to her father, which includes in substantial part, the attorneys' fees she has incurred in connection with this action.

12. Attorneys' Fees and Costs. Each party should pay his or her own attorney's fees and costs, except the amount defendant was previously ordered to pay by temporary order in this matter.

13. Life Insurance. Defendant is ordered to maintain his present policy of life insurance with a face amount between \$300,000 and \$350,000, naming plaintiff and the parties' minor child as beneficiaries of the policy for the time periods during which he is obligated to pay child support and alimony.

14. Motion To Seal File. Plaintiff's motion to seal the file is granted and the file should be sealed in this matter.

15. Tax Provisions:

(a) Defendant is awarded the right to claim the minor child of the parties as an exemption for federal and state income tax purposes. In the event that plaintiff obtains employment and child support is adjusted, the court shall reconsider the award of this tax exemption.

(b) In the event any joint income tax return of the parties is audited or amended, defendant shall be solely liable for the payment of any additional tax, penalty, or interest assessed, or shall be awarded any refund.

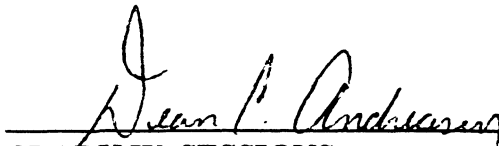
DATED this 18 day of October, 1995.

BY THE COURT:



JUDGE SANDRA N. PEULER

Approved as to form:



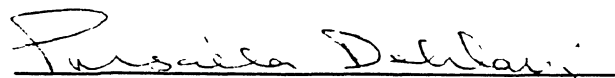
CLARK W. SESSIONS

Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that I mailed a true and correct copy of the foregoing **DECREE OF DIVORCE** to the following, postage prepaid, this 13 day of October, 1995:

Clark W. Sessions, Esq.  
Campbell, Maack & Sessions  
One Utah Center, Thirteenth Floor  
201 South Main Street  
Salt Lake City, Utah 84111-2215



Tab C

### **30-3-4. Pleadings — Findings — Decree — Use of affidavit — Sealing.**

(1) (a) The complaint shall be in writing and signed by the plaintiff or plaintiff's attorney.

(b) A decree of divorce may not be granted upon default or otherwise except upon legal evidence taken in the cause. If the decree is to be entered upon the default of the defendant, evidence to support the decree may be submitted upon the affidavit of the plaintiff with the approval of the court.

(c) If the plaintiff and the defendant have a child or children and the plaintiff has filed an action in the judicial district as defined in Section 78-1-2.1 where the pilot program shall be administered, a decree of divorce may not be granted until both parties have attended a mandatory course provided in Section 30-3-11.3 and have presented a certificate of course completion to the court. The court may waive this requirement, on its own motion or on the motion of one of the parties, if it determines course attendance and completion are not necessary, appropriate, feasible, or in the best interest of the parties.

(d) All hearings and trials for divorce shall be held before the court or the court commissioner as provided by Section 78-3-31 and rules of the Judicial Council. The court or the commissioner in all divorce cases shall enter the decree upon the evidence or, in the case of a decree after default of the defendant, upon the plaintiff's affidavit.

(2) The file, except the decree of divorce, may be sealed by order of the court upon the motion of either party. The sealed portion of the file is available to the public only upon an order of the court. The concerned parties, the attorneys of record or attorney filing a notice of appearance in the action, the Office of Recovery Services if a party to the proceedings has applied for or is receiving public assistance, or the court have full access to the entire record. This sealing does not apply to subsequent filings to enforce or amend the decree.

**History:** R.S. 1898 & C.L. 1907, § 1211; L. 1909, ch. 60, § 1; C.L. 1917, § 2999; R.S. 1933 & C. 1943, 40-3-4; L. 1957, ch. 55, § 1; 1961, ch. 59, § 1; 1969, ch. 72, § 2; 1983, ch. 116, § 1; 1985, ch. 151, § 1; 1989, ch. 104, § 1; 1990, ch. 230, § 1; 1991, ch. 5, § 35; 1992, ch. 98, § 1; 1992, ch. 290, § 3; 1995, ch. 62, § 1.

**Amendment Notes.** — The 1995 amendment, effective July 1, 1995, added the second sentence of Subsection (1)(b) and in the second sentence of Subsection (1)(d) substituted "shall enter the decree" for "shall make and file findings and decree" and added the language beginning "or, in the case of" at the end.

### **30-3-5. Disposition of property — Maintenance and health care of parties and children — Division of debts — Court to have continuing jurisdiction — Custody and visitation — Determination of alimony — Nonmeritorious petition for modification.**

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children;



(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders;

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Parts 4 and 5; and

(e) with regard to child support orders issued or modified on or after January 1, 1994, that are subject to income withholding, an order assessing against the obligor an additional \$7 per month check processing fee to be included in the amount withheld and paid to the Office of Recovery Services within the Department of Human Services for the purposes of income withholding in accordance with Title 62A, Chapter 11, Parts 4 and 5.

The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide care for the dependent children, necessitated by the employment or absence of the custodial parent.

The court has continuing jurisdiction to make subsequent changes or orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for as long as is reasonable and necessary.

(a) In determining visitation rights of parents, grandparents, and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a visitation schedule a provision, among other things, authorizing any peace officer to enforce a court ordered visitation schedule entered under this chapter.

If a petition for modification of child custody or visitation provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or maintained in good faith.

If a petition alleges substantial noncompliance with a visitation order by a parent, a grandparent, or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the party's failure to provide or exercise court-ordered visitation.

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

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

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

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

(iv) the length of the marriage.

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

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

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

(f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(g) (i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this subsection.

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

(h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

(8) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(9) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

**History:** R.S. 1898 & C.L. 1907, § 1212; L. 9, ch. 109, § 4; C.L. 1917, § 3000; R.S. 3 & C. 1943, 40-3-5; L. 1969, ch. 72, § 3; 5, ch. 81, § 1; 1979, ch. 110, § 1; 1984, ch. § 1; 1985, ch. 72, § 1; 1985, ch. 100, § 1; 1, ch. 257, § 4; 1993, ch. 152, § 1; 1993, 261, § 1; 1994, ch. 284, § 1; 1995, ch. 330,

upon remarriage, or cohabitation with a member of the opposite sex, by the payee; added Subsections (7) to (9); renumbered former Subsections (7) and (8) as (5) and (6); and made stylistic changes.

**Compiler's Notes.** — Laws 1995, ch. 330, which amended this section, provides in § 2 that the Legislature does not intend that termination of alimony based on cohabitation, in accordance with Subsection (9), "be interpreted in any way to condone such a relationship for any purpose."

**Amendment Notes.** — The 1995 amendment, effective May 1, 1995, deleted a provision Subsection (3) for support and maintenance orders; deleted former Subsections (5) (6), providing that alimony terminates

## CHAPTER 5

### GRANDPARENTS

on

2. Visitation rights of grandparents.

#### 5-2. Visitation rights of grandparents.

The district court may grant grandparents reasonable rights of visitation if it is in the best interest of the grandchildren, in cases where a grandparent's child has died or has become a noncustodial parent through divorce or legal separation.

Grandparents may petition the court as provided in Section 78-32-12.2 to remedy a parent's wrongful noncompliance with a visitation order.

**History:** C. 1953, 30-5-2, enacted by L. ch. 123, § 2; 1993, ch. 152, § 2; 1995, 7, § 1.

**Amendment Notes.** — The 1995 amendment, effective May 1, 1995, deleted "and other

immediate family members" from both subsections and in Subsection (1) substituted "grandchildren" for "children" and added the clause beginning "in cases" to the end.

## CHAPTER 6

### COHABITANT ABUSE ACT

	Section	
Definitions.	30-6-4.5.	Mutual protective orders prohibited.
Abuse or danger of abuse — Protective orders.	30-6-4.6.	Prohibition of court-ordered or court-referred mediation.
Venue of action.	30-6-4.8.	Electronic monitoring of domestic violence offenders.
Forms for petitions and protective orders — Assistance.	30-6-5 to 30-6-7.	Repealed.
Continuing duty to inform court of other proceedings — Effect of other proceedings.	30-6-8.	Statewide domestic violence network — Peace officers' duties — Prevention of abuse in absence of order — Limitation of liability.
Protective orders — Ex parte protective orders — Modification of orders — Duties of the court.	30-6-9, 30-6-10.	Repealed.
Hearings on ex parte orders.	30-6-11.	Division of Family Services — Development and assistance of volunteer network.
No denial of relief solely because of lapse of time.		

**78-45-7.10. Reduction when child becomes 18.**

(1) When a child becomes 18 years of age, or has graduated from high school during the child's normal and expected year of graduation, whichever occurs later, the base child support award is automatically reduced to reflect the lower base combined child support obligation shown in the table for the remaining number of children due child support, unless otherwise provided in the child support order.

(2) The award may not be reduced by a per child amount derived from the base child support award originally ordered.

**History:** C. 1953, 78-45-7.10, enacted by L. 1989, ch. 214, § 12; 1994, ch. 118, § 11.

**Amendment Notes.** — The 1994 amendment, effective July 1, 1994, inserted "or has

graduated from high school during the child's normal and expected year of graduation, whichever occurs later" and deleted "combined" before "child support award" in Subsection (1).

**78-45-7.11. Reduction for extended visitation.**

(1) The child support order shall provide that the base child support award be reduced by 50% for each child for time periods during which the child is with the noncustodial parent by order of the court or by written agreement of the parties for at least 25 of any 30 consecutive days. If the dependent child is a recipient of Aid to Families with Dependent Children, any agreement by the parties for reduction of child support during extended visitation shall be approved by the administrative agency. However, normal visitation and holiday visits to the custodial parent shall not be considered an interruption of the consecutive day requirement.

(2) For purposes of this section the per child amount to which the abatement applies shall be calculated by dividing the base child support award by the number of children included in the award.

**History:** C. 1953, 78-45-7.11, enacted by L. 1989, ch. 214, § 13; 1990, ch. 100, § 9; 1994, ch. 118, § 12.

**Amendment Notes.** — The 1994 amendment, effective July 1, 1994, in Subsection (1), substituted the language beginning "which the child is" for "which the order grants specific extended visitation for that child for at least 25

of any 30 consecutive days" at the end of the first sentence and substituted the second and third sentences for "Only the base child support award is affected by the 50% abatement. The amount to be paid for work related child care costs may be suspended if the costs are not incurred during the extended visitation."

**78-45-7.12. Income in excess of tables.**

If the combined adjusted gross income exceeds the highest level specified in the table, an appropriate and just child support amount shall be ordered on a case-by-case basis, but the amount ordered may not be less than the highest level specified in the table for the number of children due support.

**History:** C. 1953, 78-45-7.12, enacted by L. 1989, ch. 214, § 14; 1994, ch. 118, § 13.

**Amendment Notes.** — The 1994 amend-

ment, effective July 1, 1994, substituted "shall" for "may" and inserted "on a case-by-case basis."

## NOTES TO DECISIONS

Cited in *Baker v Baker*, 866 P.2d 540 (Utah Ct. App. 1993)

### 78-45-7.13. Advisory committee — Membership and functions.

(1) On or before March 1, 1995, and every fourth year subsequently, the governor shall appoint an advisory committee consisting of:

(a) two representatives recommended by the Office of Recovery Services;

(b) two representatives recommended by the Judicial Council;

(c) two representatives recommended by the Utah State Bar Association; and

(d) an uneven number of additional persons, not to exceed five, who represent diverse interests related to child support issues, as the governor may consider appropriate. However, none of the individuals appointed under this subsection may be members of the Utah State Bar Association.

(2) (a) The advisory committee shall review the child support guidelines to ensure their application results in the determination of appropriate child support award amounts.

(b) The committee shall report to the Legislative Judiciary Interim Committee on or before October 1 in 1989 and 1991, and then on or before October 1 of every fourth year subsequently.

(c) The committee's report shall include recommendations of the majority of the committee, as well as specific recommendations of individual members of the committee.

(3) The committee members serve without compensation. Staff for the committee shall be provided from the existing budgets of the Department of Human Services and the Judicial Council. The committee ceases to exist no later than the date the subsequent committee under this section is appointed.

**History:** C. 1953, 78-45-7.13, enacted by L. 1959, ch. 214, § 15; 1990, ch. 183, § 58; 1994, 118, § 14.

**Amendment Notes.** — The 1994 amendment, effective July 1, 1994, substituted

"March 1, 1995" for "May 1, 1989 and May 1, 1991" and deleted "then on or before May 1 of" before "every fourth year" in the introductory language of Subsection (1).

### 78-45-7.14. Base combined child support obligation table and low income table.

The following includes the Base Combined Child Support Obligation Table and the Low Income Table:

BASE COMBINED CHILD SUPPORT OBLIGATION TABLE  
(Both Parents)

Monthly Combined Gross Income	Number of Children					
	1	2	3	4	5	6
From To						
650 — 675	99	184	191	198	200	201

Monthly Combined Adj. Gross Income		Number of Children					
		1	2	3	4	5	6
From	To						
676	— 700	103	190	198	205	207	209
701	— 725	106	197	205	212	214	216
726	— 750	110	204	212	220	221	223
751	— 775	113	211	219	227	229	231
776	— 800	117	218	226	234	236	238
801	— 825	121	224	243	261	263	265
826	— 850	124	231	253	275	277	279
851	— 875	128	238	263	289	291	294
876	— 900	132	245	274	303	305	308
901	— 925	135	251	284	316	319	322
926	— 950	139	258	294	330	333	336
951	— 975	143	265	305	344	347	350
976	— 1,000	146	272	315	358	361	364
1,001	— 1,050	154	285	335	385	389	393
1,051	— 1,100	161	299	356	413	417	421
1,101	— 1,150	168	313	377	441	444	449
1,151	— 1,200	176	326	387	449	454	460
1,201	— 1,250	183	340	403	465	475	484
1,251	— 1,300	190	353	418	482	496	508
1,301	— 1,350	198	367	433	499	516	532
1,351	— 1,400	205	381	448	515	537	556
1,401	— 1,450	212	394	463	532	558	580
1,451	— 1,500	220	408	478	549	579	605
1,501	— 1,550	227	421	493	565	600	629
1,551	— 1,600	234	435	509	582	620	653
1,601	— 1,650	242	449	524	599	641	677
1,651	— 1,700	249	462	539	615	662	701
1,701	— 1,750	256	476	554	632	683	725
1,751	— 1,800	264	489	569	649	704	749
1,801	— 1,850	271	503	584	664	723	771
1,851	— 1,900	278	517	597	677	736	786
1,901	— 1,950	286	530	610	690	750	800
1,951	— 2,000	293	544	622	700	752	813
2,001	— 2,100	308	571	643	716	779	833
2,101	— 2,200	319	592	666	741	807	862
2,201	— 2,300	328	608	687	766	835	891
2,301	— 2,400	336	625	708	791	862	921
2,401	— 2,500	345	641	725	809	882	942
2,501	— 2,600	354	658	746	834	909	972
2,601	— 2,700	362	674	767	859	937	1,001
2,701	— 2,800	371	691	788	885	964	1,031
2,801	— 2,900	380	707	809	910	992	1,060
2,901	— 3,000	388	724	830	936	1,020	1,090
3,001	— 3,100	397	740	851	962	1,048	1,120
3,101	— 3,200	406	756	872	987	1,076	1,149
3,201	— 3,300	414	773	893	1,013	1,103	1,179
3,301	— 3,400	423	789	914	1,039	1,131	1,208
3,401	— 3,500	431	804	934	1,064	1,159	1,238

Monthly Combined Adj. Gross Income		Number of Children					
		1	2	3	4	5	6
From	To						
3,501	— 3,600	438	817	953	1,090	1,187	1,268
3,601	— 3,700	444	830	973	1,116	1,215	1,297
3,701	— 3,800	451	843	992	1,141	1,243	1,327
3,801	— 3,900	458	856	1,012	1,167	1,270	1,356
3,901	— 4,000	465	870	1,031	1,192	1,297	1,386
4,001	— 4,100	472	883	1,050	1,217	1,325	1,415
4,101	— 4,200	479	896	1,069	1,242	1,352	1,444
4,201	— 4,300	486	909	1,088	1,267	1,379	1,474
4,301	— 4,400	493	923	1,107	1,292	1,407	1,503
4,401	— 4,500	499	936	1,131	1,326	1,443	1,541
4,501	— 4,600	506	949	1,150	1,350	1,470	1,570
4,601	— 4,700	513	962	1,169	1,375	1,498	1,600
4,701	— 4,800	520	975	1,188	1,400	1,525	1,629
4,801	— 4,900	527	989	1,207	1,425	1,552	1,658
4,901	— 5,000	534	1,002	1,226	1,450	1,580	1,687
5,001	— 5,100	541	1,015	1,245	1,475	1,607	1,717
5,101	— 5,200	547	1,028	1,264	1,500	1,634	1,746
5,201	— 5,300	554	1,042	1,282	1,522	1,658	1,772
5,301	— 5,400	561	1,055	1,300	1,544	1,682	1,797
5,401	— 5,500	568	1,068	1,317	1,566	1,706	1,823
5,501	— 5,600	575	1,081	1,335	1,588	1,730	1,848
5,601	— 5,700	582	1,093	1,351	1,610	1,754	1,874
5,701	— 5,800	586	1,103	1,367	1,632	1,778	1,899
5,801	— 5,900	591	1,112	1,383	1,653	1,802	1,925
5,901	— 6,000	596	1,122	1,398	1,675	1,826	1,950
6,001	— 6,100	601	1,131	1,414	1,697	1,850	1,976
6,101	— 6,200	605	1,141	1,430	1,719	1,874	2,001
6,201	— 6,300	610	1,150	1,445	1,740	1,897	2,026
6,301	— 6,400	615	1,159	1,461	1,762	1,921	2,052
6,401	— 6,500	620	1,169	1,480	1,791	1,951	2,084
6,501	— 6,600	624	1,178	1,495	1,812	1,975	2,109
6,601	— 6,700	629	1,188	1,511	1,834	1,998	2,134
6,701	— 6,800	629	1,188	1,511	1,834	1,998	2,134
6,801	— 6,900	673	1,188	1,511	1,834	1,998	2,134
6,901	— 7,000	680	1,188	1,511	1,834	1,998	2,134
7,001	— 7,100	687	1,188	1,511	1,834	1,998	2,134
7,101	— 7,200	694	1,188	1,511	1,834	1,998	2,134
7,201	— 7,300	701	1,188	1,520	1,834	1,998	2,134
7,301	— 7,400	706	1,189	1,531	1,834	1,998	2,134
7,401	— 7,500	710	1,197	1,541	1,834	1,998	2,134
7,501	— 7,600	715	1,205	1,551	1,834	1,998	2,134
7,601	— 7,700	719	1,213	1,562	1,834	1,998	2,134
7,701	— 7,800	723	1,220	1,572	1,834	1,998	2,134
7,801	— 7,900	728	1,228	1,582	1,834	1,998	2,137
7,901	— 8,000	732	1,236	1,592	1,834	2,000	2,150
8,001	— 8,100	737	1,244	1,603	1,834	2,013	2,164
8,101	— 8,200	741	1,252	1,613	1,841	2,026	2,178
8,201	— 8,300	746	1,259	1,623	1,853	2,039	2,192

Monthly Combined  
Adj. Gross Income

		Number of Children					
		1	2	3	4	5	6
From	To						
8,301	— 8,400	750	1,267	1,633	1,864	2,052	2,206
8,401	— 8,500	755	1,275	1,644	1,876	2,064	2,220
8,501	— 8,600	759	1,283	1,654	1,887	2,077	2,234
8,601	— 8,700	763	1,291	1,664	1,899	2,090	2,247
8,701	— 8,800	768	1,298	1,675	1,911	2,103	2,261
8,801	— 8,900	772	1,306	1,685	1,922	2,116	2,275
8,901	— 9,000	777	1,314	1,695	1,934	2,129	2,289
9,001	— 9,100	781	1,322	1,705	1,945	2,141	2,303
9,101	— 9,200	786	1,330	1,716	1,957	2,154	2,317
9,201	— 9,300	790	1,337	1,726	1,969	2,167	2,330
9,301	— 9,400	795	1,345	1,736	1,980	2,180	2,344
9,401	— 9,500	799	1,353	1,747	1,992	2,193	2,358
9,501	— 9,600	803	1,361	1,757	2,003	2,206	2,372
9,601	— 9,700	808	1,369	1,767	2,015	2,218	2,386
9,701	— 9,800	812	1,376	1,777	2,027	2,231	2,400
9,801	— 9,900	817	1,384	1,788	2,038	2,244	2,414
9,901	— 10,000	821	1,392	1,798	2,050	2,257	2,427
10,001	— 10,100	826	1,400	1,808	2,061	2,270	2,441

LOW INCOME TABLE  
(Obligor Parent Only)

		Number of Children					
		1	2	3	4	5	6
Monthly Adj. Gross Income	To						
650	— 675	23	23	23	23	24	24
676	— 700	45	46	46	47	47	48
701	— 725	68	68	69	70	71	71
726	— 750	90	91	92	93	94	95
751	— 775	113	114	115	116	118	119
776	— 800		137	138	140	141	143
801	— 825		159	161	163	165	166
826	— 850		182	184	186	188	190
851	— 875		205	207	209	212	214
876	— 900		228	230	233	235	238
901	— 925		250	253	256	259	261
926	— 950			276	279	282	285
951	— 975			299	302	306	309
976	— 1,000				326	329	333
1,001	— 1,050				372	376	380



## COLLATERAL REFERENCES

**A.L.R.** — Sexual partner's tort liability to other partner for fraudulent misrepresentation regarding sterility or use of birth control resulting in pregnancy, 2 A.L.R.5th 301.

Parent's child support liability as affected by other parent's fraudulent misrepresentation regarding sterility or use of birth control, or refusal to abort pregnancy, 2 A.L.R.5th 337.

### **78-45-7. Determination of amount of support — Rebuttable guidelines.**

(1) (a) Prospective support shall be equal to the amount granted by prior court order unless there has been a material change of circumstance on the part of the obligor or obligee.

(b) If the prior court order contains a stipulated provision for the automatic adjustment for prospective support, the prospective support shall be the amount as stated in the order, without a showing of a material change of circumstances, if the stipulated provision:

(i) is clear and unambiguous;

(ii) is self-executing;

(iii) provides for support which equals or exceeds the base child support award required by the guidelines; and

(iv) does not allow a decrease in support as a result of the obligor's voluntary reduction of income.

(2) If no prior court order exists, or a material change in circumstances has occurred, the court determining the amount of prospective support shall require each party to file a proposed award of child support using the guidelines before an order awarding child support or modifying an existing award may be granted.

(3) If the court finds sufficient evidence to rebut the guidelines, the court shall establish support after considering all relevant factors, including but not limited to:

(a) the standard of living and situation of the parties;

(b) the relative wealth and income of the parties;

(c) the ability of the obligor to earn;

(d) the ability of the obligee to earn;

(e) the needs of the obligee, the obligor, and the child;

(f) the ages of the parties; and

(g) the responsibilities of the obligor and the obligee for the support of others.

(4) When no prior court order exists, the court shall determine and assess all arrearages based upon the Uniform Child Support Guidelines described in this chapter.

**History:** L. 1957, ch. 110, § 7; 1977, ch. 145, § 10; 1984, ch. 13, § 2; 1989, ch. 214, § 3; 1990, ch. 100, § 2; 1994, ch. 118, § 2; 1994, ch. 140, § 14.

**Amendment Notes.** — The 1994 amendment by ch. 140, effective May 2, 1994, substituted "the Uniform Child Support Guidelines described in this chapter" for "but not limited to: (a) the amount of public assistance received by the obligee, if any; and (b) the funds that

have been reasonably and necessarily expended in support of spouse and children" at the end of Subsection (4).

The 1994 amendment by ch. 118, effective July 1, 1994, designated former Subsection (1) as Subsection (1)(a) and added Subsection (1)(b).

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

Tab D

Michael J. Wilkins, Judge