1995

Nell v. Nell : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

REGINA LYNN NELL, Plaintiff/Appellee, vs. SANDY KEVIN NELL, Defendant/Appellant.	Lower Court Case No. 904904147 Appeal Case No. 950107 Priority Classification 15

BRIEF OF APPELLEE

APPEAL FROM AN ORDER IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE J. DENNIS FREDERICK PRESIDING

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IN THE UTAH COURT OF APPEALS

REGINA LYNN NELL,	:	
	:	
Plaintiff/Appellee,	:	
	:	Lower Court Case No. 904904147
vs.	:	
	:	Appeal Case No. 950107
SANDY KEVIN NELL,	:	
	:	Priority Classification 15
Defendant/Appellant.	:	

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STATEMENT OF JURISDICTION

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

ISSUES AND APPROPRIATE STANDARDS OF REVIEW

Issue 1. Did the district court err in finding that the Decree of Divorce in this matter was not ambiguous regarding the division of proceeds from the sale of the marital residence.

Standard of Review. "Findings of fact . . . shall not be set aside unless clearly erroneous." Utah R. Civ. P. 52(a). "Under that standard, [appellate courts] do not set aside the trial court's factual findings unless they are against the clear weight of the evidence or [the court] otherwise reach[es] a definite and firm conviction that a mistake has been made." Western Kane County Special Service District No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1377 (Utah 1987).

Issue 2. Did the district court err in finding that Defendant owed the Plaintiff child support in the amount of $1,982.04, representing the difference between the child support paid by the Defendant and the amount set forth in the child support guidelines.

Standard of Review.[1] "Findings of fact . . . shall not be set aside unless clearly erroneous." Utah R. Civ. P. 52(a). "Under that standard, [appellate courts] do not set aside the trial court's factual findings unless they are against the clear weight of the evidence or [the court] otherwise reach[es] a definite and firm conviction that a mistake has been made." Western Kane County Special Service District No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1377 (Utah 1987).

Issue 3. Did the district court err in finding that Defendant's offset for one-half of all medical expenses he purportedly incurred on behalf of the parties' minor children was $1,890.83.

Standard of Review.[2] "Findings of fact . . . shall not be set aside unless clearly erroneous." Utah R. Civ. P. 52(a). "Under that standard, [appellate courts] do not set aside the trial court's factual findings unless they are against the clear weight of the evidence or [the court] otherwise reach[es] a definite and firm conviction that a mistake has been made."

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[1] In his brief, the Defendant likewise cites the inappropriate standard of review for this issue. In its order, the District Court made an explicit finding regarding Defendant's child support arrearage (R. 264) and therefore the appropriate standard of review would be the one cited above.

[2] In his brief, the Defendant cites the inappropriate standard of review for this issue. In its order, the District Court made an explicit finding regarding the medical and dental expenses for the parties minor children (R. 265) and therefore the appropriate standard of review would be the one cited above.

Western Kane County Special Service District No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1377 (Utah 1987).

Issue 4. Did the district court err in finding that the Defendant failed to pay alimony in the sum of $5,083.00 prior to February 1994, and consequently entering judgment in favor of the Plaintiff for said amount.

Standard of Review.[3] "Findings of fact . . . shall not be set aside unless clearly erroneous." Utah R. Civ. P. 52(a). "Under that standard, [appellate courts] do not set aside the trial court's factual findings unless they are against the clear weight of the evidence or [the court] otherwise reach[es] a definite and firm conviction that a mistake has been made." Western Kane County Special Service District No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1377 (Utah 1987).

Issue 5. Did the district court err in awarding Plaintiff attorney fees and costs in the amount of $4,308.00.

Standard of Review. Absent patent error or clear abuse of discretion, an appellate court will not disturb a trial court's award of attorney fees. Beckstrom v. Beckstrom, 578 P.2d 520, 524 (Utah 1978).

Issue 6. The Plaintiff is entitled to an award of attorney fees on appeal.

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[3] In his brief, the Defendant likewise cites the inappropriate standard of review for this issue. In its order, the District Court made an explicit finding regarding Defendant's failure to pay alimony during the relevant period (R. 264) and therefore the appropriate standard of review would be the one cited above.

Relevant Law. "Generally, when the trial court awards fees in a domestic action to the party who then substantially prevails on appeal, fees will also be awarded to that party on appeal. Lyngle v. Lyngle, 831 P.2d 1027 (Utah App. 1992) (citing Crouse v. Crouse, 817 P.2d 836, 840 (Utah App. 1991).

DETERMINATIVE LAW

There are no constitutional provisions, statutes, ordinances, rules and regulations whose interpretation is determinative of the instant appeal.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from a final order and judgment entered in the Third Judicial District Court on January 20, 1995. (R. 272).

B. Course of Proceedings and Disposition.

1. The parties to this action were divorced pursuant to a decree of divorce entered on February 8, 1991. (R. 49-54).

2. The Decree herein explicitly provided:

> That plaintiff be and she is hereby awarded the use of the home and real property located at 2197 West 13250 South, Riverton, Utah, until such time as one of the following contingencies occur, to wit: (a) plaintiff remarries; (b) plaintiff cohabitates with an individual of the opposite sex; (c) youngest child reaches majority; (d) plaintiff desires to sell said home; (e) plaintiff no longer resides in said home.
>
> When the first of the above contingencies occur, said home will be immediately placed for sale and from

> the proceeds from said sale, the sums will be distributed as follows: (a) all costs and expenses of sale including real estate commissions; (b) the balance due on the mortgage; (c) any costs of repairs to sell the home; (d) Plaintiff will be reimbursed for any reduction of mortgage commencing in February, 1991, until date of sale; and (e) plaintiff and defendant will equally divide the remaining balance.

(R. 50-51).

3. That on or about October 12, 1993, the parties sold the marital residence, at which time the Defendant concocted all sorts of claims against the Plaintiff to reduce her net proceeds from the sale and threatened the Plaintiff that unless she paid such claims, the closing would not proceed. (R. 338-339).

4. That subsequently, the Defendant filed a quiet title action in an effort to recover the funds he claims were owing pursuant to alleged negotiations at the time of closing. (R. 78)

5. Defendant also filed a Verified Petition for Modification of Decree of Divorce, seeking to terminate alimony, recover certain proceeds from the sale of the marital residence, and recover reimbursements for medical and dental expenses purportedly paid by him. (R. 121-125).

6. That at a temporary hearing held in this matter, the Commissioner found that "the parties' factual dispute is appropriately resolved in favor of the Plaintiff." (R. 117).

7. That the Plaintiff filed a Counterpetition for Modification of Decree of Divorce, claiming: (1) that based upon the income of the parties, child support should be modified for the remaining two minor children; (2) delinquent alimony in the amount of $5,083.00; child support arrearages; and reimbursement for amounts paid for medical and dental expenses for the minor children. (R. 172-176).

8. That the above cases were ultimately consolidated prior to trial.

9. That after trial, the court entered findings of fact, conclusions of law, and order and judgment ruling, in pertinent part that:

(a) Defendant's Petition to Modify was denied;

(b) Defendant's quiet title cause of action was dismissed;

(c) Based upon the parties' respective incomes, the child support amount would be modified to $727.00 per month;

(d) Plaintiff was granted judgment against Defendant in the amount of $5,083.00 for delinquent alimony;

(e) Plaintiff was granted judgment against the Defendant in the amount of $1,982.04 for delinquent child support;

(f) That the Defendant was awarded a set off in the amount of $1,890.83 for one-

half of the children's medical and dental expenses;

(g) That the Plaintiff was granted judgment for attorney fees and costs in the amount of $4,308.00.

(R. 262-272).

10. Defendant appealed from that order and judgment. (R. 273).

SUMMARY OF ARGUMENTS

Issue 1. In the instant action, the decree of divorce with respect to sale of the marital residence is abundantly clear and explicitly provides for those expenses that will adjust the parties' ultimate distribution. Under no stretch of reason could repayment of the parties' parents fit within "all costs and expenses of sale" or "any cost of repairs."

Issue 2. The Defendant's argument that he prepaid child support in the amount of $7,200.00 is without merit. Further, such purported agreement between the parties contravenes public policy inasmuch as child support does not necessarily inure to the respective parties but to the parties' minor children. Finally, the evidence was sufficient to support the court's finding that Defendant was indeed delinquent in his child support.

Issue 3. Defendant's evidence at trial regarding medical and dental payments on behalf of the parties' minor children was insufficient to support his purported claim. Of particular note,

the Defendant lacked documentation to verify thousands of dollars in medical and dental payments which he claimed he paid.

Issue 4. There was sufficient evidence at trial to support the district court's finding that the Defendant was delinquent in his alimony payments in the amount of $5,083.00. Specifically, there was adequate evidence that the Defendant regularly paid the Plaintiff lesser sums than those set forth in the Decree of Divorce.

Issue 5. An award of attorney fees is routinely based on the parties' respective abilities to pay the same. In the instant action, there was evidence that the Plaintiff was unemployed and that the Defendant earned $3,259.00 per month, thereby demonstrating the Plaintiff's inability to pay her own attorney fees and her attending need. The court further found that the Plaintiff was required to employ counsel to defend the actions which were brought by the Defendant and ultimately dismissed by the court. Finally, the court found that such fees and costs were necessary and reasonable based upon the time and expenditures made on behalf of the Plaintiff. Consequently, the attorney award should be affirmed.

Issue 6. Generally, if a party in a domestic action is awarded attorney fees at the trial level and then subsequently prevails on appeal, that party is awarded reasonable attorney fees for such appeal. Here, in the event that the Plaintiff substantially prevails on appeal, this court should award attorney fees and costs incurred therein.

ARGUMENT

POINT I

THE DECREE OF DIVORCE IN THIS CASE WAS NOT AMBIGUOUS AS TO THE DIVISION OF THE PROCEEDS FROM THE MARITAL RESIDENCE.

The Defendant irrationally argues that the Decree of Divorce in this case is ambiguous. Specifically, he argues that the Decree of Divorce does not define the term "all costs and expenses of sale" to either include or exclude the repayments of certain loans to the parties' parents. See Appellant's brief at p. 13. In an attempt to bolster his argument, Defendant cites Whitehouse v. Whitehouse, 790 P.2d 57, 60 (Utah App. 1990) for the proposition that "[language in a written document is ambiguous if the words used may be understood to support two or more plausible meanings." Further, Defendant cites that language from the same case that "[a] court is justified in determining that a contract or order is ambiguous if the terms are either unclear or missing."

In the case at bar, Defendant's reliance on Whitehouse is wholly misguided. The court's language regarding the ultimate distribution of the proceeds from the marital residence is abundantly clear and in no way lends itself to two or more plausible meanings. Specifically, the language that "all costs and expenses of sale" would be paid prior to distribution has only one meaning, to wit: that any expenses directly associated to the sale of the marital residence, i.e., real estate commissions, advertising, etc. would be deducted prior to any distribution. Even the most illogical stretch of reason would not contemplate

that such language would include repayment of loans to the parties' respective parents.[4]

By arguing that such straightforward, simple language as "all costs and expenses of sale" is ambiguous so as to include the repayment of loans to the parties' parents, the Defendant is attempting to rewrite the Decree of Divorce. There is absolutely no evidence of such loans in the decree, nor is there any evidence that repayment of the same was contemplated at the time of the entry of the Decree. Accord-ingly, Defendant's failure to address this issue at the time of the Decree does not warrant some finding that simple language in the Decree is ambiguous so as to include wholly unrelated and unaddressed issues within the same.[5]

Finally, Defendant argues that the Decree of Divorce should be construed against the Plaintiff inasmuch as Plain-tiff's counsel drafted such Decree, citing Home Savings and Loan v. Aetna Cas. & Sur., 817 P.2d 341, 347-48 (Utah App. 1991). In so arguing, Defendant evidences a complete misunderstanding of the fundamental judicial tenet that the district court is presumed to be the drafter of the ultimate decree or order. Such is particularly true in this case where the decree was simply a

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[4] Inasmuch as the subject language in the decree is not ambiguous as claimed by the Defendant, the trial court was not required to employ the applicable rules of contract interpretation.

[5] A further point that Defendant fails to address is that the parties' respective parents possibly retain some cause of action for recovery of the monies owed to the Plaintiff and Defendant. Consequently, the fact that the parties failed to include the repayment of the same in their Decree of Divorce is hardly fatal.

restatement of the stipulation entered into between the parties. Therefore, Defendant's suggestion that the clear, unambiguous language in the Decree should somehow be construed against the Plaintiff is without merit.[6]

Based on the foregoing, the district court's determination that the relevant language in the parties' Decree of Divorce was not ambiguous should be affirmed.

POINT II

THERE WAS SUFFICIENT EVIDENCE AT TRIAL TO SUPPORT THE DISTRICT COURT'S FINDING THAT DEFENDANT HAD CHILD SUPPORT ARREARAGES IN THE AMOUNT OF $1,982.04.

Defendant challenges the district court's finding that he owes child support in the amount of $1,982.04. Defendant initially argues that "if the trial court erred in not finding the decree of divorce ambiguous, the trial court erred in finding that Defendant owes any sum for delinquent child support." Defendant's Brief at 15. However, such point is moot since the Plaintiff has previously established that the decree of divorce is patently clear.

As part of the foregoing argument, Defendant claims that the parties entered into a private agreement that certain funds received at closing on the marital residence represented prepaid child support. However, the Defendant misrepresents such agreement. In fact, and as testified to by the Plaintiff:

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[6] Consequently, the cases cited by Defendant for this proposition are not controlling since those cases all involve private agreements presumably drafted by one party.

> What I agreed to was while we were sitting in the closing, it wasn't closing and I had a home waiting to close on and Sandy kept refusing to close on the home and beings the fact I had a couple-week-old baby and we were in a motel, I was willing to do what I needed to and that's when I said I will just pay what I need to pay. I will go without child support for a year so I have a place to go with my children, and that's what I did. I was desperate at the time. I needed to do what I could for my kids so we could get in a home.

(R. 338)

Accordingly, there was hardly an agreement, rather, the Defendant coerced the Plaintiff in agreeing to waive her child support in consideration for proceeds to which she was already legally entitled. Inasmuch as this court has previously held that such "agreements" are unlawful since child support does not inure to the parents but to the child(ren), such is nevertheless unenforceable.

Notwithstanding, there was sufficient evidence to support the following finding of the district court:

> 9. That pursuant to the statute of the State of Utah and the Divorce Decree provision as to child support for the two (2) remaining children in custody of the Plaintiff, and based upon Plaintiff's Counter-Petition, the child support is established at Seven Hundred Twenty-Three ($723.00) Dollars per month, and Plaintiff is granted judgment against Defendant for arrearage in child support of One Thousand Nine Hundred Eighty-Two and 04/100 ($1,982.04) Dollars, being the difference between the child support paid by Defendant and the child support schedule amount pursuant to Plaintiff's Exhibit.

Finding of Fact No. 9 (R. 264).

As set forth in the foregoing finding, and a point completely ignored by Defendant in his brief, the child support award was modified at the time of the hearing in this matter to reflect the proper level of child support pursuant to the uniform guidelines and based upon the parties' respective incomes as stipulated by the parties and ultimately set forth in the parties' divorce decree. Specifically, the Decree provides:

> 8. That defendant be and he is hereby ordered to pay to Plaintiff the sum of $196.33 per child per month, a total of $589.00 per month, for the support and maintenance of the minor children, . . . with the express provision that pursuant to the statute of the State of Utah that when each child reaches majority the child support shall be adjusted based on the Child Support Schedule.

Decree of Divorce, Finding No. 8.

Consequently, inasmuch as one of the parties' minor children had reached the age of majority, the court, pursuant to the Decree of Divorce, simply recalculated the support amount, representing the difference between that amount paid by the Defendant since the relevant period and the appropriate amount pursuant to the uniform child support guidelines. See Finding of Fact No. 9. Exhibit 19 and the Plaintiff's corroborating testimony were certainly sufficient to support the district court's finding regarding child support arrearage and the Defendant has not overcome his burden of demonstrating that such finding is clearly erroneous; therefore, that finding should be upheld.

POINT III

THERE WAS SUFFICIENT EVIDENCE AT TRIAL TO SUPPORT THE DISTRICT COURT'S FINDING REGARDING ALIMONY ARREARAGE.

Defendant also challenges the district court's finding that he owes Plaintiff back alimony in the amount of $5,083.00, representing arrearages from January 1991 through August 1994. In addition to his testimony, which he claims controverts the finding, he relies on Exhibits 13 and 17 from the Office of Recovery Services. Notwithstanding, there was sufficient evidence to support the court's ultimate finding.

Of particular significance, there was sufficient testimony and corroborating evidence to support the district court's finding. With respect to alimony arrearage, Plaintiff testified as follows:

> Q. (By Mr. Spencer) You claim in your Counter Petition that Sandy is in arrears in his alimony payments in the amount of $5,083; is that correct?
>
> A. (By Plaintiff) I do, uh-huh.
>
> Q. Upon what do you base that allegation?
>
> A. Well, when Sandy and I first got divorced we--he paid me in cash. We kind of just--it was pretty easy going. We kind of bent for each other and there would be times he wouldn't have enough. There would be, you know, so he wouldn't give me enough, and there would be other times when I needed--when he did the house payments, you know, and he paid the house payments because I told him, I said that would be easier, and oftentimes he might not have enough for the child support or the alimony and so we worked out the child support, that there were times that Sandy would come and maybe give me $200 on the alimony and then he'd give me $175 and that's kind of how it worked on and

off and that's where I came up with that because there was oftentimes that it kind of went back and forth like that.

Q. Do you have any records to show Sandy did not pay you?

A. No, I told him that. I told him it was just a figure but I think it was a very conservative figure.

(R. 333) (Emphasis added).

Further, the Plaintiff testified:

Q. (By Mr. Olsen) You were awarded $400 alimony?

A. (By Plaintiff) Yes.

Q. And you're claiming $5,093 delinquency?

A. Yes.

Q. And that was the best you could come with as far as your remembering, et cetra? There's no accounting records; is that correct?

A. No, I just came to a conservative number.

Q. Is that a liberal or a conservative figure?

A. It's conservative.

Q. You think it's greater than that, but you know it's at least that?

A. Yes.

(R. 352).

Furthermore, Exhibit 18 provided an accounting of delinquent alimony. Accordingly, the foregoing testimony and evidence conclusively demonstrates that there was sufficient evidence to support the district court's finding; therefore, such finding was not clearly erroneous.

Moreover, testimony by both the Plaintiff and Defendant controverts the reliability of Exhibit 13 and 17 from the Utah State Office of Recovery Services. First, Defendant's own testimony demonstrates that such records did not accurately reflect the payment history between the Plaintiff and the Defendant.

> Q. (By Mr. Spencer) Do you make your alimony payments directly to [the Plaintiff] or to the State of Utah?
>
> A. (By Defendant) Part of the time directly to her, part of the time to the State of Utah.
>
> Q. When did you start making payments to the State of Utah?
>
> A. As of January.
>
> Q. Of which year?
>
> A. January of 1994.
>
> Q. Now, going back to the time previous to January of 1994, did you make the payments to Regina in cash?
>
> A. Sometimes in cash, sometimes in checks.

R. 297-98).

By Defendant's own admission, therefore, he made no payments to the Office of Recovery Services until January of 1994, and the finding and judgment represented arrearages from January 1991 to August 1994. Accordingly, the records for periods from January 1991 to January 1994 admitted into evidence by Defendant could only be confirmed by the Plaintiff who reported to Office of Recovery Services, who testified as follows:

> Q. (By Mr. Spencer) Did you tell anyone at the State of Utah, Office of Recovery Services that Sandy wasn't paying you alimony?
>
> A. (By Plaintiff) When I went into the Office of Recovery Services, I went in and told them I was going to collect on child support and they told me at that time that we would need to do alimony. To be honest with you, I did not do the back alimony. At that time I was very concerned on getting enough food for my children. When I went to Recovery Services, I had told Sandy that even if he would just provide food and maybe pay the utility bills, I wouldn't go to Recovery Services, that I needed that. That's what we needed.
>
> Q. Now, when you went to Recovery Services, you did go to Recovery Services this year?
>
> A. I did, yes.
>
> Q. Did you tell them at that time that there was an alimony arrearage due and payable?
>
> A. I did and I told her, though, when we went, everything. She said to fill out the papers {Exhibit 13] on the arrears and I filled out the arrears. I didn't go back for the other.
>
> Q. Did you claim arrears for 1991?
>
> A. I did not. I told you that. I did not claim arrears for anything. I did not go back for the back alimony.

(R. 333-34) (emphasis added).

Consequently, the Plaintiff's testimony candidly indicates that when she went to Office of Recovery Services, she noted on the requisite forms that the Defendant was not in arrears on alimony payments inasmuch as she did not want to collect on alimony arrearages through ORS. However, such action on the part of the Plaintiff does not vitiate the fact that the Defendant was indeed in arrearage with respect to alimony or that Plaintiff had

a legal right to collect the same through judicial proceedings. Therefore, Defendant's reliance on such is misplaced.

POINT IV

Defendant next challenges the district court's finding regarding reimbursement for medical and dental expenses for the parties' minor children. See finding of fact No. 14 (R. 265). While purporting to marshall the evidence in support of the finding by citing the relevant pages in the record, Defendant utterly fails to meet his burden of marshalling all the evidence and demonstrating that such is insufficient to support the finding.

A simple review of the Defendant's testimony regarding his claim for reimbursement of the medical and dental expenses supports the district court's finding regarding the offset for the same.

> Q. (By Mr. Olsen) And you have attached to that document all checks that you've paid medical bills; is that true?
>
> A. (By Defendant) Yes.
>
> Q And there are no checks whatsoever in relation to what you claim to be copayments; is that true?
>
> A. That's true.
>
> . . . .
>
> Q. Okay, and the doctors you owed, you have got all the checks I requested by interrogatories attached there, are they not?
>
> A. They are.
>
> Q. And if I tell you I've gone through those and the total amount of those checks is -- that

a total amount of those checks -- I divide them differently. There was $1,331.19 paid to a Grant Weber, a collection outfit; is that correct?

A. That's true.

Q. And you got a letter from them. There's no checks on those. There's some checks you'd sent but they don't total $1,331.19.

A. That's true. I knew that I would need a statement from them stating I did pay it in full.

Q. I see. There's a bunch of checks there but as I recall, those are only about $500, but you said you paid $1,331 and got a statement from them.

A. They stated in that paper that I paid thirteen --

. . . .

Q. But anyway, if I add all those things together that you've got checks for, I end up with approximately thirty-seven, thirty-eight hundred dollars. I think in your document -- let me see your document, Exhibit 5. Shows you have checks for $2,369.44; is that correct?

A. Uh huh (affirmative)

Q. And in addition to that, you have the $1,331.19 you paid to collection outfit?

A. Right.

Q. Now, it's true, is it not, that of this $2,369 some thing, there are some--are there any checks in here made payable to this collection outfit?

A. To which collection--

Q. CPC, Olympus View Hospital or the collection company that was handling that.

A. To Grant Wiley?

Q. What I'm saying is you got a statement from the collection agency that you paid $1,331 and there are some checks to that collection outfit.

A. Uh-huh (affirmative).

Q. That's paying the whole-- they don't total $1,331 and that's payment on that $1,331' is that correct?

A. If a company states that I paid them a certain amount of money, I believe that is the amount I paid them.

Q. That isn't what I'm getting at. You're duplicating things. If you've got checks in there made payable to that company, they are a payment on that $1331; is that true?

A. I pulled out all of the checks to Grant Webber that I paid to them. They were not added twice.

Q. Okay, so if we take your documents as all being paid, the $1,331 and the 23, we have total amount of, the way I calculate it, of thirty-six -- no an even $4,000.63.

. . . .

Q. And that's the only checks you have, is that true, what you've got attached.

A. At this time I'm sure that's just a portion of what I paid.

(R. 313-18).

It is abundantly clear that based upon the foregoing testimony, the list of medical and dental expenses that the Defendant provided to the court was wholly inconsistent with the documentation verifying those expenses. Of particular note, the defendant testified that he did not have any checks for those amounts representing co-payments which amounted to approximately $6,000.00. Further, counsel for the Plaintiff elicited specific

testimony that the Defendant duplicated medical and dental expenses by setting forth the appropriate amount due the medical or dental provider as well as those same amounts being collected by collection agencies. Inasmuch as the district court had an opportunity to weigh the evidence provided by the Defendant in addition to the testimony and other evidence elicited by the Plaintiff in relation to the medical expenses, this court should not superimpose its judgment of such evidence, particularly where there was sufficient evidence to support the finding in question.[7]

POINT V

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING PLAINTIFF ATTORNEY FEES AND COSTS IN THE AMOUNT OF $4,308.00.

Finally, Defendant challenges the district court's award and underlying findings regarding attorney fees. "The decision to award costs and attorney fees in divorce and modification proceedings lies within the sound discretion of the trial court." Larson v. Larson, 888 P.2d 719, 726 (Utah App. 1994) (citing Utah Code Ann. sec. 30-3-3 (1989 & Supp. 1994). "However, to recover costs and attorney fees in proceedings on a petition to modify a divorce decree, the requesting party must demonstrate his or her need for attorney fees, the ability of the other spouse to pay, and the reasonableness of the fees. Id. (citing Morgan v. Morgan,

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[7] This court should likewise note that the Defendant does not necessarily challenge the reimbursement claim for medical and dental expenses by the Plaintiff set forth in Exhibit 23 and Exhibit 24.

854 P.2d 559, 568 (Utah App.), cert. denied, 860 P.2d 943 (Utah 1993).

In the case at bar, the district court made explicit findings regarding each of the foregoing factors, and the Defendant has failed to marshall or attack those findings; this court may presume the validity of the same. Speci-fically, with respect to the Plaintiff's need and the Defendant's ability to pay, the court found that "Plaintiff is presently unemployed and has assessed income to Plaintiff of minimum wage, or Seven Hundred Fifty-Four ($754.00) Dollars per month. That Defendant is employed by Salt Lake County and has gross income of Three Thousand Two Hundred Fifty-Nine ($3,259.00) Dollars. See Finding of Fact No. 10 (R. 264). Moreover, as to the reasonableness of the requested fee, the court found:

> 13. That Plaintiff has been required to employ counsel in defending the actions by Defendant, and Plaintiff's counsel's fees were necessary and were reasonable based upon the time and expenditures made on behalf of the Plaintiff and it is fair and reasonable that Plaintiff be awarded judgment against Defendant for reasonable attorney fees in the sum of Four Thousand One Hundred Ninety-Eight ($4,198.00) Dollars, together with costs in the amount of One Hundred Ten ($110.00) Dollars, for a judgment of total attorney fees and costs of Four Thousand Three Hundred Eight ($4,308.00) Dollars.

Finding of Fact No. 13 (R. 265).

Inasmuch as the district court considered each of the necessary factors in awarding attorney fees in the present modification case, the court did not abuse its discretion in doing so.

POINT VI
PLAINTIFF IS ENTITLED TO ATTORNEY FEES ON APPEAL.

"Generally, when a trial court awards fees in a divorce [or modification] action to a party who then prevails on appeal, that party will also be entitled to fees on appeal." Larson, 888 P.2d at 727 (citing Crouse v. Crouse, 817 P.2d 836, 840 (Utah App. 1991). Here, in the event that the Plaintiff prevails or substantially prevails on appeal, this court should remand this action to the district court for an award of reasonable attorney fees on appeal.

CONCLUSION

Based on the foregoing, this court should: (1) determine that the decree of divorce in this matter is sufficiently clear and unambiguous; (2) uphold the findings of the district court as to child support arrearages, alimony arrearages, and medical and dental expense reimbursement; (3) determine that the district court did not abuse its discretion in awarding the Plaintiff attorney fees and costs in the amount of $4,308.00; and (4) determine that the Plaintiff is entitled to an award of reasonable attorney fees incurred in defending the present appeal.

DATED this 1 day of August, 1995.

NOLAN J. OLSEN
Attorney for Plaintiff/Appellee

CERTIFICATE OF MAILING

I hereby certify that on the 1 day of August, 1995, I mailed a true and correct copy of the foregoing BRIEF OF APPELLEE, postage prepaid thereon, to:

MARY C. CORPORON, Esq.
TERRY R. SPENCER, Esq.
CORPORON & WILLIAMS
Attorneys for Defendant/Appellant
310 South Main Street, Suite 1400
Salt Lake City, Utah 84101

ADDENDUM "A"

COPY OF DECREE OF DIVORCE

DATED FEBRUARY 8, 1991

NOLAN J. OLSEN
Utah State Bar No. 2464
OLSEN & OLSEN
Attorneys for Plaintiff
8138 South State Street
Midvale, Utah 84047
Telephone: 255-7176

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

2163325
2-12-91-8:08am.

REGINA LYNN NELL,	DECREE OF DIVORCE
Plaintiff,	
vs.	
SANDY KEVIN NELL,	Civil No. 904904147
Defendant.	Honorable J. Dennis Frederick

The above-entitled matter having come on to be heard on the 22nd day of January, 1991, before Commissioner Michael Evans, plaintiff appearing in person and by her attorney, Nolan J. Olsen, and defendant appearing in person and by his attorney, Martin J. Pezely, and plaintiff and defendant having stipulated in open court, and plaintiff and defendant having each approved the stipulation in open court, and the court having approved the stipulation, and plaintiff having been sworn and testified concerning the allegations of her Complaint, and the court having heretofore made and entered its Findings of Fact and Conclusions of Law, and upon motion of Nolan J. Olsen, attorney for plaintiff, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That the bonds of matrimony heretofore existing between plaintiff, REGINA LYNN NELL, and defendant, SANDY KEVIN NELL, be and the same are hereby dissolved.

1. That plaintiff be and she is hereby awarded the care, custody and control of the three children born as issue of said marriage, to-wit: Mandy Lynn Nell, born February 26, 1976; Travis Sandy Nell, born November 25, 1977; and Trenton J. Nell, born April 12, 1980, subject to the right of reasonable visitations by the defendant which shall include but not be restricted to the following:

a. alternating weekends from Friday at 6:00 p.m. to Sunday at 6:00 p.m., with the express provision that due to the fact defendant's work schedule requires him to work weekends on occasion, the parties will work out the weekends such that defendant can have two weekends each month;

b. alternating holidays;

c. Father's Day and defendant's birthday;

d. a portion of children's birthdays;

e. Christmas Eve from 12:00 noon until 5:00 p.m.;

f. Christmas Day from 1:00 p.m. to 8:00 p.m.;

g. a minimum of two weeks each summer for vacation;

h. such other times as the parties may agree.

Plaintiff shall have the children on Mother's Day and plaintiff's birthday.

2. That plaintiff be and she is hereby awarded the

use of the home and real property located at 2195 West 13250 South, Riverton, Utah, until such time as one of the following contingencies occur, to-wit:

a. plaintiff remarries;

b. plaintiff cohabitates with an individual of the opposite sex;

c. youngest child reaches majority;

d. plaintiff desires to sell said home;

e. plaintiff no longer resides in said home.

When the first of the above contingencies occur, said home will be immediately placed for sale and from the proceeds from said sale, the sums will be distributed as follows:

a. all costs and expenses of sale including real estate commissions;

b. the balance due on the mortgage;

c. any costs of repairs to sell said home;

d. plaintiff will be reimbursed for any reduction of mortgage commencing in February, 1991, until date of sale;

e. plaintiff and defendant will equally divide the remaining balance.

3. That plaintiff be and she is hereby awarded as her sole and separate property the furniture, furnishings and fixtures located in the home, with the exception of certain personal property as agreed to by the parties which will be awarded to defendant; 1983 Cadillac; 1982 Voltswagon Rabbit; one-half of savings bonds; one-half of 401k at defendant's place of employment as of December 31, 1990; one-half of defendant's

retirement at Utah State Retirement Fund as of December 31, 1990; and her personal belongings.

4. That defendant be and he is hereby awarded as his sole and separate property the 1975 Ford pickup; motorcycle; trail bike; 4 wheel ATV; 3 wheel ATV; one-half of savings bonds; one-half of 401k at defendant's place of employment as of December 31, 1990; one-half of defendant's retirement at Utah State Retirement Fund as of December 31, 1990; and his personal belongings.

5. That a Qualified Domestic Relations Order shall be signed by the court awarding to plaintiff one-half interest in defendant's 401k plan and retirement at Salt Lake County and Utah State Retirement Fund.

6. That plaintiff be and she is hereby ordered to assume and pay the mortgage on the home due American Savings; Jordan School Credit Union; LDS Social Services; South Jordan City; and any other debts she has incurred since the filing of the Complaint.

7. That defendant be and he is hereby ordered to assume and pay the Salt Lake County Credit Union; Internal Revenue Services; Larry Peterson on medical bills; miscellaneous medical bills incurred during the marriage; and any other debts he had incurred since the filing of the Complaint, and hold plaintiff harmless therefrom.

8. That defendant be and he is hereby ordered to pay to plaintiff the sum of $196.33 per child per month, a total of $589.00 per month, for the support and maintenance of the minor children, a copy of said child support obligation worksheet

is attached hereto marked Exhibit "A", with the express provision that pursuant to the statute of the State of Utah that when each child reaches majority the child support shall be adjusted based on the Child Support Schedule. Defendant shall subtract from the child support as set forth above the costs of medical insurance on the minor children. Defendant shall pay said child support until each child reaches majority or completes high school whichever occurs last. Defendant shall pay one-half of said child support on or before the 5th day of each month and one-half on or before the 20th day of each month.

9. That defendant be and he is hereby ordered to pay to plaintiff the sum of $400.00 per month as alimony until defendant remarries, cohabitates, or dies, or there is a substantial change of circumstances by reason of plaintiff's graduating from college and obtaining higher paying employment.

10. That plaintiff and defendant be and they are hereby ordered to maintain medical insurance on the minor children as long as a policy is available at their place of employment, and plaintiff and defendant should each be ordered to pay one-half of medical and dental expenses not covered by insurance.

11. That plaintiff and defendant be and they are hereby ordered to maintain the children as beneficiaries on their present group life insurance policies.

12. That plaintiff and defendant be and they are hereby ordered to assume and discharge their individual attorney fees and courts costs.

DATED this 8 day of February, 1991.

BY THE COURT:

Michael L. Evans

COMMISSIONER ~~SANDRA PEULER~~

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of January 1991, I mailed a true and correct copy of the foregoing DECREE OF DIVORCE, to: Martin J. Pezely, Attorney for Defendant, 23 Maple Street, Midvale, Utah 84047, postage prepaid thereon.

Stephanie Davis

ADDENDUM "B"

COPY OF FINDINGS OF FACT

AND CONCLUSIONS OF LAW

DATED JANUARY 20, 1995

NOLAN J. OLSEN
Utah State Bar No. 2464
OLSEN & OLSEN
Attorneys for Plaintiff
8138 South State Street
Midvale, Utah 84047
Telephone: 255-7176

C. Beverley

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

REGINA LYNN NELL, Plaintiff, vs. SANDY KEVIN NELL, Defendant.	: : : : : : : : :	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 90 490 4147 DA Honorable J. Dennis Frederick

The above-entitled matter having come on for trial on the 21st day of December, 1994, before the Honorable J. Dennis Frederick; Plaintiff appearing in person and by her attorney Nolan J. Olsen; and Defendant appearing in person and by his attorney, Terry R. Spencer; and Plaintiff and Defendant having submitted evidence to the Court; and Plaintiff and Defendant and other witnesses having testified; and the Court having consolidated the civil case of *Sandy Kevin Nell vs. Regina Lynn Nell*, Civil No. 940902163; and the Court having taken said matter under advisement; and the Court having made its ruling on the 22nd day of December, 1994, and good cause appearing therefor; and the Court having been fully advised in the premises now makes the following:

FINDINGS OF FACT

1. That Defendant's civil action as against Plaintiff pursuant to Civil No. 940902163, was consolidated for trial with Defendant's Petition for Modification and Plaintiff's Counter-Petition for Modification, in the above matter.

2. That Defendant alleged in his Petition to Modify that there had been a change of circumstances, as to distribution of monies from the sale of the home and as to the payment of Plaintiff and Defendant's parents. The Court, however, determined that there was no substantial change of circumstances, as to said matter.

3. That Defendant alleges in his civil action and Petition to Modify, that Paragraph 2 of the Divorce Decree was ambiguous. The Court determined, however, that Paragraph 2 is not ambiguous and that the provisions set forth by Paragraph 2 is the determining factor in relation to the division of the money received from the sale of the home.

4. That the Lis Pendens filed as Entry No. 5783080 in Book 6909, Page 1157/1158 on the 1st day of April, 1994 in the office of the Salt Lake County Recorder's Office, be and the same is hereby dismissed, terminated and discharged.

5. That Merrill Title Company be and it is hereby ordered to deliver the Seven Thousand Two Hundred ($7,200.00) Dollars held in escrow pursuant to the sale of the property located in Salt Lake County, State of Utah, to wit: "Lot 1302 Mountain View Estates #13", to the Plaintiff, Regina Lynn Nell.

6. That Plaintiff remarried on September 5, 1994, and based upon said marriage, alimony terminated on said date.

7. That pursuant to the Counter-Claim on the civil action Number 940902163, the accounting of monies pursuant to Paragraph 2 of the Complaint provides that Defendant owes to Plaintiff the sum of One Thousand Six Hundred Thirty and 67/100 ($1,630.67) Dollars.

8. That Defendant has failed to pay alimony in the sum of Five Thousand Eighty-Three ($5,083.00) Dollars prior to February, 1994, and Plaintiff should be granted judgment against Defendant for delinquent alimony in the sum of Five Thousand Eighty-Three ($5,083.00) Dollars.

9. That pursuant to statute of the State of Utah and the Divorce Decree provision as to child support for the two (2) remaining children in the custody of Plaintiff, and based upon Plaintiff's Counter-Petition, the child support is established at Seven Hundred Twenty-Three ($723.00) Dollars per month, and Plaintiff is granted judgment against Defendant for arrearage in child support of One Thousand Nine Hundred Eighty-Two and 04/100 ($1,982.04) Dollars, being the difference between the child support paid by Defendant and the child support schedule amount pursuant to Plaintiff's Exhibit.

10. That Plaintiff is presently unemployed and has assessed income to Plaintiff of minimum wage, or Seven Hundred Fifty-Four ($754.00) Dollars per month. That Defendant is employed by Salt Lake County and has gross income of Three Thousand Two Hundred Fifty-Nine ($3,259.00) Dollars.

11. That it is fair and reasonable that Defendant be ordered to pay to Plaintiff child support for the two (2) minor

children, the sum of Seven Hundred Twenty-Seven ($727.00) Dollars per month, commencing in January, 1995.

12. That it is hereby ordered that Universal Income Withholding be effected pursuant to Utah Code Annotated, Section 62A-11-502. Further, pursuant to Utah Code Annotated, Section 62A-11-502(4)(b), an order assessing a Seven ($7.00) Dollar per month check processing fee shall be withheld and paid to the Office of Recovery Services for the purposes of income withholding.

It is further ordered that the Uniform Income Withholding be and is hereby ordered withheld for child care expense pursuant to this Decree of Divorce.

13. That Plaintiff has been required to employ counsel in defending the actions by Defendant, and Plaintiff's counsel's fees were necessary and were reasonable based upon the time and expenditures made on behalf of Plaintiff and it is fair and reasonable that Plaintiff be awarded judgment against Defendant for reasonable attorneys' fees in the sum of Four Thousand One Hundred Ninety-Eight ($4,198.00) Dollars, together with costs in the amount of One Hundred Ten ($110.00) Dollars, for a judgment of total attorneys' fees and costs of Four Thousand Three Hundred Eight ($4,308.00) Dollars.

14. That Defendant had paid medical and dental bills for the children of the parties, and pursuant to the Divorce Decree Plaintiff was to reimburse Defendant for one-half (½) of said medical and dental expenses not covered by insurance, and based upon the expenditures shown by the evidence presented by Plaintiff and Defendant, Defendant should have an offset from above set

forth judgment in the sum of One Thousand Eight Hundred Ninety and 83/100 ($1,890.83) Dollars for the one-half (½) medical and dental expenses, which are attributable to the Plaintiff.

15. That based upon the judgments as set forth above and the offset for medical expenses, Plaintiff should be awarded judgment against Defendant in the sum of Eleven Thousand One Hundred Twelve and 88/100 ($11,112.88) Dollars.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. That Defendant's Petition to Modify be and the same is hereby denied, as to distribution of funds from the sale of the home and payment of Plaintiff and Defendant's parents.

2. That Plaintiff's Complaint in the civil action Civil No. 940902163, be and the same is hereby dismissed, as no cause of action.

3. That Plaintiff be and she is hereby granted judgment against Defendant based upon her Counter-Claim in Civil No. 940902163, in the sum of One Thousand Six Hundred Thirty and 67/100 ($1,630.67) Dollars.

4. That Plaintiff's alimony terminated September 5, 1994.

5. That Plaintiff should be granted judgment against Defendant for the sum of Five Thousand Eighty-Three ($5,083.00) Dollars delinquent alimony.

6. That Plaintiff should be granted judgment against Defendant for the sum of One Thousand Nine Hundred Eighty-Two and 04/100 ($1,982.04) Dollars delinquent child support.

7. That Plaintiff should be awarded judgment against Defendant for reasonable attorneys' fees and costs of court in the sum of Four Thousand Three Hundred Eight ($4,308.00) Dollars, for the use and benefit of Plaintiff's counsel.

8. That the Divorce Decree in the above-entitled matter should be modified as follows:

a. That Defendant should be ordered to pay to Plaintiff child support for the two (2) minor children in the sum of Seven Hundred Twenty-Seven ($727.00) Dollars per month, commencing January, 1995 and continuing until the children reach the age of majority or complete high school in their normal graduating class, whichever occurs last.

b. That when the oldest child reaches majority, that Defendant should be ordered to pay child support to Plaintiff for the one (1) child in her custody, based upon the income of Plaintiff and Defendant at the date the said oldest child reaches majority or completes high school in his normal graduating class, whichever occurs last.

9. That mandatory withholding should be ordered.

DATED this 10th day of January, 1995.

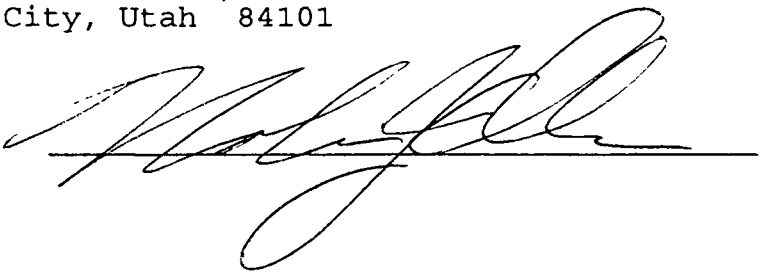
BY THE COURT:

The Honorable J. Dennis Frederick
Third District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 11 day of January, 1995, I mailed a true and correct copy of the foregoing, FINDINGS OF FACT AND CONCLUSIONS OF LAW, postage prepaid, to the following:

Terry R. Spencer
Attorney for Plaintiff
310 South Main Street, Suite 1400
Salt Lake City, Utah 84101



ADDENDUM "C"

COPY OF ORDER MODIFYING

DECREE OF DIVORCE

DATED JANUARY 20, 1995

JAN 20 1995

By C. Beverley

NOLAN J. OLSEN
Utah State Bar No. 2464
OLSEN & OLSEN
Attorneys for Plaintiff
8138 South State Street
Midvale, Utah 84047
Telephone: 255-7176

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

REGINA LYNN NELL,	:	216 3325
	:	**ORDER AND JUDGMENT**
Plaintiff,	:	219600
	:	1-20-95 8:00 am
vs.	:	
	:	
SANDY KEVIN NELL,	:	Civil No. 90 490 4147 DA
	:	
Defendant.	:	Honorable J. Dennis Frederick

The above-entitled matter having come on for trial on the 21st day of December, 1994, before the Honorable J. Dennis Frederick; Plaintiff appearing in person and by her attorney Nolan J. Olsen; and Defendant appearing in person and by his attorney, Terry R. Spencer; and Plaintiff and Defendant having submitted evidence to the Court; and Plaintiff and Defendant and other witnesses having testified; and the Court having consolidated the civil case of *Sandy Kevin Nell vs. Regina Lynn Nell*, Civil No. 940902163; and the Court having taken said matter under advisement; and the Court having made its ruling on the 22nd day of December, 1994, and good cause appearing therefor; and the court having heretofore made and entered its Findings of Fact and Conclusions of Law, and upon motion of Nolan J. Olsen, attorney for Plaintiff, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That Defendant's Petition to Modify be and the same is hereby denied, as to distribution of funds from the sale of the home and payment of Plaintiff and Defendant's parents.

2. That Plaintiff's Complaint in the civil action Civil No. 940902163, be and the same is hereby dismissed, as no cause of action.

3. That Plaintiff be and she is hereby granted judgment against Defendant based upon her Counter-Claim in Civil No. 940902163, in the sum of One Thousand Six Hundred Thirty and 67/100 ($1,630.67) Dollars.

4. That the Lis Pendens filed as Entry No. 5783080 in Book 6909, Page 1157/1158 on the 1st day of April, 1994 in the office of the Salt Lake County Recorder's Office, be and the same is hereby dismissed, terminated and discharged.

5. That Merrill Title Company be and it is hereby ordered to deliver the Seven Thousand Two Hundred ($7,200.00) Dollars held in escrow pursuant to the sale of the property located in Salt Lake County, State of Utah, to wit: "Lot 1302 Mountain View Estates #13", to the Plaintiff, Regina Lynn Nell.

6. That the Divorce Decree in the above-entitled matter be and it is hereby modified as follows:

a. That Plaintiff's alimony be and is hereby terminated as of September 5, 1994.

b. That Defendant be and he is hereby ordered to pay to Plaintiff child support for the two (2) minor children in the sum of Seven Hundred Twenty-Seven ($727.00) Dollars per month, commencing January, 1995

and continuing until the children reach the age of majority or complete high school in their normal graduating class, whichever occurs last.

c. That when the oldest child reaches majority, that Defendant be and he is hereby ordered to pay child support to Plaintiff for the one (1) child in her custody, based upon the income of Plaintiff and Defendant at the date the said oldest child reaches majority or completes high school in his normal graduating class, whichever occurs last.

7. That Plaintiff be and she is hereby granted judgment against Defendant for the sum of Five Thousand Eighty-Three ($5,083.00) Dollars delinquent alimony.

8. That Plaintiff be and she is hereby granted judgment against Defendant for the sum of One Thousand Nine Hundred Eighty-Two and 04/100 ($1,982.04) Dollars delinquent child support.

9. That it is hereby ordered that Universal Income Withholding be effected pursuant to Utah Code Annotated, Section 62A-11-502. Further, pursuant to Utah Code Annotated, Section 62A-11-502(4)(b), an order assessing a $7.00 per month check processing fee shall be withheld and paid to the Office of Recovery Services for the purposes of income withholding.

It is further ordered that the Uniform Income Withholding be and is hereby ordered withheld for child care expense pursuant to this Decree of Divorce.

10. That Plaintiff be and she is hereby awarded judgment against Defendant for reasonable attorneys' fees and costs of

court in the sum of Four Thousand Three Hundred Eight ($4,308.00) Dollars, for the use and benefit of Plaintiff's counsel.

11. That Defendant be and he is hereby awarded a set off of One Thousand Eight Hundred Ninety and 83/100 ($1,890.83) Dollars for the one-half (½) medical and dental expenses, which are attributable to the Plaintiff.

12. That based upon the judgments as set forth above and the offset for medical expenses, Plaintiff be and she is hereby awarded judgment against Defendant in the sum of Eleven Thousand One Hundred Twelve and 88/100 ($11,112.88) Dollars.

DATED this 20th day of January, 1995.

BY THE COURT:

The Honorable J. Dennis Frederick
Third District Judge

STATE OF UTAH THIRD DISTRICT COURT SALT LAKE COUNT

CERTIFICATE OF MAILING

I hereby certify that on the 11 day of January, 1995, I mailed a true and correct copy of the foregoing, ORDER AND JUDGMENT, postage prepaid, to the following:

Terry R. Spencer
Attorney for Plaintiff
310 South Main Street, Suite 1400
Salt Lake City, Utah 84101