1992

# Kathryn Tuck Coats v. Peter M. Coats : Reply Brief

Utah Court of Appeals



Graig S. Cook; Attorney for Appellant and Cross Appellee.
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IN THE UTAH COURT OF APPEALS

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KATHRYN TUCK COATS,

Plaintiff, Appellee
and Cross Appellant,

vs.

Case No. 920588-CA
Category No. 15

PETER M. COATS,

Defendant, Appellant
and Cross Appellee.

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# REPLY BRIEF OF APPELLANT AND CROSS APPELLEE

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Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Homer F. Wilkinson

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This brief filed by Peter Coats is in reply to the arguments raised by his former wife Kathryn Coats as to his original appeal and as to her cross appeal. Appellant believes there is a major distinction between these two appeals. Appellant's appeal concerns assertions that the lower court made mistakes in its ruling after certain discretionary decisions, those which could have gone either way, were ultimately decided by the court. Appellee Kathryn Tuck Coats, on the other hand, mainly urges that the discretionary decisions of the court are erroneous. This distinction will be readily seen during the discussion portion of this brief.

## ARGUMENT

### POINT I

**THE LOWER COURT ERRED IN DETERMINING THAT APPROXIMATELY $148,000 IN TRUST DEED NOTES WERE PART OF THE MARITAL ESTATE SUBJECT TO DIVISION WHEN SUCH NOTES CAME FROM NON-MARITAL FUNDS OF THE KIDDER-PEABODY ACCOUNT, WERE ALL ISSUED AFTER THE PARTIES WERE DIVORCED, AND WERE ALL PAYABLE BACK INTO THE KIDDER-PEABODY FUND.**

Before discussing the arguments raised by appellee Kathryn Coats, it is useful to briefly review the circumstances surrounding the Kidder-Peabody account which is the subject of this claimed error. As noted in Appellant's opening Brief, this account existed prior to the marriage, was always listed solely in Peter Coats' name, and had been funded from Peter's grandparents. Had this account remained entirely intact during the marriage, there is little doubt under this Court's previous decision that the account would be considered as premarital and inherited property and would not be subject to division. See Burt v. Burt, 799 P.2d 1166 (Utah App. 1990). However, during the course of the marriage this account was extensively utilized by the appellant in his personal and business dealings. Appellee Kathryn Coats maintained that this type of co-mingling rendered the account marital property including all offsprings from such account. Conversely, appellant Peter Coats conceded that whenever money was withdrawn from the account and used for family purposes that such money became part of the marital estate. He maintained, however, that all other money which was used in his business and

returned into the account remained non-marital property.

Because this account constituted some $400,000 it was a major item of dispute between the parties. The evidence introduced by both sides as to the use of this account during the marriage consumed a large portion of the trial and its evidence. Because of this dispute it was necessary to propose various alternatives with and without this assset considered as marital property. Likewise, the promissory notes which were funded by this account during the marriage also required double treatment. Peter Coats maintained that these promissory notes were exclusively his own property since they were derived from the Kidder-Peabody account and in at least half of the cases were paid directly back into the account. (Tr. 915). His accountant maintained that these notes were merely conversions into another form of the Kidder-Peabody account. (Tr. 1363). Appellant was aware, however, that if the Court ruled that the Kidder-Peabody account was marital property then these note receivables would also become marital property subject to division. For that reason appellant Peter Coats was forced to alternatively argue that these notes should not be considered at full value but should be discounted because of the difficulty in collecting them. (Tr. 1153-66).

Kathryn Tuck Coats argued throughout the trial that since the Kidder-Peabody account was a marital asset then all notes which eminated from such account also became a marital asset. See Plaintiff's Exhibit 91 which was Kathryn Coats proposed marital asset division including the Kidder-Peabody account. Moreover, she maintained that even if the Kidder-Peabody account itself was

not considered a marital asset, that the notes eminating from it became marital property subject to division. See Plaintiff's Exhibt 91.

Had the lower court ruled in favor of appellee Kathryn Coats that the Kidder-Peabody account was marital property, then there is no doubt that the promissory notes executed both before the divorce was finalized in 1991 and those issued after such event would all be subject to marital division. Simplistically, it would be analogous to a husband having a marital bank account which is utilized to purchase and keep automobiles both before and after the parties have been legally divorced. In such a case since the funds are determined to be marital property any conversion of such funds would likewise be marital property.

Using this same analogy, if a court determines that such account is the separate property of the husband, then any purchases he makes that can be traceable to such funds either before finalization of the divorce or after would still remain his separate property. The mere fact that the form of the property has been changed does not affect the result.

Appellant Peter Coats, therefore, could have appealed to this Court as to all the notes determined by the lower court to be marital property: those issued prior to February of 1991 and those issued after February 1991. However, because there was evidence that the proceeds of the pre-divorce notes sometimes did not go back into the Kidder-Peabody account but went to other funds or for other purposes, such an argument has not been made. In effect, Appellant concedes that those notes prior to his divorce

could be considered part of the marital assets even though the initial funds were derived exclusively from the Kidder-Peabody account.

As to those notes that were issued after the divorce was final, however, there can be no room for argument. Appellant carefully issued each note in his real estate business to be payable back into "The Kidder-Peabody Account." Kathryn was no longer living with him and therefore there was no co-mingling of assets or liabilities. Once it was determined by the lower court that the Kidder-Peabody account was exclusively his, then it had to follow as a matter of law that any conversion of such funds into another form was also his exclusive property. Had he purchased five antique automobiles in June of 1991 with the Kidder-Peabody money it cannot be said, under any circumstances, that these automobiles would be subject to marital division.

Appellant utilized the Kidder-Peabody money after his divorce for purely business purposes. Because of the availability of this money he was able to transact numerous real estate loans by lending buyers sufficient funds to make their purchases. This enabled him to receive in some cases two commissions as well as to receive a return on his money from the borrower. However, this use of the money was insignificant when compared with the fact that 50 percent of the value of the notes was taken from him by the property division. Thus, Mr. Coats was essentially penalized some $59,000 because he chose to use the money in the Kidder-Peabody account rather than letting it merely sit there where no claim by his former wife could be made.

With this background it now remains to examine the specific arguments raised by Mrs. Coats.

A. The Issue Concerning These Promissory Notes Was Raised Below.

Appellee Kathryn Coats has reviewed some of the testimony in this case concerning the promissory notes. She claims that the argument now raised by Appellant was not raised below. However, her own citations clearly show this was not the case. Appellant's attorney in introducing Exhibit 78 clearly stated that the purpose of such exhibits was to trace the funds out of the Kidder-Peabody account in order to show that they were separate property. (See Appellee's Brief, p. 9). Moreover, Exhibit 78 contained all of the notes that were executed after the parties had been divorced in February of 1991. Again, in his closing argument Mr. Larew clearly stated that the identity of these promissory notes had not been lost and had not been co-mingled with other funds. As he stated and as was quoted by Appellee, "The promissory notes used funds coming out of the Kidder-Peabody. We maintain those are the sole property of Mr. Coats because they have not been co-mingled or lost through exchange. They were clearly identified and readily traceable." (Tr. 1305, Appellee's Brief, p. 11).

Appellee seems to assert that Mr. Coats was required to separately argue pre-separation notes from post-separation notes. In fact, however, as stated above, the same principle applied to all such notes regardless of when they were issued. If they could be shown to have eminated from the Kidder-Peabody account and to have gone directly back to it, then such notes would be the separate property of Mr. Coats.

Mr. Coats has elected, however, for purposes of this appeal to focus only upon the post-divorce notes to eliminate any arguments which could be advanced as to the ultimate use of funds from the pre-divorce notes. This narrowing of the issues was Mr. Coats' own choice for purposes of this appeal. However, the lower court was fully apprised of Appellant's argument that all of the notes, including the post-divorce notes, were the separate property of Mr. Coats since they were traceable from the Kidder-Peabody account.

Appellee argues that because Exhibits P-90 and P-91 were introduced into evidence that somehow this was an admission by Appellant that these notes were part of the marital property. It is obvious, however, that both of these exhibits were the proposals of the appellee as to how the property should be classified and divided. Certainly, Appellant could make no objection to Kathryn Coats' proposal as to how she believed a division should be made.

Likewise, the fact that Appellant listed these assets in his own Exhibit 59 is of no consequence since Exhibit 59 includes all of his assets both marital and separate. As noted by Appellee herself concerning the testimony relating to this exhibit, "Defendant did not ever testify as to what assets were not marital other than the Kidder-Peabody account." (Appellee's Brief, p. 9).

For these reasons, therefore, the issue of the promissory notes was sufficiently raised in the lower court and has been preserved for this appeal.

B. <u>The Inclusion of $148,000 in Notes as Part of the Marital Estate Was Erroneous.</u>

Appellee argues that the lower court correctly included all of these notes as marital property based upon the same arguments she advanced at trial that the Kidder-Peabody account itself was marital property. (Appellee's Brief, pp. 11-13). Of course, the lower court rejected this testimony and concluded that the Kidder-Peabody account should remain the sole property of Peter Coats. All of the testimony by Appellee's accountant concerned the use of these accounts prior to their divorce. Whatever may be said for those notes that were issued before February of 1991, no such arguments can be made as to those issued after February 1991. Obviously, since the parties were separated none of these contentions advanced by Appellee's accountant would have any validity after February 1991.

C. In This Case, The Marital Estate Was Determined at the Time of Trial.

Appellee maintains that Mr. Coats is arguing that the $148,000 in promissory notes should have been valued at the time of the separation and not the time of trial. (Appellee's Brief, pp. 13-14). She relies upon Howe v. Howe, 806 P.2d 1209 (Utah App. 1991) as her authority, that all assets must be valued at time of trial. It is questionable that the Howe case establishes such a rule. See Hoagland v. Hoagland, 852 P.2d 1025 (Utah App. 1993) (Bench, J. and Jackson, J. concurring). In any event, however, the estate was not valued by the lower court at the time of the divorce but was valued at the time of trial. There is no doubt that both parties placed values upon the Kidder-Peabody account as of the time of trial. (See Plaintiff's Exhibit 98;

Defendant's Exhibit 58). Had the lower court ruled that the Kidder-Peabody account was subject to marital division such division would have been based upon the value of the account in June of 1992.

Had appellant Peter Coats not utilized any of the Kidder-Peabody money for his bridge loans, then the balance of such account as of the time of trial would have been the same (plus interest) as it was in February of 1991. Appellant is merely asking this Court to withdraw from the marital division the amount of the promissory notes that was wrongfully included in the marital division between the time of the divorce and the time of trial. There is no request to value these promissory notes at any different time period than the remainder of the estate.

For all of these reasons, therefore, this Court should correct the present judgment and exclude the post-divorce promissory notes as a marital asset.

## POINT II

### THE LOWER COURT ERRED IN FAILING TO RECOGNIZE THE FULL AMOUNT OF DEBT THE DEFENDANT OWED TO HIS MOTHER ISABEL COATS.

Appellee Kathryn Coats has been unable to cite any testimony of Isabel Coats in which she directly stated that the total amount owing by her son was $270,000. The very best attempt by Appellee consists of the following dialogue between Mr. Coats' attorney and Mrs. Coats:

A. However, it was an open-ended note.

Q. You did not disburse money out at all with that?

A. The money was disbursed in increments from my Kidder margin account as necessary for things in the

development.

Q. Now the need for the note are copies of several letters. Can you tell us what those are?

A. This is what I was talking about.

Q. Are these letters copies of letters that were written by you?

A. Yes.

Q. And they are written to Fred A. Moreton at Kidder-Peabody.

A. Yes. He's my brother.

Q. You typically deal through him in relation to your accounts?

A. Yes.

Q. Were these written at or about the time that you got-- the dates on these letters?

A. These letters are dated, as far as I know, exactly. I would sometimes telephone, and then he would do it, and I followed up with a letter: but usually it was written in anticipation.

Q. <u>But these represent draws against that note, $400,000.</u>

A. <u>Yes.</u> (Tr. 981-82). (Emphasis added).

The testimony of Mrs. Coats is entirely consistent with the argument now made by her son. Exhibit 50 containing the note and various letters attached to such note did in fact represent draws against the $400,000 note. She at no time, however, stated that these were the only draws made against the note.

The Finding of Fact entered by the lower court, however, is completely inconsistent with this testimony. It states, "Isabel Coats testified to the Court and stated that Defendant's Exhibit D-50 <u>showed all of the obligations owed by the defendant to her.</u> (Finding No. 14(k)(2), Findings of Fact, pp. 17-18) (emphasis

added). Such Finding is clearly not supported by the evidence.

This same Finding asserts:

> "While the defendant's certified public account testified on the amount of the notes stated that the outstanding balance was $411,025, that amount was never verified by Isabel Coats, and the Court cannot reconcile in its mind the difference between the amount testified to by the certified public accountant and the amount testified to by defendant's mother, who is the creditor on the notes." (Id.). (Emphasis added).

A review of the testimony of Isabel Coats shows that the number "$270,000" never appears in either direct examination or cross examination. It is not until the closing argument by Appellee's attorney that the assertion is made that she testified that Exhibit D-50 was the entire amount. The following statement of Appellee's attorney evidences this fact:

> Mr. Coats is bound by the testimony presented to the Court, and the only evidence presented by the defendant relating to that note was the credible evidence of the creditor herself.
>
> She said to the Court in her testimony, and D-50--and I ask you to look at that and add it up, and you'll see that this cover sheet is the note attached to it or letters which exhibit and evidence each loan that she made.
>
> * * *
>
> That Mrs. Coats testified to these letters and "all the evidence of all the loans I made" and the very first loan she said she made was a March, 1990 loan and that's when they began.
>
> And then we go through there and those add up, Your Honor to $270,000. And the note doesn't say $400,000, it says up to $400,000. (Tr. 1244-46).

Thus, the Court essentially stated that he would have found the amount testified to by Appellant's accountants but for the fact that this testimony was in direct contradiction to the amount stated by the creditor herself. As can be seen, however, no such

contradiction occurred.

A similar type of situation occurred in McClellan v. David, 439 P.2d 673 (Nev. 1968). In that case a secretary in the office of the plaintiff's attorney testified with exactness that she had conversed three times with the defendant by telephone soon after he had been served with the summons about the necessity of his filing an answer to the complaint. Her recollection of the conversation was refreshed from written notes made by her at the time. The defendant did not deny the conversations, but simply testified he did not recall them. The trial court relieved the defendant of his default. The Supreme Court of Nevada reversed. The Court held that there was no fundamental conflict in the testimony requiring it to adhere to the trial court's finding in favor of the defendant. The Court stated:

> Testimony of a witness that he does not remember whether a certain event took place does not contradict positive testimony that such event or conversation took place. Bender v. Roundup Mining Co., 356 P.2d 469, 471 (1960); Tennent v. Leary, 304 P.2d 384, 387 (1956). See also: Comment Note--Comparative Value of Positive and Negative Testimony, 98 A.L.R. 161. Therefore, we hold that there was no credible evidence before the lower court to show that the neglect of [the defendant] was excusable under the circumstances. Id. at 675.

A nearly identical situation occurred in this case. Appellant's accountant testified with precision as to the exact amount that was owing on the debt, including documentation supporting such figure. Appellant's mother acknowledged the existence of the $400,000 note but did not state any amount that was specifically owed. At no time did she state that the draws contained in Exhibit 50 constituted the total amount borrowed.

Thus, the positive testimony of the accountant cannot be overcome by the neutral testimony of Appellant's mother.

Since the findings of the lower court are not supported by the evidence, the judgment of the court must be modified to correctly reflect the entire amount borrowed by the appellant from his mother.

## POINT III

THE LOWER COURT ERRED IN ARBITRARILY CHARGING APPELLANT WITH A MARITAL ASSET VALUE OF $57,300 FOR THE BRANDON CANYON DEVELOPMENT WHEN SUCH FINDING WAS NOT BASED UPON ANY EVIDENCE.

There is little to say about this contention of Appellant. Kathryn Coats has herself acknowledged that "The Court appears to take an arbitrary position in valuing Brandon Canyon." (Appellee's Brief, p. 21). The best that Appellee can do is to offer an alternative scenario in which a worse result could have occurred. This offer is simply not sufficient to overcome the fact that the lower court made his ruling in an arbitrary manner. Appellant Peter Coats could also suggest ways in which the Court's decision may have been reduced had he considered other formulas of computation. Obviously, however, neither the speculation of Appellant or Appellee is sufficient to overcome the absence of any sufficient evidence to support the finding of the lower court.

For this reason, therefore, the decision should be vacated and remanded to allow the Court to make a proper evaluation based upon evidence as to all facets of the project which were unavailable at the time the Court made its ruling.

## POINT IV

ALTHOUGH THE COURT ORDERED APPELLANT TO BE GIVEN A CREDIT OF $4,300 FOR APPELLEE'S SALE OF THE FAMILY BOAT, NO SUCH CREDIT WAS EVER GIVEN IN THE ACTUAL ACCOUNTING.

Although this is a small issue in comparison to the amounts involved in this divorce, the approach of the appellee is enlightening. Rather than acknowledging that a simple mistake has been made and that the boat was never included in the revised Exhibit P-91 which serves as the basis for the accounting between the parties, Appellee states that Mr. Coats "will receive the credit when he pays the estate equalization."

It is difficult to understand why Appellee is unable to admit even the simplest error. There is no doubt that paragraph 14(h) quoted by the appellee (Appellee's Brief, p. 22) clearly awards the $4,300 credit. Until this finding is included in the actual property distribution sheet, however, it is of no value. The property settlement sheet attached to the Court's decision must therefore be amended to reflect this $4,300 credit. Again, while the mistake is small it is clearly there for all to see and Appellee's assertion that "Appellant is mistaken regarding this issue" is indicative of other arguments made thoughout her brief which are not as apparent for their lack of substance.

## CONCLUSION AS TO APPEAL OF APPELLANT

The issues raised by Appellant are simple, clear, and do not involve discretionary decisions by the lower court. Instead, they involve miscalculations or errors in findings which are not based upon the evidence existing in the record.

Appellee has failed to refute any of these contentions and

therefore the relief requested should be granted.

## PETER M. COATS RESPONSE TO CROSS APPEAL

Many of the issues raised by Kathryn Coats in her cross appeal are now irrelevant and moot because of changed circumstances. Other challenge the discretion of the lower court in various types of decision-making processes. These arguments will now be examined.

### I.

### THE COURT DID NOT COMMIT ERROR IN ALLOWING APPELLANT TO VISIT HIS CHILDREN WITHOUT SUPERVISION.

Kathryn Coats maintains that the lower court erred in failing to require supervised visitation as she requested. She contends that the Court ignored the only evidence presented to this issue which was offered by Dr. Mercedes Reisinger and Thomas Harrison. (Appellee's Brief, pp. 37-38). She acknowledges that Appellant himself testified as to his visitation desires as did Ms. Francis Gomez who supervised some ten visits with the children. Kathryn Coats fails to mention that the Court was also able to observe her in her testimony throughout the proceedings. Based upon all of this evidence the Court made the following Finding:

> The Plaintiff has requested that the defendant exercise visitation only in a supervised capacity. However, the Court is persuaded that both parties have problems which each of them have created for themselves as parents and which have affected the emotional lives of the children. While the Court has not interviewed the children, it has read the reports of the therapists, and it is clear that the children do have fear toward their father, much of which has been generated by their mother. The Court finds that there are two adults before the Court who love their children, but have committed acts against each other which have seriously

> affected their children. There is concern about the father's dysfunction and the mother informing the children of his dysfunction. (Finding of Fact No. 2, pp. 2-3).

In subsequent findings the Court observed that both parties needed counseling in order to rebuild their relationship with their children. The Court also found that there was no evidence to show that Mr. Coats had abused the children either physically or sexually or anything to indicate that he was going to abuse the children in any way. In addition, the Court found there was no evidence that the appellant was a pedophile or would engage in any criminal activity toward the children. (Findings 3, 4, and 5, pp. 3-4).

The lower court was not required to follow the recommendations of the alleged experts offered by Kathryn Coats. It is fundamental that the testimony of witnesses is to be given such weight and credibility as the trier of fact may find reasonable under the circumstances. Guinard v. Walton, 480 P.2d 137 (Utah 1971). The Court was therefore completely within its authority to believe or disbelieve any portion of the testimony or reports offered by Appellee's witnesses.

Moreover, now that the children reside in Virginia the appellant is able to see them only on infrequent occasions. This limited time together is an additional reason to allow unsupervised visits so that he can attempt to rebuild his relationship with his children.

II.

THE COURT DID NOT COMMIT ERROR IN DIRECTING THE APPELLEE TO REPLACE MR. TOM HARRISON AS THE CHILDREN'S COUNSELOR.

The trial court concluded there was a great deal of antagonism between Mr. Tom Harrison and the appellant. The Court concluded that this antagonism was anti-productive in resolving problems between the appellant and his children. The Court concluded that it would be "in the best interests of the parties and the children to place the children with another therapist." (Finding No. 7, p. 6).

The lower court did not abuse its discretion in determining that another counselor would be more appropriate so that Appellant could attend counseling sessions with his children. Obviously, if antagonism existed between the counselor and the appellant, a non-productive session would likely result.

Appellant Peter Coats is again perplexed why this issue is even raised in this appeal. His children and former wife now live in Virginia and Mr. Harrison practices in Salt Lake. Even if the Court had ordered Mr. Harrison to continue his therapy it is apparent that such relationship would have terminated upon this distant move. Likewise, an order reversing this decision would have no effect since Mr. Harrison would be physically unable to counsel the children at the present time. For this reason, Appellant believes that the circumstances have changed during the appeal thereby rendering the relief requested impossible or of no legal effect. Franklin Financial v. New Empire Development Co., 659 P.2d 1040, 1043 (Utah 1983).

III.

THE LOWER COURT DID NOT COMMIT ERROR IN DIRECTING THAT ALIMONY WOULD TERMINATE TEN YEARS FROM THE DATE OF COMMENCEMENT.

In limiting Appellee's alimony to a ten-year period the Court noted that in light of the parties ages, and the potential ability of the appellee to earn income, the award of alimony should not be without a time limitation. (Finding No. 12, p. 10).

Kathryn Coats has failed in her burden to produce facts and evidence showing that the decision of the lower court is incorrect. Reed v. Reed, 806 P.2d 1182 (Utah 1991). Certainly, with the substantial property award given to the appellee by the Court together with her age and earning ability, an award of $240,000 over a ten-year period cannot be said to be an abuse of discretion.

Appellant Peter Coats also asserts that upon information and belief, Kathryn Coats was remarried in the summer of 1993 and therefore under Utah law any award of alimony immediately ceases. (§30-3-5(5), U.C.A.). Assuming that such marriage did occur then this issue would also be moot and not subject to appellate review.

IV.

THE LOWER COURT DID NOT ERR IN THE VALUATION OF THE NORTHRIDGE FURNISHINGS.

Appellee Kathryn Coats asserts that the lower court erred in valuating the Northridge property at $4,500 when the only "evidence" was the testimony of appellant Peter Coats himself. (Appellee's Brief, pp. 41-42).

Plaintiff's Exhibit 2 contains an appraisal of the

furnishings by Mr. John Davis of the entire Northridge household of numerous individual items. This estimate by a professional appraiser showed a total value of all furnishings of approximately $7,300. Mr. Davis testified that these prices were based upon what he would expect to sell them for at a retail value, not what he would expect to buy them for. (Tr. 577). A review of this exhibit shows the marginal value of used furniture when it is being resold. For example, a queen anne style low boy in good condition is listed for $65.00. A JVC stereo system, multiple CD player, tuner, amplifier, cassette deck, turntable, and simulated oak cabinet is listed for $200.00. Sterling flatware in a mahogany silver chest with approximately 50 pieces is listed for $210.00.

Appellant testified as to his opinion of certain items that were not listed in Exhibit 2 which he felt had been omitted. Appellee's counsel prepared Exhibit 80 and attempted to elicit Mr. Coats' admission that this was a correct value. Mr. Coats did not agree, however, and stated the following:

> This is a value just to show some things were left out. I think the way the values have gone from the testimony of the appraisers, they came through and they absolutely do a fire sale on it. So these might be a retail value, then from that value we would have to establish a market value. I don't think we talked about market value. We talked about what they were purchased for and what they are going to go through, and I just wanted to have a choice in the items that I received instead of them being hidden in Virginia. (Tr. 1455-56).

Based upon the testimony of Appellee's own appraiser as to the value of used furniture, the lower court was justified in concluding that the retail value suggested by the appellant was

only approximately one-fourth of the actual market value that these items would sell for in a commercial setting. Determining and assigning values to marital property is a matter for the trial court and an appellate court will not disturb those determinations absent a showing of clear abuse of discretion. Yelderman v. Yelderman, 669 P.2d 406 (Utah 1983).

It should also be noted that the purpose of this valuation was to give Appellee a credit for the furniture after she had delivered it to Mr. Coats. As of this date, however, Mr. Coats has yet to receive any of the items listed on Exhibit 80. If this Court were to increase the valuation to $18,000 as now requested by Appellee, and if Appellee fails to deliver these items to Appellant as required, then it would be Appellant who would be entitled to the increased valuation credit. Thus, this contention of Kathryn Coats could ultimately be detrimental to her own financial interests.

## V.

## THE CLAIM CONCERNING TARGET CAPITAL AS AN ASSET IS A NON-ISSUE.

Appellee asserts that "both parties agreed that Target Capital was an asset." (Appellee's Brief, p. 42). No citation is given for this statement. Likewise, there is no explanation as to any "value" stipulated by both parties or that Appellant would be given this as an asset. Appellant asserts that Target Capital has absolutely no value and therefore it is immaterial whether it would be given to him or to his former wife. There was no testimony concerning this asset since it had no value. The lower court was correct in completely discarding this non-existent asset.

VI.

THE LOWER COURT DID NOT ERR IN FAILING TO AWARD APPELLEE THE LIABILITY CLAIMED BY HER FATHER AS TO PROMISSORY NOTES SHE HAD EXECUTED.

Appellee Kathryn Coats makes the unusual argument that she is entitled to be reimbursed by appellant Peter Coats for promissory notes that she executed to her father in the amount of $40,000. She acknowledges that most of this money went to attorneys' fees and expert witness fees as well as living expenses. She subsequently makes two separate claims as will be discussed infra for attorney fees and witness fees. Essentially, therefore, she wishes Mr. Coats to pay the entire liability to her father and then to pay her separately for assessed attorneys fees and witness fees which she also claims are due. Such double dipping cannot be allowed.

Appellee has cited no authority which requires a spouse to pay a relative of a former spouse for monetary expenses advanced. If her father's money was utilized for attorneys' fees and other reimbursable expenses, then when she receives such amount from Appellant she can certainly reimburse her father. This divorce action is clearly between Kathryn Coats and Peter Coats and not between Peter Coats and Kenneth Tuck, Appellee's father.

Essentially, whatever money is due between Peter and Kathryn for alimony, temporary support, attorneys' fees, and witness fees, is irrelevant to any debt incurred by Appellee to her father. Had Appellee gone to a bank and borrowed money for these same expenses the bank could make no direct claim against Mr. Coats for payment of Appellee's debt. This same result applies here and the Court

was correct in denying any liability to Appellee's father.

VII.

THE LOWER COURT WAS CORRECT IN ITS AWARD AS TO ATTORNEYS FEES.

Appellant has no dispute with the legal authorities cited by Kathryn Coats in her Brief. (Appellee's Brief, pp. 43-44). Certainly, a court has wide discretion in deciding how much, if any, attorneys' fees should be awarded from one spouse to the other. Appellee maintains that "the Court made no finding on the total legal fees but simply ordered Defendant to pay only $20,000 of those fees, offering no explanation for the reduction and the failure to recognize the liability to Mr. Tuck." (Appellee's Brief, p. 44). This statement is incorrect. The lower court offered the following explanation for the attorney fee award:

> The Court would also order that--would find, first, that the defendant has more ability to pay the attorneys' fees in this matter than the plaintiff has, and would award attorneys' fees in the amount of $20,000.
>
> I'm not saying that this is total fees in this case, I'm saying that's the total amount that this Court would award.
>
> I think the attorneys' fees were generated here unnecessarily--I'm not putting that right; I'm saying that the attorneys' fees were generated necessarily, but I'm saying that the attorney fees had--the attorneys had to do work which this Court deems was unnecessary because either as a result of uncooperation of the parties or because of events that took place as far as the case is concerned. (Tr. 565-66).

See also Finding No. 20 in which the Court finds that the appellee has incurred substantial attorneys' fees in excess of $40,000 and that a reasonable amount for Appellant to contribute to the appellee is $20,000).

Clearly, the Court took into account the financial need of the receiving spouse and the ability of the other spouse to pay together with the conduct of both spouses in generating the fees. This award was not an abuse of discretion.

VIII.

THE COURT DID NOT ERR IN FAILING TO AWARD APPELLEE REASONABLE FEES FOR EXPERTS.

The lower court denied Appellee's request for expert witness fees on the basis that her request was overly broad under Utah law.

In addition to this legal ground, there was insufficient evidence before the court to justify such fees. The only evidence was Appellee's testimony that she had incurred these fees and that she wished to be reimbursed for them. Unlike the detailed summary of attorneys' fees offered as evidence in this case (see Plaintiff's Exhibit 37 as contained in Appendix of Respondent and Cross Appellant) there was no evidence as to the breakdown of the alleged expert fees or testimony that such fees were reasonable under community standards. This lack of foundation was itself sufficient for the lower court to deny these fees regardless of any other reason the court may have utilized.

IX.

DEFENDANT ACKNOWLEDGES THAT UNDER RECENT LAW THE COURT ERRED IN AWARDING THE CHILDREN AS TAX DEDUCTIONS TO THE APPELLANT.

In view of recent decisions by this Court and federal courts, Appellant acknowledges that the lower court under today's standards did not satisfactorily justify the award of one child as

an exemption on Appellant's federal tax return or two children if Appellee was unable to utilize such exemption on her return.

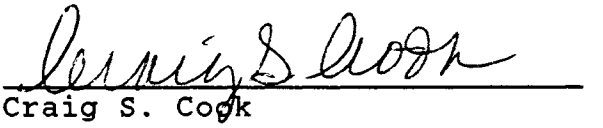
Appellant, therefore, agrees that this provision of the Divorce Decree may be amended to provide that Appellee receive all exemptions.

## CONCLUSION

Before this Court can justify relief to Appellee as to her cross appeal, it must find that the lower court abused its discretion in making the various awards and decisions of which Appellee now complains. As noted in the context of argument, some of these issues are now moot or irrelevant because of circumstances which have changed since the trial. In other instances, the lower court was justified in the decision based upon the financial status of the parties and the circumstances surrounding the divorce.

With the exception of the tax exemption issue, therefore, the present judgment should be affirmed in its entirety as to the claims now being asserted by Appellee on her cross appeal.

DATED this 3rd day of February, 1994.



Craig S. Cook
Attorney for Appellant and
Cross Appellee

## MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Reply Brief of Appellant and Cross Appellee to Craig Peterson and Joanna B. Sagers, Attorneys for Appellee and Cross Appellant, 426 South 500 East, Salt Lake City, Utah 84102 this 3rd

day of February, 1994.