

1995

Wendalyn Ence nka Wendalyn Smith v. Larry D. Ence : Brief of Appellant

Utah Court of Appeals

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Carolyn D. Zeuthen; Martin W. Custen; Marquardt, Hasenyager & custen; Attorney for Appellant.
Mary C. Corporon; Corporon & Williams; Attorney for Appellee.

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IN THE UTAH COURT OF APPEALS DOCKET NO. 950829-CA

Defendant/Appellee.

Priority No. 15

Case No. 950829-CA

BRIEF OF APPELLANT

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF WEBER, STATE OF UTAH,
HONORABLE MICHAEL J. GLASMANN, PRESIDING

Carolyn D. Zeuthen #5020
Attorney for Plaintiff/Appellant
2485 Grant Avenue, Suite 200
Ogden, Utah 84401

Mary C Corporon #734
CORPORON & WILLIAMS, P.C.
Attorney for Defendant/Appellee
310 South Main Street, Ste. 1400
Salt Lake City, Utah 84101

Martin W. Custen #0785
MARQUARDT, HASENYAGER & CUSTEN
Attorney for Plaintiff/Appellant
2408 Van Buren Avenue
Ogden, Utah 84401

FILED

APR - 4 1996

COURT OF APPEALS

WENDALYN ENCE, nka
WENDALYN SMITH,

Plaintiff /Appellant,

VS.

LARRY D. ENCE,

Defendant/Appellee.

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Carolyn D. Zeuthen #5020
Attorney for Plaintiff/Appellant
2485 Grant Avenue, Suite 200
Ogden, Utah 84401

Mary C Corporon #734
CORPORON & WILLIAMS, P.C.
Attorney for Defendant/Appellee
310 South Main Street, Ste. 1400
Salt Lake City, Utah 84101

Martin W. Custen #0785
MARQUARDT, HASENYAGER & CUSTEN
Attorney for Plaintiff/Appellant
2408 Van Buren Avenue
Ogden, Utah 84401

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WENDALYN ENCE, nka
WENDALYN SMITH

VS.

Defendant/Appellee.

Case No. 950829-CA

STATEMENT OF JURISDICTION

Jurisdiction to hear this appeal is conferred upon this court by § 78-2a-3 (2)(h), Utah Code Annotated, as amended, which gives the Utah Court of Appeals appellate jurisdiction over appeals from district courts involving divorce, property division and support.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Point I Was the trial court's alimony award of \$1,700 per month for twenty-one (21) years an abuse of discretion?

A. Are the trial court's Findings of Fact insufficient to support its alimony award?

B. Did the court err in failing to enter specific detailed Findings of

Fact showing how it arrived at the amount and duration of the alimony award?

C. Did the trial court err in finding that Mr. Ence contributed significantly and substantially to his wife's attendance at medical school?

Point II What factors should the trial court follow when deciding whether or not to make a compensation adjustment in dividing the marital property and awarding alimony?

STANDARD OF REVIEW FOR ALL ISSUES

A trial court's award of alimony is committed to the sound discretion of that court, and will not be disturbed absent a clear and prejudicial abuse of discretion. Breinholt v. Breinholt, 905 P.2d 877, 276 Utah Adv. Rep. 38, 39 (Utah App. 1995).

In setting an award of alimony, the trial court must at least consider four factors: (1) the financial condition and needs of the recipient spouse, (2) recipient's earning capacity or ability to produce income, (3) the ability of the payor spouse to provide support, and (4) the length of the marriage. Utah Code Annotated, § 30-3-5(7)(a).

The trial court is required to enter sufficient findings on all factors as well as on all material issues unless the facts in the record are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment. Howell v. Howell, 806 P.2d 1209, 1213 (Utah App. 1991), cert. denied, 817 P.2d 327 (Utah 1991). If the trial court does not meet these requirements, the Appellate court must reverse unless the record is clear and uncontroverted such as to allow the reviewing court to apply the above factors as a matter of law on appeal. If the trial court considers the above

described factors in setting an award of alimony, the award will not be disturbed absent a showing that such a serious inequity has resulted as to manifest a clear abuse of discretion.

The trial court must make adequate and specific Findings of Fact justifying an alimony award and the award must also comply with the relevant legal principles governing alimony awards. Johnson v. Johnson, 855 P.2d 250, 252 (Utah App. 1993).

A court's Findings of Fact are subject to the clearly erroneous standard of review and must be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusions on each factual issue was reached. Breinholt, 276 Utah Adv. Rep. at 41. A trial court's Conclusions of Law is reviewed for correctness, according no deference to the trial court. Breinholt, 276 Utah Adv. Rep. at 39.

A finding is clearly erroneous when, even though there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. Schindler v. Schindler, 776 P.2d 84, 88, (Utah App. 1989).

For a successful attack on the trial court's Findings of Fact, an Appellant must marshal all the evidence in support of the trial court's findings and then demonstrate that, even viewing it in the light most favorable to the court below, the evidence is insufficient to support the findings. Scharaf v. M.G. Corp., 700 P 2d 1068 (Utah 1985).

Although, Appellate courts may weigh the evidence and substitute their

judgment for that of the trial court in divorce actions, this is not done lightly and merely because its judgment may differ from that of the trial judge. Peterson v. Peterson, 737 P.2d 237, 239 (Utah App. 1987). A finding is clearly erroneous only if the finding is without adequate support or induced by an erroneous view of the law. State v. Walker, 743 P.2d 191, 193 (Utah 1987).

DETERMINATIVE STATUTES

Section 30-3-5-(1), Utah Code Annotated, as amended:

When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, and parties . . .

Section 30-3-5-(3), Utah Code Annotated, as amended:

The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties,

Section 30-3-5-(7)(a), Utah Code Annotated, as amended:

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

- i.) The financial conditions 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.

Section 30-3-5-(7)(c), Utah Code Annotated, as amended:

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

Section 30-3-5-(7)(e), Utah Code Annotated, as amended:

When a marriage of long duration dissolves on a 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 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.

Section 78--45-(3), Utah Code Annotated, as amended:

Every father shall support his child; and every man shall support his wife when she is in need.

STATEMENT OF THE CASE

1. Nature of the Case. This is an appeal from a final judgment of a decree of divorce and related relief, and specifically, from the amount and duration of the alimony award.

2. Course of the Proceedings. Plaintiff/Appellant, Wendalyn Smith, hereafter referred to as Dr. Smith, filed a Complaint seeking a divorce from Mr. Ence in Weber County District court on January 5, 1995, and Mr. Ence filed an Answer on February 21, 1995. After discovery and hearings, a trial was held on September 8, 1995, before the Honorable Michael J. Glasmann, presiding. On September 28, 1995, a further hearing was held via telephone conference whereby the court delivered its Findings of Fact and Conclusions of Law and Order.

3. Disposition at trial court. The Decree of Divorce was entered on November 13, 1995, awarding defendant, Mr. Ence, \$1,700 per month as alimony for a period of twenty-one (21) years. Mr. Ence's defined contribution and defined benefit plans were divided between the parties and a Qualified Domestic Relations Order was ordered to be issued. The equity in the parties' home in Tucson, Arizona, was to be divided equally with the net proceeds after sale.

4. Statement of Facts. The parties married on November 25, 1974, in Page, Arizona. (Tr. at 17). Dr. Smith was twenty-one (21) and Mr. Ence was thirty-five (35). (Tr. at 133). At the time of the marriage, Dr. Smith was working in a hospital business office as a secretary and, later in 1975, worked as a secretary for the Ram Valley Consolidated School District. (Tr. at 20, 21). Except for when he quit working in 1991, Mr. Ence worked full-time in construction at all times which he worked during the marriage as a heavy equipment operator and has worked in this field since 1956. (Tr. at 21, 134).

The parties have jointly raised two (2) children to maturity during this marriage, to-wit: Tyson, born October 20, 1976, and Kelly, born November 14, 1977. (Tr. at 18, 21, 138). After the youngest child was born in 1977, Dr. Smith worked part-time at home as a typist for the local airport. (Tr. at 21). In January of 1981, she started attending Glendale Community College in Glendale, Arizona, and transferred to Grand Canyon University in 1983. (Tr. at 22). Dr. Smith obtained her undergraduate degree in May of 1985. (Tr. at 23, 139).

Dr. Smith worked part-time during the first semester of college. (Tr. at 22). During the period of approximately May 1981 through May of 1985, she attended college, did not work outside the home, but took full responsibility for the housework, child care, laundry and cooking. (Tr. at 23-25, 78-81, 139). Mr. Ence continued to work in construction with various jobs taking him out of town for a few days at a time. (Tr. at 23).

Dr. Smith borrowed approximately \$6,000 to finance her college education,

\$1,000 from Grand Canyon University and \$5,000 from Lincoln Center and also received scholarships. (Tr. at 25; Tr. Exhibits P1 and P2). These loans were subsequently repaid by Dr. Smith in December 1994 from her post residency earnings and after Mr. Ence had stopped working and earning. (Tr. at 39).

For two years after she completed her undergraduate degree, Dr. Smith worked full time as an estimator for an industrial truss company, and then as a substitute teacher, earning approximately \$15,000 per year. (Tr. at 27, 28, 139; Tr. Exhibits P-3 through P-8).

In 1987, the parties bought a house in Tucson, Arizona, and Dr. Smith and the children, ages 10 and 9 at the time, moved to Tucson, Arizona in July of that year for her entry into medical school at the University of Arizona in Tucson, . (Tr. at 29, 30). Mr. Ence continued to work in Phoenix, sometimes going to Tucson on weekends while Dr. Smith attended medical school full-time and continued as the children's primary care giver. (Tr. at 30). Mr. Ence's work consisted of running a crane and driving a pick-up truck 50,000 miles a year which took him out of the Phoenix area on occasion. (Tr. at 30, 140). If Mr. Ence had a job to do while in Tucson or nearby, he came home on weekdays. (Tr. at 30, 142). The company Mr. Ence worked for had a branch in Tucson, and the parties discussed his move to Tucson. (Tr. at 82).

Since Mr. Ence was not living in Tucson and not available to help with the children, Dr. Smith assumed full responsibility for their care. During Dr. Smith's first two years of medical school, she was able to be home with the children when they were home. (Tr. at 80, 81). However, during her third and fourth years, she was

required to spend more hours at the hospital resulting in her hiring a first year medical student to live in the home and to take care of the children in exchange for the student's room and board. (Tr. at 82).

Dr. Smith borrowed approximately \$49,000 to finance her medical school education. (Tr. at 30, 32; Tr. Exhibits P9 through 11). Her tuition for medical school was \$21,734 and, with books and miscellaneous expenses, the total cost was \$23,000. (Id.). The remaining \$26,000 went to meet household expenses. (Tr. at 32).

Dr. Smith has paid back a part of the money she borrowed for medical school and is still paying it back by working at her current post residency employment with the Medical Arts Clinic in Brigham City. (Tr. at 32 through 38; Tr. Exhibit P12). A part of Dr. Smith's tuition, amounting to \$1,252.50, was paid off through savings acquired during her residency and the first few months of employment at the Medical Arts Clinic while Mr. Ence was not working. (Tr. at 39; Tr. Exhibit P11).

While Dr. Smith was in medical school, Mr. Ence continued in construction work earning approximately \$45,000 in 1987, \$41,000 in 1988, and \$36,000 in 1989 and 1990. (Tr. at 164, 165; Tr. Exhibits P4 through P7). In 1989, Mr. Ence's hourly wages were reduced from \$18.52 per hour to \$14.50 per hour when another company bought out the company he worked for. (Tr. at 145).

Dr. Smith graduated from medical school in May 1991 and moved to Ogden, Utah, in June, 1991, to fulfill her internship and residency requirements at McKay Dee Hospital. (Tr. at 40). She did her internship and residency from June 1991 through

June 1994. In the late summer or fall of 1991, Mr. Ence worked for approximately five weeks, then did not work again until approximately three and one-half years later, which was after the parties had separated and Dr. Smith had filed for divorce. (Tr. at 41, 42, 170).

From July 1991 to July 1994, Dr. Smith's income from her residency program and from extra jobs totally supported the family. Total family income in 1991 was \$30,242.00 with \$15,385 earned by Dr. Smith as a resident and her extra work at blood drives. (Tr. Exhibit P8). Mr. Ence quit his job in Phoenix a month before the family moved to Utah in order to help with the move; he was earning \$15.00 per hour at the time. (Tr. at 147). Dr. Smith earned approximately \$34,000 in 1992 while Mr. Ence received \$4,455 from unemployment. (Tr. Exhibit P13). Her moonlighting was in addition to her regular hours of up to one hundred (100) hours a week. (Tr. at 46)

In 1993, Dr. Smith earned a total of \$60,035. Approximately Thirty Thousand (\$30,000) was earnings from her regular residency work and the rest came from moonlighting at clinics in North Ogden and Fairfield, and blood drives. (Tr. at 46, 47; Tr. Exhibit P14).

In her third year of residency, Dr. Smith also worked in Malad, Idaho, in the emergency room of a hospital one weekend per month which entailed a sixty (60) hour weekend. This work was in addition to her regular Monday through Friday work in Ogden. (Tr. at 47, 151).

In 1994, Dr. Smith earned a total of \$106,381. (Tr. at 48; Tr. Exhibit P15). She earned \$65,700 from her employment at McKay Dee Hospital and the Medical Arts

Center and earned \$40,000 moonlighting in Malad, Idaho. At the end of June 1994, she completed her residency and took a month off to take her board exam, and a vacation, and then started working August 1, 1994, at the Medical Arts Clinic in Brigham City, working a forty (40) hour week. (Tr. at 48, 49).

The parties separated in December, 1994. At the time of trial, September 1995, Dr. Smith was earning \$120,000 a year. (Tr. at 76). Dr. Smith has a written employment contract with the clinic in Brigham City which expires in August 1997. (Tr. at 75; Tr. Exhibit P12). Under her employment contract, the hospital pays all of her overhead, money for continuing education and her medical malpractice insurance; this will terminate when her contract ends and she may choose to look for work elsewhere. (Tr. at 77).

The benefits Dr. Smith receives are the result of the hospital's recruiting practices where they seek to entice medical doctors to Brigham City, which is considered a rural area. (Tr. at 78). If she had stayed in Ogden, Dr. Smith would have received \$90,000 per year but would not receive loan repayment provisions in the contract. (Tr. at 78).

At the time of trial, Mr. Ence was earning \$12.00 per hour, operating heavy equipment in St. George, Utah since March, 1995. (Tr. at 170, 173). He tried to get his old job back paying \$15.00 per hour in Arizona, but it was not available and he could not find other work in Arizona. (Id).

Throughout the marriage and up to the time the parties separated in December 1994, the parties' lifestyle was modest. When the parties first married, they lived in a

small mobile home and moved to a small two bedroom, 1,100 square foot house when the children were young, which house they later sold for \$32,000. (Tr. at 86). The parties lived in mobile homes thereafter until they bought the Tucson home. (Tr. at 87). Just prior to living in the Tucson home, the parties lived in a single 14 x 70 mobile home in Phoenix. (Tr. at 29, 140). When Dr. Smith moved to Tucson, the parties bought a three bedroom , 1,500 square foot home on an acre of land, paying \$92,000 for it. (Tr. at 86, 87). Mr. Ence stayed in Phoenix and lived in a 19' camping trailer on his parent's land paying them a little to help with the electric bill and eating meals with them at times. (Tr. at 116, 141, 166). When the parties moved to Ogden, they rented a house for \$745 per month. (Tr. at 87). Except for a trip to Alaska in 1994, the parties' vacations were usually spent visiting relatives. (Tr. at 49, 88). They purchased moderately priced cars and did not buy expensive clothes. (Tr. at 88, 89).

In September 1994, the older child, Ty, entered his first year at Utah State, living in a private dorm room and the cost for his education was between Five and Six Thousand (\$5,000 and \$6,000) dollars the first year he attended which was paid for by Dr. Smith. (Tr. at 90). Ty had finished high school in three years with straight A's. (Tr. at 91). At the time of trial, Dr. Smith was also paying for the youngest child's education who is attending Weber State University and living at home. (Tr. at 90, 91). From the time Mr. Ence quit working in 1991 and continuing to the time of trial, Dr. Smith was the sole support of the children. (Tr. at 95).

At trial, Dr. Smith submitted an exhibit showing her current expenses of \$4,104 per month and anticipated monthly expenses of approximately \$5,454 per month.

(Tr. at 102-105; Tr. Exhibit P17). Mr. Ence did not dispute her monthly expenses nor her anticipated monthly expenses. Mr. Ence submitted no testimony or exhibits showing his monthly expenses or his need for any particular amount of money. (Tr. at 171, 172).

The trial court rendered its decision and entered Findings of Fact and Conclusions of Law set forth in the Addendum.

SUMMARY OF ARGUMENT

I. The trial court abused its discretion in awarding alimony of \$1,700 per month for 21 years.

A. The trial court failed to analyze the alimony award using the three Jones factors which must be considered in every award of alimony. Mr. Ence produced no evidence at trial showing his financial condition or his need for alimony and the court failed to analyze the award based on his need. As to his earning capacity or ability to produce income, the court found Mr. Ence has a present net income of \$1,600 per month, \$25,000 per year, but made no findings concerning his earning capacity. As to the third factor, the court apparently recognized that Dr. Smith has the ability to pay alimony but, made no findings based upon her financial needs or her financial situation.

B. The trial court failed to make detailed and specific Findings of Fact to support the alimony award. Martinez v. Martinez, 818 P.2d 538, 542 (Utah 1991) and Utah Code Annotated Section 30-3-5(7)(e) allows the court the discretion to make a compensation adjustment in dividing the marital property and in awarding alimony

when there is, at the end of the marriage, drastic income changes due to the collective efforts of both spouses. The court must give these situations some weight in fashioning an award, but it has discretion in determining the appropriate adjustment and no particular result is mandated. However, the court cannot give an award which reflects a property interest in the other spouse's earning potential or advanced degree. Martinez, 818 P.2d at 542.

The history of alimony decisions in Utah shows that the supporting, i.e., non-professional spouse is to be considered for a Martinez-type award only in situations where the supporting spouse becomes economically disadvantaged in a virtually absolute sense in that she was unable to earn a living either at all or above minimum wage. The supporting spouse must be either in need of support for rehabilitation purposes, or have enjoyed the increased standard of living for a significant period of time. These circumstances were not found by the trial court in this case.

Because the facts in the present case are not applicable to the situations requiring Martinez-type compensation, it was an abuse of discretion for the trial court to enter the challenged alimony award. The court, for the most part, ignored the factors as required in Jones and decide to "reward" Mr. Ence with a large alimony award which is inconsistent with the Martinez decision and the cases preceding it. The trial court abused its discretion as there is no evidence that Mr. Ence made career or education sacrifices, or that he reduced his standard of living to enable Dr. Smith to obtain her degree. There is no evidence that Mr. Ence did anything other than what he did all along, providing support as he was legally obligated to do.

C. The trial court erred in finding that Mr. Ence contributed significantly and substantially to his wife's attendance at medical school. It found that Dr. Smith was not the only one to put herself through medical school and that both parties contributed significantly and substantially to her attendance at medical school as well as the common family good. The court, however, did not specify any particular contributions Mr. Ence made to Dr. Smith's education which would explain its award of alimony even though it specified Dr. Smith's contributions. The trial court's findings regarding Mr. Ence's contributions are in error because there is insufficient evidence to support them.

The evidence reveals that it was Dr. Smith that put herself through medical school by her own hard work, by borrowing and repaying the money herself, while taking full responsibility for the children and home with little or no help or sacrifices from Mr. Ence. The evidence shows that the major change in Dr. Smith's income was not due to the collective efforts of both spouses at all but rather due almost exclusively and certainly primarily to the individual efforts of Dr. Smith above and beyond her historical functioning as a homemaker.

While Dr. Smith acknowledges that Mr. Ence willingly provided support to the family throughout the marriage, Dr. Smith contends the court failed to reconcile the legal duty of support each spouse owes to the other and how this alone can be called a significant contribution to Dr. Smith's education. The evidence shows that Mr. Ence did nothing additional while Dr. Smith was in medical school or an undergraduate than he did all during the parties' marriage. Case law requires an

exceptional effort on Mr. Ence's part, but the trial court did not so find. Thus, the trial court's alimony award was an abuse of its discretion.

II. Martinez and § 30-3-5(7)(e) contains no guidelines to limit the trial court's discretion and, therefore, this court must establish guidelines.

The Jones criteria served to limit the trial court's exercise of discretion by assessing the financial concern of the parties. Unfortunately, neither Martinez nor § 30-3-5(7)(e) directs the trial court to do anything other than "consider" the collective efforts of the spouses in setting alimony. Dr. Smith argues that this court must limit the trial court's discretion by confining the Martinez type discretion to circumstances involving unjust enrichment and/or reimbursement alimony. In the present case, the trial court did not set forth its reasons as to why it arrived at an alimony award of \$1,700 per month for twenty-one (21) years other than to reward Mr. Ence with "a reasonable standard of living" which he had never enjoyed. It made no Findings of Fact on what that "reasonable standard of living" was, or upon what it would be based. It did not address specifically the Martinez criteria. Normally, this would require a remand, but Dr. Smith argues that since the record is clear and uncontroverted, this court can remedy the trial court's abuse of discretion.

Other jurisdictions, as in Utah, refuse to treat marriage as strictly a financial undertaking requiring strict accounting and reimbursement for various contributions. Other courts look to whether the professional spouse has been unjustly enriched and, if so, the award is limited to the financial contributions and living expenses and direct educational expenses. If this court awards reimbursement alimony, it should look to

the direct expenditures and make actual compensation based on those expenditures but, compensation should not be merely for the sake of providing the legal obligation of support every spouse owes to the other. It should be based on real sacrifices and contributions from the supporting spouse, not merely on the fact that the supporting spouse allowed or simply didn't object to the other spouse obtaining an education while making no exceptional sacrifices or contribution towards that effort.

ARGUMENT

I.

THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING ALIMONY OF \$1,700 PER MONTH FOR TWENTY-ONE YEARS

The trial court abused its discretion in awarding alimony to Mr. Ence for three reasons: First, the court failed to analyze the alimony award using either the factors required by Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985), or by Utah Code Annotated, Section 30-3-5(7)(a). Second, the court's Findings of Fact are not sufficiently detailed so as to disclose the steps by which the court determined the amount and duration of the alimony award which is clearly excessive in this case. Third, the court found that Mr. Ence contributed significantly and substantially to Dr. Smith's attendance at medical school but made no findings as to any particular contribution which would justify such an award. The award of alimony in this case is inherently unfair and is tantamount to giving Mr. Ence a property interest in Dr. Smith's medical degree and future earnings.

A. The trial court's Findings of Fact are insufficient to support its alimony award

It is well settled that the trial court must consider three factors before its

computation of any alimony award. Jones v. Jones, 700 P.2d at 1075. Effective in July, 1995, these factors are now codified in Utah Code Ann., Section 30-3-5(7)(a). The first three factors are identical to the Jones factors and the fourth factor was added by the 1995 legislature. Section 30-3-5(7)(a) states as follows: The court should consider at least the following factors in determining alimony:

- (i) the financial condition and need 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.

Nowhere in the court's Memorandum Decision or its Findings of Facts is there any indication that the court analyzed the circumstances of the parties in light of the required factors. This is an indication that the trial court clearly abused its discretion in fixing the amount and duration of the alimony award to Mr. Ence.

1. The financial condition and need of the recipient spouse.

In the instant case, the trial court made no findings of Mr. Ence's financial needs as required. At trial, Mr. Ence showed no evidence of need for alimony by testimony or exhibits. He produced no exhibits showing his present or projected monthly expenses. When questioned regarding the amount of alimony he was requesting, Mr. Ence's only response was that he would "be happy with \$3,500" a month, but gave no basis showing his need for such an amount. (Tr. at 171, 172). The only evidence as to Mr. Ence's monthly expenses is his testimony that his rent is \$500.00 per month (Tr. at 161), and he was ordered to pay one-half of the

approximately \$635.00 per month house payment until the house is sold. (Tr. at 159; Findings of Fact # 5; R. at 97). Mr. Ence further testified that if he lived in an apartment he would have to come up with first and last months rent, implying he doesn't have the money; however, he was given and used \$1,000 to go to golf school. (Tr. at 161, 162).

A spouse's demonstrated need must, under Jones, constitute the maximum permissible alimony award. Bingham v. Bingham, 872 P.2d 1065, 1068 (Utah App. 1994). In Bingham, the trial court awarded the wife \$701.76 per month more than her projected financial requirements and the Court of Appeals reversed because the trial court offered no explanation for such a discrepancy.

The trial court based its alimony award on a reasonable standard of living for Mr. Ence. (Findings of Fact # 13(q); R. at 102). The court failed to explain why Mr. Ence's own income of \$25,000 per year did not provide a reasonable standard of living since he is supporting only himself while Dr. Smith is supporting herself and paying for the parties' children's college education. Mr. Ence never earned much more than \$35,000 per year while supporting himself, Dr. Smith, and the two children. \$25,000 per year just to spend on himself, plus the equity from the sale of the Tucson home, would seem to be more than adequate for him to enjoy the standard of living he enjoyed during the marriage. The court failed to explain why he needs an additional \$1,700 per month for the next 21 years. Furthermore, the yearly amount of alimony awarded to him (\$20,400), combined with his earned income (\$25,000), exceeds the income he alone has generated during the eight years preceding trial.

(Exhibits P4 through P8 and P13 through P15).

2. The recipient's earning capacity or ability to produce income.

The facts indicate that Mr. Ence is able to support himself adequately. Except for the three years during Dr. Smith's residency and internship, and one year when he was layed off, Mr. Ence has worked in construction since 1956. (Tr. at 134). In the past, Mr. Ence has supported the family on his income alone. He testified that his health is good, and he has the ability to continue to work to support himself. (Tr. at 170). The court found that Mr. Ence currently earns a yearly income of \$25,000.00. (Findings of Fact #13(p), R. at 102). However, in spite of the court's findings and the facts in evidence, the court failed to make a finding on Mr. Ence's capacity to earn. There are no findings as to why Mr. Ence is earning less at the time of trial then he earned previously. He only stated at trial that he was not able to get his old job back or any job in Arizona. (Tr. at 173).

3. The ability of the payor spouse to provide support. Dr. Smith's income is currently \$120,000 per year with a net of \$7,000 per month. (Findings of Fact ¶ 13(j),(k); R. at 101). The court apparently recognized that Dr. Smith has the ability to provide support.

However, an underlying factor regarding the payor spouse's ability to provide support is a finding of the payor spouse's financial need and it is a necessary step in determining the ability to provide support. Willey v. Willey, 866 P.2d 547, 551 and n.1 (Utah App. 1993).

In the present case, the trial court made no findings of Dr. Smith's financial need as required, and made no underlying factual determination required for the assessment of plaintiff's ability to provide support. Willey 866 P.2d at 551. Although Dr. Smith testified regarding her monthly expenses and her projected monthly expenses, the trial court did not enter findings regarding the reasonableness of the expenses except to omit her expenses in supporting the children. (Tr. at 225). Furthermore, the court failed to take into consideration the fact that Dr. Smith's contract expires in 1997 and what her earnings would be thereafter. She testified she expected to earn \$80 - \$90,000 per year in future years, working a 40 hour week. (Tr. at 101). The trial court should have made findings regarding the reasonableness of her anticipated lower wages once her contract with the Medical Arts Clinic expires.

4. The length of the marriage.

As to the fourth factor, the court noted that the marriage was of a long duration having lasted approximately twenty-one years. (Findings of Fact ¶ 13(a); R. at 100). However, there were no findings on why the court decided to award alimony of twenty-one years at \$1,700 per month which equals \$428,400. Dr. Smith has to work until she is about 63 years of age while Mr. Ence could retire almost immediately on the \$1,700 per month alimony plus his various retirements and social security, and enjoy the standard of living he had all during the marriage.

After analyzing an alimony award under Section 30-3-5(7)(a), the trial court may examine additional factors it deems influential in setting the amount of alimony. However, the above four factors must at least be considered. The trial court's failure

to enter these findings was error.

B. The court erred in failing to enter specific detailed Findings of Fact showing how it arrived at the amount and duration of the alimony award.

On the surface, the factual situation in the present case would appear to be the reverse of the common situation where the husband earns a professional degree and the wife works to support the family, contributes to a husband's education costs, provides a home, accepts a lower standard of living, a depletion of their marital assets, and may even forego her own education or career opportunities, all with the intention that their joint efforts will be rewarded by the husband's increased earning capacity and a better and higher standard of living when the degree is earned. Then, at the threshold of this increased earning power, the parties divorce. The marital earnings and savings were used to support the family and to meet the husband's educational expenses, resulting in virtually no property subject to equitable distribution.

Utah courts have long recognized in these circumstances that the wife has an equitable claim to repayment for the investment and sacrifices she made in husband's education. Otherwise the husband would leave the marriage with a substantial increase in earning capacity obtained in substantial measures through the efforts and sacrifices of his wife. She, on the other hand, would leave the marriage either without an adequate earning capacity or with a reduced standard of living. In these cases it clearly is because of the wife's efforts and sacrifices that the husband was relieved of the burden of supporting himself and his family and was able to devote his time and attention to his education uninterrupted. The following is a chronological history of

the evolution of Utah case law on this issue.

In Tremayne v. Tremayne, 116 Utah 483 (Utah 1949), the court appeared to first recognize this problem and awarded the wife slightly more than half of the value of the marital property in addition to a total alimony award of \$475 which was payable in installments. The court here compensated the wife for all the years she worked and did not improve her ability to earn. Tremayne, 116 Utah at 486.

In Peterson v. Peterson, 737 P.2d 237 (Utah App. 1987), the Utah court of Appeals explored the issue of the division of a professional license and ruled that a professional license is not property to be divided but acknowledged that rehabilitative or reimbursement alimony could be used in situations where equity demands an award to compensate a spouse who endures substantial financial sacrifice or defers their own education to help their spouse obtain an advanced degree or increased ability to earn. Peterson, 737 P.2d at 242, n.(4). Mrs. Peterson worked as an elementary school teacher to help finance her husband's education. The couple took out a student loan and received money from Mrs. Peterson's parents. While her husband was in medical school, Mrs. Peterson worked one year full time and three years part time. Mrs. Peterson stopped working to care for the parties' child when Dr. Peterson began his internship, and during the next fifteen years, she was not employed outside the home and her teaching certificate expired. At the time of the divorce, the parties had been married twenty-six years and had six children under eighteen years of age. The trial court awarded the wife, among other things, \$120,000 to be paid in \$1,000 monthly installments, reflecting an ownership interest in

the husband's medical degree. Peterson, 737 P.2d at 243. The Court of Appeals vacated the award and, after analyzing the criteria under Jones, directed that the payments of \$1,000 per month, be continued as additional alimony, noting that Mrs. Peterson's standard of living during the marriage enabled her to enjoy a very comfortable lifestyle. Peterson, 737 P.2d at 242.

This approach was followed in Rayburn v. Rayburn, 738 P.2d 238, 240 (Utah App. 1987), where the Court of Appeals revised a \$45,000 cash award into temporary alimony, payable at \$750 per month for five years to allow the wife to obtain further education. Rayburn, 738 P.2d at 241. The Court of Appeals found that the trial court properly analyzed the wife's needs under Jones, but labeled the award as a property settlement to preclude termination should Mrs. Rayburn remarry. Rayburn, 738 P.2d at 240, n. (4). The Appellate court held that an award of non-terminable rehabilitative or reimbursement alimony was not appropriate in this case because Mrs. Rayburn did not endure substantial financial sacrifices or defer her own education to help her husband obtain his degree because he received his medical degree the same day he married. Rayburn, 738 P.2d at 241. During the five year period of Dr. Rayburn's internship, residency, and his military service, the parties moved, but Mrs. Rayburn stayed at home, for the most part, to raise their children while Dr. Rayburn was the primary financial provider for the family. Rayburn at 239.

As stated in Martinez v. Martinez, 818 P.2d 538 (Utah 1991), usually the needs of the spouse are assessed in light of the standard of living during the marriage (see I A of this brief), and it is sometimes also appropriate to equalize the parties' standard

of living. In the cases that use the equalization of living standards approach, the recipient spouse had either become or always was severally economically disadvantaged as a result of having not worked either at all or substantially, outside of the home during the marriage.

An early case using the equalization of living standards approach is Higley v. Higley, 676 P.2d 379, 381 (Utah 1983). Mrs. Higley had no present or prospective permanent income other than the \$100 per month permanent alimony awarded by the trial court even though her living expenses exceeded \$800 per month. The Supreme Court found that her efforts as a homemaker enabled her husband to build a career as an aircraft welder. Mrs. Higley was in poor health and had spent the last thirty years of her life as a full time homemaker and caretaker of five children and had no employment training or experiences other than with unskilled jobs. Id. The trial court awarded her temporary alimony for 3 years in an amount equivalent to the house and utilities payments, but permanent alimony of only \$100.00 per month. The Supreme Court held that an alimony award should attempt to equalize the parties' standard of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage. Id. Thus, the alimony award to Mrs. Higley would not afford her a standard of living anywhere near that which she enjoyed during the marriage or near that of her husband. Id. Here the court found that both parties made sacrifices during the marriage, since husband worked two jobs to provide for his family while the wife managed the home and cared for their children, thereby foregoing employment training, experience and benefits. Higley, 676 P.2d at 379 -

381. The trial court's temporary alimony award was affirmed and the permanent alimony award was remanded. Higley, 676 P.2d at 382.

In Jones v. Jones, 700 P.2d at 1075, the Supreme Court again recognized that the most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage and to prevent her from becoming a public charge. Mrs. Jones had enjoyed a very comfortable lifestyle during the marriage and had no income producing assets and no outside income. The Supreme Court remanded the case to the trial court because it found Mrs. Jones would be unable to maintain anything even approaching the standard of living she enjoyed during the marriage with the \$1,000 per month alimony for five years, and with decreased amounts for the following years. Id.

Another case is Gardner v. Gardner, 748 P.2d 1076, 1081 (Utah 1988), where the parties remained married long after the husband attained his medical degree with his wife's help. The Supreme Court, looking to the standard of living enjoyed during the marriage, held that the benefits of the wife's investment in the husband was adequately reflected in a greater property settlement and higher alimony award based upon an adequate number of years enjoying the higher standard of living during the marriage. During the early years, Mrs. Gardner worked full time as a secretary while Mr. Gardner completed his medical training. Mr. Gardner also worked various jobs and his parents provided support in the form of medical school tuition. At the time of the divorce, Mrs. Gardner had not worked for the entire thirty years of the marriage and Mr. Gardner was employed as a general surgeon, earning \$6,000 per month.

Gardner, 748 P.2d at 1077.

In Rasband v. Rasband, 752 P.2d 1331 (Utah App. 1988), the trial court failed to consider husband's obvious ability to provide support and Mrs. Rasband's severe limited ability to meet her own established financial needs. In Rasband, the Court of Appeals recited the facts as follows:

The parties were married in 1957, a few months after graduating from high school. Four children were born as issue of this marriage. The youngest child was emancipated two months after entry of the Decree; another is an adult and capable of self support. Mrs. Rasband worked occasionally at low skilled, minimum wage jobs and did some typing to help Mr. Rasband in his work. He was a manager of insurance agents from 1977 until 1984 when he elected to work as an independent agent. Rasband, 752 at 1332.

The Court of Appeals held that the trial court's award of non-permanent alimony was an abuse of discretion. Rasband, 752 P.2d at 1335.

In all of these cases the common thread is that the recipient spouse, by taking herself out of the work force for a lengthy period during a long term marriage for reasons of being a homemaker and/or health reasons, became economically disadvantaged in an absolute sense.

An equalization of living standards is based upon the type of facts found in Higley, Jones, Gardner, and Rasband, which are couched in terms of severe, absolute economic disadvantage. None of these type of facts are found in the present case where Mr. Ence still has the same career he has had for almost 40 years, where he has no health problems, and where he did not become economically disadvantaged as a result of any sacrifices made while Dr. Smith was attending

school.

No cases in Utah employ an equalization of living standards when there is an end of the marriage drastic income change for one of the parties. Rather, the standard is now set forth in Utah Code Annotated, Section 30-3-5(7)(e). This Section gives the trial court the authority to make alimony and property division awards when there is an end of the marriage drastic income change for one of the parties. The standard set forth in Section 30-3-5(7)(e), now provides:

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 compensation adjustment in dividing the marital property and awarding alimony.

That language is lifted from Martinez v. Martinez, 818 P.2d 538, 542 (Utah 1991), which holds:

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, unless unrelated to the efforts put forward by the spouses during the marriage, should be given some weight in fashioning the support award [citation omitted]. Thus, if one spouse's earning has been greatly enhanced through the efforts of both spouse during the marriage, it may be appropriate for the trial court to make a compensating adjustment in dividing the marital property and awarding alimony. . . . 818 P.2d 538, at 542 (emphasis on language different from statute).

Clearly, the minor differences in language between the Martinez holding and the subsequently enacted alimony statute are not significant. If the court finds that

there is a major change due to the collective efforts of both spouses, the court is mandated to give some weight in fashioning an alimony award, and also is given discretion in determining an appropriate adjustment of dividing marital property and awarding alimony. No particular result is mandated by either Martinez or our new statute, and the decision is completely within the court's traditional discretion. However, the language of Martinez, ("some weight"), hardly suggests a large alimony award.

The Martinez case was a writ of certiorari in the Utah Supreme Court, to review a decision of the Court of Appeals, which Court of Appeals decision had created a new type of property interest ("equitable restitution"), which was to be awarded to Mrs. Martinez in addition to a more traditional property, alimony and child support award. Martinez at 818 P.2d at 539 - 540. The first part of the Supreme Court's decision in Martinez involved the court's analysis and rejection of the concept of equitable restitution. (See generally, 818 P.2d at 540 - 542).

The Supreme Court rejected the doctrine of equitable restitution as unsound and unmerited for three reasons: First, a marriage is not a commercial partnership and the efforts and sacrifices a spouse makes for the other and for their common marital interest cannot be quantified in monetary terms for the very idea of marriage contemplates mutual efforts and sacrifices. Any attempt to reduce a spouse's contribution to a marriage to a common denominator allowing for a comparison in monetary terms, would interfere with the trial court's ability to achieve an equitable result based on the needs of the spouses in light of the monetary resources available.

Martinez, 818 P.2d at 541. Second, an award of equitable restitution is extraordinarily speculative, giving the receiving spouse what is tantamount to a lifetime estate in the paying spouse's earnings that have no necessary relationship to the receiving spouses actual contribution to the enhanced earning power or to that spouse's need. Id. Third, the concept of equitable restitution is indistinguishable from the concept that a medical degree is valued as a property interest. Id.

The Supreme Court also rejected Mrs. Martinez' contention that the traditional alimony remedies and property right remedies of Section 30-3-5, Utah Code Annotated, as amended, were insufficient to provide her with an equitable overall award in light of the facts of her case. The Supreme Court held that "those remedies are adequate to fashion an appropriate award that meets the standards to be applied in determining awards of alimony." Martinez, 818 P.2d at 542.

The Supreme Court in Martinez addressed the unique facts of the case which had to do with a marriage of long duration dissolving on the threshold of a major change in the income of the husband spouse due to the collective efforts of both. Mr. Martinez attended college and then medical school during the marriage. He obtained financial support for his education primarily from his own earnings, student loans, the GI Bill, and a bequest from his mother's estate. Mrs. Martinez did not contribute financially to her husband's medical education. However, the court found that during the fourteen year marriage Mrs. Martinez assisted extensively in Dr. Martinez' obtaining a college education, medical degree and internship. In addition, she made substantial sacrifices in order to facilitate the completion of his medical

schooling and internship. Mrs. Martinez also earned a very minor amount of income for a short period which was used for family expenses. She was in need of financial assistance for herself and her children and the trial court analyzed her needs under the factors set forth in Jones. (See Martinez v. Martinez, 754 P.2d 69, 74 (Utah App. 1988)). It is noteworthy that the Utah Supreme Court did not mandate any particular alimony award on remand to the trial court but simply reversed the only issue before it on certiorari, to-wit: The equitable restitution issue, and remanded to the trial court for further proceedings in light of their opinion and the opinion of the court of Appeals. Martinez, 818 P.2d at 543.

Thus, Martinez did not mandate a particular result, and neither does the present statute Section 30-3-5(7)(e). Whether any adjustment should be made in dividing marital property and awarding alimony is up to the trial court, after resolution of the specific factual issues. But there must be limits on the trial court's exercise of discretion under § 30-3-5(7)(e) or a reviewing court cannot determine whether that discretion has been abused.

The Martinez case is the only Utah case having addressed this specific fact situation in any detail. However, the common thread running through Tremayne, Peterson, Rayburn, and Martinez, is that of the court recognizing the sacrifices one spouse makes to enable the other one to obtain the necessary education that will increase that spouse's earning power. All the spouses in the above cases were disadvantaged economically in some way because of their efforts and sacrifice. Mrs Tremayne did not increase her ability to earn while helping her husband to achieve

his success; Mrs. Peterson worked to help her husband and cared for the children; Mrs. Rayburn did not work but showed need for temporary support because she had been away from the job market for many years. It is interesting that the court awarded her temporary alimony but stated that it was not appropriate to award non-terminal rehabilitative or reimbursement alimony, because she had not made financial or career related sacrifices. Like Dr. Smith, in the early years of the marriage, Mrs. Rayburn's contribution to the family was in raising the children and maintaining the home while her husband provided the support. If Mrs. Rayburn had managed to attend school or worked during the marriage, no amount of alimony would have been awarded to her. The trial court in Martinez found that Mr. Martinez' increased income was due to some extent to the efforts of both spouses which justified the award.

Martinez, 818 P.2d at 542.

It is submitted that the trial court in the present case, for the most part, ignored the factors as required in Jones and decided to "reward" Mr. Ence with a large and a long duration alimony award which is inconsistent with the Martinez decision and the cases preceding it. The trial court failed to explain the reasons for the amount and duration of the alimony award and include facts in the findings which would disclose the steps by which it arrived at its decision. However, the court attempted to be equitable:

. . . what the court has attempted to do is look at their net income levels and the different expenses of the parties, and given the history of the income in the family, make an allocation of alimony that appears to the court to be equitable taking all of those circumstances into account. (Tr at 224).

It is true that in divorce actions, the court's primary interest is one of effecting fairness between the parties. Utah Code Annotated § 30-3-5(1) and (3). To accomplish equity, the court must consider those circumstances which indicate the contribution by one party to the increased earning power of the other under Section 30-3-5(7)(e). Without stating it outright, the trial court implies that it was making some kind of compensation award to Mr. Ence:

I think that to characterize that situation as though the plaintiff was the only one that contributed to her being able to go through the school and to accomplish the things that she did is not an accurate statement. The court believes that both parties contributed significantly to their family life, such as it was during those years that the plaintiff was going to school. (Tr. at 222).

During the course of the parties' marriage, they worked to the common good of the family unit. . . . this court could not characterize this situation as plaintiff having been the only one to put herself through medical school. Both parties contributed significantly and substantially to plaintiff's attendance at medical school. . . (Findings of Fact #13(e); R. at 99-100).

The court is unable to value one parties' labor more than the others. . . (Findings of Fact #13(g); R. at 100).

The standard of living enjoyed by the parties during their marriage does not approach the standard of living which can be enjoyed by the plaintiff now, based upon her income. On the other hand, during the time the parties lived together as husband and wife, the defendant contributed in part to achieving plaintiff's current financial situation . . . (Findings of Fact #13(n); R. at 102).

However, in Martinez, the Supreme Court states that "the very idea of marriage contemplates mutual effort and mutual sacrifice. Yet, in this case, Mrs. Martinez would value only her contribution to the marriage and not his." 818 P.2d at 541 In

its award of alimony, the trial court seems to value only Mr. Ence's contribution to the marriage and not Dr. Smith's.

Furthermore, underlying the Supreme Court's decision in Martinez, is its concern that marriage is not a business enterprise which requires strict economic accounting for all financial aid rendered during its course. Along with equitable restitution, the Supreme Court in Martinez rejected any idea of entitlement to financial reimbursement for efforts made in assisting a spouse to obtain an advanced degree. Martinez, 818 P.2d at 540. The court also rejected any idea that a spouse could benefit for life by sharing in the other spouse's increased earning capacity. Id.

The present case can hardly be compared with these past Utah cases. Nor is it the reverse of the common situation described above when courts attempt to remedy an injustice done to a spouse who makes substantial financial and career related sacrifices. Several facts distinguished this case. First, Mr. Ence made no personal sacrifices which resulted in a reduced standard of living for the family because he did not suffer a loss of income when Dr. Smith was unemployed. He was the primary wage earner in the family and admitted that the jobs his wife had were menial. (Tr. at 138). Second, even though Mr. Ence provided support to Dr. Smith, he provided no financial capital for tuition, books and other expenses. Dr. Smith paid or is paying back, out of her own earnings, all of her medical school and undergraduate expenses. (Tr. at 32 through 39; Tr. Exhibit P12). Also, there is no indication that he deferred his own career or education to advance hers and, while Mr. Ence provided for the family's financial support during most of the marriage, Dr.

Smith, in turn, raised the children, performed the household responsibilities, and even managed to provide complete support to the family for three and one-half years after she attended medical school and while she finished residency. Furthermore, unlike the typical situations when the couple struggle with a reduced standard of living allowing no accumulation of assets, the family's modest income during the marriage enabled them to accumulate modest assets. They purchased a home and personal property, such as cars and household furnishings and continued to accumulate savings in Mr. Ence's retirement plans, valued at over \$60,000. (Tr. at 65 through 72; Tr. Exhibits P20 and P21). Finally, Mr. Ence left the marriage being able to support himself reasonably at the standard of living he enjoyed during the marriage from his own earnings.

Thus, Dr. Smith's medical degree was not obtained at Mr. Ence's expense. Mr. Ence did not become economically disadvantaged in any absolute sense. Rather, Mr. Ence contributed to the support of the family while Dr. Smith was unable to work because she was attending medical school. It was the same support contributions he made willingly when Dr. Smith was not able to work because she stayed home and took care of the children and home. Mr. Ence should be no more entitled to reimbursement for supporting his wife than she is entitled to seek reimbursement for the years she worked and supported him while he voluntarily chose not to work. In a situation such as this, it is inherently unfair to compensate one spouse to the exclusion of all other contributing persons to the achievement of the other spouse. Even if Mr. Ence had struggled with support, his contributions to her degree only

plays one part in the overall achievement. There is no question that Dr. Smith as well as the children have made sacrifices towards her achieving her medical education and increased income.

If an important criterion for fashioning the alimony award under the statute is fairness, it was not fair to award Mr. Ence alimony in the amount of \$1,700 per month for twenty-one years because Mr. Ence provided Dr. Smith support for the four years during medical school and four years during undergraduate school. The Martinez court specifically rejected any entitlement to such financial reimbursement. It also rejected any idea of a spouse benefiting for life by sharing in a former spouse's increased earning capacity. But that is what the trial court did in awarding Mr. Ence nearing a half a million dollars for nearly the rest of his life. Even if this court determines that somehow Mr. Ence should be rewarded for this support, it should find that the alimony award is so excessive as to be inherently unfair to Dr. Smith, and an abuse of discretion.

C. There is insufficient evidence to support the trial court's finding that Mr. Ence contributed significantly and substantially to his wife's attendance at medical school.

Findings of Fact are clearly erroneous if it can be shown that they are against the clear weight of evidence or that they induced a definite and firm conviction that a mistake has been made. Maughan v. Maughan, 770 P.2d 156 (Utah Ct. App. 1989).

For a successful attack on the trial court's Findings of Fact, an Appellant must marshal all the evidence in support of the trial court's findings and then demonstrate that, even viewing it in the light most favorable to the court below, the evidence is

insufficient to support the findings. Scharaf v. M.G. Corp., 700 P.2d 1068 (Utah 1985).

The trial court's findings regarding Mr. Ence's contributions to Dr. Smith's education is without adequate evidentiary support. Even though Mr. Ence testified as to his efforts to help, the court was mistaken in its findings that Dr. Smith was not the only one to put herself through medical school and that both parties contributed significantly and substantially to her attendance at medical school as well as to the common family good. (Findings of Fact #13(e), (h); R. at 100). In its ruling on September 28, 1995, the court considered the specific contributions Dr. Smith made to her medical education:

Plaintiff, and to her credit, during this marriage not only worked as a homemaker and from time to time worked part-time jobs, but also in the somewhat traditional sense put herself through school in that she was the one that went to school and did the studying and obtained the grades necessary to advance herself. And was able to obtain eventually an admission to a medical school, and then. . . a medical degree, and is now working as a medical doctor. The plaintiff, in order to finance that schooling, took out student loans. And has been paying these loans off. And part of her employment package that attracted her to Brigham City involved monies that were to be used to pay off those student loans. (Tr. at 221-222).

. . . she was working as a homemaker, keeping the house on keel, taking care of the children, and putting herself through school, which to the court appears to be a phenomenal effort on her part. (Tr. at 225).

The court, however, did not specify particular contributions Mr. Ence made to Dr. Smith's education which would explain its award of alimony or why it found his contributions to be significant and substantial, contributing "in part" to where Dr. Smith

is today. (Tr. at 224). Mr. Ence testified that since the children were born in 1976 and 1977, and through the period of time Dr. Smith earned both her undergraduate and medical degrees, he was the main financial support of the family. (Tr. at 138, 139, 144). Even though Mr. Ence testified that it was no picnic in Phoenix driving a pick-up truck 50,000 miles a year and running a crane up to fourteen hours a day, the evidence is insufficient to show significant and substantial contributions. (Tr. at 140).

The evidence, contrary to the findings, reveals that it was Dr. Smith who put herself through medical school by her own hard work, by borrowing and repaying the money herself, while taking full responsibility for the children and home with little or no help or sacrifices from Mr. Ence other than the usual financial support. Furthermore, the evidence shows that the major change in Dr. Smith's income was not due to the collective efforts of both spouses at all, but rather due almost exclusively and certainly primarily to the individual ambition of Dr. Smith.

Dr. Smith was alone with the children when she attended medical school. Even Mr. Ence admits it was an uphill climb for her in Tucson with the house and kids, and going to school. (Tr. at 140). After being accepted to medical school, Dr. Smith testified she wanted Mr. Ence to live with them in Tucson to help out, but he liked his job in Phoenix and wanted to stay there even though the company he worked for had a branch in Tucson. (Tr. at 82, 83). Mr. Ence does not deny this but contends, however, that he wanted to be with his family, that he applied for jobs in the Tucson area and none were available, and it was necessary to stay with the job in Phoenix, even when he received a cut in pay, because it was the best way he could

support the family. (Tr. at 145, 146). However, Mr. Ence admits that he did not have a lot of time to look for a job in Tucson because he was working forty to sixty hours per week while in Phoenix, and driving 50,000 miles a year with his truck. (Tr. at 167). But Dr. Smith testified it became fairly obvious to her that he didn't want to move to Tucson and had no intention of moving there because working the Phoenix job was easier than working in Tucson. (Tr. at 82, 83). If he had transferred to Tucson, Dr. Smith would not have needed to hire a first year medical student to help with the children. (Tr. at 82). But the court mistakenly characterized Mr. Ence's support as actually enabling Dr. Smith to have a housekeeper/nanny in exchange for housing. (Findings of Fact #13(f); R. at 100).

Mr. Ence implies that living in the 19' camp trailer on his parents property away from his family was a personal sacrifice. (Tr. at 141-146, 166). However, the court made no findings indicating that living in the camper trailer was a substantial contribution and the testimony is in dispute whether it was even necessary for him to remain in Phoenix. The evidence shows that while Dr. Smith was in medical school, Mr. Ence continued to work to support the family as he did throughout the marriage, but did nothing extra in the way of helping her through by making financial or career related sacrifices.

Dr. Smith's testimony is undisputed that throughout the children's youth and up to the time the parties moved to Ogden, Utah in June 1991, she assumed full responsibility for the care of the children, the home, the household chores, the yard and cooking with little help from Mr. Ence in these areas. (Tr. at 22-25; 78 through

83). She even worked part-time jobs. (Tr. at 21, 22). Later, she attended college and retained the full responsibility for the children and home while managing to work one semester. (Tr. at 22). Meanwhile, Mr. Ence continued to work and support the family as he had been doing all along and nothing changed for him. Dr. Smith also arranged for and assumed full responsibility for her student loans and received scholarships to pay for the balance of her education. (Tr. at 25; Tr. Exhibits P1 and P2). The parties did not have to deplete their financial assets in order for Dr. Smith to attend school. Instead, they were able to save enough money to buy a house in Tucson, paying approximately \$10,000 for a down payment. (Tr. at 140). There is no evidence that Mr. Ence made any sacrifice during this period. His standard of living remained the same as he was the main financial support of the family.

When they moved to Utah and Mr. Ence quit working, Dr. Smith testified she was forced to work longer hours while continuing to do her share of the housework, approximately fifty (50%) percent. (Tr. at 84). Dr. Smith testified that the parties agreed and intended that during her residency, Mr. Ence would continue to work as she expected to earn only about \$29,000 per year. (Tr. at 40, 41). Mr. Ence contends he was not able to find a job as a crane operator in the Ogden, Salt Lake and Brigham City area. (Tr. at 148, 149). However, Mr. Ence did find work immediately after the move to Utah and worked for approximately one week, then told Dr. Smith he had quit working, would not look for another job and was going to stay home with the kids. (Tr. at 41, 42). Mr. Ence contends that he quit working because he was afraid his employer would not pay him and that Dr. Smith agreed that he

would not work and, instead, stay home to care for the children and do the household chores. (Tr. at 151). But, according to Dr. Smith, the children did not need a fulltime parent in the home during the day as they had caused no problems in the past and, being teenagers, they were self-sufficient and could care for themselves. (Tr. at 42, 43, 85). Furthermore, the parties lived within a couple of blocks of Ogden High where the children attended school. (Tr. at 43). Dr. Smith testified that the parties selected this location so the children could be self-sufficient in getting to and from school and they were able to fix their own breakfast, and do their own laundry. (Tr. at 84 through 86). However, Mr. Ence contends that by staying at home, he was there for the children if they needed him and he could do the household work. (Tr. at 151, 152). Dr. Smith was concerned, however, about Mr. Ence not working because there would not be enough money to live on. (Tr. at 43). Instead, Mr. Ence told her he was entitled to be supported by her because he had put her through medical school. (Tr. at 44). There is no question Mr. Ence felt entitled to support for he testified at trial that he was entitled to alimony because he backed his wife when she decided to pursue her education with any support and effort that he could do. (Tr. at 160).

Because Mr. Ence did not work, Dr. Smith found it necessary to find extra jobs to support the family, sometimes working up to one hundred hours per week. (Tr. at 46). Dr. Smith testified that working the amount of hours she did was not required for the residency program nor, was it considered best for her to work that much. (Tr. at 47). She testified that she worked the large number of hours because she had to

meet expenses with two children who would soon be going to college. (Tr. at 48, 91). During 1993, Dr. Smith testified she was asking Mr. Ence to work on a monthly basis but he refused saying that it was not necessary, that she was making plenty of money. (Tr. at 48, 86, 92). Even Mr. Ence admits that his wife worked hard and the hours were long. (Tr. at 151). But he testified his wife complained about his not working only six months before the parties separated, and urged him to do something with his life, even to volunteer. (Tr. at 153).

There is no dispute that Mr. Ence provided support to his family throughout the marriage up until 1991 when he quit working altogether. However, there is no evidence that he made unusual or exceptional sacrifices to support his wife's efforts to obtain her medical education and that he was worse off at the time of trial because of them. Mr. Ence testified he worked long hours in construction, supporting the family while Dr. Smith went to medical school. (Tr. at 143, 144). But he chose to stay in Phoenix with the job he preferred, even when his hourly rate was cut, rather than join her in Tucson; he chose to be unemployed in Ogden, Utah, rather than working a different job.

Contrary to the court's findings, there is little evidence of substantial efforts or sacrifices on the part of Mr. Ence in helping his wife to obtain a medical degree. Mr. Ence testified that he was embarrassed at times by being called "Mr. Mom" and people sometimes gave him strange looks and snickered. (Tr. at 154). He also testified he told his wife he would support her wherever she wanted to go and it had been like that since she started medical school. (Tr. at 155). He also testified that he

supported his wife in every way he could and that they both had dreams and plans and Dr. Smith told him there would be a day when he wouldn't have to work as hard as he was. (Tr. at 158). Mr. Ence's testimony is not disputed. However, this is not the standard for awarding alimony. There is no evidence that Mr. Ence sacrificed his own job skills, earning potential, or jeopardized his position as a heavy equipment operator in any way while Dr. Smith was in school, or by the move he made to Utah. Mr. Ence worked in construction all his life, not only during the time his wife was attending school.

The court's Findings were induced by an erroneous view of the law. Although the court found that all of Mr. Ence's paychecks went "into the family pot, . . . which helped with keeping a roof over the family's head, and keeping food on the table." (Tr. at 222), it failed to reconcile the legal duty of support each spouse owes to the other with how this alone can be called a significant contribution to Dr. Smith's education. Furthermore, all of Dr. Smith's paychecks also went into the family pot, when she worked, including parts of her student loans.

More importantly, the trial court did not specify whether it considered Mr. Ence's paychecks to be more significant and substantial contributions when Dr. Smith was pursuing her education than when she was at home raising the children, sometimes working part-time but not attending school. Considering Mr. Ence's support during the years Dr. Smith attended school to be any different from his support when she stayed home with the children or worked part-time would be to ignore what the parties agreed to during their marriage. The decision that Dr. Smith

would be unemployed was one born of the marriage. So was the decision that she attend school. When Mr. Ence quit work to stay home, there may not have been full agreement, but it was a decision made during the marriage. That the marriage proved unsuccessful should not permit entitlement to an alimony reward for the sake of the reward itself. It should not permit a court to consider contributions of support when a spouse is unemployed and attends school to be any different then when the spouse is unemployed and assumes full responsibility for the home and children.

Utah Code Annotated, Section 78-45-(3) states that ". . . every man shall support his wife when she is in need." Clearly the intent of Section 30-3-5(7)(e) is not to reward or compensate a husband or wife for supporting their spouse during the ordinary course of the marriage. It is only when one spouse endures substantial financial sacrifices or defers his own education or career to help the other spouse obtain hers that the alimony adjustment contemplated in Martinez, supra, and § 30-3-5(7)(e) should be utilized. In this case, the evidence was insufficient to bring these unique provisions into play. Because the court's findings are without adequate evidentiary support and also induced by an erroneous view of the law, this court should reverse and order that no alimony be awarded.

II.

THE TRIAL COURT SHOULD USE FACTORS OR GUIDELINES WHEN DECIDING WHETHER OR NOT TO MAKE A COMPENSATION ADJUSTMENT IN DIVIDING THE MARITAL PROPERTY AND AWARDING ALIMONY

Our new statute and case law provides no guidelines on how to make compensation adjustments in alimony awards in cases such as the present one when

compensation is an issue. Neither does it provide any supporting factors for the trial court to consider in arriving at a fair amount of alimony or property distribution. While the court must address the four criteria of § 30-3-5(7)(a), no criteria are specified for making additional or different awards under § 30-3-5(7)(e). Because of this, the decisions of other jurisdictions may offer guidance.

A large number of other jurisdictions have addressed the issue of compensation to a spouse when the parties divorce soon after the student spouse receives his or her degree or license. In some of these cases, the couple had accumulated substantial marital assets over a period of time from which assets the working or supporting spouse received large awards of property, maintenance, and child support. A number of jurisdictions have also addressed cases such as the present one where there is little or no marital property from which to order any award to the working spouse and that spouse has demonstrated an ability to support, not only herself or himself, but the family as well. Compensation has involved a number of different theories.

A case with the similar factual background as the present one is St.-Pierre v. St.-Pierre, 357 N.W.2d 250 (S.D. 1984). Here the court refused to award alimony to the husband because he could support himself. The parties were married, had two children, and shortly thereafter the wife was accepted into medical school. The husband had obtained employment with the University of South Dakota School of Education and he later worked at the Division of Allied Health and then the Indian Studies Program. Furthermore, he wrote a book on Indian art and earned his Master

of Arts degree during the time that plaintiff was earning her medical degree. After medical school, the wife received a waiver of her tuition in return for her agreement that she would practice medicine in South Dakota. The parties started building a home while plaintiff began practicing medicine in Eagle Butte as a part of her three year commitment to pay off her student loans. At that time, husband was unemployed, as he was working on building the parties' house and couldn't find work. St.-Pierre, 357 N.W.2d at 253.

When the parties divorced, the husband made a claim for alimony saying he gave up his career in order to move so that his wife could attend medical school and that he made substantial contributions to plaintiff's attainment of a medical degree and her increase in future earning capacity. He felt that he should be compensated for his contributions by being awarded the family home or, in the alternative, being awarded alimony in such an amount and for such period of time as necessary to enable him to attain competency to earn at a level equivalent to that which he would have had had he not sacrificed his career to support plaintiff in her career pursuits.

The Supreme Court of South Dakota did not agree. Because an educational degree is not property to be divided or valued, the court looked to an alternative method by which the husband might be compensated for his contributions to his wife's professional training and her enhanced earning capacity pulling therefrom, the court concluded that:

In a proper case the trial court should award alimony as reimbursement to the supporting spouse for his or her contribution to the non-working spouse's obtaining of an advanced training or in the way of rehabilitative alimony to

enable the supporting spouse to refresh or enhance the job skills that he or she needs to earn a living. We do not propose that the trial court be bound by any specific formula or approach in determining the amount of such alimony. Just as the trial court is not bound by any mathematical formula in dividing marital property, neither should the trial court be bound by a rigid inflexible formula in awarding reimbursement or rehabilitative alimony. Rather, the trial court should consider all relevant factors including the amount of the supporting spouse's contributions, his or her foregoing opportunities to enhance or improve professional or vocational skills, and the duration of the marriage following completion of the non-supporting spouse's professional education. St.-Pierre, 357 N.W.2d at 262.

In St.-Pierre the Court found that:

The husband did not forego any career plans or advancement as a result of moving with his wife to attend medical school and that he did secure employment which is hardly the type of personal sacrifice and self deprivation that is characteristic of so many cases in which one's spouse contributes to the professional education of his or her partner. Id.

Like the court in St.-Pierre, the Utah Supreme Court has also rejected the concept that the contributions of spouses during the marriage be compared in monetary terms because an alimony award based on such concept would be tantamount to giving a lifetime estate in the paying spouse's earnings but have no necessary relationship to the receiving spouse's actual contributions to the enhanced earning power or to that spouse's needs. Martinez, 818 P.2d at 541.

The Minnesota Supreme Court in DeLaRosa v. DeLaRosa, 309 N.W.2d 755 (Minn. 1981), affirmed an award of restitution to the wife for the financial support she provided her husband while he attended medical school. The award, however, is

limited to the money expended by the wife for husband's living expenses and any contributions made toward his direct educational costs. DeLaRosa, 309 N.W.2d at 759. In this case, the wife had demonstrated an ability to support herself but the court found that the sacrifice she made in foregoing the immediate enjoyment of earned income to enable her spouse to pursue an advanced education on a full time basis, with the expectation that the parties will enjoy a higher standard of living in the future, justified such an award. In the present case, there is no evidence that Mr. Ence sacrificed any amount of income to enable Dr. Smith to attend school nor did he pay any educational expenses.

Also, in Mahoney v. Mahoney, 453 A.2d 527 (NJ 1982), the Supreme Court of New Jersey ordered "reimbursement alimony," finding that the supporting spouse should be compensated for all financial contributions toward her former spouse's education including household expenses, educational costs, school travel expenses and other contributions used by the student spouse in obtaining his or her degree or license. Mahoney 453 A.2d at 534. However, not every spouse who contributes toward the other spouse's education or professional training is entitled to reimbursement alimony. For instance, it is unlikely that a financially successful executive's spouse who, after many years of homemaking, returns to school would upon divorce be required to reimburse her husband for his contributions toward her degree. Furthermore, reimbursement alimony should not subvert the basic goals of traditional alimony and equitable distribution. Mahoney 453 A.2d at 535. The court in Mahoney explained the award by acknowledging that a supporting spouse has

contributed more than mere earnings to her student husband, undergoing personal financial sacrifices, resulting in a reduced or lowered standard of living during the period her husband has not been employed. This loss of support and reduction of the standard of living, coupled with the unfairness resulting from the loss of the supporting spouse's expectation of future advantages, is what justifies reimbursement alimony. There is no such loss in the present case. Mr. Ence's standard of living during the marriage was never reduced. Until 1991, when he stopped working, he never depended on Dr. Smith for support or income. He made no personal sacrifices in anticipation of an increased standard of living. In fact, Mr. Ence quit working because he thought her earnings were enough to live on.

The Arizona Appellate Court in Pyeatte v. Pyeatte, 661 P.2d 196 (Ariz. App. 1982), refused to treat marriage as a strictly financial undertaking, fully compensating the parties for the investment of various contributions when they divorce. To do so would diminish the individual personalities of the husband and wife into economic entities and reduce the institution of marriage to that of a closely held corporation. Pyeatte, 661 P.2d at 207. It is up to the trial court make specific findings as to whether the education, degree, or license acquired by the student spouse during the marriage involved an unjust enrichment of that spouse, and, if so, the award to the wife should be limited to the financial contribution by her for her husband's living expenses and direct educational expenses. Id.

Finally, in Bold v. Bold, 574 A.2d 552 (Pa. 1990), the Pennsylvania Supreme Court held that the wife who supported her husband while he obtained an education

was entitled to equitable reimbursement to the extent that her contributions of support exceeded the bare minimum of her legal obligation of support. Bold v. Bold, 574 A.2d at 556.

CONCLUSION

Utah case law as well as cases from other jurisdictions, indicate that reimbursement or alimony to compensate one spouse for supporting the other will not always be appropriate or necessary. This is true in cases when the non-student spouse made no personal sacrifices and paid no direct education expenses. In some cases an award of what the Utah court's have termed "rehabilitative alimony" may be more appropriate. This is especially true in cases in which the contributing supporting spouse requires a lump sum or short term award to achieve economic self sufficiency or to improve or refresh his or her job skills. It should be up to the trial court to look at the facts and circumstances of every individual case and to determine what sacrifices or monetary contributions the supporting spouse has made to the student spouse's achievements. Any alimony award should be fair to both parties and the findings should indicate the facts upon which such an award is based.

In the present case, however, the record is clear and uncontroverted that there is no basis for an award of alimony. The findings are insufficient and not sufficiently detailed to justify an award of alimony in this case. Furthermore, there is insignificant evidence to support the trial court's findings pertaining to the alimony award. Because the record is clear and uncontroverted, a remand to the trial court will serve no purpose and this court can weigh the evidence and substitute its own judgment.

This court should reverse and order that no alimony be awarded.

RESPECTFULLY submitted this 3rd day of April, 1996.


MARTIN W. CUSTEN
Attorney for Appellant


CAROLYN D. ZEUTHEN
Attorney for Appellant

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered four true and correct copies of the foregoing Brief of Appellant, on this 4th day of April, 1996, to: Mary C. Corporon, CORPORON & WILLIAMS, P.C., 310 South Main Street, Suite 1400, Salt Lake City, Utah 84101.


CAROLYN D. ZEUTHEN

ADDENDUM

MEMORANDUM DECISION

(Ence vs. Ence, No. 945900029 9/28/95)

THE COURT: We can now show that we are on the transcribed record, but will continue to tape record from this. Now, our record should further show that we have the attorneys representing the parties involved by telephone. And on the Plaintiff's side, we have Dr. Ence, who is with Mr. Custen at his office. And we are on a speaker phone at his office. And Ms. Corporon is representing the Defendant. And, Ms. Corporon, as I understand it Mr. Ence is not with you.

MS. CORPORON: That is correct, he has remained in St. George rather than travel to Salt Lake.

THE COURT: All right. Now the Court finds first of all that there are grounds for the divorce as the testimony was given by the Plaintiff in this case. And the Court is going to grant a divorce on the grounds of irreconcilable differences. This divorce will become final when it is entered in the Clerk's Office. And the Findings and Decree should reflect the ruling that the Court presents this morning. And should also reflect the stipulations of the parties.

The Court is going to require that the house payment that needs to continue to be made on the home should be split fifty/fifty between the parties.

Regarding the personal property, the parties agree that they would each keep the personal property in their

1 possession. But during the trial there was a dispute as to
2 the value of that personal property. This Court finds that
3 the personal property that is in the Plaintiff possession to
4 be worth \$3,900.00. And that the personal property in the
5 Defendant's possession is worth \$2,500.00.

6 The parties agreed that the Geo Metro automobile and the
7 Cougar automobile would go to the Plaintiff. And that the
8 pickup truck with its camper shell would go to the Defendant.
9 The Court finds that the values there are pretty much a wash,
10 so I haven't attempted to assign a value. Just that the
11 vehicles described should each go to the parties.

12 The Plaintiff should be awarded her I.R.A. of \$2,000.00
13 and the Defendant should be awarded the I.R.A. in his name of
14 \$250.00.

15 The Court finds from its notes--and counsel, we didn't
16 spend a lot of time on this, and you can chime in here if you
17 think I am missing something. But I found from a review of my
18 notes that there were two debts that needed to be paid that
19 were the joint obligation of the parties. And they consisted
20 of an A T & T credit card with a balance of \$2,256.00. And
21 then a Visa card with a balance of \$1,600.00. The Court is
22 going to order that those be paid and discharged by the
23 Plaintiff.

24 Do either of you want to comment on that?

25 MR. CUSTEN: No, your Honor.

1 MS. CORPORON: No.

2 THE COURT: Now, I realize you may want to comment
3 when I get all done, and I will give you the opportunity.

4 MS. CORPORON: I think those figures are accurate,
5 your Honor.

6 THE COURT: The Court commented on the record that I
7 was leaning towards trying to award all of the pension and
8 profit sharing assets to the Defendant in this case. And I
9 asked the parties to write supplemental briefs in order to
10 help me analyze the value there, and how that division might
11 be made. As I went through this case in more detail in
12 preparation for this decision, I have decided not to go that
13 direction. And I am going to order that the pension and
14 profit sharing assets be divided according to the Woodward
15 formula. And that a QDRO be prepared, or QDROs, if more than
16 one are necessary, to handle those proceeds.

17 Now, that brings me town to an analysis of the alimony
18 issue. These parties have been married in what the Court
19 considers to be a long term marriage of 21 years. We have the
20 Defendant at age 56 at this time, and the Plaintiff at age 41.
21 Both parties have worked and contributed to the common good of
22 the family and of the marriage during their married life.

23 Plaintiff, and to her credit, during this marriage not
24 only worked as a homemaker, and from time to time worked part-
25 time jobs, but also in the somewhat traditional sense put

1 herself through school in that she was the one that went to
2 school and did the studying and obtained the grades necessary
3 to advance herself. And was able to obtain eventually an
4 admission to a medical school, and then a degree, a medical
5 degree, and is now working as a medical doctor.

6 The Plaintiff, in order to finance that schooling, took
7 out student loans. And has been paying those loans off. And
8 part of her employment package that attracted her to Brigham
9 City involved monies that were to be used to pay off those
10 student loans.

11 I think that to characterize that situation as though the
12 Plaintiff was the only one that contributed to her being able
13 to go through school and to accomplish the things that she did
14 is not an accurate statement. The Court believes that both
15 parties contributed significantly to their family life, such
16 as it was during those years that the Plaintiff was going to
17 school.

18 The evidence would be that the parties had a home, and
19 that the home was very adequate for the family. The parties'
20 children and the mother lived there most of the time; with the
21 Defendant, because of his work, living away from the home, but
22 coming home on weekends. All of the Defendant's paycheck went
23 into the family pot, if you will, which helped with keeping a
24 roof over the family's head and keeping food on the table.
25 Which also allowed during some of the school years for the

1 Plaintiff to have one of the medical students live in the home
2 and assist with the care of the children. And I believe
3 generally the upkeep and care of the home.

4 By saying that, this Court is not trying to put a value
5 on who did more work or less work or anything else. What I am
6 finding is that the parties each contributed to the family
7 good, and the accomplishments that the family made.

8 I am pausing for just a moment to look at my notes.

9 I find from the evidence that a view of the historical
10 income of the family is somewhat interesting. The evidence
11 that I have would show that there was an income of \$51,000.00
12 to the family in 1987; \$41,000.00 in 1988; \$36,000.00 in '89;
13 \$36,000.00 in '90; \$30,000.00 in '91; \$34,000.00 in '92;
14 \$57,000.00 I believe in '93 and \$100,000.00 in '94. And then
15 the evidence that was presented to the Court concerning their
16 current incomes would show Plaintiff earning a gross of about
17 \$120,000.00 per year. And the Defendant earning gross of
18 approximately \$25,000.00 per year. Plaintiff having a current
19 take home--and these figures were somewhat in dispute. The
20 Court finds when you factor in the amount being paid for the
21 student loan, the Court believes that the net income to the
22 Plaintiff is approximately \$7,000.00 per month. And that the
23 net income to the Defendant is approximately \$1,600.00 per
24 month.

25 The Court believes that in this case that there has been

1 a dramatic spike increase certainly in the Plaintiff's income
2 that has occurred within the last two years, with significant
3 increase in the last year of the parties' marriage. The
4 income history would begin back in '87 with that contribution
5 being made almost entirely by the Defendant. And then the
6 Defendant began to scale back the amount of his working, and
7 we reached a low in '91. And then as the Plaintiff's income
8 began to increase, that reflects the increases of up to the
9 present.

10 The Court believes that that is important to consider in
11 that the standard of living that these parties enjoyed during
12 those 21 years of marriage was not anywhere near the standard
13 of living that could be enjoyed by the parties at the
14 Plaintiff's current level of income. On the other hand, as I
15 have already stated, I believe that the Defendant, through his
16 contributions, contributed to the Plaintiff's in part being
17 where she is today.

18 The Court does not believe in this case that an
19 equalization of income approach is appropriate from an
20 equitable point of view. Rather what the Court has attempted
21 to do is look at their net income levels and the different
22 expenses of the parties, and given the history of the income
23 in the family, make an allocation of alimony that appears to
24 the Court to be equitable taking all of those circumstances
25 into account.

1 The Court also wants to make a record of the fact that
2 certainly the Court is not downplaying in any way the effort
3 that was made by the Plaintiff in this case. As I have
4 already said, she was working as a homemaker, keeping the
5 house on keel, taking care of the children, and putting
6 herself through school, which to the Court appears to be a
7 phenomenal effort on her part.

8 The Court believes in this situation that an alimony
9 amount of \$1,700.00 per month for 21 years would be the
10 appropriate award. In arriving at that, I took a look at the
11 statement provided by the Plaintiff of her costs of monthly
12 living, her monthly expenses. And in going down through that
13 and backing out some of the items that appeared to the Court
14 to be particularly needed for the children, and also
15 discounting somewhat the fact that there were more people
16 involved in that budget than would be involved in the
17 Defendant's budget, and then taking into account what I think
18 would be a reasonable standard of living for the Defendant, it
19 appeared to the Court that if I add \$1,700.00 on to the
20 \$1,600.00 that is being taken home net by the Defendant,
21 putting him at a \$3,300.00 level, that that is a reasonable
22 level for the Defendant to be at.

23 Again, this Court is not attempting to equalize the
24 income because the Plaintiff will have certainly more net
25 income than the Defendant. But the Court again believes that

1 a major portion of that increase is just this spike that has
2 occurred right at the end of the marriage, and is not
3 something that is part of the standard of living that these
4 parties have grown accustomed to.

5 Now with regard to attorney fees, the Court believes that
6 the rate of \$150.00 per hour that was proffered by Ms.
7 Corporon based on her 15 years of experience and the Court's
8 observation of her work in the courtroom, that that rate is
9 reasonable. And I believe, Ms. Corporon, you indicated that
10 your attorney fees bill was at \$3,000.00?

11 MS. CORPORON: Yes, your Honor.

12 THE COURT: The Court believes after I have done
13 some adjustments, after the alimony award, that it would be
14 appropriate for the Plaintiff to pay \$1,000.00 towards
15 Defendant's attorney fees. And that Plaintiff should be
16 responsible for her own attorney fees.

17 Now, have I left you with some loose ends?

18 MR. CUSTEN: Yes.

19 THE COURT: Okay, Mr. Custen.

20 MR. CUSTEN: QDRO, what figures--can you hear me?

21 MS. CORPORON: What do you mean what figures?

22 MR. CUSTEN: We argued different values--I am sorry,
23 different time frames on the defined contribution. I think it
24 should--

25 THE COURT: Mr. Custen.

1 MR. CUSTEN: Yes.

2 THE COURT: Let me ask you to go off the speaker
3 phone for a moment. And then if you want to put me back on as
4 I discuss any further ruling, you can. But you are breaking
5 up. And I am having trouble hearing you.

6 MR. CUSTEN: Got me?

7 THE COURT: Now I can hear you better.

8 MR. CUSTEN: I don't have the memoranda in front of
9 me. It seems to me, Mary and I were disputing the value on
10 the defined contribution plan as to whether it should stop--
11 whether we should value it all the way through. It seems to
12 me like the figure was about 60 percent, though, either way.

13 MS. CORPORON: The QDRO will fix that problem.

14 THE COURT: Ms. Corporon, do you want to make a
15 comment?

16 MS. CORPORON: Just that I think what Marty is
17 saying is that with the defined contribution plan, there is no
18 plan administrator to do the math for us to figure out what is
19 attributable to what period of time. Therefore we still need
20 to know what percentage of that plan goes to Plaintiff and
21 what percentage goes to Defendant. We address that in the
22 memorandum.

23 Now my argument in the memorandum was essentially that he
24 contributed many years--he contributed many years before the
25 date of the marriage to the plan itself. And that there is

1 some monies that's attributable to interest earned on
2 premarital contributions that she didn't do anything to
3 enhance. It just was sitting there and would have continued
4 to grow without any marital contribution. That was the basis
5 for our argument as to how the plan should be divided. And I
6 think Marty argued in his memorandum it should be split
7 fifty/fifty. So I would leave it to the Court on that.

8 THE COURT: Mr. Custen.

9 MR. CUSTEN: Well, yeah, I was talking to my client.
10 I am trying to remember. It seems to me I did it two ways.
11 There was a fact sheet that was attached that Mary probably
12 saw that we didn't put into evidence that discussed the
13 credits that Mr. Ence got on his defined contribution plan.
14 Do you know the one I am talking about, Mary? It came from
15 the guy, Hafner, whatever his name was. Although the plan
16 started in 1960 for instance, your Honor, Mr. Ence didn't
17 start accumulating these credits until about '65.

18 But when I did a rough percentage, when I did like
19 either--you know, when I put that as a 35 year period with 21
20 years being during the marriage versus a shorter period using
21 the number of years, the number of credits that were accrued
22 during the marriage and those accrued before, oddly enough it
23 came out to about 60 percent either way. So I think when Mary
24 looks at that, we can probably work that out.

25 MS. CORPORON: What you are saying is 60 percent of

1 the plan is marital?

2 MR. CUSTEN: 60 percent of the defined contribution
3 plan--(inaudible).

4 MS. CORPORON: Right.

5 MR. CUSTEN: I will do whatever number of QRDOS it
6 takes and so forth.

7 MS. CORPORON: So we are talking about his getting
8 40 percent of the defined off the top, and then the 60
9 percent?

10 MR. CUSTEN: Yeah, however they do it. My guess is
11 being a defined contribution plan, they will segregate it over
12 to an account in Wendy's name.

13 THE COURT: Are you comfortable with that, Ms.
14 Corporon?

15 MS. CORPORON: I think so.

16 THE COURT: That will be the Court's ruling then.
17 And so do you need any more detail from me than a 60/40 split
18 on the defined contribution plan?

19 MR. CUSTEN: No, we will work that out, Judge.

20 I don't know if you put this in, but Dr. Ence would like
21 to be restored to her prior surname of Smith.

22 THE COURT: I did have that in my notes. That will
23 be the Order of the Court.

24 MS. CORPORON: Marty, who is going to prepare the
25 documents on this?

1 MR. CUSTEN; I am going to let you, Mary, because I
2 am going out of town.

3 MS. CORPORON: Okay. I need to know what Dr.
4 Smith's first, last and middle name would be.

5 MR. CUSTEN: Wendalyn, W e n d a l y n, Gay, G a y,
6 Smith.

7 THE COURT: Now, counselors, can you both hear me?

8 MS. CORPORON: Yes.

9 THE COURT: Is there anything else that you need of
10 me while we are on the record by way of questions about the
11 ruling or anything I have left out?

12 MS. CORPORON: I have no other questions that come
13 to mind right now.

14 MR. CUSTEN; No, I think Mary and I can add it in
15 and agree on it.

16 THE COURT: All right. Then what I will do, I don't
17 mind you continuing your conversation but we will go off the
18 record at this time. And I will keep you here on the phone as
19 long as you need to be talking to each other.

20 MS. CORPORON: I think that's it.

21 MR. CUSTEN: I think that's it. Mary, I will be
22 gone to the 10th, so give me--that's assuming you crank it out
23 right away.

24 MS. CORPORON: I will just give it to you around the
25 10th of October.

SECOND JUDICIAL DISTRICT COURT
NOV 13 1995 9 57

MARY C. CORPORON #735
Attorney for Defendant
CORPORON & WILLIAMS, P.C.
310 South Main Street, Suite 1400
Salt Lake City, Utah 84101
(801) 328-1162

IN THE SECOND JUDICIAL DISTRICT COURT,
IN AND FOR WEBER COUNTY, STATE OF UTAH.

WENDALYN ENCE,
Plaintiff,

DECREE OF DIVORCE

NOV 14 1995

-vs-

Case No. 954900029

LARRY D. ENCE,
Defendant.

Judge Michael J. Glasmann

THE ABOVE-ENTITLED ACTION having come before the court for trial Friday, the 8th of September, the Honorable Michael J. Glassman, District Court Judge presiding, the plaintiff appearing in person and by and through her counsel of record, Martin W. Custen, the defendant appearing in person and by and through his counsel of record, Mary C. Corporon, the court proceeded to hear testimony of the parties and their counsel, and to review the file and the pleadings contained therein, and more than ninety-days having elapsed since filing the complaint for divorce, the court having heretofore made and entered its findings of fact and conclusions of law; based thereon and for good cause appearing;

MICROFILM ROLL 158 PAGE 132

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Both parties are granted a decree of divorce dissolving the bonds of matrimony heretofore existing between the parties, the same to become final and effective immediately upon being signed by the Judge and entered by the Clerk.

2. No child support or maintenance is awarded for the minor child. Plaintiff is awarded custody of the minor child, subject to defendant's reasonable and liberal rights of visitation.

3. The parties shall continue to list the real property in Tucson, Arizona for sale with a duly qualified real estate agent pursuant to a multiple listing contract, and that they use their best efforts to accomplish the sale of this property as soon as is commercially feasible at a commercially reasonable sales price. Upon the sale of the property, the sale proceeds, net of payment of the outstanding mortgage obligation for the property, and net of payment of the costs of sale, including a reasonable real estate sales commission, shall be divided equally between the parties, one-half to each. Until such time as the home in Arizona has sold, the parties shall share equally in the payment of the monthly mortgage obligation for the home, and each shall hold the other harmless on one-half of that monthly payment.

4. Each party is awarded the items of household furnishings and fixtures, appliances, personal clothing and effects, currently in his or her possession free and clear of any claim of the other party.

5. The Geo Metro and the Cougar vehicles are awarded to the plaintiff free and clear of any interest of the defendant. The pickup truck and camper are awarded to the defendant free and clear of any interest of the plaintiff. Each party is ordered to pay and assume any debt or obligation which encumbers the title of the motor vehicle awarded to him or to her, and each shall hold the other harmless thereon.

6. The building lot acquired by the parties is awarded to the plaintiff free and clear of any interest of the defendant as the plaintiff's sole and separate property, subject to the indebtedness thereon which she shall pay and assume and to hold defendant harmless thereon.

7. Each party is awarded his or her individual retirement account free and clear of any claim of the other.

8. The debts to AT&T and Visa shall be paid by the plaintiff and she is ordered to hold defendant harmless thereon. Each party is ordered to pay and assume any debts or obligations incurred in his or her own name commencing effective with the date of filing of the complaint for divorce herein and each shall hold the other harmless thereon.

9. Defendant's retirement plan through his union shall be divided equally between the parties, one-half to each, according to the Woodward formula. A stipulated Qualified Domestic Relations Order shall issue from this Court, as necessary, to accomplish this distribution of the retirement plan.

10. Defendant's defined contribution retirement plan through his union shall be divided 40% to the defendant free and clear of any interest of the plaintiff, as the defendant's sole and separate premarital and non-marital property, and the remaining 60% shall be divided between the parties, one-half to each. Hence, 70% of the plan is awarded to the defendant, and 30% to the plaintiff. A stipulated Qualified Domestic Relations Order shall issue from this Court as necessary to accomplish this distribution of the defined contribution retirement plan.

11. Defendant is awarded alimony from the plaintiff in the sum of \$1,700.00 per month, said alimony to commence effective with the month of October 1995, and to continue for 21 years from the date of signing and entry of the decree of divorce herein, or until the death of the plaintiff, the death of the defendant, or the defendant's remarriage or cohabitation, whichever event should occur first.

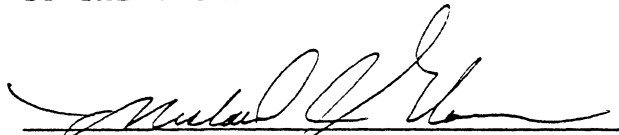
12. Plaintiff is ordered to pay a portion of defendant's attorney's fees in the sum of \$1,000.00, and defendant shall pay the remaining balance of his attorney's fees. The plaintiff shall pay her own court costs and attorney's fees in this matter, and she shall hold defendant harmless thereon.

13. Each party shall execute and deliver all necessary documents to transfer the title and ownership of the properties of the parties as discussed herein.

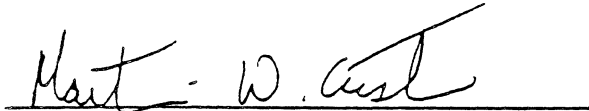
14. Plaintiff's surname is restored to her and she shall be known from the date of signing and entry of the Decree of Divorce herein as "Wendalyn Gay Smith."

DATED this 13th day of November, 1995.

BY THE COURT:


MICHAEL L. GLASMANN
District Court Judge

APPROVED AS TO FORM AND CONTENT:



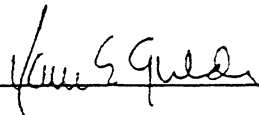
MARTIN CUSTEN
Attorney for Plaintiff

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I caused the foregoing Decree of Divorce, to be mailed, postage prepaid, by placing a true and correct copy of the same in an envelope addressed to:

MARTIN W. CUSTEN
Attorney for Plaintiff
2408 Van Buren Avenue
Ogden, Utah 84401

on the 8 day of November, 1995.


Secretary

THE SECOND JUDICIAL DISTRICT COURT
NOV 13 1995

MARY C. CORPORON #735
Attorney for Defendant
CORPORON & WILLIAMS, P.C.
310 South Main Street, Suite 1400
Salt Lake City, Utah 84101
(801) 328-1162

IN THE SECOND JUDICIAL DISTRICT COURT,
IN AND FOR WEBER COUNTY, STATE OF UTAH.

WENDALYN ENCE,
Plaintiff,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

NOV 14 1995

-vs-

Case No. 954900029

LARRY D. ENCE,
Defendant.

Judge Michael J. Glasmann

THE ABOVE-ENTITLED ACTION having come before the court for trial Friday, the 8th of September, the Honorable Michael J. Glassman, District Court Judge presiding, the plaintiff appearing in person and by and through her counsel of record, Martin W. Custen, the defendant appearing in person and by and through his counsel of record, Mary C. Corporon, the court proceeded to hear testimony of the parties and their counsel, and to review the file and the pleadings contained therein, and more than ninety-days having elapsed since filing the complaint for divorce, based thereon and for good cause appearing; the court now makes and enters the following:

FINDINGS OF FACT

1. The parties were residents of Weber County, State of Utah, for three months or more immediately prior to the filing of this action.

2. Irreconcilable differences have arisen between the parties, making the continuation of the marriage impossible.

3. The parties maintained their marital domicile in Weber County, State of Utah.

4. There have been two children born as issue of this marriage, both of whom had achieved their majority or were about to achieve their majority as of the date of trial herein. For this reason it is reasonable, just and proper that no disposition be made for support or maintenance of the minor children. Plaintiff should be awarded custody of the minor child, subject to defendant's reasonable and liberal rights of visitation.

5. During the course of the parties' marriage, the parties acquired an interest in certain real property located in Tucson, Arizona, consisting of a single family home and residence. As of the date of trial herein, this residence was not occupied by either party, and was listed for sale. It is reasonable, just and proper that the parties be ordered to continue to list this property for sale with a duly qualified real estate agent pursuant to a multiple listing contract, and that they use their best efforts to accomplish the sale of this property as soon as is commercially feasible at a commercially reasonable sales price. Upon the sale of the property, the sale proceeds, net of payment of the

outstanding mortgage obligation for the property, and net of payment of the costs of sale, including a reasonable real estate sales commission, should be divided equally between the parties, one-half to each. Until such time as the home in Arizona has sold, the parties should share equally in the payment of the monthly mortgage obligation for the home, and each should be ordered to hold the other harmless on one-half of that monthly payment.

6. The parties have previously made a fair and equitable division of their household furnishings and fixtures, appliances, personal clothing and effects, and each party should be awarded the items currently in his or her possession free and clear of any claim of the other party. The court finds that the personal property awarded to the plaintiff has a value of \$3,900.00 and the personal property awarded to the defendant has a value of \$2,500.00.

7. During the course of their marriage, the parties have acquired an interest in certain motor vehicles including a Geo Metro, a Cougar, and a pickup truck and camper. The Geo Metro and the Cougar should be awarded to the plaintiff free and clear of any interest of the defendant. The pickup truck and camper should be awarded to the defendant free and clear of any interest of the plaintiff. Each party should be ordered to pay and assume any debt or obligation which encumbers the title of the motor vehicle awarded to him or to her, and each should be ordered to hold the other harmless thereon. The court finds that this distribution of

the motor vehicles has the effect of equalizing the value of the vehicles as between the parties.

8. During the course of the parties' marriage, the plaintiff has acquired an interest in a building lot located in the State of Utah. This building lot should be awarded to the plaintiff free and clear of any interest of the defendant as the plaintiff's sole and separate property, subject to the indebtedness thereon which she should be ordered to pay and assume and to hold defendant harmless thereon.

9. During the course of the parties' marriage they have acquired an interest in certain individual retirement accounts. The plaintiff's individual retirement account has a value of approximately \$2,000.00. The defendant's individual retirement account has a value of approximately \$250.00. Each party should be awarded his or her individual retirement account free and clear of any claim of the other.

10. During the course of their marriage the parties have incurred certain debts and obligations including an AT&T card and a Visa. The indebtedness owing for the AT&T card is approximately \$2,256.00. The indebtedness owing for the Visa card is approximately \$1,600.00. These marital debts and obligations should be paid by the plaintiff and she should be ordered to hold defendant harmless thereon. Each party should be ordered to pay and assume any debts or obligations incurred in his or her own name commencing effective with the date of filing of the complaint for

divorce herein and each should be ordered to hold the other harmless thereon.

11. During the course of their marriage the defendant has acquired an interest in a defined benefit retirement plan through his union. This retirement plan should be divided equally between the parties, one-half to each, according to the Woodward formula. A stipulated Qualified Domestic Relations Order should issue from this Court, as necessary, to accomplish this distribution of the retirement plan.

12. During the course of the parties' marriage and prior to the time of the parties' marriage, the defendant acquired an interest in a defined contribution retirement plan through his union. Forty percent of this defined contribution plan should be awarded to the defendant free and clear of any interest of the plaintiff, as the defendant's sole and separate premarital and non-marital property. The remaining 60% of the existing defined contribution retirement plan should be divided equally between the parties, one-half to each. Hence, 70% of the current value of the plan should be awarded to the defendant and 30% to the plaintiff. A stipulated Qualified Domestic Relations Order should issue from this Court as necessary to accomplish this distribution of the defined contribution retirement plan.

13. The defendant husband has made a claim for alimony from the plaintiff wife. With regard to this claim for alimony, the court makes the following factual findings:

a. The parties' marriage is of long duration, having lasted approximately 21 years; and

b. The parties' have jointly raised two children to maturity during this marriage; and

c. Plaintiff is 41 years of age; and

d. Defendant is 56 years of age; and

e. During the course of the parties' marriage, they both worked to the common good of their family unit. Defendant was employed full-time outside the home until the plaintiff completed medical school, working as a heavy equipment operator. The plaintiff was first a homemaker, then worked outside the home, and then attended medical school during the course of the parties' marriage. Plaintiff took student loans to finance her medical school education, which are now being paid in full by reason of her current employment. However, this court cannot characterize this situation as plaintiff having been the only one to put herself through medical school. Both parties contributed significantly and substantially to plaintiff's attendance at medical school; and

f. The lifestyle of the parties during their marriage was such that they had an adequate home. All of defendant's paychecks went to the "family pot." During the time plaintiff attended medical school, this house supported by the defendant's labors enabled the plaintiff to have another medical student live with her as a housekeeper/nanny, in exchange for housing; and

g. The court is unable to value one party's labor more than the other's; and

h. Each party contributed significantly and substantially to the common family good; and

i. The combined historical annual income of the family is approximately as follows: 1987, \$51,000; 1988, \$41,000; 1989, \$36,000; 1990, \$36,000; 1991, \$30,000; 1992, \$34,000; 1993, \$57,000; and 1994, \$100,000; and

j. Plaintiff's gross income is currently \$120,000.00 per year and defendant's current gross income is \$25,000.00 per year; and

k. Plaintiff's income, net of taxes is \$7,000.00 per month and defendant's income, net of taxes is \$1,600.00 per month; and

l. The parties have realized a dramatic increase in their combined household income in the past two years; and

m. In 1987, the defendant was virtually the sole contributor to the parties' household income. In 1995 that situation has been reversed, and the plaintiff is virtually the sole contributor to the parties' household income; and

n. The standard of living enjoyed by the parties during their marriage does not approach the standard of living which can be enjoyed by the plaintiff now, based upon her income. On the other hand, during the time the parties lived together as husband

and wife, the defendant contributed in part to achieving the plaintiff's current financial situation; and

o. Based upon all of the facts and circumstances, it would not be equitable to equalize the income of the parties; and

p. Defendant should be awarded alimony from the plaintiff in the sum of \$1,700.00 per month, said alimony to commence effective with the month of October 1995, and to continue for 21 years from the date of signing and entry of the decree of divorce herein, or until the death of the plaintiff, the death of the defendant, or the defendant's remarriage or cohabitation, whichever event should occur first; and

q. The alimony award in this case is based upon a reasonable standard of living for the defendant.

14. The court finds that the award of alimony in this case does not equalize the parties' incomes, and that the plaintiff will still have significantly more net income than the defendant.

15. The court finds that the defendant's attorney, Mary C. Corporon, has charged a fee in this matter of \$150.00 per hour, which the court finds to be a reasonable fee for an attorney of her experience practicing in this community in the field of contested domestic relations law. The court finds that it is reasonable, just and proper that the plaintiff should pay a portion of defendant's attorney's fees in the sum of \$1,000.00, and that the defendant should pay the remaining balance of his attorney's fees.

The plaintiff should pay her own court costs and attorney's fees in this matter, and she should hold defendant harmless thereon.

16. Each party should execute and deliver all necessary documents to transfer the title and ownership of the properties of the parties as discussed herein.

17. Prior to her marriage to the defendant, the plaintiff was known by the surname "Smith" and this surname should be restored to her and she should be known from the date of signing and entry of the Decree of Divorce herein as "Wendalyn Gay Smith."

BASED UPON the foregoing Findings of Fact, the court now makes the following:

CONCLUSIONS OF LAW

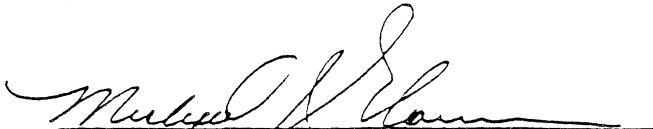
1. The court has jurisdiction over the parties of this action and the subject matter of this action.

2. That a decree of divorce should be awarded to defendant on the basis of irreconcilable differences, the same to become final immediately upon being signed by the court and entered by the clerk.

3. That said decree of divorce should be in conformance with the foregoing findings of fact.

DATED this 13th day of November, 1995.

BY THE COURT:


MICHAEL L. GLASMANN
District Court Judge

APPROVED AS TO FORM AND CONTENT:

Martin W. Custen

MARTIN CUSTEN
Attorney for Plaintiff

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I caused the foregoing Findings of Fact and Conclusions of Law to be mailed, postage prepaid, by placing a true and correct copy of the same in an envelope addressed to:

MARTIN W. CUSTEN
Attorney for Plaintiff
2408 Van Buren Avenue
Ogden, Utah 84401

on the 8 day of November, 1995.

Kenneth G. Gulderson

Secretary