

1995

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

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 950829-CA

IN THE UTAH COURT OF APPEALS

WENDALYN ENCE, nka
WENDALYN SMITH,

Plaintiff/Appellant,

vs.

LARRY D. ENCE,

Defendant/Appellee.

:
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:
:

Priority No. 15

Case No. 950829-CA

BRIEF OF APPELLEE

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FILED

MAY 21 1996

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

WENDALYN ENCE, nka	:	
WENDALYN SMITH,	:	
Plaintiff/Appellant,	:	
vs.	:	
LARRY D. ENCE,	:	Case No. 950829-CA
Defendant/Appellee.	:	

BRIEF OF APPELLEE

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

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
NATURE OF THE PROCEEDINGS	1
STATEMENT OF THE ISSUES	2
STANDARD OF REVIEW	3
DETERMINATIVE PROVISIONS, CASES, STATUTES, AND RULES, ETC.	4
STATEMENT OF THE CASE	4
STATEMENT OF THE FACTS	5
SUMMARY OF THE ARGUMENT	9
ARGUMENT	11
I. THE TRIAL COURT DID NOT ERR IN AWARDING ALIMONY TO HUSBAND INASMUCH AS HUSBAND SUBSTANTIALLY CONTRIBUTED TO THE PARTIES' TWENTY-ONE YEAR MARRIAGE	11
A. The Trial Court's Findings of Fact Were Sufficient to Support the Alimony Award.	12
B. The Trial Court Did Not Err In Setting Forth Its Findings of Fact Showing The Basis for the Alimony Award and Further Set Forth Sufficient Findings to Support the Finding That Husband Contributed To Wife's Medical School Career	19
II. COMPENSATION ADJUSTMENTS IN MARITAL PROPERTY AND ALIMONY AWARDS SHOULD REMAIN, BASED ON EQUITABLE PRINCIPLES, SUBJECT TO THE INDIVIDUAL FACTS OF EACH CASE	28
III. THE TRIAL COURT ERRED IN FAILING TO EQUALIZE THE PARTIES' RESPECTIVE INCOMES	31

IV. HUSBAND SHOULD BE REIMBURSED FOR ATTORNEY'S FEES INCURRED IN THIS ACTION	34
CONCLUSION	37
CERTIFICATE OF SERVICE	39

TABLE OF AUTHORITIES

Utah Cases

<u>Andersen v. Andersen</u> , 757 P.2d 476 (Utah Ct. App. 1988) . . .	20
<u>Bell v. Bell</u> , 810 P.2d 489 (Utah Ct. App. 1991)	13
<u>Breinholt v. Breinholt</u> , 905 P.2d 877 (Utah Ct. App. 1995) . .	11
<u>Cabrera v. Cottrell</u> , 694 P.2d 622 (Utah 1985)	35
<u>Chambers v. Chambers</u> , 840 P.2d 841 (Utah Ct. App. 1992) . . .	13
<u>Crouse v. Crouse</u> , 817 P.2d 836 (Utah Ct. App. 1991)	34
<u>Eames v. Eames</u> , 735 P.2d 395 (Utah Ct. App. 1987)	4
<u>Gardner v. Gardner</u> , 748 P.2d 1076 (Utah 1988)	3, 12, 19, 23
<u>Godfrey v. Godfrey</u> , 854 P.2d 585 (Utah Ct. App. 1993)	13
<u>Haumont v. Haumont</u> , 793 P.2d 421 (Utah Ct. App. 1990)	34
<u>Higley v. Higley</u> , 676 P.2d 379 (Utah 1983)	19, 22, 31
<u>Hoagland v. Hoagland</u> , 852 P.2d 1025 (Utah Ct. App. 1993) . .	29
<u>Howell v. Howell</u> , 806 P.2d 1209 (Utah Ct. App. 1991)	29
<u>Jones v. Jones</u> , 700 P.2d 1072 (Utah 1985)	12, 13, 14, 19, 22, 31
<u>Martindale v. Adams</u> , 777 P.2d 514 (Utah Ct. App. 1989) . . .	36
<u>Martinez v. Martinez</u> , 754 P.2d 69 (Utah Ct. App. 1988) . . .	23

<u>Martinez v. Martinez</u> , 818 P.2d 538 (Utah 1991)	19, 25, 27, 31
<u>Maughan v. Maughan</u> , 770 P.2d 145 (Utah Ct. App. 1989)	34
<u>Muir v. Muir</u> , 841 P.2d 736 (Utah Ct. App. 1992)	34, 35
<u>Munns v. Munns</u> , 790 P.2d 116 (Utah Ct. App. 1990)	20
<u>Olson v. Olson</u> , 704 P.2d 564 (Utah 1985)	21, 22, 31
<u>Paffel v. Paffel</u> , 732 P.2d 96 (Utah 1986)	22
<u>Peterson v. Peterson</u> , 737 P.2d 237 (Utah Ct. App. 1987) .	12, 19
<u>Rasband v. Rasband</u> , 752 P.2d 1331 (Utah Ct. App. 1988)	19, 23, 35
<u>Rayburn v. Rayburn</u> , 738 P.2d 238 (Utah Ct. App. 1987)	19
<u>Riche v. Riche</u> , 784 P.2d 465 (Utah Ct. App. 1989)	34
<u>Roberts v. Roberts</u> , 835 P.2d 193 (Utah Ct. App. 1992) . .	12, 13
<u>Ruhsam v. Ruhsam</u> , 742 P.2d 123 (Utah Ct. App. 1987)	3
<u>Sampinos v. Sampinos</u> , 750 P.2d 615 (Utah Ct. App. 1988) . . .	23
<u>Schindler v. Schindler</u> , 776 P.2d 84 (Utah Ct. App. 1989)	11, 13
<u>Throckmorton v. Throckmorton</u> , 767 P.2d 121, (Utah Ct. App. 1988)	3, 21
<u>Tremayne v. Tremayne</u> , 116 Utah 483 (1949)	19

Other State Cases

<u>Mahoney v. Mahoney</u> , 453 A.2d 527 (N.J. 1982)	30
<u>Pyeatte v. Pyeatte</u> , 681 P.2d 196 (Ariz. Ct. App. 1982) . . .	30
<u>St.-Pierre v. St.-Pierre</u> , 357 N.W.2d 250 (S.D. 1984)	29

Statutes

Utah Code Ann. §30-3-5	4, 13, 25, 28, 31
Utah Code Ann. §30-3-3	34
Utah Code Ann. §78-2a-3(2)(h)	1

IN THE UTAH COURT OF APPEALS

WENDALYN ENCE, nka	:	
WENDALYN SMITH,	:	
Plaintiff/Appellant,	:	
vs.	:	
LARRY D. ENCE,	:	Case No. 950829-CA
Defendant/Appellee.	:	

BRIEF OF APPELLEE

COMES NOW the Appellee to the above-captioned matter (hereinafter "Husband"), by and through counsel, and submits the following as his brief of Appellee herein:

STATEMENT OF JURISDICTION

Jurisdiction is conferred upon the Court of Appeals pursuant to Utah Code Annotated, §78-2a-3(2)(h), and the provisions of Rules 3 and 4 of the Utah Rules of Appellate Procedure.

NATURE OF THE PROCEEDINGS

This appeal is from a final Decree of Divorce and the Findings of Fact and Conclusions of Law in support thereof, of the Second Judicial District Court in and for Weber County, State of Utah. In particular, Wife has appealed those provisions which awarded Husband \$1,700 per month alimony from wife; including whether the

trial court's findings supported the award, whether the trial court erred with regard to entering specific detailed findings regarding the amount and duration of the alimony award, and whether the trial court erred in finding that Husband contributed significantly and substantially to Wife's medical school career. Wife has further appealed the trial court's property and alimony award, specifically regarding what factors the court should consider in deciding whether or not to make a compensation adjustment.

Husband appeals the trial court's alimony award. Specifically, Husband appeals the provisions regarding the amount thereof, and whether the court's determination of that amount properly considered Husband's needs, Wife's ability to pay, and equalization of the parties' income.

In addition, Husband has requested that this court award Husband attorney fees and costs on appeal.

STATEMENT OF THE ISSUES

I. Appellant's issues:

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 Husband contributed significantly and substantially to his wife's attendance at medical school?

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

II. Appellee's Issues:

A. Did the trial court err in awarding Husband alimony in the amount of \$1,700 per month, considering Husband's needs, Wife's ability to pay, and equalization of the parties' income?

B. Is Husband entitled to attorney fees herein?

STANDARD OF REVIEW

The standard of review on appeal in this case is an abuse of discretion standard. "Trial courts have considerable discretion to adjust divorcing parties' financial and property interests." Throckmorton v. Throckmorton, 767 P.2d 121, 122 (Utah Ct. App. 1988), citing Ruhsam v. Ruhsam, 742 P.2d 123, 124 (Utah Ct. App. 1987). This court has stated that "[a]bsent a showing of clear and prejudicial abuse of discretion, we will not interfere with an alimony or property award." Throckmorton, at 123, citing Gardner

v. Gardner, 748 P.2d 1076, 1078 (Utah 1988); Eames v. Eames, 735 P.2d 395, 397 (Utah Ct. App. 1987).

DETERMINATIVE PROVISIONS, CASES, STATUTES, AND RULES

There is no case law authority, nor statutory authority believed by Husband to be wholly dispositive or wholly determinative of the issues raised on appeal; however, Utah Code Ann. § 30-3-5 (Supp. 1996) is substantially relevant.

STATEMENT OF THE CASE

Appellant, Wendalyn Ence, now known as Wendalyn Smith (hereinafter referred to as "Wife") filed a Complaint for divorce on January 5, 1995. Husband filed an Answer on February 21, 1995.

This divorce action was tried before the Second District Court in and for Weber County, State of Utah, on the 8th day of September, 1995, the Honorable Michael J. Glasmann, presiding.

Among other things, the judge entered orders regarding alimony. The Findings of Fact and Conclusions of Law and Decree of Divorce from which the parties appeal were signed and entered by the court on November 14, 1995. Said Findings of Fact and Conclusions of Law and Decree of Divorce are attached hereto, designated as Appendix "A" and "B," respectively.

Wife filed a Notice of Appeal on December 12, 1995. Husband filed a Notice of Cross Appeal on December 20, 1995.

STATEMENT OF THE FACTS

The parties were married on November 25, 1974, in Page, Arizona. (Tr. at 17). Husband was thirty-five and Wife was twenty-one at the time of marriage. (Tr. at 133). The parties have two adult children, to-wit: Tyson, born october 20, 1976, and Kelly, born November 14, 1977. (Tr. at 18, 21, 138).

Throughout the parties marriage, Husband worked full-time as a heavy equipment operator, and has worked in that field since 1956. (Tr. at 21, 134). When the parties married, Wife worked as a secretary at a hospital business office. (Tr. at 20). In 1975, Wife worked as a secretary at the Ram Valley Consolidated School District. (Tr. at 21). During part of the time when the parties' children were young, Wife was primarily a primary caregiver and worked part time at home as a typist for the local airport. (Tr. at 21).

In January, 1981, Wife entered college at Glendale Community College. (Tr. at 22). Wife transferred to Grand Canyon University in 1983. (Tr. at 22). Wife obtained her undergraduate degree in May, 1985. (Tr. at 23, 139). Wife worked part time during her first semester of college. (Tr. at 22). However, after that time, Wife did not work outside the home while attending college. (Tr. at 23-25). Throughout her four years of undergraduate education,

Wife borrowed approximately \$6,000.00 for tuition and received some scholarships. (Tr. at 25).

For approximately two years after Wife obtained her undergraduate degree, Wife worked as an estimator for an industrial truss company and later as a substitute teacher. (Tr. at 27). Wife earned approximately \$15,000 per year during this time. (Tr. at 28).

Wife was accepted to medical school in 1987. (Tr. at 29). Wife and the minor children moved from Phoenix to Tucson, Arizona in order for the Wife to attend medical school at the University of Arizona in Tucson. (Tr. at 30). The parties purchased a home in Tucson. (Tr. at 29).

During Wife's third and fourth years of medical school, Wife "hired" a first year medical student to serve as a nanny on weekdays while Wife was spending increased amounts of time at the hospital and at school. (Tr. at 82). This was accomplished by trading a room in the Tucson home for services. (Tr. at 82). Wife borrowed approximately \$49,000 in student loans to finance her medical school education. (Tr. at 30, 32). Wife's tuition, books and fees for medical school amounted to \$23,000. (Tr. at 30, 32). Wife therefore contributed approximately \$6,500 per year out of her student loans toward family expenses during the four years she attended medical school. (Tr. at 32). While Wife was in medical

school, the parties spent their savings of approximately \$10,000 to \$12,000. (Tr. at 116, 130). The remaining household expenses were met by Husband's earnings.

Wife graduated from medical school in May, 1991. (Tr. at 40). Wife moved to Ogden, Utah in June 1991 in order to complete her internship and residency requirements at McKay Dee Hospital, and the family, including Husband, moved in order to accommodate Wife's career. (Tr. at 40). Wife completed her internship and residency in June 1994. (Tr. at 40).

Throughout the parties' marriage Husband worked as a heavy equipment operator. (Tr. at 134). Husband has no college training and his educational background consists of high school. (Tr. at 133). Husband had been a heavy equipment operator since 1956. (Tr. at 134). Husband had been a union member since approximately 1960. (Tr. at 135). Husband earned approximately \$18.52 per hour when Wife was in medical school. (Tr. at 143). However, the company for which Husband worked was purchased by another company while Wife was in medical school, and Husband's pay was reduced to \$14.50 per hour. (Tr. at 145). Husband was eventually given a raise to \$15.00 per hour. (Tr. at 147).

Husband was required to live apart from Wife and the parties' children while Wife was in medical school in order to continue working at a job which provided the income needed to support the

family. (Tr. at 140-141). Husband lived in a 1965 camper trailer in his parent's yard during the work week. (Tr. at 141). Husband drove to Tucson every weekend to be with the family. (Tr. at 142). Husband worked at least eight hours per day and often worked overtime five days per week while Wife was in medical school. (Tr. at 144). Husband logged an average of 50,000 miles driven in employment every year while Wife was in medical school. (Tr. at 143-44). Husband attempted to find a job in Tucson in order to be nearer the family, but was unable to find a suitable job. (Tr. at 145). Husband could not afford to lose his job, even though his pay decreased while Wife was in medical school, because he provided the sole support for the family. (Tr. at 145).

When the parties eventually moved to Ogden, Utah for Wife's residency, Husband looked for employment. (Tr. 148). Because Utah is not a union state, Husband found that \$10.00 per hour was the highest wage he could find. (Tr. at 149). Husband eventually found employment, but his employer did not pay him. (Tr. at 149-150). Husband then stayed home with the parties' children, pursuant to an agreement with Wife, caring for the home and children. (Tr. 151).

Finally, after the parties separated, Husband looked for work and was able to find work in St. George, Utah. (Tr. at 172-173). Husband attempted to return to his employment in Arizona at the rate of \$15.00 per hour, but the company was not hiring and Husband

was unable to find any other union work in Arizona. (Tr. at 173). Husband therefore earned \$12.00 per hour at the time of trial as a heavy equipment operator for Delray Jackson Construction in St. George, Utah. (Tr. at 173-73).

Wife completed her residency and earned over \$100,000 in 1994, the last full year of the parties' marriage. (Tr. at 48). At the time of trial, September 1995, Wife was earning \$120,000 per year. (Tr. at 76). Wife has a written employment contract which expires in August 1997. (Tr. at 75). Under her employment contract, the hospital pays all of Wife's overhead, money for continuing education, and medical malpractice insurance, and repays her student loans, in addition to the \$120,000 per year. (Tr. at 77).

SUMMARY OF THE ARGUMENT

The trial court did not err in awarding alimony to Husband. First, the trial court entered sufficient findings upon which the award was based. The trial court specifically set forth findings regarding Husband's need, Wife's ability to pay, Husband's ability to provide sufficient income for himself, and the length of the marriage. Second, the trial court based the award on the parties' specific situation, as presented in the record. Both statutory and case law support Husband's alimony award in that Husband substantially contributed to Wife's ability to obtain her current career level, and based upon the parties' incomes.

Further, this court should not attempt to alter settled law to require specific guidelines for establishing compensation alimony as suggested by Wife. Current Utah law, as well as the law in other jurisdictions, emphasize the need for equitable determinations in alimony cases, in which the trial court is allowed broad discretion and is able to view the particular circumstances of the individual cases in their totality.

However, the trial court did err in failing to equalize the parties' income. The parties in this matter were married for twenty-one years, during which Husband provided nearly the sole monetary support for the family while Wife was able to attend college, medical school, and residency, eventually becoming a medical doctor. Just as Wife completed her residency and was finally able to utilize her degree to earn a substantial income, Wife filed this divorce action. Husband has supported Wife for twenty-one years, helped raise two children to adulthood, has a limited education and few job skills, and is fifteen years older than Wife. Additionally, Wife has sufficient income in excess of expenses to accommodate an equalization of income. Thus, this is a proper case for the court to equalize the parties' income levels through the alimony award.

Finally, the trial court erred in its award of attorney's fees and Husband should have been awarded the entire amount of \$3,000, as requested.

Thus, this court should affirm the lower court's decision in part and reverse the lower court's decision in part, as outlined above. Husband should get his fees in this appeal.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN AWARDING ALIMONY TO HUSBAND INASMUCH AS HUSBAND SUBSTANTIALLY CONTRIBUTED TO THE PARTIES' TWENTY-ONE YEAR MARRIAGE.

Wife has alleged in her brief that the trial court abused its discretion in its alimony award to Husband. Wife has claimed that the trial court's findings were insufficient to support the award, that the trial court did not enter specific findings as to how it arrived at the amount and duration of the award, and that there was insufficient evidence to support the trial court's finding that Husband contributed significantly and substantially to Wife's medical school career.

An alimony award is committed to the sound discretion of the trial court and may not be disturbed absent a clear and prejudicial abuse of discretion. Breinholt v. Breinholt, 905 P.2d 877 (Utah Ct. App. 1995). The trial court's findings of fact are only erroneous when 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 Ct. App. 1989). Further, even though appellate courts may weigh the evidence and substitute their judgment for that of the trial court, this is not done lightly nor merely because the appellate court's judgment may differ from that of the trial court's judgment. Peterson v. Peterson, 737 P.2d 237, 239 (Utah Ct. App. 1987).

Husband will show first that the trial court's findings of fact were sufficient; second, that the trial court entered specific findings supporting the alimony award; and third, that the record contains sufficient evidence to prove that Husband contributed to Wife's medical career.

A. The Trial Court's Findings of Fact Were Sufficient to Support the Alimony Award.

The findings of fact in this matter were sufficiently detailed and comprehensive to support the award of alimony to Husband. Case law and statutory provisions have set forth the necessary requirements for establishing alimony in Utah divorces.

"Utah courts have held that '[a]n alimony award should, after a marriage . . . and to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to that standard of living enjoyed during the marriage.'" Godfrey v. Godfrey, 854 P.2d 585, 589 (Utah Ct. App. 1993), citing Gardner v. Gardner, 748 P.2d 1076, 1081 (Utah 1988); see also Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985); Roberts

v. Roberts, 835 P.2d 193, 198 (Utah Ct. App. 1992); Bell v. Bell, 810 P.2d 489, 491 (Utah Ct. App. 1991).

"In light of this goal, the trial court must consider: '(1) the financial conditions and needs of the receiving spouse; (2) the ability of the receiving spouse to produce a sufficient income; and (3) the ability of the supporting spouse to provide support.'" Godfrey, at 589, quoting Roberts, 835 P.2d at 198; see also Jones, 700 P.2d at 1075, Chambers v. Chambers, 840 P.2d 841, 843 (Utah Ct. App. 1992); Schindler v. Schindler, 776 P.2d 84, 90 (Utah Ct. App. 1989).

These three factors, known as the Jones factors, have been incorporated into the Utah alimony statute. The statute also adds a fourth factor which trial courts must consider in fashioning an alimony award. The statute provides as follows:

- (7) (a) The court shall consider at least the following factors in determining alimony;
 - (i) the financial condition and needs of the recipient spouse;
 - (ii) the recipient's earning capacity or ability to produce income;
 - (iii) the ability of the payor spouse to provide support; and
 - (iv) the length of the marriage.

Utah Code Ann. § 30-3-5(7)(a) (Supp. 1996).

"Failure to consider these factors in fashioning an alimony award constitutes an abuse of discretion." Godfrey, at 589, citing Bell, 810 P.2d at 492.

Wife has alleged that the trial court failed to consider these factors. However, the trial court, while not specifically categorizing its findings as Jones factors, considered the same, stating that:

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

. . .

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. The Plaintiff's gross income is currently \$120,000 per year and defendant's current gross income is \$25,000 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

. . .

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

(Findings of Fact and Conclusions of Law #13). Accordingly, the court specifically noted Husband's financial condition and needs, explaining the prior joint income of the parties as well as Husband's current income. Husband's needs were noted in the provision which states that the alimony award was based on a reasonable standard of living. The court noted Husband's earning capacity specifically, explaining the prior earnings of the parties (and noting that prior to 1993 the great majority of all of the income of the parties throughout the lengthy marriage was produced by Husband), and citing Husband's current income. Finally, the court noted Wife's ability to pay by explaining Wife's current income, less taxes, and comparing the same to Husband's current income (which shows that Wife earns \$5,400.00 more per month than Husband after taxes).

Within her brief, Wife has alleged that Husband showed no need for alimony through testimony or exhibits and that therefore Husband's need does not exist. In fact, Wife specifically mentions that "the only evidence as to [Husband'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 19, Findings of Fact

#5; R. at 97). However, Wife fails to mention that inherent within this testimony lies Husband's need for alimony. Husband's \$500.00 per month rent is for a 25 foot long camper trailer in which he resides in a relative's back yard in St. George. (Tr. 161). Thus, not only does Husband not have the money on his own to purchase a home, but Husband has insufficient monetary support, on his own, to rent an apartment. Further, Wife mentions in her brief that Husband "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." (Appellant's Brief at 18). Wife again fails to set forth the full context of Husband's testimony, in which Husband testified that, although Husband did in fact accept a golf school vacation near the end of 1994 and/or beginning of 1995, the same was a gift from the parties' son. (Tr. 161-162).

Further, Wife alleges in her brief that the court did not enter sufficient findings regarding Husband's earning capacity, specifically stating that "[t]here are no findings as to why [Husband] is earning less at the time of trial than he earned previously." (Appellant's Brief at 19). The trial court is not required, per statute or case law, to enter such a specific finding. However, the court based its findings on all of the evidence before it, and Husband testified during trial that he is

a heavy equipment operator (Tr. 134). Husband testified that his only employment skills are to operate heavy equipment or ride horses. (Tr. at 134). Husband testified that there isn't much employment available riding horses. (Tr. at 134). Husband also testified that he has no college training and his educational background consists of high school. (Tr. at 133). Husband had been a heavy equipment operator since 1956. (Tr. at 134). Husband had been a union member since approximately 1960. (Tr. at 135). Husband had earned approximately \$18.52 per hour when Wife was in medical school. (Tr. at 143). However, the company for which Husband worked at the time was purchased and Husband's pay was reduced to \$14.50 per hour. (Tr. at 145). Husband was eventually given a raise to \$15.00 per hour. (Tr. at 147). When the parties eventually moved to Ogden, Utah for Wife's residency, Husband looked for employment. (Tr. 148). Because Utah is not a union state, Husband found that \$10.00 per hour was the highest wage he could find. (Tr. at 149). Husband eventually found employment, but his employer failed to pay him. (Tr. at 149-150). Husband then stayed home with the parties' children, pursuant to an agreement between the parties. (Tr. 151). Finally, after the parties separated Husband looked for work and was able to find work in St. George, Utah. (Tr. at 172-173). Husband attempted to return to his employment in Arizona at the rate of \$15.00 per hour, but the

company was not hiring and Husband was unable to find any other union work in Arizona. (Tr. at 173). Husband therefore earned \$12.00 per hour as a heavy equipment operator for Delray Jackson Construction in St. George, Utah at time of trial. (Tr. at 173-73). Therefore, the trial court had ample testimony before it which explained Husband's decreased income.

Further, Wife claims that the trial court made no underlying factual determination of Wife's ability to pay support. However, this argument is misplaced. Wife entered exhibits which set forth her monthly income and expenses, thereby providing the court with the underlying factual determination of her ability to pay support. Wife's exhibit number 17 was summarized by Husband's counsel in closing argument as follows:

Her paycheck shows a net of \$7,664.69. Her expenses are \$4,104.00 a month. And that's her expenses on Exhibit 17. Her current expenses, \$4,104.00 a month. And that's allowing for things like buying herself a building lot in Willard of \$734.00 a month. And that's allowing for things like \$250.00 a month for clothing. That's continuing to carry insurance for adult children. That's putting an adult child through college or university. That's \$300.00 a month entertainment. Pet care of \$200.00 a month. She has a \$100.00 vacation allowance, \$200.00 a month gift allowance, \$75.00 a month for dentist. And she comes up with \$4,104.00 in expenses against \$7,664.00 a month net. She is \$3,561.00 per month to the good while her husband of 21 years is still living in a camp trailer and can't muster first and last month's rent to get into even an apartment.

(Tr. at 198-99).

Thus, the trial court did not abuse its discretion and met the findings of fact requirements as set forth by Utah case law and statute.

B. The Trial Court Did Not Err In Setting Forth Its Findings of Fact Showing The Basis for the Alimony Award and Further Set Forth Sufficient Findings to Support the Finding That Husband Contributed To Wife's Medical School Career.

The trial court entered specific Findings of Fact which provided a basis for the alimony award in this matter. Wife has claimed in her brief that the trial court failed to enter such findings. Wife's argument on this point consists of a recital of the evolution of Utah case law.

Wife has set forth the following cases for the proposition that the recipient spouse had become economically disadvantaged during a long-term marriage: Tremayne v. Tremayne, 116 Utah 483 (Utah 1949); Peterson v. Peterson, 737 P.2d 237 (Utah Ct. App. 1987); Rayburn v. Rayburn, 738 P.2d 238 (Utah Ct. App. 1987); Martinez v. Martinez, 818 P.2d 538 (Utah 1991); Higley v. Higley, 676 P.2d 379 (Utah 1983); Jones v. Jones, 700 P.2d 1072 (Utah 1985); Gardner v. Gardner, 748 P.2d 1076 (Utah 1988); and Rasband v. Rasband, 752 P.2d 1331 (Utah Ct. App. 1988).

Wife has claimed that the common thread in all of the above cases was that the recipient spouse took herself out of the work force for a lengthy period during a long term marriage to be a

homemaker and/or for health reasons and thereby became economically disadvantaged in an absolute sense. (Appellant's Brief at 26). Wife's reading of the case law is skewed. The same cases may be seen to stand for the proposition that, when the marriage is of long duration, in which both parties sacrificed and worked toward the common good of the family, the spouse with smaller earning potential should be entitled to long-term (if not permanent) alimony.

The Utah Court of Appeals and the Utah Supreme Court have consistently overruled temporary alimony decisions or small awards in cases of long-term marriages. Several of these cases are analogous to the facts in this matter.

In Andersen v. Andersen, 757 P.2d 476 (Utah Ct. App. 1988), the wife was in her fifties, had spent most of her life providing services to her family with no monetary remuneration, and had minimal work experience. The Utah Court of Appeals found that she could not be expected to find a job immediately upon completing her schooling, and that her salary, when she did find employment, was unknown. Id. at 478. Thus, the court overruled a temporary alimony award. Id. at 479.

The fact situation in Munns v. Munns, 790 P.2d 116 (Utah Ct. App. 1990) was as follows: the wife was a woman in her late fifties, who, while in reasonably good health, had never been

substantially employed and had not developed any employable skills. The court found that the trial court had therefore abused its discretion in terminating her alimony at age sixty-two. Id. at 122.

In Throckmorton v. Throckmorton, 767 P.2d 121, 125 (Utah Ct. App. 1988), the wife filed a modification petition to increase alimony from \$1.00 per year to \$500.00 per month. The trial court awarded \$396.00 per month, based upon its findings that wife was unable to produce sufficient income for herself due to her medical problems, and husband was able to provide support due to his annual retirement income of \$18,000.00.

The court in Olson v. Olson, 704 P.2d 564 (Utah 1985), held a two-year alimony award was an abuse of discretion, based upon the facts that the wife was married soon after high school, her primary occupation during the twenty-odd year marriage was caring for the parties' home and six children, she had only worked at two clerical jobs briefly during the marriage, and had no reasonable expectation of obtaining employment two years hence that would enable her to support herself at a standard of living even approaching that which she had during the marriage. Accordingly, the Utah Supreme Court overturned the alimony award to award permanent alimony to the wife.

In Higley v. Higley, 676 P.2d 379 (Utah 1983) the Utah Supreme Court reversed a \$100.00 per month alimony award, based upon the wife's very poor health, the fact that she had spent thirty years as a homemaker and caretaker of five children, her efforts as a homemaker enabled the husband to build a career as an aircraft welder, she had no employment training or experience other than a few sporadic, seasonal, unskilled jobs, and due to her health problems, it is questionable whether she could maintain a full time job. The matter was remanded.

In the case of Jones v. Jones, 700 P.2d 1072 (Utah 1985). Mrs. Jones was fifty-two years of age at the time of trial. She had only performed sporadic, seasonal, and unskilled jobs during the marriage, and, with the full consent of her husband, had devoted most of her time to rearing the parties' four children. She had no professional training, few marketable skills, and no independent income. Id. at 1075. The Utah Supreme Court stated, in overruling her temporary alimony award and ordering permanent alimony, that it is "entirely unrealistic to assume that a woman in her mid-50's with no substantial work experience or training will be able to enter the job market and support herself in anything even resembling the style in which the couple had been living." Id. at 1075. See also Paffel v. Paffel, 732 P.2d 96, 103 (Utah 1986); Olson v. Olson, 704 P.2d 564, 567 (Utah 1985); Higley v.

Higley, 676 P.2d 379, 381-82 (Utah 1983); Rasband v. Rasband, 752 P.2d 1331, 1334 (Utah Ct. App. 1988); and Sampinos v. Sampinos, 750 P.2d 615, 618 (Utah Ct. App. 1988).

The Court of Appeals held the trial court's alimony award was an abuse of discretion in Martinez v. Martinez, 754 P.2d 69 (Utah Ct. App. 1988). The Court cited such reasons as the wife's limited education, lack of work experience, and the fact that she had no reasonable expectation of obtaining employment within two years that would be sufficient to enable her to support herself at a standard of living even approaching that which she had during the marriage. The award of alimony on a temporary basis was overturned and the wife was granted permanent alimony. Id. at 74.

Further, in Gardner v. Gardner, 748 P.2d 1076 (Utah 1988), the Utah Supreme Court reversed the alimony award, specifically listing the fact that although the wife had been employed as an executive secretary while her husband was in medical school, she had not been employed for a period of thirty years and therefore would have a very difficult time finding employment. Id. at 1081.

Within her brief, Wife stated as follows:

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.

(Appellant's Brief at 21). This case is almost exactly the situation described by Wife, above. First, Wife earned a professional degree during the marriage and is now a medical doctor. When the parties were first married Wife either worked as a secretary or not at all. Second, Husband worked throughout the marriage to support the family. Although Husband may not have contributed to actual tuition costs (as Wife obtained loans for the same), Husband provided the great majority of the income for the parties throughout the twenty-one year marriage. Third, Husband sacrificed in order to assist Wife in her educational pursuits, including using the parties' savings and living apart from the family in a small camper trailer while Wife was attending medical school and living in a home. Wife was able to have domestic help during medical school by taking in a boarder in the home for which Husband paid the mortgage. He travelled hundreds of miles each week in order to be near the family. He moved from a union state (Arizona) to a non-union state (Utah) in order to be with the family while Wife completed her residency requirements. He could not find work as a result. He provided homemaking services for a

period of three years while the parties' two minor children were teenagers. Fourth, in the last year of marriage the parties' income, as a result of Wife's completion of her education, drastically increased to \$100,000 per year and is expected to continue at the same amount or to continue to increase. However, Husband's earning ability has decreased during the marriage as a result of supporting Wife's education and moving with the family in pursuit of Wife's career. At best, his income is static.

Thus, this is clearly a case in which Husband's efforts and sacrifices helped to relieve Wife's burden of supporting herself and the children and allowed Wife to devote most of her time and attention to her education.

The Utah Legislature has specifically provided for alimony awards in situations such as this case.

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

Utah Code Ann. § 30-3-5(7)(e) (Supp. 1996).

The language of this statute was based upon the decision in Martinez v. Martinez, 818 P.2d 538, 542 (Utah 1991), which states as follows:

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.

The trial court entered specific findings which supported the award of alimony based upon the specific facts and circumstances of these parties and equitable theories of marriage as a partnership.

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. . . . [T]his 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).

Wife has also cited the above findings, but does so for the proposition that the findings imply that the trial court was making a compensation award to Husband. (Appellant's Brief at 32). In a general sense, alimony itself may be seen as a compensating award. However, the trial court, as evidenced by the findings cited above, was setting forth its exact findings explaining how and why the court entered the alimony award that the Wife claims the court did not enter. The alimony award in this matter is based upon the partnership theory of marriage and the findings cited above relate that theory specifically to the facts of this case.

The Utah Supreme Court has stated that "the very idea of marriage contemplates mutual effort and mutual sacrifice. Yet, in this case, [the wife] would value only her contribution to the marriage and not his." Martinez v. Martinez, 818 P.2d at 541. This is exactly the position that Wife has taken in this matter, and it is exactly this type of position that the partnership theory of marriage, and the Utah Supreme Court in following this theory, have disallowed.

Therefore, the trial court properly determined that this was an appropriate case for an alimony award and set forth sufficient

findings upon which to base the award. The trial court determined that, inasmuch as Husband had supported and assisted Wife throughout the twenty-one year marriage, the proper period of time for alimony in this matter was twenty-one years. The findings of fact, and the facts before the court below upon which the findings were based, provide sufficient basis for the lower court's determination of the amount and duration of the award.

II. COMPENSATION ADJUSTMENTS IN MARITAL PROPERTY AND ALIMONY AWARDS SHOULD REMAIN BASED ON EQUITABLE PRINCIPLES, SUBJECT TO THE INDIVIDUAL FACTS OF EACH CASE.

Wife alleges in her brief that the new Utah alimony statute and prior case law provide no guidelines for the trial courts as to how to make compensation adjustments in alimony awards in cases such as this. However, Utah courts and the Utah Legislature have consistently and specifically refrained from requiring strict guidelines in marital property distribution and alimony awards, and have rather relied on equitable principles. In fact, the Utah alimony statute provides just such equitable guidelines in compensation cases such as that described by Plaintiff.

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.**

Utah Code Ann. § 30-3-5(7)(c) (Supp. 1996) (emphasis added).

The Utah Supreme Court has stated that the parties' standard of living is "fact-sensitive" and . . . the court must consider "all relevant facts and equitable principles" [and therefore the appellate court should] defer to the court's sound discretion in determining the parties' standard of living." Hoagland v. Hoagland, 852 P.2d 1025, 1027 (Utah Ct. App. 1993) (quoting Howell v. Howell, 806 P.2d 1209, 1212 (Utah Ct. App. 1991)).

Further, the cases from other jurisdictions which Wife cites for her proposition that specific guidelines should be set forth do not support her argument. First, Wife cites St.-Pierre v. St.-Pierre, 357 N.W.2d 250 (S.D. 1984) (holding that the husband was not entitled to an alimony award from a wife who had received medical degree because husband could support himself). The fact situation in that case is dissimilar to that in the case at hand. Further, as quoted by Wife in her brief, with regard to strict guidelines, the South Dakota court specifically held as follows:

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.

Id. at 262. Thus, the South Dakota court has endorsed the equitable standard, based upon the specific circumstances of the parties in each individual case, which Husband advocates and which is currently the law in the state of Utah.

Wife has cited cases from other jurisdictions in which the professional spouse was not ordered to provide alimony. However, none of these cases advance her argument that specific guidelines should be set forth, and the fact situations in each of these cases are different from that of the parties in this case. For example, the court in Mahoney v. Mahoney, 453 A.2d 527, 535 (N.J. 1982) stated that reimbursement alimony should not subvert the basic goals of traditional alimony and equitable distribution. The Arizona court in Pyeatte v. Pyeatte, 681 P.2d 196 (Ariz. Ct. App. 1982) looked to the "individual personalities" of the parties and refused to look to the husband and wife as "economic entities". Id. at 207. That court held a trial court is required to make specific findings regarding the facts of the individual cases. Id.

Therefore, the Utah courts as well as courts in other jurisdictions support the principle that alimony awards, whether based upon compensating factors or not, must be based on equitable principles and conform to the individual facts of each case. The trial court in this matter did so. Accordingly, Wife's argument for the establishment of specific guidelines must fail.

III. THE TRIAL COURT ERRED IN FAILING TO EQUALIZE THE PARTIES' RESPECTIVE INCOME LEVELS IN THIS MATTER.

The fact situation in this matter is such that the trial court should have equalized the parties' respective income levels through the alimony award. The trial court awarded alimony to Husband in the amount of \$1,700.00 per month for a period of twenty-one years. (Findings of Fact and Conclusions of Law #13(p), Decree of Divorce #11, Tr. 58). However, in marriages of long duration, equalization of the parties' income levels is proper.

The Utah alimony statute states that "the court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living." Utah Code Ann. § 30-3-5(7)(d)(Supp. 1996).

The Utah Supreme Court set forth the need to allow equalization of income with alimony awards and the circumstances surrounding such awards.

Usually the needs of the spouses are assessed in light of the standard of living they had during marriage. Gardner v. Gardner, 748 P.2d 1076,, 1081 (Utah 1988); Jones, 700 P.2d at 1075. In some circumstances, it may be appropriate to try to equalize the spouses' respective standards of living. Gardner, 748 P.2d at 1081; see also Olson v. Olson, 704 P.2d 564, 566 (Utah 1985); Higley v. Higley, 676 P.2d 379, 381 (Utah 1983).

Martinez v. Martinez, 818 P.2d 538 (Utah 1991).

The fact situation in this matter is precisely the type of situation described in Martinez. Thus, equalization of income in

this case is proper. During the course of this marriage Wife attended college and medical school as well as completed her residency. Although Wife obtained student loans to assist her with tuition and books, the substantial majority of Wife's living expenses (excluding approximately \$6,000 per year) was provided by Husband. Husband was required to live apart from Wife and the parties' children while Wife was in medical school in order to continue working at a job which provided the income needed to support the family. After Wife and the children moved to a different city while Wife attended medical school, Husband lived in a camper trailer in his parent's yard. Husband supported the family with his earnings and they were able to live in a two-bedroom home and Wife was even able to have a live-in nanny to assist with the children on the weekdays (while Husband was out of town working). Later, when Wife was serving her residency, the family moved to Utah. Husband quit his union job in Arizona to move with the family. Then, after Wife was able to support the family on her substantial income, the parties agreed that Husband would remain at home with the parties' minor children, who were teenagers at the time. Husband stayed at home and raised the children for three years prior to the parties' separation.

This is clearly a case in which Husband's efforts and sacrifices helped to relieve Wife's burden of supporting herself

and the children and allowed Wife to devote most of her time and attention to her education.

Further, Wife's income and expenses are such that she has the ability to equalize the parties' income through alimony. Wife earns a net income of \$7,664.69 per month. Her expenses are \$4,104.00 a month. Thus, Wife has \$3,561.00 per month excess income. This calculation even allows for expenses such as the following: a building lot in Willard at \$734.00 per month; clothing at \$250.00 per month; insurance for adult children; financing an adult child's college or university education; entertainment at \$300.00 per month; pet care of \$200.00 per month; vacation allowance of \$100.00 per month; \$200.00 a month gift allowance, and \$75.00 per month for dentist expenses. Therefore, while Wife has the ability to expend great sums for luxuries such as those listed above and still has excess income of over \$3,500.00 per month, her Husband of 21 years is still living in a camp trailer and can't muster first and last month's rent to get into an apartment. (Tr. at 198-99).

Accordingly, this is a proper case for the equalization of income. This court should therefore remand this case for a factual determination of the monetary amount needed to equalize the parties' income levels.

IV. HUSBAND SHOULD BE REIMBURSED FOR ATTORNEY'S FEES
INCURRED IN THIS ACTION.

At trial, Husband's counsel proffered that her attorney's fees and costs were approximately \$3,000.00. The trial court awarded Husband attorney's fees in the amount of \$1,000.00. It is equitable that Husband should have been awarded judgment against Wife for the full amount.

Utah Code Ann. § 30-3-3, (1953, as amended) states that "[t]he district court has discretion to order either party to pay the other party's attorney fees in a divorce action." See also, Muir v. Muir, 841 P.2d 736, 741 (Utah Ct. App. 1992), citing Maughan v. Maughan, 770 P.2d 145, 162 (Utah Ct. App. 1989).

When awarding attorney's fees, "the trial court must find (1) the requesting party is in need of financial assistance; (2) the requested fees are reasonable; and (3) the other spouse has the ability to pay". Muir, at 741, citing Crouse v. Crouse, 817 P.2d 836, 840 (Utah Ct. App. 1991); Haumont v. Haumont, 793 P.2d 421, 425 (Utah Ct. App. 1990); Riche v. Riche, 784 P.2d 465, 470 (Utah Ct. App. 1989).

In this matter, Husband is undoubtedly in need of financial assistance. Wife is in a much better financial position to pay Husband's attorney's fees and has the ability to do so, even if the same must be done on a payment rather than lump-sum basis.

Additionally, the requested fees were reasonable. In Muir, this Court stated as follows:

In determining the reasonableness of attorney fees, the court may consider the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved."

Muir, at 741, quoting Rasband v. Rasband, 752 P.2d 1331, 1336 (Utah Ct. App. 1988) (quoting Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985)).

This was a complex case involving research, discovery and expertise. Difficult legal issues were broached regarding alimony awards. Each of the attorneys involved efficiently represented their respective clients. Husband prevailed in his claim for alimony over Wife's utter objection to paying any alimony.

Further, the number of hours claimed were reasonable in light of the complexity of the case. Husband's attorney has fifteen years of experience and expertise in domestic matters, thereby warranting the hourly rate charged. Husband's attorney's fees were similar to that which would be charged by other similarly skilled attorneys practicing in Utah.

In a similar fact situation, the court in Muir v. Muir, 841 P.2d 736, 741 (Utah Ct. App. 1992) allowed wife's attorney to proffer testimony regarding the amount and reasonableness of

attorney's fees. Husband's attorney did not object. The court found that wife incurred \$15,000.00 in legal fees, but ordered husband to only pay \$3,000.00 of those fees. The trial court offered no explanation for the reduction. Although the court had made general findings regarding husband's income, it made no findings specifically regarding husband's ability to pay wife's attorney's fees. The court held that because the proffered evidence of wife's attorney fees was adequate and entirely undisputed, the court abused its discretion in reducing the requested amount from a sum of more than \$15,000 to only \$3,000 without a finding that the reduction was warranted by one of the established factors.

"Where 'the evidence supporting the reasonableness of requested attorney fees is both adequate and entirely undisputed, . . . the court abuses its discretion in awarding less than the amount requested unless the reduction is warranted' by one or more of the established factors." Muir, at 741, quoting Martindale v. Adams, 777 P.2d 514, 517-18 (Utah Ct. App. 1989).

Husband's attorney's fees were proffered on the record at the time of trial and were not objected to. Such fees, as discussed above, were proper and undisputed. Each of the factors for establishing a reasonable award of attorney's fees were met.

Accordingly, the trial court abused its discretion in awarding only \$1,000 in attorney's fees when the amount requested was \$3,000.00.

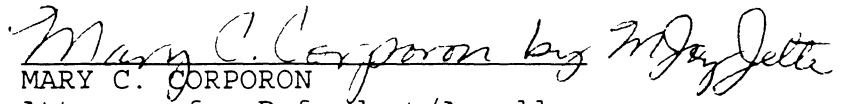
CONCLUSION

First, the trial court in this matter did not err in its decision to award alimony to Husband nor in the entry of the findings or determination of the supporting facts in support of that decision. Second, this court should not attempt to alter settled law to require specific guidelines for establishing compensation alimony. The sound principles of equity and the totality of the circumstances in each case should govern all alimony decisions and therefore this court should not alter the law. Third, the trial court erred in failing to equalize the parties' income through the alimony award in light of the length of the parties' marriage and the circumstances surrounding Wife's ability to earn a greater income due to her medical degree. Fourth, the trial court erred in its award of attorney's fees, as Husband should have been awarded the entire amount of \$3,000 as requested. Finally, Husband should receive his fees incurred in this appeal.

Thus, this court should affirm the lower court's decision in part and reverse the lower court's decision in part, as outlined above.

Respectfully submitted this 21 day of May, 1996.

CORPORON & WILLIAMS, P.C.


MARY C. CORPORON
Attorney for Defendant/Appellee

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLANT were mailed, first class, postage prepaid, to:

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on this 21 day of May, 1996.