2000

Uintah Basin Medical Center v. Leo W. Hardy, M.D. : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

STATE OF UTAH

UINTAH BASIN MEDICAL CENTER, Plaintiff and Appellee, v. LEO W. HARDY, M.D., Defendant and Appellant.	BRIEF OF APPELLANT, LEO W. HARDY, M.D. Supreme Court No. 20000501 Priority No. 15

From an Order of Summary Judgment
of the Eighth Judicial District Court for Duchesne County, State of Utah
Honorable John R. Anderson, Presiding

Blaine J. Benard (A5661)
E. Blaine Rawson (A7289)
HOLME, ROBERTS & OWEN, LLP
111 East Broadway, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 521-5800

Attorneys for Plaintiff / Appellee
Uintah Basin Medical Center

John P. Harrington (A5242)
Joni J. Jones (A7562)
Melissa H. Bailey (A8379)
RAY, QUINNEY & NEBEKER
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

Attorneys for Defendant / Appellant
Leo W. Hardy, M.D.

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JURISDICTION

This is an appeal from a summary judgment of the trial court. This Court has jurisdiction to decide this appeal pursuant to UTAH CODE ANN. § 78-2-2(j) (1996).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

Did the trial court err in ruling that the Uintah Basin Medical Center's Board of Trustees properly terminated the pathology services agreement with Leo W. Hardy, M.D. ("Dr. Hardy") on July 18, 1996?

Standard of Review. The trial court's application of law to the undisputed facts in summary judgment is reviewed for correctness. *Trujillo v. Utah Dep't. of Transp.*, 1999 UT App. 227, ¶ 12, 986 P.2d 752, 757.

Preservation of Issue. Dr. Hardy raised this issue in his Supplemental Brief on Issue of Whether Contract Impermissibly Binds Successor Boards. (R.991-1018.)

DETERMINATIVE LAW

The decision in this appeal is governed by common law and thus no statutes, constitutional provisions, ordinances, or rules are determinative.

STATEMENT OF THE CASE

Nature of the Case

This is a breach of contract case involving a professional services contract for pathology services (the "Agreement") entered into by Dr. Hardy and the Uintah Basin Medical Center ("UBMC"). The Agreement, executed on November 29, 1994, recited no termination date, but instead was terminable "for just cause." Despite the fact that Dr. Hardy never received complaints from UBMC or its medical staff regarding his services between November of 1994 and July of 1996, UBMC terminated the Agreement on July 18, 1996. At the same time, UBMC hired Dr. Thomas Allred to provide pathology and emergency room services for the hospital.

Although it originally maintained that the trial court should impose a contractual duration of two years since the Agreement did not include a term of duration, UBMC later argued that the Agreement was voidable because it impermissibly bound successor boards. Dr. Hardy disputed the application of this law as suggested by UBMC. However, on summary judgment, the trial court agreed with UBMC's analysis and ruled that the Agreement was voidable by UBMC successor boards of trustees. The trial court further determined that the board seated in 1996 was a "successor" board and that the Agreement therefore properly had been terminated by a July 18, 1996 vote of the UBMC board of trustees.

Course of Proceeding and Disposition Below

On October 28, 1996, UBMC filed a declaratory judgment action seeking a ruling on the parties' rights under the Agreement. Shortly thereafter, Dr. Hardy filed a counterclaim against UBMC for breach of contract. On June 19, 1998, Dr. Hardy filed a motion for partial summary judgment on his breach of contract counterclaim asserting that UBMC terminated the Agreement without just cause as required by the terms of the Agreement. UBMC subsequently filed a cross-motion for summary judgment seeking a determination that the Agreement contained no term of duration and that it was therefore reasonable for the trial court to infer a two-year durational term. The trial court denied both motions on the ground that material facts remained in dispute. After engaging in extensive discovery, the parties stipulated to certain material facts and filed renewed motions for summary judgment on the question of whether Dr. Hardy's "just cause" contract was enforceable under Utah law. In its reply memorandum, UBMC argued for the first time that because UBMC is a governmental entity, its successor board could not be bound by the Agreement.

The trial court heard oral argument on the renewed motions for summary judgment and ruled from the bench that Dr. Hardy's "just cause" contract was enforceable under Utah law, and that the question of whether UBMC had just cause to terminate the Agreement should be resolved by the jury. The trial court

then allowed the parties to file additional briefs on the issue of whether the Agreement was voidable by a UBMC successor board. In a written ruling issued on April 6, 2000, the trial court concluded that the Agreement could not be enforced against UBMC's successor boards. (A copy of the trial court's ruling is included in the Addendum.) The trial court further ruled that because the ten-member board in place when the Agreement was terminated included three new members, it was a successor board with the legal right to terminate the Agreement at any time. On that basis, the trial court denied Dr. Hardy's renewed motion for summary judgment and granted summary judgment in favor of UBMC.

The trial court entered a judgment and order dismissing Dr. Hardy's breach of contract counterclaim on May 18, 2000. (A copy of the trial court's order is included in the Addendum.)

Statement of Facts

1. Dr. Hardy is a board certified pathologist. (R.189.)

2. UBMC is the business name for Duchesne County Hospital which is owned by Duchesne County and operated by UBMC's Board of Trustees (the "Board"). (R.304.)

3. On November 29, 1994, Dr. Hardy and UBMC entered into the Agreement in which Dr. Hardy agreed to provide professional services for UBMC

as director of the hospital's pathology laboratory and to perform related duties. (A copy of the Agreement is included in the Addendum.) The language of the Agreement was taken from a contract between UBMC and Dr. Sannella (a pathologist at UBMC who immediately preceded Dr. Hardy). Dr. Hardy modified the contract slightly and returned the edited contract to UBMC. The Agreement was then typed onto Duchesne County Hospital letterhead and signed by Bradley D. LeBaron, who was UBMC's administrator and who had authority to enter into personal service contracts on UBMC's behalf. Although the Agreement was executed on November 29, 1994, it became effective August 1, 1994, the date upon which Dr. Hardy first began providing pathology services to UBMC. (R.185-86, 189, 546.)

4. Paragraph 11 of the Agreement provides:

> This agreement shall become effective August 1, 1994 and continue to bind the parties to the terms hereof until terminated after ninety (90) days written notice for just cause of termination by either party or by mutual consent of the parties to a shorter notice period.

(R.185-86, 546.)

5. Pursuant to the terms of the Agreement, Dr. Hardy agreed to (a) be available for physician consults to interpret laboratory results; (b) visit the UBMC hospital weekly for one to two hours to recommend processes and policies to

assure smooth operation of the UBMC laboratory; and (c) undertake teaching activities when new procedures were introduced. (R.185-86.)

6. The Board is the entity authorized to terminate personal services contract. (R.546.)

7. The Board consists of nine voting members, seven of whom are appointed for a three-year term. Two of these members are appointed for a term of indefinite duration. In addition, the hospital administrator serves as a non-voting member of the Board, and his tenure also has no stated term of duration. The UBMC Bylaws provide as follows:

> *Board of Trustees.* The Uintah Basin Medical Center Board of Trustees, created by the Duchesne County Commission shall constitute the Board of Trustees and shall be known as the Board of Trustees of the Uintah Basin Medical Center.
>
> The Board of Trustees shall consist of nine (9) voting members, seven of which are appointed elected [sic] for three (3) year [sic]. Board members are eligible to fill a maximum of two consecutive three (3) year terms.
>
> *County Commission Representative (Ex Officio).* There shall at all times be a member of the Duchesne County Commission on the Board of Trustees. That Board member will be selected by the Duchesne County Commission and shall serve as an ex officio member of the Board. This representative is a voting member of the Board.

> *Medical Staff Representative (Ex Officio).* The Board of Trustees shall have as a member the Chief of Medical Staff of Duchesne County Hospital who shall be nominated by the Medical Staff and who shall serve as an ex officio member of the Board. This representative is a voting member of the Board of Trustees.
>
> *Hospital Administrator (Ex Officio w/o vote).* The Administrator of the Hospital shall serve as a non-voting member of the Board.
>
> * * *
>
> *Appointment and Vacancies*. All appointments to fill vacancies on the Board of Trustees shall be made by the County Commission, whether such vacancies occur by death, resignation, removal, expiration of term, increase or decrease in the number of Board members. The Commission will be provided recommended nominees by the Hospital Board of Trustees. ...

(R.993-1002, a copy of the Bylaws is included in the Addendum.)

8. On July 18, 1996, the Board voted to terminate the Agreement and to invite Dr. Thomas J. Allred to join UBMC's medical staff as a pathologist and as an emergency room physician. (R.290A, 290-91, 304, 545.)

9. Between the time the Board entered into the Agreement with Dr. Hardy and the time it terminated that Agreement, three new voting members had been appointed to the Board. (R.1027.)

10. Dr. Hardy continued working for UBMC until October 28, 1996, approximately 90 days after UBMC notified him it was terminating the Agreement. (R.189, 545.)

11. Prior to his termination, Dr. Hardy performed his obligations under the Agreement satisfactorily and received no complaints from UBMC or its medical staff. After termination of the Agreement, on a few occasions, at the request of members of the UBMC medical staff, and with the approval of the UBMC administration, Dr. Hardy performed limited pathology services for members of the UBMC medical staff in Dr. Allred's absence. (R.189, 545.)

SUMMARY OF ARGUMENT

The trial court erred when it held that the UBMC Board properly terminated the Agreement with Dr. Hardy on July 18, 1996. Not only was the Agreement fully enforceable against the Board holding office in 1996 because the Agreement did not violate the rule of law holding certain contracts entered into with governmental bodies are not binding on successors, but it was also enforceable because the Board ratified its terms. Thus, this Court should enter an order reversing the trial court's ruling which granted summary judgment in favor of UBMC.

As an initial matter, the trial court improperly applied the two-part test in *Bair v. Layton City Corp.*, 307 P.2d 895 (Utah 1957), the case which was controlling on the issue of whether Dr. Hardy's Agreement impermissibly bound UBMC's successor boards of trustees. Rather than consider whether the contract at issue involved a governmental or proprietary function (as *Bair* requires), the trial court reviewed the nature of the UBMC Board. Having concluded that the Board was a "governmental entity," the trial court erroneously determined that the Agreement was voidable by successor boards. The trial court's analysis is at odds with Utah case law and results in a flawed ruling. This result is not entirely surprising because the governmental/proprietary test articulated by *Bair* is

confusing and difficult to apply. Accordingly, this Court should adopt a test that properly takes into account the policy for the rule. Under such an analysis, the Agreement clearly would be enforceable because it in no way restricts or hinders the Board in its policy-making decisions.

Although *Bair* is controlling authority on the issue of whether a government contract impermissibly binds successors, *Bair* is inapposite in this case because the policy underlying the law does not apply. First, the UBMC Board is an appointed, rather than an elected board. Second, the Agreement is essentially an employment contract made in good faith. Under well-recognized law, such contracts are generally enforceable against successor boards. Additionally, there is no "successor" board in this case because the terms of the UBMC Board members are staggered. To the contrary, the Board is a continuous body, free to enter into long-term contracts which benefit the community. Finally, the Agreement does not impermissibly bind successor boards because, pursuant to its terms, the Agreement was terminable for "just cause."

Should this Court find, however, that the Agreement was voidable by future boards—either under the governmental/proprietary test or under another test adopted by the Court—it should nonetheless hold that the Agreement is enforceable because the UBMC Board holding office in 1996 was not a

"successor" board. Such a ruling would be consistent with the case law since a new board is not created until a majority of the members of the board are replaced. In this case, between the time the Board entered into the Agreement with Dr. Hardy and the time it terminated that Agreement, only three of the ten board members were newly appointed.

Finally, even if this Court finds that the Agreement was voidable and that the UBMC Board holding office in 1996 was a successor board, it should reverse the trial court's ruling that the Agreement was properly terminated. By treating the Agreement as valid and accepting the benefits of Dr. Hardy's pathology services from the time the new board was seated in January of 1996 through July of 1996, the UBMC Board implicitly ratified the Agreement. It was not entitled to terminate the contract until January of 1997, when a new member would be appointed to the UBMC Board.

ARGUMENT

I. UNDER THE *BAIR* TEST, DR. HARDY'S AGREEMENT IS VALID AND ENFORCEABLE.

In holding that the Agreement was voidable by the UBMC Board, the trial court relied upon a seldom-cited rule of law which states that in performing governmental, as opposed to proprietary functions, municipal boards may not enter into contracts which are binding on the municipality after the end of the board's

term of office. (Ruling at 2, Addendum.) With little analysis, the trial court concluded that because the UBMC Board is a "governmental entity," it was unable to enter into the Agreement, the terms of which potentially would bind all successor boards. (*Id.*) The trial court's ruling, which failed to discuss or take note of the fact that the Agreement related to a proprietary function of the Board rather than a governmental function, was plainly in error.[1]

Almost fifty years ago in *Bair,* 307 P.2d at 902, this Court adopted the governmental/proprietary test for determining whether a municipal contract is enforceable against successors of the governmental entity.[2] In *Bair*, the Court was

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[1] While not entirely clear from the ruling itself, it appears that the trial court concluded that the Agreement was voidable because it was entered into by UBMC, a governmental entity. (Ruling at 2, Addendum.) Assuming this accurately states the trial court's analysis, reversal is clearly warranted because the trial court misapplied the law. To determine whether a contract entered into with a governmental entity is enforceable, a court must consider whether the contract itself involves the performance of the entity's governmental or proprietary function. *Bair*, 307 P.2d at 902. In this case, it appears that the trial court instead engaged in an analysis of whether the entity itself (the UBMC Board) was a governmental or proprietary entity. (Ruling at 2, Addendum) ("...[T]here should be no reason for such an agreement to continue into the future or be binding on successor Boards **where the governing Board is a governmental entity**.") (emphasis added.) Under such an analysis of the law, all contracts entered into with municipalities would be voidable at the whim of the board.

[2] The trial court did not cite or analyze the *Bair* decision in its ruling. However, that case established Utah's standard for determining whether a contract entered into by a municipality is enforceable against its successors. Thus, *Bair* was

asked to determine whether a 50-year contract for sewage treatment was valid and enforceable. *Id.* at 897. In deciding that the contract was enforceable, the *Bair* Court acknowledged the common law rule that "governing bodies, in the exercise of governmental or legislative power cannot make a contract which is binding on the municipality after the end of such governing body's term of office." *Id.* at 902. However, the Court recognized that "in the exercise of its business or proprietary power such body may bind the municipality for as long a period of time as is reasonably necessary to accomplish a legal purpose." *Id.* Thus, under *Bair*, the first step in determining whether a long-term municipal contract is enforceable is to determine whether the contract involves a governmental or proprietary function. If the function is governmental, then the contract is not enforceable against successors. On the other hand, if the contract involves a proprietary function, the contract is enforceable only if it passes the second part of the *Bair* test—whether its duration is reasonable under the circumstances. *Id.* at 902.

The trial court failed to follow the two-part analysis set forth in *Bair*. The first step in *Bair* requires determining whether the subject matter of the contract involves a governmental or proprietary function. The trial court, however, focused

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binding on the trial court and any discussion of the trial court's ruling must begin with an analysis and application of *Bair*.

on the fact that **a party** to the contract—UBMC—was a governmental entity, and concluded that because UBMC is a governmental entity, the Agreement was voidable. (Ruling at 2, Addendum.) Under *Bair*, the trial court should have analyzed whether the Agreement to provide pathology services satisfied a governmental or proprietary function of the Board.

A. The Agreement Satisfies a Proprietary Function of the Board.

Unfortunately, *Bair* simply offers no guidance on how Utah courts should make the determination of whether a municipal contract involves a governmental or proprietary function. The *Bair* court concluded sewage treatment contracts are proprietary without analysis, citing other jurisdictions that had so held. *Bair*, 307 P.2d at 902. Other jurisdictions, however have adopted useful factors to consider in making this determination.[3] Courts frequently consider whether the municipal board's discretion or policy-making authority is hampered by the contract; if not,

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[3] Utah appellate courts have developed criteria for determining whether a function is governmental or proprietary in the context of tort immunity. *See, e.g. Debry v. Noble,* 889 P.2d 428, 439 (Utah 1995) (reviewing and summarizing Utah case law on governmental/proprietary test in tort immunity context). The tort immunity test, however, does not work well in analyzing municipal contracts because the policy considerations are vastly different. *See* Janice C. Griffith, *Local Government Contracts: Escaping) from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277, 327-28 (1990) ("The risk that courts will confuse the interests that activate the distinct tests [for tort immunity and for municipal contracts] argues against use of the same general rubric in different contexts.").

the contract involves a proprietary function and is enforceable. *See, e.g., Rhode Island Student Loan Auth. v. Nels, Inc.*, 550 A.2d 624, 627 (R.I. 1988) (in which the court found the contract at issue to be proprietary because the contracting party "could neither exercise discretion nor set policy in the performance of its duties"). Courts also often consider a contract proprietary if the agreement benefits the people whom the governmental entity serves. *See, e.g., Daly v. Stokell*, 63 So.2d 644, 645 (Fla. 1953) ("We understand the test of a proprietary power to be determined by whether or not the agents of the city act and contract for the benefit and welfare of its people; any contract, in other words, that redounds to the public or individual advantage and welfare of the city or its people is proprietary..."). Other factors that indicate a contract is proprietary include whether the activity can be performed by a private entity and whether the contract is entered into to raise revenue. *See, e.g., Chichester Sch. Dist. v. Chichester Educ. Ass'n*, 750 A.2d 400, 403 n.11 (Pa. Commw. Ct. 2000). Contracts are considered to involve a governmental function, on the other hand, if the function is "indispensable to the proper functioning of government," *id.*, or involves exercising "some element of sovereignty." *Daly*, 63 So.2d at 645.

Under these factors, Dr. Hardy's contract is a proprietary contract. First, and mostly importantly, Dr. Hardy's contract does not impair the UBMC Board of

Trustees' ability to exercise its policymaking role, as the Agreement itself demonstrates. The Agreement provides, in pertinent part, that in addition to reviewing pathology specimens, Dr. Hardy would:

- be available for physician consults to interpret laboratory results;
- visit the UBMC hospital weekly for one to two hours to recommend processes and policies to assure smooth operation of the UBMC laboratory; and
- undertake teaching activities when new procedures were introduced.

(Agreement at 1-2, Addendum.) By and large, Dr. Hardy was responsible for making pathologic diagnoses. While in addition, Dr. Hardy suggested medical "policies" for correcting technical and administrative problems, such "policies" are not the sort of policymaking that must be left to a governing body. Moreover, the Agreement simply requires Dr. Hardy to **recommend** policies for fixing any problems that may arise in the pathology lab he directs at UBMC. Even if these policies were viewed as the kind of legislative policymaking that should not be taken from UBMC Boards, Dr. Hardy's contract is still enforceable because as director of pathology, Dr. Hardy merely makes suggestions. Under the terms of the Agreement, the Board continues to formulate and adopt policies for the pathology lab and the hospital as a whole. Further, if Dr. Hardy ever failed to

implement UBMC policies, then UBMC could terminate the Agreement pursuant to the "just cause" provision.

Second, the contract does "redound to the public" advantage because the people of the Uintah Basin benefit from having pathology services performed by Dr. Hardy. Certainly UBMC entered into the contract for the very purpose of providing quality medical services to the patients of the hospital.

Third, the contract does not involve a function that is "indispensable" to the functioning of a government or "an element of sovereignty." This contract was simply for pathology services, which by no stretch of the imagination can be deemed an essential aspect of government.

And finally, Dr. Hardy's services bring money into UBMC rather than require expenditure of tax dollars. Dr. Hardy bills patients for his services, retains a portion as part of his fee and UBMC retains the remainder of funds collected. (Agreement at 1-2, Addendum.) Further, the provision of pathology services not only "may be carried on by private enterprise," but it most often is. *Chichester,* 750 A.2d at 403 n.11. Private physicians, not governments, operate pathology laboratories, even, as in this case, if the laboratory is for a county hospital.

B. The Agreement is for a Reasonable Duration.

Under these factors, Dr. Hardy's contract is proprietary, not governmental. As such, it is enforceable under *Bair* if it meets the second element of the test—that is, if it is deemed to be for a reasonable duration. *Bair*, 307 P.2d at 902. In determining whether the contract was for a reasonable duration, the *Bair* Court quoted with approval the analysis in *McBean v. City of Fresno*, 44 P. 358 (Cal. 1896):

> In sustaining such [sewage treatment] contract, the court said that if "it be made to appear that at the time the contract was entered into, it was fair and just and reasonable, and prompted by the necessities of the situation, or was in its nature advantageous to the municipality, then such contract will not be construed as an unreasonable restraint upon the powers of succeeding boards." This, we believe, is a clear and correct statement of the law on this question . . . .

Bair, 307 P.2d at 902-03 (quoting *McBean*, 44 P. at 361).[4] Thus, in the event that the proprietary contract at issue is fair, just and reasonable and prompted by the necessities of the situation, the contract must be held valid and enforceable even if it extends beyond the terms of the members of the governmental entity.

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[4] As discussed in section IIA, *infra*, *Bair* is rather difficult to decipher. An argument can be made that *Bair* intended the *McBean* factors to be used for determining whether a contract is proprietary or governmental. If this Court does

Under this second step of the *Bair* test, the trial court should have held the Agreement is enforceable. First, the Agreement was fair and reasonable when UBMC entered into it. As the Agreement states, either party could terminate it "for just cause." (Agreement at 1, Addendum.) The "just cause" provision in the Agreement not only provided Dr. Hardy with security,[5] it also ensured that UBMC would always have quality pathology services, since the "just cause" provision would allow the Board to terminate the Agreement if Dr. Hardy's services ever became inadequate. Second, the Agreement was prompted by "the necessities of the situation." *Bair*, 307 P.2d at 902. As the Agreement recites, the arrangement met "the needs of Uintah Basin Medical Center" at the time it was executed. (Agreement at 1, Addendum.)

In addition to meeting UBMC's essential need for a pathologist, the duration of the contract—the occurrence of "just cause"—was necessary to ensure UBMC would have continuous, quality pathology services. These hospitals have a great need to hire and retain quality physicians, and often such hospitals offer additional

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not abolish *Bair* as urged in section II, then the Court should clarify for trial courts how *Bair* should be applied.

[5] Dr. Hardy was assured that he would be terminated only for "just cause" and not for any indiscriminate reason for which an at will employee could be let go. (Agreement at 1, Addendum.)

job security to induce physicians to stay in rural practice.[6] Rural hospitals are already at a disadvantage in attracting high quality health care providers because they simply cannot match the salaries offered in larger communities. According to the Journal of the American Medical Association:

> [O]ne of the most persistent and serious problems facing the US physician work-force [is] the shortage of physicians in rural areas. Constituting more than 20% of the US population, rural areas contain one of the largest medically underserved populations in the country. Rural areas have more primary care Health Professional Shortage Areas (HPSAs)...than nonrural areas. While this shortage of physicians in rural areas is not new, it appears to be worsening despite the large and increasing number of physicians being trained in this country. Moreover, recent data that few medical school graduates (2.2%) plan to practice in rural areas or small towns raise serious questions as to whether this is likely to improve in the future.

Howard K. Rabinowitz, et al., *A Program to Increase the Number of Family Physicians in Rural and Underserved Areas*, Journal of the American Medical Association, Jan 1999.

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[6] Although the trial court noted the problems facing rural hospitals, its concern did not factor into the decision. (Ruling at 2, Addendum) ("Perhaps this is one of the reasons why the rural hospitals in the Country are going private rather than remaining under the control of the governmental entities that had traditionally operated them; other wise [sic], their ability to recruit good Doctors' [sic] would be severely limited.")

To entice excellent physicians to move to and remain in rural areas such as the Uintah Basin, hospitals often add perks to the contracts, including "just cause" termination provisions, or even offer "lifetime" contracts.[7] The Florida courts and legislature have already recognized the importance of retaining qualified employees to perform work for municipalities or counties. "[W]e recognize the best way to get the best people to do their best job is to treat them right, pay them well and offer them security in their employment." *Tweed v. City of Cape Canaveral*, 373 So.2d 408, 410 (Fla. Ct. App. 1979). Given the necessities of the situation, such contracts are of a reasonable duration. Thus, the Agreement passes the second part of the *Bair* test as well.

When the two-step *Bair* analysis is properly applied, the Agreement is unquestionably enforceable. However, as noted above, the *Bair* test is difficult to decipher and even more difficult to apply, since it offers no guidance for determining the governmental/proprietary function. While the parties have the luxury on appeal of carefully examining and explicating the *Bair* test and applying it to the facts in the case, they often do not have such an opportunity in the trial court below. In the instant case, for example, the parties did not brief the governmental/proprietary issue until **after** summary judgment oral argument.

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[7] Indeed, UBMC has a "lifetime" contract with at least one physician.

(R.991-1018.) Like most trial courts, the Roosevelt court doubtless had little time to analyze the cases and issue its written decision. These time pressures—coupled with the fact that the *Bair* test is difficult to decode and to apply—mean that trial courts will likely continue to misapply or misinterpret Utah law on long-term municipal contracts. Thus, Dr. Hardy asks this Court to adopt a clearer, more workable test to better guide the trial court if a remand is necessary.

II. THIS COURT SHOULD ADOPT A TEST FOR DETERMINING WHETHER MUNICIPAL CONTRACTS ARE ENFORCEABLE THAT PROPERLY TAKES INTO ACCOUNT THE POLICY FOR THE RULE.

This Court should recognize that the governmental/proprietary test, which *Bair* adopted, is too difficult to apply, and adopt a more straightforward test that takes into account the policy for prohibiting long-term municipal contracts.

A. The Governmental/Proprietary Test Is Unworkable.

The common law rule that a municipality may not enter into a contract that binds its successors in office was created in the early 19th century because courts recognized that a legislative body must be free to enact policy as changing needs—and the electorate – dictate. *See* Griffith, *Escaping the Maze*, at 282-83. Courts quickly recognized, however, that municipalities need to enter into long-term contracts to operate efficiently, and ultimately the "governmental/proprietary" test was adopted for determining whether a long-term municipal contract would be

enforceable. *Id.* at 302 & n.133. As discussed above, under this test, a municipal entity may enter into a long-term contract that would bind future officials elected to run the municipality if the contract involves a proprietary, rather than a governmental, function. *Id.* at 303-04.

The problem with the governmental/proprietary test is that it simply does not work. "There is no precise dividing line between the two functions; they may sometimes be difficult of distinction and may tend to overlap." *Daly*, 63 So.2d at 645. *See also Valvano v. Board of Chosen Freeholders of the County of Union*, 183 A.2d 450, 451-52 (N.J. Super. Ct. 1962) (the governmental/proprietary dichotomy is universally recognized, but not uniformly applied because "[t]he distinction between governmental and proprietary functions is not easy to decipher"). As a leading commentator on the subject explained, "the most common criticism of the governmental/proprietary test is that it is difficult, **if not impossible**, to apply." Griffith, *Escaping the Maze*, at 322 (emphasis added); *see also Figuly v. City of Douglas*, 853 F. Supp. 381, 384 (D. Wyo. 1994) (test results in illogical or inconsistent results); *Piedmont Public Serv. Dist. v. Cowart*, 459 S.E.2d 876, 881 (S.C. Ct. App. 1996) ("[T]he difference between proprietary and governmental functions is often difficult to determine, because, as the scope of governmentality expands, the intertwining and overlapping of such functions make

it increasingly more difficult to draw any definitive line of separation.") (citation and quotation marks omitted). Indeed, as early as 1955 Justice Frankfurter described the test as the "quagmire that has long plagued the law of municipal corporations." *Indian Towing Co. v. U.S.*, 350 U.S. 61, 65 (1955). Today, with governmental entities either taking on more business activities or privatizing activities that had previously been the domain of government, the test is not so much a quagmire as it is an anachronism.

In fact, this Court in *Bair* struggled with the governmental/proprietary distinction and ultimately adopted *McBean's* "clear and correct statement of the law" regarding enforceability of long-term municipal contracts. *Bair*, 307 P.2d at 902. *McBean* itself, however, expressly declined to adopt the governmental/proprietary test. Rather, *McBean* adopted the test of whether the contract is "fair and just and reasonable, and prompted by the necessities of the situation," and "advantageous to the municipality" to determine if the contract is enforceable. *See McBean,* 44 P. at 361. Because *McBean*—which *Bair* describes as providing a "clear and correct statement of the law"—rejected the governmental/proprietary test, it is difficult to be certain exactly what the *Bair* court intended when it adopted the *McBean* factors. Subsequent Utah case law does not shed any light on the *Bair* test. *Cf. Salt Lake City v. State*, 448 P.2d 350,

353 (Utah 1968) (upholding city's argument to perpetually provide water for capitol grounds on basis that the "city in selling water is engaged in a proprietary activity and not in its governmental capacity" without discussing or citing *Bair*).

Recognizing that the governmental/proprietary test cannot do what it was originally intended to—that is allow municipalities to enter into beneficial contracts that will not impede governments' powers—many jurisdictions have abandoned it in favor of more workable tests. *See, e.g., State ex rel. Ass'n for the Preservation of Tenn. Antiquities v. City of Jackson*, 573 S.W.2d 750 (Tenn. 1978) (rejecting governmental/proprietary distinction and adopting 3-part test for determining whether long-term contracts with municipality are enforceable); *Plant Food Co. v. City of Charlotte*, 199 S.E. 712 (N.C. 1938); *Mariano & Assoc. v. Board of County Comm'rs of Sublette County*, 737 P.2d 323, 327-28 (Wyo. 1987); *McBean*, 44 P. at 361 (municipal contract enforceable against successors if it was fair, just, reasonable, and necessary at the time it was executed). This Court should also recognize that the governmental/proprietary test is unworkable and outmoded and adopt a more workable test.

B. This Court Should Adopt a Test That Focuses on the Underlying Policy of Barring Long-Term Municipal Contracts.

In adopting a test to replace the governmental/proprietary test, this Court should bear in mind the very compelling policy reasons for prohibiting

municipalities from binding their successors to contracts as well as for allowing exceptions. As one court recently explained:

> . . . the doctrine here at issue has its roots in our fundamental notions of democratic government. We select public officials, legislative or executive, whom we believe will carry out the policies intended by the electorate. If they fail to do so, or if the people conclude that new policies are in order, they can be voted out of office. To allow an elected body to perpetuate its policies beyond its term of office would frustrate the ability of the citizenry to exercise its will at the ballot box. It is only because of these fundamental concerns that we allow otherwise valid contracts to be undone, and we must carefully evaluate each case to insure that innocent third parties are not unnecessarily harmed for the sake of democratic principals. **As noted long ago by another court, "the true test is whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired."**

Lobolito, Inc. v. North Pocono Sch. Dist., 722 A.2d 249, 252-53 (Pa. Commw. Ct. 1998) (emphasis added), *rev'd on other grounds*, 755 A.2d 1287 (Pa. 2000) (quoting *Plant Food*, 199 S.E. at 714) (emphasis added). Without expressly adopting a new test, the *Lobolito* court distilled the *Plant Food* test into what it called the "essential inquiry:" "whether enforcement of the contract would impair, to any significant degree, the new body's exercise of its policymaking role." *Id.* at 252. Although this modified *Plant Food* test may be subject to criticism as "too inexact," application of the test is actually straightforward. *See* Griffith, *Escaping*

the Maze at 335 (criticizing the *Plant Food* test). It has the advantage of focusing on the *reason* governments generally should not enter into long-term contracts.

Under the modified *Plant* test, Dr. Hardy's contract is enforceable against UBMC successor boards. As detailed in section IA, *supra*, Dr. Hardy's contract does not impair the UBMC Board of Trustees' ability to exercise its policymaking role. Dr. Hardy only *suggests* medical "policies," which does not involve the sort of legislative policymaking identified in the modified *Plant Food* test. (Agreement at 1, Addendum.) Under the very terms of the Agreement, the Board continues to formulate policies for the pathology lab. And, if Dr. Hardy ever failed to implement UBMC policies, then UBMC could terminate the Agreement pursuant to the "just cause" provision. Because Dr. Hardy's Agreement does not in any way impair future UBMC Boards from formulating and adopting policies, this Court should find it is enforceable.

As the foregoing analysis demonstrates, and the analysis in section I, *supra*, deciding whether a contract should properly be enforced against a government's successors is not difficult when the focus is on the "critical issue" of whether the contract prevents an elected official from doing what he or she was elected to do—enact policy. Even if this Court declines to abolish the governmental/proprietary distinction, it should at least adopt the policymaking test as a factor in making the

governmental/proprietary distinction. The trial court below, and future trial courts, will certainly benefit from this more precise inquiry.

III. THE RULE PROHIBITING LONG-TERM MUNICIPAL CONTRACTS DOES NOT APPLY IN THIS CASE BECAUSE THE UNDERLYING POLICY IS NOT IMPLICATED UNDER THE PARTICULAR FACTS.

Although the trial court apparently reached its decision based upon *Bair*, the policy underlying the rule that government officials should not be allowed to contract beyond their term of office does not apply in this case for at least four reasons. Accordingly, this Court should rule the Agreement is exempt from the *Bair* rule. First, UBMC Board members are appointed, not elected. Second, Dr. Hardy's contract is essentially an employment contract, and under established law, such a contract may bind successor boards. Third, UBMC's Board is staggered such that there is never a "future" board to be impermissibly bound, and, fourth the "just cause" provision in the Agreement allows future Boards to terminate the contract for legitimate reasons so that future Boards are not impermissibly bound.

A. UBMC's Appointed Board Does Not Answer Directly to the Electorate and Therefore the Policy Underlying the Prohibition Against Binding Successors Does Not Come Into Play.

The UBMC Board of Trustees is not an elected body. Instead, members are appointed by the Duchesne County Commissioners and serve a minimum three year term, irrespective of whether the County Commissioners who appointed the

board members remain in office for the duration of those board members' tenure. (UBMC Hospital Bylaws at 1-2, Addendum.) This is a critical fact completely overlooked by the trial court.

Courts have prevented successor boards from being bound by the actions of predecessors because an elected official should be entitled to execute the platform upon which he or she was elected. This rationale is worth repeating, this time in the words of the Wyoming federal court:

> One of the most important characteristics of our democratic form of government is the authority of our elected officials to make changes mandated by the electorate. The ability of incoming officials to change policies, procedures, and even key personnel of their predecessors, allows the incoming officials to implement their own policies, those policies desired by the majority of the public who elected them. To allow a prior government or official to bind his successors by creating contracts or other commitments which extend beyond his term would be contrary to this critical facet of democracy.

Figuly, 853 F. Supp. at 384. If the elected official were compelled to honor all contracts executed by his or her predecessor, he or she would be unable to implement any policies or promises made during a campaign. Running for office would be a difficult task indeed if the official could not effectuate any changes.

The same logic does not apply to appointed boards. Members of an appointed board are not chosen by the ballot. If the appointed board member is

appointed by an elected official, the board member's term can, and often does, extend well beyond the term of the elected official. The appointed board member is thus not duty-bound to uphold the policies of the elected official who appointed him or her. Based upon this reasoning, the court in *Airport Impact Relief, Inc. v. Massachusetts Port Auth.*, 1995 WL 809553 * 7 (Mass. Super. Ct. 1995)[8] concluded that a contract entered into by an appointed board which exceeded the tenure of some of the members of the board was not voidable, but rather was a fully enforceable contract. "The board in the instant case is not an elected board as it was in *Dracut*, but a staggered and appointed one." *Id.* There is simply no compelling reason to extend this rule of law to contracts entered into by appointed boards. *See also Board of Klamath County Comm'rs v. Select County Employees*, 939 P.2d 80, 84 (Or. Ct. App. 1997) ("When a majority of the members of a governing body must **stand for election** at the same time, we follow the established rule that prohibits an outgoing governing body from binding a succeeding governing body to a contract that calls for the performance of governmental functions.") (emphasis added); *City of Hazel Park v. Potter*, 426

[8] Dr. Hardy recognizes that the *Airport Impact* case is an unpublished opinion under Utah R. Jud. Admin. 4-508. Accordingly, Dr. Hardy has filed contemporaneously herewith a Motion to Cite Unpublished Decision. This motion is based upon the paucity of published decisions which address this issue necessitating a review of relevant unpublished decisions.

N.W.2d 789, 793 (Mich. Ct. App. 1988) (rule applies to elected board); *Tryon v. Avra Valley Fire Dist.*, 659 F. Supp. 283 (D. Ariz. 1986) (same); *Labor Relations Comm'n v. Board of Selectmen of Dracut*, 373 N.E.2d 1165, 1167 (Mass. 1978) (same).

Because the UBMC Board was appointed, (R.1027), the ban against long-term municipal contracts does not apply. Empowering the UBMC Board to enter into contracts which extend beyond the term of any one of the board members does not threaten the electoral process. The Uintah Basin community remains free to elect officials to carry out certain platforms the community desires.

B. Because Dr. Hardy's Agreement is Essentially an Employment Contract, and Made in Good Faith, it is Enforceable Against Successor Boards.

The rule banning long-term municipal contracts also does not apply in this case because Dr. Hardy's Agreement is essentially an employment contract, and it has long been recognized that such contracts do not implicate the underlying policy of the rule. ". . . a contract of employment extending beyond the term of the office of the members of a public board, such as a board of county commissioners, a municipal board, or other similar controlling body representing a municipal corporation, is, if made in good faith, ordinarily a valid contract." 10A Eugene McQuillin, *The Law of Municipal Corporations* § 29.101, p. 45 (3d ed. 1999).

Only when "the nature of an office or employment is such that it requires a municipal board or officer to exercise supervisory control over the appointee or employee, together with the power of removal" will the appointment be considered a governmental function, and the contract voidable by successor boards. *Id.* at p. 46. In other words, if the contract is for an employee working directly for the board and helping the board implement policy, the contract is voidable by future boards. Otherwise, it is a legitimate, enforceable contract:

> Where the [employment] contract in question is a unitary one for the doing of a particular and specified act, but its performance may extend beyond the term of the officers making it, if it appears that the contract was made in good faith and in the public interest it is not void because it will not be completed during the term of those officers. If, on the other hand, the contract is for the performance of personal or professional services for employing officers, their successors must be allowed to choose for themselves those persons on whose honesty, skill and ability they must rely.

Tryon, 659 F. Supp. at 285 (citation omitted).

Because Dr. Hardy's Agreement is essentially an employment contract made in good faith,[9] and because Dr. Hardy was neither supervised by nor worked directly for the Board, his contract is valid. Pursuant to his contract, Dr. Hardy was the director of the pathology lab at UBMC. (*See* Agreement, Addendum at 2.)

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[9] UBMC has never alleged the contract was not entered into in good faith.

He was not supervised by the Board, but rather reported to the UBMC medical staff. To maintain clinical privileges at UBMC, Dr. Hardy had to be appointed to the medical staff. (*See* UBMC Hospital Bylaws at 6, Addendum.) The medical staff has "the responsibility and authority to investigate and evaluate all matters relating [to] the Medical Staff membership status (including appointment and reappointment)." (*Id.* at 7.) Thus, the medical staff, not the Board, directly supervised Dr. Hardy and evaluated whether Dr. Hardy should be allowed to continue to practice at UBMC. (*See, e.g.,* R.991, in which Dr. Hardy informs staff of new pathology systems.) Under the employment contract exception, the contract between UBMC and Dr. Hardy is valid and enforceable.

C. Because UBMC's Board is Staggered, There is No "Successor" Board.

Additionally, the prohibition against long-term municipal contracts does not apply in this case because UBMC's Board is staggered. Without analysis, the trial court rejected this argument. (Ruling at 2, Addendum.) However, the staggered board exception is recognized in treatises and case law as preventing application of the rule against long-term municipal contracts because there is never a "future" board to be impermissibly bound.

"Where a municipal body is a board or commission, the terms of the members of which are staggered, it is a continuous body, existing in perpetuity;

and contracts of such a body generally do not bind or restrict successors in office." 10A McQuillin *Mun. Corp.* § 29.101. Courts, as well as McQuillin, have recognized the "staggered board" rule, and have upheld contracts entered into by such boards. In *Airport Impact Relief,* 1995 WL 809553 * 6-7,[10] the court held that the rule prohibiting successors from being bound to a contract did not apply. "The court is not persuaded by Massport's argument that the agreement is unenforceable on its face because it binds 'future' Massport boards. The staggered terms provision was plainly intended to ensure the board's continuous, perpetual existence." *Id.* at *6. The Florida Supreme Court also recognized that common sense dictates that a staggered, continuous board never has a "future" embodiment to be impermissibly bound:

> We find no merit to the contention that the contract is invalid and unenforceable because it runs beyond the length of term of the city commissioners. It is shown that their terms are staggered and expire at different times. When this is the case, the City commission is a continuing body and may contract for any reasonable time since there is no point at which the terms of all the commissioners come to an end.

Daly, 63 So.2d at 645. *See also Manley v. Scott*, 121 N.W. 628, 630 (Minn. 1909) ("Having the power at that time to employ a morgue keeper, there is no implied limitation upon that power which restricts the possible term of employment to the

[10] *See supra* n. 8.

time when any member or members of the board shall go out of office."); *St. Louis Police Officers' Assoc. v. Board of Police Comm'rs*, 846 S.W.2d 732, 739 (Mo. Ct. App. 1992) (five-member board held to be a "continuous body" when one appointed member occupied a seat on the board throughout the relevant period); *Aslin v. Stoddard County*, 106 S.W.2d 472, 476 (Mo. 1937) (courthouse janitor's contract with the county court held to bind the county despite the fact that it extended beyond the terms of some of the members of the court).

UBMC's Bylaws dictate such a staggered or "continuous" board:

> The Board of Trustees shall consist of nine (9) voting members, seven of which are appointed elected [sic] for three (3) year [sic]. Board members are eligible to fill a maximum of two consecutive three (3) year terms.

(UBMC Hospital Bylaws at 1-2, Addendum.) Under this structure, some Board members will serve two consecutive three-year terms while others might serve only one term, thus creating overlap between new and incumbent Board members. Moreover, three of the positions created by the Bylaws—the appointed member of the Duchesne County Commission, the Chief of the Medical Staff and the Hospital Administrator—have no limit, thereby creating three board positions of indefinite duration and increasing the possibility of overlapping boards. (*Id.*)

In fact, between 1994 and 1996, the years Dr. Hardy was appointed to the medical staff and the year he was terminated, respectively, only three of the ten

board members completed their terms. (R.1026-27.) The remaining seven board members remained in office. (*Id.*) As a result of the appointment mechanisms created by the County, UBMC's Board "is a continuous body, existing in perpetuity." 10A McQuillin *Municipal Corp.* § 29.100. As a continuous body, the UBMC Board was empowered to enter into contracts even if the term of the contract had the potential to extend beyond the term of some of its members.

D. The Board's Successors are Not Impermissibly Bound by the Agreement Because Successor Boards Could Always Terminate the Agreement for "Just Cause."

Finally, the Agreement was terminable for "just cause" upon 90 days notice at any time after the contract was executed. (*See* Agreement at 1, Addendum.) Thus, any successor board could terminate the contract if it had "just cause" to do so and the prohibition against binding the hands of successor boards simply does not apply. *See, e.g., In re Averback v. Board of Educ.* , 541 N.Y.S.2d 655, 657 (N.Y. App. Div. 1989) (rejecting argument that teacher's contract impermissibly bound successor school board in part because "[t]he agreement permits a successor board to discharge petitioner for cause during the probationary term" of her employment). Similarly, if Dr. Hardy failed to fulfill his contractual obligations, or became unable to meet the needs of the community, UBMC would have had

"just cause" to terminate the contract. Because of the "just cause" provision, Dr. Hardy's Agreement does not impermissibly bind "future" UBMC Boards.

IV. IF THIS COURT RULES DR. HARDY'S AGREEMENT WAS VOIDABLE BY FUTURE BOARDS, IT SHOULD HOLD THAT A "NEW" BOARD WAS NOT CREATED UNTIL A MAJORITY OF MEMBERS WERE REPLACED.

For the reasons discussed above, this Court should hold that Dr. Hardy's contract is not voidable as a contract that impermissibly binds successor UBMC Boards. However, if this Court should rule otherwise, it also must address the question of when, exactly, a new board is created. The trial court ruled that because there were three new members on the UBMC Board when it voted to terminate the Agreement in July 1996, the Board was a "new" Board and entitled to void the Agreement. (Ruling at 2, Addendum.) Although the trial court did not explain the basis for this conclusion, presumably it concluded that once a single new member was appointed to the Board, the Board was "new" and entitled to void any contract made by a "predecessor" board. This Court should reject the trial court's legal conclusion that a "new" board is created when a single new member is added and hold that a "new" Board is not created until at least of majority of the members are replaced.

At least one recent case has recognized that the rule preventing future government boards from being bound is not implicated unless a majority of board

members are replaced. In *Klamath County,* 939 P.2d at 84, the court stated: "When a **majority** of the members of a governing body must stand for election at the same time, we follow the established rule that prohibits the outgoing body from binding a succeeding governing body to a contract that calls for the performance of governmental functions." (emphasis added) (citing *Miles v. City of Baker*, 51 P.2d 1047 (1935), which applied rule when all three members of board stood for reelection at one time and two were defeated; 28 Or. Atty. Gen. Op. 3846 (1957), concluding that the rule would apply where terms of office for five out of seven members of board would expire during term of contract). Applied to UBMC's staggered, appointed board, the rule as described in *Klamath* would allow a board that had a majority of new members to void contracts made by predecessor boards. Such a rule would fairly limit staggered government boards' ability to disavow contracts whenever a new member is appointed.

If, on the other hand, a "new" UBMC Board, for example, is created any time a single new member is appointed, then no one could enter into a contract with UBMC with any confidence that it would be enforceable. As detailed in Section IIIC, *supra*, UBMC's Boards are staggered. There are seven members of the Board who serve terms. (UBMC Hospital Bylaws at 1, Addendum.) Because the members are appointed at differing times, and their terms expire at varying

times, in virtually every year at least one Board member is replaced. (R.1026-27.) Thus, a physician could enter into a two-year contract with UBMC in August of 2000, for example, and the following January 1, 2001, a new Board member is appointed. The Board could then void the two-year contract with impunity.

Such a result is not desirable for UBMC, the physicians who enter into contracts to provide critical services to the hospital, or to the community. If physicians cannot be confident that the contracts they enter into with UBMC are legally enforceable beyond a few months, then it is not too far-fetched to reason that many physicians would simply choose not to provide services for UBMC.[11]

A rule of law which would make UBMC contracts virtually illusory is poor policy. Ultimately, the people served by the hospital lose the most, because if UBMC cannot recruit and retain excellent health care providers, it cannot maintain quality services. Accordingly, if this Court rules that UBMC could not bind "future" boards to Dr. Hardy's contract, then this Court should clarify that a "future" board is not created until a majority of new members are appointed.

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[11] *See supra* section IB for a discussion on the difficulties rural hospitals face in retaining quality health providers.

V. IN ANY EVENT, THE BOARD IMPROPERLY TERMINATED DR. HARDY'S AGREEMENT BECAUSE IN 1996, THE BOARD RATIFIED THE AGREEMENT.

If this Court finds that the trial court correctly determined that the UBMC Board in 1996 was a newly constituted board, it should find that the 1996 Board actually ratified Dr. Hardy's contract. The trial court ruled that because there were three new members on the 1996 Board, the Board properly terminated Dr. Hardy's contract on July 18, 1996. (Ruling at 2, Addendum.) However, by treating Dr. Hardy's contract as valid from January of 1996, when a new member was appointed to the UBMC Board, through July of 1996, the UBMC Board implicitly ratified Dr. Hardy's contract. It was not entitled to terminate his contract until January of 1997 when, according to the trial court's ruling, the UBMC Board would, once again, be newly constituted due to the addition of a new member.

As discussed in greater detail above, one of the purposes of the rule that a board may not impermissibly bind successor boards is to prevent a successor board from being impeded in its efforts to effectuate the policies and platforms upon which the board member was elected. (*See supra* pp. 29-30.)[12] However, courts

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[12] In fact, this rule is most often applied in circumstances in which a lame-duck board enters into agreements after an election but before the newly-elected board members take office. *Lobolito*, 755 A.2d at 1291. In *Chichester School Dist.*, 750 A.2d 400, the court noted that "the notion of 'lame-duck' boards normally applies in instances of last-minute contracts executed near the end of the board

have held that not all contracts terminate upon the completion of the term of the board members who made them. *Figuly*, 853 F. Supp. at 384. Instead, the board has the option of continuing those contracts consistent with its goals and it is not obligated to honor agreements which it believes contrary to its policies. A successor board therefore may ratify any contract entered into by its predecessors. *Lobolito*, 755 A.2d at 1291, n.7; *DeKalb County v. Georgia Paperstock Co.*, 174 S.E2d 884, 887 (Ga. 1970) (long-term contract would be enforceable "by the ratification of the contract evidenced by the board accepting the benefits thereof during subsequent years."). The contracts are not automatically void.

Utah courts most often discuss ratification in the context of agency relationships. The analysis is equally applicable in this case where, in essence, the UBMC Board which entered into the Agreement was acting as an agent for the 1996 UBMC Board. "It is well-established under Utah law that 'subsequent affirmance by a principal of a contract made on his behalf by one who had at the

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members' terms. Here, the contracts executed between the Board and the CEA and CAA were actually ratified by the Board at public hearing approximately two years prior to the election and seating of the successor Board members." *See also Klamath County*, 939 P.2d at 81 (contract terminable where predecessor board entered into employment agreement after the election of the new board but before their term had expired). Dr. Hardy's contract was not such a midnight contract. The parties executed the contract in November of 1994 and it was ratified by at least one so-called successor board.

time neither actual nor apparent authority constitutes a ratification, which in general is as effectual as an original authorization.'" *Bullock v. State*, 966 P.2d 1215, 1218 (Utah Ct. App. 1998) (citing *Moses v. Archie McFarland & Son*, 230 P.2d 571, 573 (Utah 1951)). Ratification need not be express.

> Any conduct which indicates assent by the purported principal to become a party to the transaction or which is justifiable only if there is ratification is sufficient. Even silence with full knowledge of the facts may manifest affirmance and thus operate as a ratification.

Id. (citing *Moses*, 230 P.2d at 573-74).

In this case, there is at least a factual dispute as to whether there was ratification of the Agreement making summary judgment inappropriate. In January of 1996, a new member was appointed to the UBMC Board. (R.1027.) However, rather than terminate the Agreement with Dr. Hardy upon forming what the trial court has designated a "successor board," the UBMC Board treated the Agreement as valid for over seven months. (R.1054.) Its conduct in treating the Agreement as valid and accepting the benefits of Dr. Hardy's pathology services ratified the terms of the Agreement. The Agreement was thus only terminable for just cause or upon the seating of a new successor board in January of 1997. This analysis is consistent with the case law in which successor boards must take action on the contract within a relatively short time period after election to the board. *See*

Lobolito, 755 A.2d at 1288 (contract terminated within a month after election of new school board); *Klamath County*, 939 P.2d at 82 (contract terminated "shortly after" two new board members took office); *Figuly*, 853 F. Supp. at 383 ("almost immediately" after city council elections took place, the council began to take steps to terminate employee's contract); *Tryon*, 659 F. Supp. 283 (board members included termination of employee's contract on meeting agenda two months after taking office).

Having ratified the Agreement by its conduct over a seven-month period following the appointment of a "successor board," UBMC was not entitled to terminate the Agreement in July of 1996 absent a finding of just cause.

CONCLUSION

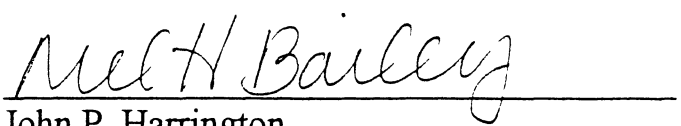
This case exemplifies the reason the Court needs to review the rule that municipalities may not enter into certain contracts which would impermissibly bind successor boards. UBMC was not even aware of this rule at the time it terminated Dr. Hardy's Agreement or at the time it initiated this litigation. It was not until filing its reply memorandum to the second motion for summary judgment that UBMC decided to rely upon the rule in any effort to avoid paying damages for terminating Dr. Hardy's contract. This court should clarify the *Bair* decision so

that government entities cannot simply void otherwise valid contracts with impunity.

The facts in this case show that Dr. Hardy's Agreement was valid under *Bair* or under any of the well-recognized exceptions to the *Bair* rule. Accordingly this Court should enter an order reversing the trial court's ruling granting summary judgment in favor of UBMC.

DATED this 7TH day of December, 2000.

RAY, QUINNEY & NEBEKER



John P. Harrington
Joni J. Jones
Melissa H. Bailey

Attorneys for Defendant / Appellant
Leo W. Hardy, M.D.

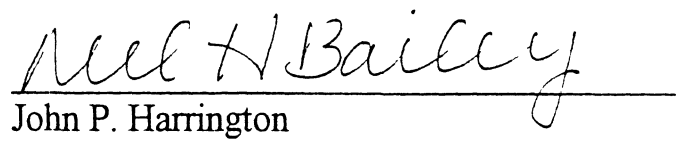
566949

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLANT was mailed, postage prepaid, on this 7TH day of December, 2000, to:

Blaine J. Benard
E. Blaine Rawson
HOLME, ROBERTS & OWEN, LLP
111 East Broadway, Suite 1100
Salt Lake City, Utah 84111

RAY, QUINNEY & NEBEKER



John P. Harrington
Joni J. Jones
Melissa H. Bailey

Attorneys for Defendant / Appellant
Leo W. Hardy, M.D.

ADDENDUM

A. Trial Court's Ruling (April 6, 2000)

B. Order and Judgment Granting Plaintiff's Motion for Summary Judgment (May 18, 2000)

C. Pathology Services Agreement

D. UBMC Hospital Bylaws

Tab A

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR DUCHESNE COUNTY
ROOSEVELT DIVISION, STATE OF UTAH

UINTAH BASIN MEDICAL CENTER, Plaintiff(s), vs. LEO W. HARDY, M.D. Defendant(s).	RULING Civil No. 990000109 CV Judge John R. Anderson
LEO W. HARDY, M.D., Counterclaimant and Third-Party Plaintiff, vs. UINTAH BASIN MEDICAL CENTER and THOMAS J. ALLRED, M.D., Counterclaim Defendant and Third-Party Defendant.	

Uintah Basin Medical Center as Plaintiff brought this action in the form of a Declaratory Judgment to have the Court determine the effect and status of an Agreement between the Center and Dr. Leo Hardy. Dr. Leo Hardy filed a Counterclaim and a Third-Party Complaint for damages under the contract and for interference of contract against the Third-Party Defendant Thomas J. Allred, M.D.

The Plaintiff and the Defendant have made cross motions for summary judgment based upon stipulated facts and further finding by this Court that the essential facts necessary to decide the issues were not in dispute. After extensive briefing and oral argument on January 20th, 2000, the Court previously found that:

1. Dr. Hardy's contract to provide pathology services was an enforceable contract under Utah Law.
2. The contract was terminable for "just cause".
3. Whether Plaintiff had "just cause" to terminate the contract would be a question for the jury.

4. The Court allowed further briefing on the question as to whether or not a contract of this nature could bind successor Boards.

The Court has carefully reviewed the supplemental memoranda filed by the parties on this last issue.

The Court concludes that the contract in question is voidable with or without "just cause" simply because it could not bind successor Boards.

There are many policy reasons why a health care provider would contract for pathology services such as entered into with the Plaintiff and Dr. Hardy. Due to the rapid advance of science, medicine changes and needs of patients there should be no reason for such an agreement to continue into the future or be binding on successor Boards where the governing Board is a governmental entity. *

The Courts' conclusion is that the Board may terminate the Agreement with Dr. Hardy either for just cause and or simply declare the contract voidable because it would be invalid through future and or successor Boards. The Court rejects the staggered term concept or argument of the Defendant and the Courts' conclusion would be that the Agreement was terminated when the Board served notice on Dr. Hardy after ninety days.

In the year the notice of termination was made there had been three new appointments and therefore a new Board. It is the Courts' opinion that the "just cause" issue therefore becomes moot and will not go to the jury.

The Motion for Summary Judgment filed by the Plaintiff, Uintah Basin Medical Center will be granted as against the Defendant for the reasons set forth in its memoranda. See also, Park City Education Association vs. Board of Education of the Park City School District, 879 P.2d 267, (Ut. 1994).

Counsel for U.B.M.C. is directed to prepare an Order consistant herewith.

Dated this 6th day of ~~March~~ April, 2000.

Judge John R. Anderson

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* Perhaps this is one of the reasons why the rural hospitals in the Country are going private rather than remaining under the control of the governmental entities that had traditionally operated them; other wise, their ability to recruit good Doctors' would be severely limited.

CERTIFICATE OF MAILING/HAND DELIVERY

I hereby certify that I mailed a copy of the foregoing, postage prepaid, or hand delivered to the following parties on the 6 day of March, 2000.

By Mail: JOHN P. HARRINGTON
JONI J. JONES
RAY, QUINNEY & NEBEKER
Attorneys at Law
PO BOX 45385
SALT LAKE CITY UT 84145-0385

By Mail: BLAINE J. BENARD
HOLME ROBERTS & OWEN
111 E. BROADWAY, #1100
Attorneys at Law
SALT LAKE CITY, UT 84111

By Mail: CLARK A. MCCLELLAN
MCKEACHNIE, ALLRED, MCCLELLAN & TROTTER
72 N 300 E (123-14)
ROOSEVELT UT 84066

Clerk

Tab B

HOLME ROBERTS & OWEN LLP
Blaine J. Benard, #5661
E. Blaine Rawson, #7289
111 East Broadway, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 521-5800
Facsimile: (801) 521-9639
Attorneys for Plaintiff

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR DUCHESNE COUNTY

ROOSEVELT DIVISION, STATE OF UTAH

UINTAH BASIN MEDICAL CENTER, Plaintiff, v. LEO W. HARDY, M.D. Defendant.	**ORDER AND JUDGMENT GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Civil No. 990000109CV Judge John R. Anderson

LEO W. HARDY, M. D., Counterclaimant and Third-Party Plaintiff, v. UINTAH BASIN MEDICAL CENTER and THOMAS J. ALLRED, M.D., Counterclaim Defendant and Third-Party Defendant.	

On January 20, 2000, the Court, the Honorable John R. Anderson presiding, heard oral argument on the parties' cross motions for summary judgment pursuant to Rule 56 of the Utah Rules of Civil Procedure. The cross motions were submitted upon stipulated facts agreed to by both parties. Plaintiff was represented by Blaine J. Benard of Holme, Roberts & Owen LLP. Defendant was represented by John P. Harrington and Joni J. Jones of Ray, Quinney & Nebeker. Third Party Defendant was represented by Clark A. McClellan of McKeachnie, Allred, McClellan & Trotter. Following the hearing and at the request of Defendant's counsel, the Court allowed further briefing on the question of whether the professional services agreement (the "Agreement") between Duchesne County Hospital, dba Uintah Basin Medical Center ("UBMC") and Leo W. Hardy, M.D. ("Dr. Hardy") impermissibly bound successor boards of a governmental entity and was voidable. Having heard oral argument of counsel, considered the cross motions for summary judgment and the supporting and supplemental memoranda of the parties, finding that the essential facts necessary to decide the issues are not in dispute, and for good cause appearing:

THE COURT FINDS AS A MATTER OF LAW THAT:

1. The Agreement to provide pathology services was an enforceable contract under Utah law.

2. The Agreement was terminable for "just cause" and the issue of whether or not "just cause" existed for UBMC to terminate the Agreement would be a question for a jury. However, the "just cause" issue has been made moot by this Court's other findings below.

3. The Court agrees with the arguments espoused by UBMC in its memoranda and finds that Agreement was voidable with or without "just cause" because, under the undisputed

facts of this case, the Board of UBMC that entered into the Agreement with Dr. Hardy cannot bind future and/or successor Boards of UBMC to the contract with Dr. Hardy. As a governmental entity serving the needs of the public, the future and/or successor Boards of UBMC should not be bound by the Agreement because the Board of UBMC needs to be able to respond to the changing needs of its patients and the citizens it serves and to adjust to rapid advances in science and medical technology.

4. The Court rejects Dr. Hardy's legal arguments regarding the "staggered term" concept.

5. In the year the notice of termination was given by the existing Board of UBMC, there had been three new appointments to the Board of UBMC, and, therefore, a new Board of UBMC was in place. This new Board of UBMC lawfully terminated the voidable Agreement with Dr. Hardy.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that

1. UBMC's Renewed Cross-Motion for Summary Judgment is granted for the reasons set forth in its memoranda. The Court's ruling on UBMC's Renewed Cross-Motion for Summary Judgment disposes of the issues raised in UBMC's declaratory judgment cause of action and the Court hereby rules that UBMC properly and lawfully terminated the Agreement with Dr. Hardy.

2. Dr. Hardy's Renewed Cross-Motion for Summary Judgment is denied and Dr. Hardy's counterclaims asserted against UBMC in this matter are hereby dismissed with prejudice.

DATED this 18 day of May, 2000.

BY THE COURT:

Judge John R. Anderson

APPROVED AS TO FORM:

John R. Harrington
Joni J. Jones
Attorneys for Defendant, Counterclaimant
and Third-Party Defendant

CERTIFICATE OF SERVICE

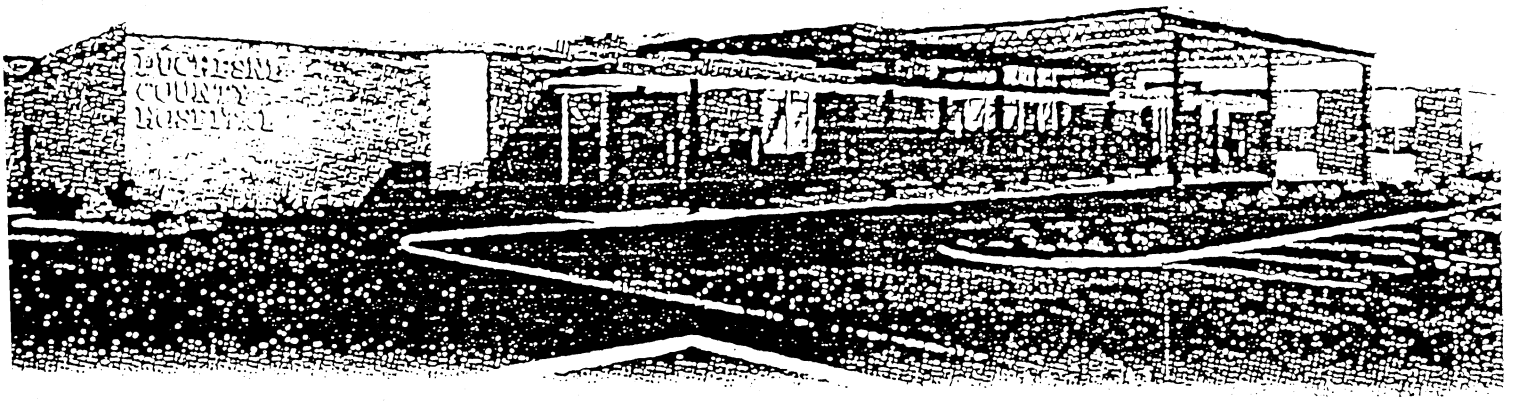
I hereby certify that on the 8th day of May, 2000, I caused to be mailed by United States First Class Mail, postage thereon fully prepaid, a true and correct copy of the foregoing **ORDER AND JUDGMENT GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** to the following:

John P. Harrington, Esq.
Joni J. Jones, Esq.
RAY, QUINNEY & NEBEKER
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84145-0385

Clark A. McClellan
McKeachnie, Allred, McClellan & Trotter, P.C.
72 North 300 East (123-14)
Roosevelt, Utah 84066

Patricia Howell

Tab C



November 29, 1994

Leo W. Hardy, M.D.
P.O. Box 795
Price, UT 84501

Dear Dr. Hardy:

We appreciate your response to our request to have a formal agreement in handling our Pathology needs. Listed below is the proposal submitted by you. I have reviewed this with Joe Hokett and have found that it meets the needs of Uintah Basin Medical Center at this time. Our agreement, therefore, includes the following:

1. Dr. Hardy agrees to personally visit the Uintah Basin Medical Center Laboratory weekly or will have another pathologist visit the hospital if he is unavailable.
2. Visits will not be substituted with technologists. Duration of visit will be for one to two hours devoted to the following activities:
   a. CAP proficiency survey reviews.
   b. Review of Uintah Basin Medical Center QC program.
   c. Recommending process to investigate technical and administrative problems and advise adoption of policies and/or procedures for correction.
   d. Develop liaison with all full-time Medical Staff members to enable full understanding of laboratory's role in supporting Medical Staff's mission. Will attend Medical Staff meetings quarterly. This meeting will be considered that week's laboratory visit.
3. Will be available to the Medical Staff for help with interpretation of laboratory results. This would be a physician-to-physician consult.
4. Will be available for more complex consultations, bone marrow biopsies, or fine needle aspiration biopsy of superficial masses (i.e., breast, thyroid, lymph node). Procedures in these categories will be direct patient services and will be billed as such.
5. Will undertake teaching activities for both Medical Staff and Laboratory Staff when new procedures are to be introduced.

6. Every opportunity to educate Laboratory Staff in those areas where new information or the need for better understanding of the need for clinical consultation will be pursued.
7. Will take responsibility for continued CLIA accreditation, including interim self-inspection, review of manuals, and all activities CLIA has identified as Laboratory Director responsibilities.
8. Uintah Basin Medical Center is permitted to formally register me with the State of Utah and CAP as Laboratory Director, and inclusion of my name on any and all laboratory reports, thus documenting my medicolegal relationship with the Uintah Basin Medical Center Laboratory.
9. Uintah Basin Medical Center will pay a Laboratory Director's fee of $400.00 per month.
10. All surgical pathology and extra-genital cytology is referred to the Laboratory Director's practice, additional activities such as Medical Staff committee work will be undertaken. These may include Infection Control, Tissue Reviews, Surgical Case Review, Blood Utilization Review, and involvement in hospital-wide Continuing Quality Improvement.
11. This agreement shall become effective August 1, 1994 and continue to bind the parties to the terms hereof until terminated after ninety (90) days written notice for just cause of termination by either party or by mutual consent of the parties to a shorter notice period.

Your signature below indicates your acceptance of the responsibilities, services and benefits listed below.

Sincerely,

Bradley D. LeBaron, CHE
Administrator

12/12/94

Leo W. Hardy, M.D.

Tab D

HOSPITAL BYLAWS
of
UINTAH BASIN MEDICAL CENTER

ARTICLE I
Name and Purpose

me. The Uintah Basin Medical Center is the official name of this hospital located at 250 est 300 North, Roosevelt, Utah 84066.

filiation. The hospital is owned by Duchesne County. The Hospital Board of Trustees is eated by the Duchesne County Commission. The Hospital is subject to the control and pervision of the Board of Trustees of the Uintah Basin Medical Center.

bjectives. The Hospital shall be a licensed hospital. The Hospital provides a setting for atients to receive services for diagnosis, treatment, and/or other care by or under the direction f the physicians, through inpatient, outpatient, emergency and outreach services in Duchesne ounty. Its role, scope and mission are defined by the Board of Trustees.

tandard of care. These Bylaws along with the Medical Staff Bylaws and the Hospital Policies re prepared pursuant to Utah law for the proper conduct of the hospital purposes, activities nd conduct which affect or may affect patient care in the hospital. These references refer to ptimal or ideal standards of care to which hospital and medical personnel are encouraged to chieve. Pursuant to Utah law, the standard of care of this hospital shall be a community tandard, i.e. that level of care required of health care providers in the same or similar ommunity.

ARTICLE II
Board of Trustees

Board of Trustees. The Uintah Basin Medical Center Board of Trustees, created by the Duchesne County Commission shall constitute the Board of Trustees and shall be known as the Board of Trustees of the Uintah Basin Medical Center.

The Board of Trustees shall consist of nine (9) voting members, seven of which are appointed elected for three (3) year. Board members are eligible to fill a maximum of two consecutive three (3) year terms.

County Commission Representative (Ex Officio). There shall at all times be a member of the uchesne County Commission on the Board of Trustees. That Board member will be selected y the Duchesne County Commission and shall serve as an ex officio member of the Board. his representative is a voting member of the Board.

edical Staff Representative (Ex Officio). The Board of Trustees shall have as a member the ief of Medical Staff of Duchesne County Hospital who shall be nominated by the Medical aff and shall serve as an ex officio member of the Board. This representative is a voting ember of the Board of Trustees.

ospital Administrator (Ex Officio w/o vote). The Administrator of the Hospital shall serve as non-voting member of the Board.

emoval. Any Board of Trustees member may be removed from office upon a vote of two irds (2/3) of the incumbent Board of Trustee members and upon the final action of the County ommissioners.

ppointment and Vacancies. All appointments to fill vacancies on the Board of Trustees shall e made by the County Commission, whether such vacancies occur by death, resignation, emoval, expiration of term, increase or decrease in the number of Board members. The ommission will be provided recommended nominees by the Hospital Board of Trustees. The Appointment or reappointment of the chairmanships of the standing committees of the Board hall be done annually as recommended by the Chairman in conjunction and concurrent with he election of the Board of Trustees.

General Powers. The Board of Trustees shall exercise the responsibility for the operation of he hospital and related health care facilities and shall have the following duties, responsibilities nd powers:

Establishing policies and programs for the hospital including adopting, reviewing and revising Hospital Bylaws.

Establishing appropriate controls to insure that policies of the Hospital are implemented.

Provide for the approval of an annual operating plan and generally oversee the hospital's operation to insure that it is kept within the framework of the annual plan.

Review and approve the administrator's capital equipment plan.

Provide for the development of a strategic plan that describes the role, programs, capital equipment and facility requirements of the hospital for the next three years.

Appointment and reappointment of the hospital's medical staff and allied health professionals and taking final action with respect to clinical privileges and corrective action as set forth in hese and the Medical Staff Bylaws; approval of the Medical Staff Bylaws adopted by the Medical Staff.

›pting and implementing a development program for broadening the local financial base for port of the hospital.

:eive regular reports from the hospital's medical staff regarding the quality of care being dered in the hospital.

proval of the personnel policies and annual wage and salary administration program.

:ablishing an appeal mechanism and acting as final appeal body for grievances and issues ated to medical staff privileges.

ARTICLE III

Meetings of Board of Trustees

'gular Meetings. Regular meetings of the Board of Trustees shall be held on the third (3rd) ıursday of each month (unless otherwise changed) at the Uintah Basin Medical Center

›ecial Meetings. Special meetings of the Board of Trustees may be held at the call of the ıairman or in his absence the Vice Chairman or in their absence, the majority of the Board embers upon three (3) business days notice to all Board members.

otice of Regular or Special Meetings; Waiver. The Assistant *Executive* Secretary or other esignee of the Board shall notify each Board member of every regular or special meeting by ıailing a notice thereof at least five (5) days prior to the meeting (except for special meetings) › his or her last known post office address, postage prepaid. Attendance of a Board member t any meeting shall constitute a waiver of notice of such meeting, except when such member ttends a meeting for the express purpose of objecting to the transaction of any business ecause the meeting is not lawfully called or convened.

)uorum and Manner of Acting. A majority of the Board members shall constitute a quorum 'or the transaction of business at any meeting of the Board of Trustees. The act of a majority ›f those present at a meeting at which such quorum is present shall be the act of the Board. :f a quorum is not present at any meeting those present can declare a quorum and acts will be ın force unless actions are rescinded at the next meeting of the Board where a quorum is present.

Attendance Requirement. Board members will be expected to attend at least sixty (60) percent of the Board meetings held during each calendar year and take an active role in committee ıssignments.

Resignation. Any Board member may resign at any time by submitting his or her resignation, ın writing, to the Board of Trustees or the chairman or vice-chairman thereof. The County

Commission shall be notified of any resignations. A resignation shall become effective upon its acceptance by the Board of Trustees. If the Board has not acted thereon within thirty (30) days from the date presented, such resignation shall be deemed accepted.

ARTICLE IV
Officers

Chairman of the Board. The Board of Trustees shall be presided over by a Chairman, who shall be elected annually, usually in January, by the Board. The Chairman will serve for a term of one (1) year. The Chairman shall preside at all meetings of the Board and shall be a voting ex-officio member of all committees thereof.

Vice Chairman of the Board. The Board of Trustees shall elect a Vice-chairman from among its members usually in January. The Vice-Chairman will serve for a term of one (1) year. The Vice-chairman shall act as Chairman in the absence or disability of the Chairman and shall perform such other duties as may be assigned by the Chairman.

The Secretary/Treasurer. The Board of Trustees shall elect a Secretary/Treasurer of the Hospital Board, usually in January. The Secretary/Treasurer shall be responsible to see that a record of all proceedings of the Hospital Board is kept and that all necessary correspondence is accomplished. The Secretary/Treasurer shall preside at meetings of the Board of Trustees in the absence of the Chairman and Vice Chairman.

Hospital Administrator. The Hospital Administrator shall be appointed by the Duchesne County Hospital Board of Trustees. The Administrator shall be the Chief Executive Officer of the hospital. The Administrator shall be responsible for the management and operation of the hospital and shall provide liaison to the Board of Trustees, Medical Staff and the departments of the hospital. The administrator shall submit an annual report based on achievements of the Hospital and its goals and obligations to the Board of Trustees of the Hospital.

Assistant Treasurer. The Assistant Treasurer, usually the Chief Financial Officer of the Hospital, shall be appointed by the Administrator. This person, under direction of the Administrator, will prepare appropriate reports for the Hospital Board.

Assistant Secretary. The Assistant Secretary shall be appointed by the Administrator. The Assistant Secretary shall, under the direction of the Secretary Treasurer, act as custodian of all records and reports of the Hospital Board. The secretary shall also be responsible to see that a record of all proceedings of the Hospital Board is kept and that all necessary correspondence is accomplished.

ARTICLE V
Committees

mmittees of the Board. The Board of Trustees may, by resolution, designate three or ›re committees each consisting of two or more Trustees, shall have and exercise such thority as shall be delegated by the Hospital Board. All committee members shall serve at ; pleasure of the Hospital Board and may be removed or replaced from committee signments with or without cause at any time by the majority of the Hospital Board.

ecutive Committee. The Executive Committee shall consist of the officers of the Board as :fined. Shall serve as the strategic planning committee of the Hospital Board and as the ospital Bylaws Committee. The Chairman of the Board will act as the Chairman.

his Executive Committee will serve as the investigating arm of the Hospital Board at the :quest of the Chairman.

his committee shall have power to transact all regular business of the hospital during the ıtervals between meetings of the Hospital Board, provided that any action taken shall not onflict with the policies and expressed wishes of the Hospital Board and that all matters of najor importance shall be referred to the Hospital Board for ratification.

Finance Committee. Specific functions of the Finance Committee shall consist of the following:

The Finance Committee shall cause to be prepared and submit to the Hospital Board at its last meeting before the end of the year, an operating plan showing expected income and expense for the ensuing year.

The Finance Committee shall examine the monthly financial reports and seek explanations for any inordinate variations from the budget.

The Committee shall recommend to the Board auditors to perform an annual audit of the use of operational funds of the hospital.

The committee shall make recommendations in matters pertaining to the deposit of trust funds, endowments and the use of the incomes derived from those deposits.

The committee shall be charged to review all insurance policies of the hospital and make recommendations regarding the negotiations and purchase of such coverage as is necessary to protect the assets of the Hospital.

The Secretary/Treasurer of the Board will act as the Chairman of this committee.

oint Conference Committee. Shall consist of Chairman of the Hospital Board plus one regular

ıember of the Board, Chief of Staff and one member of the active medical staff, the .dministrator and one other member of his Administrative Staff. The Chairman of the Hospital oard shall be the Chairman of the committee.

his committee shall act as medical and administrative liaison between the Hospital Board, the ıedical staff of the hospital and the Hospital's Administration. The committee shall try to romote mutual understanding and cooperation between the Hospital Board, the medical staff nd administration. It shall be a vehicle to enable the Hospital Board to consider matters roposed by the medical staff and shall be an instrument to interpret official hospital policy to ıe medical staff. The functions of the committee shall be advisory only. Such body shall act s a deliberative, but not decision making, body to make recommendation thereon to the Board f Trustees, Medical Staff and or Administration.

'he committee shall meet at the call of the Chairman, the Chief of the Medical Staff, or the Iospital Administrator, prior to the monthly meeting of the Hospital Board.

ARTICLE VI

The Administrator

Jeneral Statement. The Board of Trustees shall select a competent Administrator who shall ıerve as the chief executive officer. The Administrator shall be the Board's direct 'epresentative in the management of the Hospital. The Administrator shall be given the ıecessary authority and be held responsible for the administration of the hospital, all of its lepartments and all of its activities; subject only to such policies that may be adopted and such ɔrders as may be issued by the Hospital Board or any of its committees acting within it powers. Administrator shall be the authorized representative of the Hospital Board in all matters except hose the Hospital Board has formally assigned to some other person for specific purposes.

ARTICLE VII

The Medical Staff

Organization. The Board of Trustees shall appoint a Medical Staff and a Dental Staff (herein after referred to as Medical Staff) composed of qualified physicians and dentists who are duly licensed to practice medicine or dentistry in the State of Utah and except as provided by the Medical Staff Bylaws, can appoint other allied health professionals. Membership in this organization shall be prerequisite to the exercise of clinical privileges in the Hospital except as otherwise specifically provided in the Medical Staff Bylaws. The Medical Staff shall be organized into a responsible administrative unit with elected officers. It shall adopt bylaws, rules and regulations to govern its operation. It shall comply with the standards of the Joint Commission on Accreditation of Hospitals. The Board of Trustees shall approve the Medical Staff Bylaws.

The Medical Staff Bylaws, rules and regulations upon the concurrence and the approval of the Hospital Board shall become part of the official Bylaws of the Duchesne County Hospital.

Purpose. The Medical Staff organization shall propose and adopt Bylaws, rules and regulations for its internal governance which shall be effective when approved by the Board. These Bylaws shall create an effective administrative unit to discharge the functions and responsibilities assigned to the Medical Staff by the Board. The Bylaws, rules and regulations shall state the purposes, functions and organization of the staff and shall set forth the policies by which the Medical Staff exercises and accounts for its delegated authority and responsibilities.

Procedure. The Medical Staff shall have the initial responsibility to formulate, adopt and recommend to the Board staff Bylaws and amendments thereto which shall be effective when approved by the Board.

Medical Staff Membership & Clinical Privileges. All applications for appointments to the Medical Staff shall be in writing and shall be addressed to the Administrator.

All appointments to the Medical Staff shall be for two (2) years only, and upon annual application and the approval of the Medical Credentials Committee and other Committees as appointed, shall be renewable by the Hospital Board.

The Board shall and does hereby delegate to the Medical Staff the responsibility and authority to investigate and evaluate all matters relating the Medical Staff membership status (including appointment and reappointment), clinical privileges, and corrective action, and shall require the Staff to make recommendations thereon. In taking final action, the Board shall consider staff recommendations submitted provided that the Board shall act in any event if the staff fails to adopt and submit any such recommendation within the time period required by the Medical Staff Bylaws.

Medical Staff Recommendations. The Medical Staff Bylaws shall contain provisions for the staff to adopt and submit to the Board specific written recommendations on all matters of Medical Staff membership status, (including appointment and reappointment) clinical privileges and corrective action, and to support and document its recommendations in a manner that will allow the Board to take informed action.

Criteria for Board Action. In acting on matters of Medical Staff membership the Board shall consider the Staff's recommendations, the Hospital's needs, and such other standards as are set forth in the Medical Staff Bylaws. In granting and defining the scope of clinical privileges to be exercised by each practitioner, the Board shall consider the staff's recommendations, the supporting information on which they are based and such criteria as are set forth in the Medical Staff Bylaws. No aspect of membership status or specific clinical privileges shall be limited or denied to a practitioner solely on the basis of sex, religion, race,

andicap, creed, color, or national origin, or on the basis of any other criteria unrelated to ood patient care at the Hospital, or to professional ability and judgment, or to Hospital or ommunity needs.

erms and Conditions of Staff Membership and Clinical Privileges.
he terms and conditions of membership status in the Medical Staff, and of the exercise of inical privileges, shall be as specified in the Medical Staff Bylaws.

very doctor must have proof of one million dollars malpractice insurance with an aggregate f three million dollars in their file before given staff privileges at the Hospital. Evidence of surance (i.e. copy of policy or certificate of insurance, etc.) will be submitted at the time taff privileges are reviewed and in March of every other year.

rocedure. The procedure to be followed by the Medical Staff and the Board in acting on atters of membership status, clinical privileges and corrective action shall be specified in the Iedical Staff Bylaws.

lembership Status, Privileges, Review. Each physician member of the Medical Staff shall e subject to an ongoing review of his professional care. At least every two (2) years each ember shall have an in-depth peer review to determine his competency for purposes of re-ssignment of privileges.

he Medical Staff Credentials Committee shall make recommendations to the Board of Trustees oncerning all staff appointments, reappointments, suspensions, reprimands, periods of robation, and other changes in staff status or clinical privileges, disciplinary action, all matters elated to professional competency, and such other specific matters as may be referred to by ie Board of Trustees.

n action on matters of Medical Staff Membership status, the Board shall consider the staff's ecommendations, the Hospital's and the community's needs, and such additional criteria as are et forth in the Medical Staff Bylaws. In granting and defining the scope of the clinical rivileges to be exercised by each practitioner, the Board shall consider the staff's ecommendations, the supporting information on which they are based, and such criteria as are et forth in the Medical Staff Bylaws.

Change in Status and Privileges. The Board of Trustees may, for just cause, decline to make eappointments to the Medical Staff or may reduce or alter staff privileges or suspend or lismiss any Medical Staff member from the Staff and from practice in the Hospital. Such ction may, but need not, be taken upon the recommendation of the Medical Staff Committee.

When the Board of Trustees determines not to renew an appointment to the Medical Staff, or when staff privileges have been or are proposed to be reduced, altered, suspended or

rminated, the staff member in question shall be afforded the opportunity of a hearing before ı appropriate committee of the Medical Staff

ıd to appellate review by the Board of Trustees in accordance with the provisions of the [edical Staff Bylaws.

ejection of Recommendations. When the Board of Trustees of the Hospital rejects a :commendation by the Medical Staff, the Board shall specify a reasonable time during which will delay its action to allow a meeting of a special Joint Committee of the Board of Trustees ıd the Medical Staff to consider the matter. Members of said Committee shall be appointed . equal numbers by the Board of Trustees and the Medical Staff. The report of said ommittee, or failure to issue a report, shall not bind the Board of Trustees.

imitation of Membership. The Board of Trustees may decide to limit, deny, suspend, or rminate Medical Staff membership for any purpose reasonably related to the delivery of ıality patient care services, including but not limited to:

(a) The Hospital's ability to provide services related to a medical specialty or sub-specialty;

(b) The Hospital's patient load;

(c) The determination that granting Medical Staff membership is inconsistent with the mission, role and purpose of the Hospital;

(d) The Failure of the practitioner to comply with the terms of the Hospital or Medical Staff Bylaws, rules and regulations;

(e) Any other reason specified in these or the Medical Staff Bylaws or others not specified which are reasonably related to the delivery of quality patient care.

ARTICLE VIII
Volunteer Auxiliary

Appointment. The Board of Trustees may appoint a Volunteer Auxiliary comprised of :ommunity-minded individuals who are interested in serving the patients and furthering the ›urposes of the Hospital.

Purpose. The Volunteer Auxiliary shall promote good public relations between the Hospital ınd its surrounding community, to render such volunteer services to the Hospital and its ›atients as may be approved by the Administrator, and to raise funds for the Hospital through

such activities, and methods as may be approved by the Administrator.

Organization. The Volunteer Auxiliary shall be organized into a responsible administrative unit with elected officers. Such auxiliary shall adopt Bylaws and rules and regulations for the government of its conduct and its services within the Hospital, subject to the approval of the Board of Trustees. Such Bylaws shall be in accordance with the guidelines established by the American Hospital Association for Hospital Auxiliaries.

Hospital Administrator will coordinate all activities of the volunteer auxiliary.

ARTICLE IX

Patient Eligibility

All Persons shall be served by the Hospital if it is within the capabilities of the Hospital, regardless of race, religion, creed, national origin, sex, handicap or ability to pay.

ARTICLE X

Review and Amendment of Hospital Bylaws

Hospital Bylaws shall be reviewed every two (2) years. The omission or failure of the Board of Trustees to review its Bylaws shall not affect the validity of said Bylaws.

The Bylaws may be amended in whole or in part by affirmative vote of two-thirds (2/3) of the members of the Board of Trustees at any annual, regular or special meeting, provided that a full statement of the proposed amendment shall be made available to the members of Board of Trustees prior to any such vote, and provided further that these Bylaws shall be in conformity with those of Uintah Basin Medical Center.

APPROVED BY THE UINTAH BASIN MEDICAL CENTER BOARD:

CHAIRMAN

SECRETARY

Date: January 1, 1995

DUCHESNE COUNTY COMMISSION

Date: January 1, 1995

Exhibit “A”

THE SEVENTH DISTRICT JUDICIAL COURT IN AND FOR GRAND COUNTY
STATE OF UTAH

CHARLES S. GARLETT Plaintiff, vs JENNIFER T. GARLETT Defendant,	RULING ON MOTION FOR NEW TRIAL Case No. 9947-167 Judge Lyle R. Anderson

Petitioner Charles S. Garlett ("Charles") has moved for a new trial, asserting the discovery of evidence that he is not the father of one of the children. That motion is supported by no affidavit. Respondent Jennifer T. Garlett ("Jennifer") has submitted a verified response asserting that Charles was well aware of the possibility - or even probability - that he was not the father of one of the children. Charles has submitted no reply, nor any affidavit supporting his assertion that the evidence is newly discovered.

The motion for new trial is denied. Because the motion has so little merit, the court exercises its discretion in domestic relations cases to award Jennifer her fees in responding to the motion. Counsel for Jennifer should submit an affidavit with her proposed order pursuant to Rule 4-504.

Dated this [illegible] day of October, 2000.

Lyle R. Anderson, District Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 994700167 by the method and on the date specified.

METHOD	NAME
Mail	MARY C. CORPORON ATTORNEY 808 EAST SOUTH TEMPLE Suite 1400 SALT LAKE CITY, UT 84102
By Hand	HAPPY MORGAN

Dated this 26th day of October, 2006.

Deputy Court Clerk

Exhibit “B”

HAPPY MORGAN, #7586
Attorney at Law
8 South 100 East
Moab, UT 84532
(435) 259-9418
Fax: (435) 259-3979

IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR GRAND COUNTY, STATE OF UTAH

CHARLES S. GARLETT,	:	**DECREE OF DIVORCE**
Petitioner,	:	
	:	
vs.	:	**Civil No. 9947-167**
	:	
JENNIFER T. GARLETT,	:	**Judge Lyle R. Anderson**
Respondent.	:	

The Court, having made its Findings of Fact and Conclusions of Law based upon the Memorandum Decision in the above matter of July 10, 2000 and on testimony of the parties hereto and argument of Counsel, hereby

ADJUDGES, DECREES AND ORDERS as follows:

1. The bonds of matrimony and marriage contract between the parties are dissolved, and they are awarded a Decree of Divorce from each other, to become final upon entry by the Court.

2. Jennifer T. Garlett is awarded the permanent sole care, custody, and control of the parties' minor children: Travis Charles Garlett, born January 28, 1987; Corie Elizabeth Garlett, born August 15, 1990; and Taylor Hallie Garlett, born May 11, 1994.

3. Charles S. Garlett is awarded reasonable and liberal visitation in accordance with Utah Code Annotated §30-3-35 (Minimum schedule for visitation for children 5 to 18 years of age) as follows:

a) one weekday evening to be specified by the noncustodial parent or the court from 5:30 p.m. until 8:30 p.m.;

b) alternating weekends beginning on the first weekend after the entry of the Decree from 6 p.m. on Friday until 7 p.m. on Sunday, continuing each year;

c) holidays take precedence over the weekend visitation, and changes shall not be made to the regular rotation of the alternating weekend visitation schedule;

d) if a holiday falls on a regularly scheduled school day, the noncustodial parent shall be responsible for the childrens' attendance at school for that school day;

e) if a holiday falls on a weekend or on a Friday or Monday and the total holiday period extends beyond that time so that the children are free from school and the parent is free from work, the noncustodial parent shall be entitled to this lengthier holiday period;

f) in years ending in an odd number, the noncustodial parent is entitled to the following holidays:

(i) child's birthday on the day before or after the actual birthdate beginning at 3 p.m. until 9 p.m.; at the discretion of the noncustodial, he may take other siblings along for the birthday;

(ii) Human Rights Day beginning 6 p.m. on Friday until Monday at 7 p.m. unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(iii) Spring Break or Easter holiday beginning at 6 p.m. on the day school lets out for the holiday until 7 p.m. on the Sunday before school resumes;

(iv) Memorial Day beginning 6 p.m. on Friday until Monday at 7 p.m., unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(v) July 24th beginning 6 p.m. on the day before the holiday until

11 p.m. on the holiday;

(vi) Veteran's Day holiday beginning 6 p.m. the day before the holiday until 7 p.m. on the holiday; and

(vii) the first portion of the Christmas school vacation as defined in subsection 30-3-32(3)(b) plus Christmas Eve and Christmas Day until 1 p.m., so long as the entire holiday is equally divided;

g) in years ending in an even number, the noncustodial parent is entitled to the following holidays:

(i) child's birthday on actual birthdate beginning at 3 p.m. until 9 p.m.; at the discretion of the noncustodial parent, he may take other siblings along for the birthday;

(ii) President's Day beginning at 6 p.m. on Friday until 7 p.m. on Monday unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

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

(iv) Labor Day beginning at 6 p.m. on Friday until Monday at 7 p.m. unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(v) the Fall School Break, if applicable, commonly known as U. E. A. Weekend, beginning at 6 p.m. on Wednesday until Sunday at 7 p.m. unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

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

(vii) thanksgiving holiday beginning Wednesday at 7 p.m. until Sunday at 7 p.m.;

(viii) the second portion of the Christmas school vacation as defined in subsection 30-3-32(3)(b) plus Christmas Day beginning at 1 p.m. until 9 p.m., so long as the entire Christmas holiday is equally divided;

h) Father's Day shall be spent with the father every year beginning ~~at~~ 9 a.m.

until 7 p.m. on the holiday;

i) Mother's Day shall be spent with the mother every year beginning at 9 a.m. until 7 p.m. on the holiday;

j) extended visitation with the noncustodial parent may be:

(i) up to four weeks consecutive at the option of the noncustodial parent;

(ii) two weeks shall be uninterrupted time for the noncustodial parent; and

(iii) the remaining two weeks shall be subject to visitation for the custodial parent consistent with these guidelines;

k) the custodial parent shall have an identical two-week period of uninterrupted time during the childrens' summer vacation from school for purposes of vacation;

l) if the child is enrolled in year-round school, the noncustodial parent's extended visitation shall be one-half of the vacation time for year-round school breaks, provided the custodial parent has holiday and phone visits;

m) notification of extended visitation or vacation weeks with the children shall be provided at least 30 days in advance to the other parent; and

n) telephone contact shall be at reasonable hours and for reasonable duration.

4. Charles S. Garlett's child support obligation is set at $1,050.00 per month, pursuant to the "Uniform Civil Liability for Support Act", Utah Code Annotated §78-45-1 et seq. Pursuant to §30-3-10.5, Utah Code Annotated (1953 as amended) the payment of child support shall be one-half on or before the 5th of the month in which it is due and one-half on or before the 20th of the month in which it is due.

5. Jennifer T. Garlett is entitled to claim the parties' minor children as dependents for tax purposes, but Charles S. Garlett may purchase them from her annually by paying her what they save her in taxes.

6. Jennifer T. Garlett is entitled to alimony and Charles S. Garlett is ordered to pay to her the sum of $600.00 per month for a period of sixteen years, which was the duration of the marriage of the parties. Pursuant to §30-3-10.5, Utah Code Annotated (1953 as amended) the payment of alimony shall be made one-half on or before the 5th of the month in which it is due and one-half on or before the 20th of the month in which it is due.

7. Jennifer T. Garlett is awarded the sole use of the marital home for she and the children until the youngest child, Taylor Hallie Garlett, born May 11, 1994, reaches the age of eighteen years of age or she and the children move from the home. The ability of Jennifer T. Garlett to live, with the children, rent free, is part of her alimony settlement.

8. When the youngest child, Taylor Hallie Garlett, reaches the age of eighteen years of age or Jennifer T. Garlett and the children move from the home, whichever occurs first, the home will be sold and the proceeds will be split equally between Charles S. Garlett and Jennifer T. Garlett.

9. The other marital assets of the parties shall be divided as follows:

To the Petitioner, Charles S. Garlett: The business equipment because he needs these assets to earn a living, including a 1999 pickup truck. He also pay all business debts including all debts listed in Respondent's Exhibit 7; also to Petitioner, the boat and trailer and the camp trailer; his sporting goods and personal property, except where the parties have made other arrangements.

To the Respondent, Jennifer T. Garlett: The home furnishings and the jewelry; the computer; the Suburban, the payment for which she is responsible.

10. The vacant lot, identified at Trial, shall be sold and the first $10,500 of the sale proceeds after payment of the debt and any sale costs, shall be paid to Jennifer T. Garlett to offset Charles S. Garlett being awarded the boat and trailer and the camp trailer. The balance of this sale, if any, shall be divided between Charles S. Garlett and Jennifer T.Garlett, equally.

11. Jennifer T. Garlett is awarded a judgment for back child support and alimony in the amount of $3,050 covering the arrearages through June 1, 2000.

12. The Petitioner's income is subject to immediate and automatic income withholding if a delinquency in payment of child support and alimony exists for thirty (30) days. Each month's child support and alimony payment shall be paid one-half on or before the 5th of the month in which it is due and one-half on or before the 20th of the month in which it is due and if not paid timely is delinquent thereafter.

13. Charles S. Garlett is required to maintain health, dental, optical and medical emergency insurance on the minor children of the parties until each one reaches the age of eighteen. Charles S. Garlett and Jennifer T. Garlett shall each be responsible for one-half of the premium on said insurance policy. Charles S. Garlett and Jennifer T. Garlett shall share equally all reasonable and necessary uninsured medical, dental, optical or medical treatment which is not covered by the insurance policy on the minor children including deductibles and copayments. The parent who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within 30 days of payment. The parent incurring medical expenses may be denied the right to receive credit for the expenses or to recover the other parent's share

of the expenses if that parent fails to provide verification within 30 days of payment.

4. Both parties are ordered to share equally the reasonable work-related or career or occupational training costs for child care expenses of the custodial parent.

a. The non-custodial parent shall begin paying his share of child care expenses on a monthly basis immediately upon presentation of proof of the child care expenses.

b. The custodial parent shall provide written verification of the cost and identity of a child care provider to the non-custodial parent upon initial engagement of a provider and thereafter on the request of the other parent. The custodial parent shall notify the other parent of any change of a child care provider or the monthly expense of child care within 30 calendar days of the date of the change. The custodial parent may be denied the right to receive credit for the expenses or to recover the one-half of the expense if the parent incurring the expenses fails to comply with these provisions.

15. Each party shall pay his or her own legal fees in the divorce up to the Trial.

16. Each party shall execute any documents which are necessary to implement the provisions of the Decree of Divorce entered by the Court.

DATED this _____ day of _____, 2000.

BY THE COURT:

_____
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2000 I mailed/hand delivered a true and correct copy of the foregoing documents to the following: Findings Of Fact And Conclusions Of Law, Exhibit A and the Decree Of Divorce.

Mary Corporon
808 E. South Temple
Salt Lake City, UT 84102

Loretta Thames
Law Office of Happy Morgan

Exhibit “C”

THE SEVENTH DISTRICT JUDICIAL COURT IN AND FOR GRAND COUNTY STATE OF UTAH

CHARLES S. GARLETT **Plaintiff,** **vs** **JENNIFER T. GARLETT** **Defendant,**	**MEMORANDUM DECISION** **Case No. 9947-167** **Judge Lyle R. Anderson**

Charles S. Garlett ("Chuck") and Jennifer T. Garlett ("Jennifer") have been married since 1983. They have three children, born in 1987, 1990, and 1994. Both Chuck and Jennifer admit to infidelity during the marriage. Jennifer claims that her infidelity was an isolated incident responding to her discovery of Chuck's affair with another woman. Both apparently decided to stay together after this mutual infidelity became known. More recently, Chuck has become sexually involved with a woman who was described during the trial only as Dr. Etzel's former fiancee. Despite Chuck's recent infidelity, Jennifer does not seek a divorce. Chuck does, citing irreconcilable differences which include Jennifer's alleged failure to take care of the finances, high living, and failure to take care of the marital home. Regardless of the legitimacy of these complaints, the complaints unquestionably exist and appear to be

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irreconcilable. Chuck is therefore entitled to the divorce he seeks.

Both Chuck and Jennifer seek custody of the children. Both have a good relationship with the children and are involved in the lives of the children. Jennifer has had custody since the separation and was the primary caretaker of the children during the marriage. She was essentially a stay at home mother to the children during most of their lives. Chuck has involved his paramour in his life with the children, which is not usually a good idea. Ordinarily, girlfriends should not be introduced to the children until it is evident that a legal commitment is both likely and legally possible. The paramour does treat the children well.

It is clear that Jennifer should have primary responsibility for the children. On all of the factors where there is a difference between Chuck and Jennifer, the circumstances favor Jennifer. These include her status as primary and present caretaker, her at least marginally superior moral character and her ability to provide personal rather than surrogate care. Jennifer also intensely desires that Chuck be involved in the lives of the children. Chuck does not manifest such a desire.

The parties did not present significant evidence on the question of joint custody. The court is not persuaded that the parents are capable of implementing joint legal custody or that

the best interest of the children would be served by joint legal custody. Chuck has proposed having the children divide their time equally between the parents. This court believes such an arrangement would leave the children without a place they can call home. Jennifer is awarded sole legal custody.

The court will not define visitation at this time. Jennifer clearly desires that the children have extensive interaction with Chuck. The court will order that Chuck have reasonable and liberal visitation. If the parties are ultimately unable to agree on the specifics, they may return to this court, which is likely to impose the standard visitation schedule.

Chuck maintains that his income has averaged about $30,000 per year. His federal income tax returns reflect incomes in that range for 1994-98. He admits "fudging" his income by $5,000 during at least two of those years. Jennifer claims that the family spent $50,000 to $80,000 per year. The court has heard testimony about the possessions accumulated by Chuck and Jennifer, as well as their lifestyle, and finds Jennifer's position better supported by that evidence. Chuck maintains that the has had difficulty maintaining his business during the past year because of the stress of the divorce. He admits to turning down at least one opportunity to do significant work because he did not think he could do it justice in his present state. Nevertheless, he has received $28,000 for his services so far in

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2000, $11,000 in direct compensation from Pete Byrd, and $17,000 in loans from Roma and Ray Knuth, for whom he is building a home. The court is persuaded that any reduction in Chuck's income is the product of this conscious choice. It is not unusual to see claims that business has gone down when alimony or child support are about to be calculated. Chuck is capable of, earning, and has actually earned, at least $50,000 per year. His child support obligation will be based on the assumption that he earns $50,000 per year. Jennifer has sought employment, but has limited skills and has not qualified for jobs paying more than minimum wage. Her employment has been seasonal as well. Taking the seasonality of her employment into account, as well as her need to be home to care for the children when they are not in school, the court will base Jennifer's child support calculation on the expectation that she will earn minimum wage for 30 hours per week. Jennifer will be entitled to the tax exemption and credits for the children, but Chuck may purchase them from her annually by paying her what they save her in taxes.

Jennifer is entitled to alimony. She will receive about $1050 in child support. She will earn about $600 per month in take home pay. She has demonstrated a need for $2,134.50 per month to cover expenses for herself and the children. Alimony will be taxable to her. The court will award $600 per month alimony with the expectation that she will net $500 to cover her

expenses. Chuck is able to pay this amount. If Jennifer and the children can live on $2134.50 per month, Chuck can live on what remains of his monthly income after he pays $1650 in child support and alimony.

Jennifer's budget includes no provision for rent or a mortgage payment. She lives in the marital home, which is debt free. Chuck asks that the marital home be sold so that he and Jennifer will each have some money to start over with. His plan is apparently to use his half of the sale proceeds to buy the materials for a new home which is larger than the marital home. In fact, he has already started building that home.[1] Jennifer's only option, since she does not have Chuck's expertise or equipment, would be to purchase a much more modest home in a different neighborhood, or obtain a substantial mortgage. The children know the marital home as their home and it is a source of stability for them. If the court were to order the home sold, it would probably have to substantially increase the alimony. The court accordingly orders that Jennifer be permitted to continue living in the home until the youngest child is eighteen years old, or until Jennifer and the children move out of the

[1]Chuck testified that he is building a home with money from Ray and Roma Knuth. They are also advancing him some money for living expenses. If he is able, he will pay them back this loan and reimburse them for the material costs. He hopes to take about $100,000 from the sale of the marital home, pay these obligations, and end up with a new home worth about $200,000.00

house. The house will then be sold, and Chuck and Jennifer will each receive one-half of the proceeds.

Chuck and Jennifer own other marital assets. The court will award Chuck's business equipment to him because he needs these assets to earn a living to support himself and pay his alimony and child support. He will be required to pay all business debts. The business assets include the 1999 pickup and the business debts include all debts listed in Exhibit 7. Chuck and Jennifer have each attempted to value the furnishings of the home and Chuck's guns, fishing tackle and similar sporting goods. As might be expected, each declares that what the other wants is the most valuable. The court believes there is very little value difference between these items, and that they are personal items whose value is very dependent on their meaning to each person and the use each could make. The most reasonable resolution of this dispute is to award Jennifer the home furnishings and the jewelry and Chuck the sporting goods, except where they have made other arrangements. Jennifer gets the computer and the Suburban.

There are, however, some items of significant value that can be fairly evaluated. They are as follows:

Item	Value	Debt	Net Value
1995 Boat and Trailer	$12,000	$8000	$4,000
Camp Trailer	$6,000	0	$6,500
Vacant Lot	$60,000	$42,000	$18,000

The boat and trailer, and the camp trailer are awarded to Chuck. The vacant lot should be sold and the first $10,500 of the sale proceeds after payment of the debt and any sale costs, should be paid to Jennifer. The balance, if any, should be divided between Chuck and Jennifer equally.

Jennifer has asked the court to award judgment for unpaid support. She has established that Chuck failed to pay $4,800 in support for February to June, 2000. However, the court's ultimate child support and alimony award is only $1650 per month. It is therefore fair and appropriate that Chuck receive a credit of $350 per month, reducing the unpaid support obligation to $3,050.00, for which Jennifer will also be awarded judgment. Each party should pay its own legal fees.

Counsel for Jennifer is directed to prepare formal findings, conclusions and a decree, which the court will sign when the parties have completed their mandatory divorce education.

Dated this 10th day of July, 2000.

STATE OF UTAH SEVENTH DISTRICT COURT

Lyle R. Anderson, District Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 994700167 by the method and on the date specified.

METHOD	NAME
Mail	GENE S BYRGE ATTORNEY 147 SOUTH MAIN STREET HELPER, UT 84526
By Hand	HAPPY MORGAN

Dated this 10th day of [illegible], 2001.

STATE OF UTAH SEVENTH DISTRICT COURT

Deputy Court Clerk

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Exhibit “D”

DNA Parentage Test Report

DNA DIAGNOSTICS CENTER

Report Date 8/4/2000

Case 64792	MOTHER	CHILD	Alleged FATHER
Name	Not Tested	Taylor H. Garlett	Charles Scott Garlett
DoB - Race		5/11/94	2/1/62 Caucasian
Date Collected		7-21-00	7-21-00
Test No.		64792-20	64792-30

Results	Allele Sizes	Allele Sizes	Allele Sizes
D2S44 pYNH24 *Hae III* PI 0.00		3.07 1.89	1.30 1.20
D4S163 SU604 *Hae III* PI 0.00		7.99 2.70	7.57 **2.29**
D7S467 PAC415 *Hae III* PI 0.00		5.36 4.00	**4.45** **3.09**
D10S28 TBQ7 *Hae III* PI 0.00		2.79 2.51	1.10 1.00

Interpretation Combined Paternity Index **0** Probability of Paternity **0%**

The alleged father, Charles Scott Garlett, is excluded as the biological father of the child named Taylor H. Garlett. The alleged father lacks the genetic markers that must be contributed to the child by the biological father. Based on testing results obtained from DNA probes: D2S44, D4S163, D7S467, and D10S28, the probability of paternity is 0%.

Subscribed and sworn to before me on August 4, 2000

NOTARIAL SEAL STATE OF OHIO

[redacted]
Notary Public, State of Ohio
My commission expires October 5, 2003

I, the undersigned, verify that the interpretation of the results is correct as reported, and the testing procedure was conducted in accordance with the AABB guidelines.

Thomas M. Reid, Ph.D.
Assistant Laboratory Director

Exhibit “E”

HAPPY MORGAN, #7586
Attorney at Law
8 South 100 East
Moab, UT 84532
(435) 259-9418
Fax: (435) 259-3979

IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR GRAND COUNTY, STATE OF UTAH

CHARLES S. GARLETT, **Petitioner,**	:	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
vs.	:	**Civil No. 9947-167**
JENNIFER T. GARLETT, **Respondent.**	:	**Judge Lyle R. Anderson**

The Court, having entered its Memorandum Decision in the above matter on July 10, 2000, based on testimony of the parties hereto and argument of Counsel, hereby makes the following:

FINDINGS OF FACT

1. The parties hereto have been married since 1983.

2. Jurisdiction properly rests in Grand County, State of Utah.

3. There were three children born as a result of this union: Travis Charles Garlett, born January 28, 1987; Corie Elizabeth Garlett, born August 15, 1990; and Taylor Hallie Garlett, born May 11, 1994.

4. Both parties admit to infidelity during the marriage.

5. Although despite the infidelity in the past and a current infidelity on the part of the Petitioner, the Respondent does not desire a divorce. The Petitioner does, however, desire a divorce, citing irreconcilable differences.

6. Although both parties seek custody of the children and both have good relationship with the children and are involved in the lives of their children, the Respondent has had custody since the separation and was the primary caretaker of the children during the marriage. She was essentially a stay at home mother to the children during most of their lives. The Respondent intensely desires that the Petitioner be involved in the lives of the children but the Petitioner does not manifest such a desire.

7. The Court is not persuaded that the parents are capable of implementing joint legal custody or that the best interest of the children would be served by joint legal custody.

8. The Respondent clearly desires that the children have extensive interaction with the Petitioner.

9. It is in the best interest of the children that Charles S. Garlett, the Petitioner, have reasonable and liberal visitation in accordance with Utah Code Annotated §30-3-35 (minimum schedule for visitation for children 5 to 18 years of age) as follows:

a) one weekday evening to be specified by the noncustodial parent or the court from 5:30 p.m. until 8:30 p.m.;

b) alternating weekends beginning on the first weekend after the entry of the Decree from 6 p.m. on Friday until 7 p.m. on Sunday, continuing each year;

c) holidays take precedence over the weekend visitation, and changes shall not be made to the regular rotation of the alternating weekend visitation schedule;

d) if a holiday falls on a regularly scheduled school day, the noncustodial parent shall be responsible for the childrens' attendance at school for that school day;

e) if a holiday falls on a weekend or on a Friday or Monday and the total holiday period extends beyond that time so that the children are free from school and the parent is free from work, the noncustodial parent shall be entitled to this lengthier holiday period;

f) in years ending in an odd number, the noncustodial parent is entitled to the following holidays:

(i) child's birthday on the day before or after the actual birthdate beginning at 3 p.m. until 9 p.m.; at the discretion of the noncustodial, he may take other siblings along for the birthday;

(ii) Human Rights Day beginning 6 p.m. on Friday until Monday at 7 p.m. unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(iii) Spring Break or Easter holiday beginning at 6 p.m. on the day school lets out for the holiday until 7 p.m. on the Sunday before school resumes;

(iv) Memorial Day beginning 6 p.m. on Friday until Monday at 7 p.m., unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(v) July 24th beginning 6 p.m. on the day before the holiday until 11 p.m. on the holiday.

(vi) Veteran's Day holiday beginning 6 p.m. the day before the holiday until 7 p.m. on the holiday; and

(vii) the first portion of the Christmas school vacation as defined in subsection 30-3-32(3)(b) plus Christmas Eve and Christmas Day until 1 p.m., so long as the entire holiday is equally divided;

g) in years ending in an even number, the noncustodial parent is entitled to the following holidays:

(i) child's birthday on actual birthdate beginning at 3 p.m. until 9 p.m.; at the discretion of the noncustodial parent, he may take other siblings along for the birthday;

(ii) President's Day beginning at 6 p.m. on Friday until 7 p.m. on Monday unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

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

(iv) Labor Day beginning at 6 p.m. on Friday until Monday at 7 p.m. unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(v) the Fall School Break, if applicable, commonly known as U.E.A. Weekend, beginning at 6 p.m. on Wednesday until Sunday at 7 p.m. unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

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

(vii) Thanksgiving holiday beginning Wednesday at 7 p.m. until Sunday at 7 p.m.;

(viii) the second portion of the Christmas school vacation as defined in subsection 30-3-32(3)(b) plus Christmas day beginning at 1 p.m. until 9 p.m., so long as the entire Christmas holiday is equally divided;

h) Father's Day shall be spent with the father every year beginning at 9 a.m. until 7 p.m. on the holiday;

i) Mother's Day shall be spent with the mother every year beginning at 9 a.m. until 7 p.m. on the holiday;

j) extended visitation with the noncustodial parent may be:

(i) up to four weeks consecutive at the option of the noncustodial parent;

(ii) two weeks shall be uninterrupted time for the noncustodial parent; and

(iii) the remaining two weeks shall be subject to visitation for the custodial parent consistent with these guidelines;

k) the custodial parent shall have an identical two-week period of uninterrupted time during the childrens' summer vacation from school for purposes of vacation;

l) if the child is enrolled in year-round school, the noncustodial parent's extended visitation shall be one-half of the vacation time for year-round school breaks, provided the custodial parent has holiday and phone visits;

m) notification of extended visitation or vacation weeks with the children shall be provided at least 30 days in advance to the other parent; and

n) telephone contact shall be at reasonable hours and for reasonable duration.

10. The Petitioner has maintained that his income has averaged about $30,000.00 per year and his federal income tax returns reflect income in that range for 1994-1998, however the lifestyle and standard of living of the parties supports the position of the Respondent that the family spent $50,000.00 to $80,000.00 per year.

11. The Petitioner maintains that he had had difficulty maintaining his business during the past year because of the stress of the divorce. However, he has turned down at least one opportunity to do significant work because he did not think he could do it justice in his present state. Nevertheless, he has received $28,000.00 for his services during the first seven months of the year 2000, $11,000.00 in direct

compensation from Pete Byrd, and $17,000.00 in loans from Roma and Ray Knuth, for whom he is building a home. The Court is persuaded that any reduction in the income of the Petitioner is the product of this conscious choice. The Court finds that the Petitioner is capable of earning, and has actually earned, at least $50,000 per year. His child support obligation will be based on the assumption that he earns $50,000 per year.

12. The Respondent has sought employment, but has limited skills and has not qualified for jobs paying more than minimum wage. Her employment has been seasonal as well. Taking the seasonality of her employment into account, as well as her need to be home to care for the children when they are not in school, the Court will base the Respondent's child support calculation on the expectation that she will earn minimum wage for 30 hours per week.

13. The Respondent should be entitled to the tax exemption and credits for the children, but the Petitioner may purchase them from her annually by paying her what they save her in taxes.

14. The Respondent is entitled to alimony for the next sixteen years, which is the same as the duration of the marriage. Alimony will be taxable to her.

15. The Respondent has demonstrated a need for $2,134.50 per month to cover expenses for herself and the children.

16. The Petitioner is able to pay the anticipated child support and alimony.

17. The children know the marital home as their home and it is a source of

stability for them. It is free of encumbrances. If the Court were to order the home sold, as the Petitioner has requested, it would probably have to substantially increase the alimony. Accordingly the Respondent and the minor children should be permitted to continue living in the home until the youngest child is eighteen years old, or until the Respondent and the children move out of the house. The Respondent will be responsible for the payment of the property taxes on the marital home.

18. When the youngest child, Taylor Hallie Garlett, born May 11, 1994, is 18 years old or the Respondent and the children move out of the marital home, whichever occurs first, the house should be sold and the Petitioner and the Respondent will each receive one-half of the proceeds.

19. The Petitioner and the Respondent own other marital assets. The business equipment should be awarded to the Petitioner because he needs these assets to earn a living to support himself and pay his alimony and child support. He should be required to pay all business debts. The business assets include the 1999 pickup and the business debts include all debts listed in Petitioner's Exhibit 7 and attached hereto as "*Exhibit A.*"

20. The Court believes there is very little value difference between the items which the Petitioner desires and the items which the Respondent desires. The most reasonable resolution of this dispute would be to award the Respondent the home furnishings and the jewelry and the Petitioner the sporting goods, except where they have made other arrangements. The Respondent should receive the computer and the

Suburban which she will be required to make all payments on.

21. The boat and trailer and the camp trailer should be awarded to the Petitioner.

22. The vacant lot should be sold and the first $10,500 of the sale proceeds after payment of the debt and any sale costs, should be paid to the Respondent to offset the gain made by Petitioner in Paragraph 21 of this document. The balance, if any, should be divided between the Petitioner and the Respondent equally.

23. It has been established that the Petitioner failed to pay $4,800 in support for February to June, 2000. However, the Court's ultimate child support and alimony award is only $1,650 per month, $1050 per month in child support and $600 per month in alimony. It is therefore fair and appropriate that the Petitioner receive a credit of $350 per month, reducing the unpaid support obligation to $3,050, through June 1, 2000, for which the Respondent should be awarded judgment.

24. Each party should pay his or her own legal fees for this action up to the time of the trial.

25. Each party should complete their mandatory divorce education.

26. Each party should be ordered to execute and deliver to the other party any documents necessary to implement the provisions of the Decree of Divorce entered by the Court.

27. Pursuant to Utah Code Annotated §62A-11-404 and §78-45-9, Charles S. Garlett's income should be subject to immediate and automatic income

withholding if a delinquency in payment of child support and alimony exists for thirty (30) days. Pursuant to §30-3-10.5, each month's child support and alimony payment shall be due one-half by the 5th day of each month, and the remaining one-half by the 20th day of that month, and is delinquent thereafter.

28. Pursuant to §78-45-7.15 Utah Code Annotated (1953 as amended) the Petitioner should be required to maintain health, dental, optical and medical insurance on the minor children of the parties until each one reaches the age of eighteen. Petitioner and Respondent shall each be responsible for one-half of the premium on said insurance policy.

The Petitioner and the Respondent shall share equally all reasonable and necessary uninsured medical, dental, optical or medical treatment which is not covered by the insurance policy on the minor children including deductibles and copayments. The parent who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within 30 days of payment. The parent incurring medical expenses may be denied the right to receive credit for the expenses or to recover the other parent's share of the expenses if that parent fails to provide verification within 30 days of payment.

29. Pursuant to Utah Code Annotated §78-45-7.16 (1953 as amended) both parties should share equally the reasonable work-related or career or occupational training costs for child care expenses of the Respondent.

a. The non-custodial parent shall begin paying his share of child

care expenses on a monthly basis immediately upon presentation of proof of the child care expenses.

b. The custodial parent shall provide written verification of the cost and identity of a child care provider to the non-custodial parent upon initial engagement of a provider and thereafter on the request of the other parent. The custodial parent shall notify the other parent of any change of a child care provider or the monthly expense of child care within 30 calendar days of the date of the change. The custodial parent may be denied the right to receive credit for the expenses or to recover the one-half of the expense if the parent incurring the expenses fails to comply with these provisions.

30. Each party should be responsible for his or her own attorney's fees and court costs.

Having found the foregoing Findings of Fact, the Court therefore makes the following

CONCLUSIONS OF LAW

1. Pursuant to Utah Code Annotated §30-3-1(2) this Court has jurisdiction to decree the dissolution of the parties' marriage contract on the grounds of irreconcilable differences.

2. The parties have differences that are irreconcilable, making continuance of the marriage impossible.

3. The parties should be awarded a Decree of Divorce, to become absolute and final upon entry by the Court Jennifer T. Garlett, the Respondent, should be awarded the permanent and sole care, custody, and control of the parties three minor children: Travis Charles Garlett, born January 28, 1987; Corie Elizabeth Garlett, born August 15,

1990; and Taylor Hallie Garlett, born May 11, 1994.

4. It is in the best interest of the children that Charles S. Garlett, the Petitioner, have reasonable and liberal visitation in accordance with Utah Code Annotated §30-3-35 (Minimum schedule for visitation for children 5 to 18 years of age) as follows:

a) one weekday evening to be specified by the noncustodial parent or the court from 5:30 p.m. until 8:30 p.m.;

b) alternating weekends beginning on the first weekend after the entry of the Decree from 6 p.m. on Friday until 7 p.m. on Sunday, continuing each year;

c) holidays take precedence over the weekend visitation, and changes shall not be made to the regular rotation of the alternating weekend visitation schedule;

d) if a holiday falls on a regularly scheduled school day, the noncustodial parent shall be responsible for the childrens' attendance at school for that school day;

e) if a holiday falls on a weekend or on a Friday or Monday and the total holiday period extends beyond that time so that the children are free from school and the parent is free from work, the noncustodial parent shall be entitled to this lengthier holiday period;

f) in years ending in an odd number, the noncustodial parent is entitled to the following holidays:

(i) child's birthday on the day before or after the actual birthdate beginning at 3 p.m. until 9 p.m.; at the discretion of the noncustodial, he may take other siblings along for the birthday;

(ii) Human Rights Day beginning 6 p.m. on Friday until Monday at 7 p.m. unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(iii) Spring Break or Easter holiday beginning at 6 p.m. on the day school lets out for the holiday until 7 p.m. on the Sunday before school

resumes;

(iv) Memorial Day beginning 6 p.m. on Friday until Monday at 7 p.m., unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(v) July 24th beginning 6 p.m. on the day before the holiday until 11 p.m. on the holiday.

(vi) Veteran's Day holiday beginning 6 p.m. the day before the holiday until 7 p.m. on the holiday; and

(vii) the first portion of the Christmas school vacation as defined in subsection 30-3-32(3)(b) plus Christmas Eve and Christmas Day until 1 p.m., so long as the entire holiday is equally divided;

g) in years ending in an even number, the noncustodial parent is entitled to the following holidays:

(i) child's birthday on actual birthdate beginning at 3 p.m. until 9 p.m.; at the discretion of the noncustodial parent, he may take other siblings along for the birthday;

(ii) President's Day beginning at 6 p.m. on Friday until 7 p.m. on Monday unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

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

(iv) Labor Day beginning at 6 p.m. on Friday until Monday at 7 p.m. unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

(v) the Fall School Break, if applicable, commonly known as U.E.A. Weekend, beginning at 6 p.m. on Wednesday until Sunday at 7 p.m. unless the holiday extends for a lengthier period of time to which the noncustodial parent is completely entitled;

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

(vii) Thanksgiving holiday beginning Wednesday at 7 p.m. until Sunday at 7 p.m.;

(viii) the second portion of the Christmas school vacation as defined in subsection 30-3-32(3)(b) plus Christmas day beginning at 1 p.m. until 9 p.m., so long as the entire Christmas holiday is equally divided;

h) Father's Day shall be spent with the father every year beginning at 9 a.m. until 7 p.m. on the holiday;

i) Mother's Day shall be spent with the mother every year beginning at 9 a.m. until 7 p.m. on the holiday;

j) extended visitation with the noncustodial parent may be:

(i) up to four weeks consecutive at the option of the noncustodial parent;

(ii) two weeks shall be uninterrupted time for the noncustodial parent; and

(iii) the remaining two weeks shall be subject to visitation for the custodial parent consistent with these guidelines;

k) the custodial parent shall have an identical two-week period of uninterrupted time during the childrens' summer vacation from school for purposes of vacation;

l) if the child is enrolled in year-round school, the noncustodial parent's extended visitation shall be one-half of the vacation time for year-round school breaks, provided the custodial parent has holiday and phone visits;

m) notification of extended visitation or vacation weeks with the children shall be provided at least 30 days in advance to the other parent; and

n) telephone contact shall be at reasonable hours and for reasonable duration.

5. The Petitioner is capable of earning, and has actually earned, at least $50,000 per year. His child support obligation shall be based on the assumption that

he earns $50,000 per year.

6. The Respondent's income will be based upon her working 30 hours per week at minimum wage.

7. The Petitioner will receive from the Respondent the sum of $1,050 per month in child support, to be paid one-half before the 5th of the month for which it is due and the other half before the 20th of the month for which it is due.

8. The Petitioner will receive from the Respondent the sum of $600 per month in alimony for the next sixteen years. which is the same as the duration of the marriage. The alimony payment will be paid one-half on or before the 5th of the month for which it is due and one-half on or before the 20th of the month for which it is due. The alimony will be taxable to the Respondent.

9. The Petitioner will be awarded the sole use of the martial home for herself and the children until the youngest child is eighteen years of age or she and the children move out of the home, whichever occurs first.

10. When the youngest child, Taylor Hallie Garlett, is eighteen years of age or the Petitioner and the children move out of the home, the home shall be sold and the Petitioner and the Respondent shall each receive one-half of the proceeds.

11. The other marital assets of the parties shall be divided as follows: The Petitioner shall be awarded all the business equipment because he needs these assets to earn a living. He shall pay all business debts. The business assets include the 1999 pickup truck and the business debts include all debts listed in Petitioner's Exhibit 7 and

attached hereto as "*Exhibit A*." The Respondent shall be awarded the home furnishings and the jewelry and the Petitioner the sporting goods, except where they have made other arrangements. The Respondent should receive the computer and the Suburban, which the Petitioner shall be required to pay for. The Petitioner shall be awarded the boat, trailer and the camp trailer. The vacant lot shall be sold and the first $10,5000 of the sale proceeds after payment of the debt and any sale costs, shall be paid to the Respondent to offset the gain made by the Petitioner in receiving the boat, trailer and the camp trailer. The balance of this sale, if any, shall be divided between the Petitioner and the Respondent equally.

12. The Respondent is awarded a judgment for back child support and alimony in the amount of $3,050, covering the arrearages through June 2000.

13. Pursuant to Utah Code Annotated §62A-11-404 and §78-45-9, Charles S. Garlett's income should be subject to immediate and automatic income withholding if a delinquency in payment of child support and alimony exists for thirty (30) days. Each month's child support and alimony payment shall be paid on or before the 5th of that month and is delinquent thereafter.

14. Pursuant to §78-45-7.15 Utah Code Annotated (1953 as amended) the Petitioner should be required to maintain health, dental, optical and medical insurance on the minor children of the parties until each one reaches the age of eighteen. Petitioner and Respondent shall each be responsible for one-half of the premium on said insurance policy.

The Petitioner and the Respondent shall share equally all reasonable and necessary uninsured medical, dental, optical or medical treatment which is not covered by the insurance policy on the minor children including deductibles and copayments. The parent who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within 30 days of payment. The parent incurring medical expenses may be denied the right to receive credit for the expenses or to recover the other parent's share of the expenses if that parent fails to provide verification within 30 days of payment.

15. Pursuant to Utah Code Annotated §78-45-7.16 (1953 as amended) both parties should share equally the reasonable work-related or career or occupational training costs for child care expenses of the Respondent.

a. The non-custodial parent shall begin paying his share of child care expenses on a monthly basis immediately upon presentation of proof of the child care expenses.

b. The custodial parent shall provide written verification of the cost and identity of a child care provider to the non-custodial parent upon initial engagement of a provider and thereafter on the request of the other parent. The custodial parent shall notify the other parent of any change of a child care provider or the monthly expense of child care within 30 calendar days of the date of the change. The custodial parent may be denied the right to receive credit for the expenses or to recover the one-half of the expense if the parent incurring the expenses fails to comply with these provisions.

16. Each party shall pay his or her own legal fees in the divorce up to the Trial.

17. Each party shall complete their mandatory divorce education course.

DATED this _____ day of _____, 2001.

BY THE COURT:

_____

District Court Judge