1992

Kathryn Tuck Coats v. Peter M. Coats : Brief of Respondent and Cross Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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KATHRYN TUCK COATS,	:	**BRIEF OF RESPONDENT AND CROSS-APPELLANT**
Plaintiff, Appellee, and Cross-Appellant,	:	
v.	:	
PETER M. COATS,	:	
Defendant, Appellant, and Cross-Appellee.	:	Case No. 920588-CA Category No. 15

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Appeal From an Order in the Third Judicial District Court,
in and for Salt Lake County, State of Utah,
Honorable Homer F. Wilkinson

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TABLE OF CONTENTS

RESPONDENT

CROSS-APPELLANT

TABLE OF AUTHORITIES

RESPONDENT

CASES

STATUTES

CROSS-APPELLANT

CASES

STATUTES

j12\COATS-4.TOC

JURISDICTION AND NATURE OF THIS CASE

The Court of Appeals has jurisdiction over this matter pursuant to Utah Code Annotated § 78-2a-3, as an Appeal from a Final Order entered in a civil proceeding.

RESPONDENT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the lower Court err 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 which were issued after the parties were divorced and were all payable back into the Kidder-Peabody fund.

2. Did the lower Court err in failing to recognize the full amount of the debt which the Defendant owed to Isabel Coats.

3. Did the lower Court err in arbitrarily charging Defendant with the marital asset value of $57,300 for the Brandon Canyon Development when such finding was not based upon any evidence.

4. Although the Court ordered Defendant to be given a credit of $4,300 for Plaintiff's sale of the family boat, no such credit was ever given in the actual accounting.

STATEMENT OF FACTS

1. During the course of the marriage, the parties had three children, to wit: Katie, born November 2, 1979; Grace, born June 30, 1982; and Peter, born March 18, 1986. [TR 140]

2. Defendant was a real estate broker and the parties started their own brokerage company out of their home in 1982. [TR 138]

3. The Plaintiff worked part time as a receptionist for the Defendant until the business ultimately moved outside the home in 1986. [TR 138]

4. After 1986, the Plaintiff was not employed in the market place, she maintained the household. [TR 138]

5. During the course of the marriage, the parties lived very well. They lived in a large house in an exclusive area of Salt Lake County, they purchased what they needed for clothing and vehicles, they began their own businesses and traveled extensively. [TR 183-184]

6. Exhibit 27 was entered into evidence and was representative of the real and actual expenditures for the Plaintiff and the children taken from a ledger kept for several years demonstrating household expenditures. [TR 745]

7. The Plaintiff testified that Defendant did not actually earn enough money to support the party's high life style from his real estate business and that from the beginning of the marriage, the parties lived off of the Defendant's inheritance to support the life style which the parties were accustomed to. [TR 750]

8. The Defendant testified that the parties lived on part of the dividend from the Kidder-Peabody account. [TR 911]

9. The Defendant testified that he inherited stock from his grandparents. Rather than passing inheritance from parent to child, it was passed from grandparent to grandchild in his family. [TR 906]

10. Defendant testified that he received blue-chip stock prior to marrying the Plaintiff and that the stock was placed in a Kidder-Peabody account. [TR 907-908]

11. The Defendant testified that in 1986, over $260,000 stock that was held by Edward L. Burton Company was placed in the Kidder-Peabody account. [TR 908]

12. The Defendant testified that none of the stock in the Kidder-Peabody account was ever registered jointly. [TR 909]

13. The Defendant testified that the only stock which he had ever been given to the Plaintiff was $10,000 of General Electric stock in December, 1990. [TR 909-910]

14. Plaintiff's accountant, Randy Petersen, testified that the Defendant was continually moving money from Kidder-Peabody to his own account. He testified that the Defendant had four bank accounts which he was using and the money would be transferred from Kidder-Peabody into these bank accounts. [TR 560]

15. Mr. Petersen further testified that money from the Kidder-Peabody account was moved into one of the four accounts that effected his personal life as well as his business life and that payments were made from these accounts for the family home, for improvements on the family home, purchases of automobiles, trips, clothing and credit cards. [TR 562]

16. Randy Petersen testified that there was no way to determine the separation of money used by the Defendant and to show that it was not commingled with his personal life. This testimony was uncontroverted by Defendant. [TR 562]

17. Randy Petersen testified that three of the bank accounts were primarily used for business and personal needs and that the fourth account opened in 1990 or 1991 was a development account for Brandon Canyon. He testified that there was an account for the office through which Peter Coats paid most of his business expenses, that there was a joint account between Peter and Kathryn Coats, that there was a personal account which was used for personal expenses, and that prior to that, Peter Coats had used that account quite extensively for business in Brandon Canyon and Coats Realty. [TR 563] Defendant continually mixed and commingled his inherited funds with marital funds.

18. The Defendant testified that he would buy a rental home which would free up their cash so that they could buy the next home and that a person would go ahead and buy the next home. [TR 912]

19. The Defendant testified that he no longer had any of the rentals, that there was a high cost to maintain them. [TR 913]

20. The Defendant further testified that after he sold the rentals, he used the stocks in the Kidder-Peabody account, that he would go ahead and do principal loans or loans on second mortgages to make it easier for people to purchase. These were bridge loans with someone who has a house or property and they are desiring to purchase another house or property, most often they have to sell that property before purchasing. Defendant would come through and say that if they would buy the property through him, he would guarantee their principal loan. They would go ahead and purchase their new home and would then pay that back when they sold their old house. The Defendant would take back a Trust Deed Note. The Defendant did not testify that these bridge loans occurred after the marriage had been terminated by the bifurcated proceeding. [TR 914]

21. The Defendant testified some of the notes were bad and that when he was repaid on some other notes, as they were being collected, the proceeds were spent on living purposes. [TR 915-916]

22. Defendant's accountant, Scott Bradford, testified to the foundation for Defendant's Exhibit No. 59, which was entered into evidence. Exhibit No. 59 is entitled "Peter M. Coats Balance Sheet as of April 30, 1992." The balance sheet shows $173,468 in notes receivable. [TR 1112]

23. Scott Bradford also testified about the major differences between the balance sheet prepared by Randy Petersen (P-91) and

Defendant's balance sheet (D-59). In reviewing Exhibit D-60 (the comparison of the parties' position prepared by Scott Bradford), there are no differences in the gross value of the accounts receivable notes. [TR 1115]

24. The Defendant borrowed funds from his mother, Isabel Coats, to build "Brandon Canyon," a housing development.

25. Isabel Coats testified about Defendant's Exhibit No. 50 that it was an open-ended note [TR 981], that the money was disbursed in increments from her Kidder-Peabody margin account [TR 981], and that Exhibit D-50 represented a compilation of the draws against that Note [TR 982].

26. Isabel Coats further testified that it was a bona fide loan to Peter Coats and that she expected payment on that Note. [TR 982] All of the letters and notes attached to Exhibit D- 50 added up to $273,000.

27. The Defendant's accountant, Scott Bradford, testified that there was evidence of interest payments to Isabel Coats. He testified that the interest payments have been made on a regular basis, approximately quarterly, and that interest was paid through December 31, 1991, as of April 30. He testified that the quarterly interest was approximately $7,000, and that the payments were slightly more or less than that. He testified that the interest payments began as early as 1990 and have continued through May, 1992. [1120]

28. Scott Bradford testified under cross-examination that the Defendant has always had an income history from notes, and that Defendant's note generation began in earnest probably within the last couple of years. [TR 1203]

29. David Evans, a land developer for the Plaintiff, testified

that as he was doing a title search, he did find a $400,000 lien owing to Isabel Coats which was recorded by Peter Coats. [TR 1084]

30. Melody J. Rasmussen was called as a witness and testified over Plaintiff's Objection that the Note payable to Isabel Coats was $401,000. [TR 1379-1380]

STANDARD OF REVIEW

The Standard of Review applicable to appeals involving civil decrees is stated in Dunn v. Dunn, 802 P.2d 1314 (Utah App. 1990), where the Court said that in a divorce proceeding:

> "...determining and assigning values to marital property is a matter for the trial court and this court will not disturb those determinations absent a showing of clear abuse of discretion. To permit appellate review of the property distribution, the distribution must be based upon adequate factual findings and must be in accordance with the standards set by this state's appellate court. We will not disturb a trial court's findings unless they are clearly erroneous, that is, against the clear weight of evidence or unless we reach a definite and firm conviction that a mistake has been made."

SUMMARY OF THE ARGUMENT

1. The lower Court erred in determining that approximately $148,000 in Promissory Notes were part of the marital estate subject to division when such Notes came from non-marital funds such as Kidder-Peabody account, were all issued after the parties were divorced, and all payable back to the Kidder-Peabody fund, is genuinely raised for the first time on this Appeal. The Appellant genuinely failed to raise the issue before the trial Court and the Court never had a real opportunity to rule on the post-divorce assets issue.

2. Even if the issue of $148,000 in Notes had been raised at the trial, the trial Court's determination that the Notes should have been included in the marital estate is appropriate. It is clear from the evidence presented to the trial Court that the Promissory Notes were commingled and became part of the marital estate.

3. The marital estate should be determined at the time of the trial and the bifurcated divorce proceeding and not at the time of the determination of the marriage.

4. The lower Court's recognition of the $240,000 debt owed to Isabel Coats was fully supportable by the evidence. Trial Court's assessment of the credibility of witnesses should not be disturbed on appeal, and in this instance, the lower Court gave more weight and credibility to the testimony of Isabel Coats, the holder of the Notes.

5. The lower Court did not err in charging Defendant with the marital asset value of $57,300 for the Brandon Canyon development. It appeared that the Judge's ruling regarding Lot 16 of Brandon Canyon is more favorable to the Defendant's position and clearly was not an abuse of discretion.

6. The Defendant was given the credit for the $4,300 for Plaintiff's sale of the family boat, and he will receive the credit when he pays the estate equalization.

ARGUMENT

I.

A. THE LOWER COURT'S RULING THAT $173,468 IN TRUST DEED NOTES WERE PART OF THE MARITAL ESTATE WAS NOT A CLEAR ABUSE OF THE TRIAL COURT'S DISCRETION, WAS BASED ON EVIDENCE REASONABLY SUPPORTING THE TRIAL COURT DECISION AND MUST BE UPHELD.

The Appellant's argument that the lower Court erred in determining that approximately $148,000 in Promissory Notes were not 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, is genuinely raised for the first time on this Appeal.

A. Principles Regarding Issues Raised for the First Time on Appeal. To preserve the substantive issue for appeal, the party must

timely bring the issue to the attention of the trial Court, and provide the Court a genuine opportunity to rule on the issue's merits. See Turtle Management, Inc., v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982); James v. Preston, 746 P.2d 799, 801-802 (Utah App. 1987). "Issues not raised in the trial court in a timely fashion are deemed waived, precluding the appellate court from considering their merits on appeal." Salt Lake County v. Carlston, 776 P.2d 653, 655 (Utah App. 1989); Accord Barson v. E. R. Squibb & Sons, Inc. 682 P.2d 832, 837 (Utah 1984); Franklin v. New Empire DEB Company, 659 P.2d 1040, 1045 (Utah 1983). Further, the mere mention of an issue in the pleadings when no supporting evidence of legal authority is introduced at trial in support of the claim, is insufficient to raise an issue at trial and thus insufficient to preserve the issue for appeal. James, 746 P.2d at 801. This rule is "stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial," Id, quoting Bogacki v. Board of Supervisors, 5 Cal 3 D 771; 489 P.2d 537, 543-544; 97 Cal Reporter 657, 653-664 (1971), cert. denied, 405 U.S.C 1030, 92 S. Ct. 1301, 31 L.Ed. 2d 488 (1972).

In reviewing the transcript of the trial, the parties waived opening argument which would have been the first opportunity Appellant had to bring this issue before the trial court. Because the Appellant waived opening argument, the next portion of the record to examine is Appellant's testimony.

The Appellant initially testified regarding these Promissory Notes and stated that they were bridge loans. [TR 914] He found that he could significantly increase his real estate commissions if he would lend money to home owners thus allowing them to purchase new

homes pending the sale of their old homes. [TR 914] He further testified that the intention was to repay the Kidder-Peabody account, but that happened only about one-half the time. He also testified that as he was collecting the notes, they were spent on living expenses. [TR 914-915]

On cross-examination, Appellant stated that Defendant's Exhibit No. 58 and No. 59 represented Defendant's balance sheet. He testified that many items on the balance sheet were <u>not marital</u> but that the balance sheets did represent the parties' assets and liabilities. [TR 1437-1438] Defendant did not ever testify as to what assets were not marital other than the Kidder-Peabody account.

While redirecting Appellee, Mr. Larew stated to the Court in reference to the purpose for Exhibit D-78:

> To trace the funds, your Honor, to trace the funds in and out of Kidder-Peabody, the purpose of these is directly from the Kidder-Peabody, interests alone, and some of them come back out with the dates we've already gotten into. It shows they were post-divorce related. I propose to show, your Honor, that they were separate property, not marital property to define them more clearly." [TR 1495]

However, Mr. Larew did not ever define what property was separate and what property was marital. This was the only examination about post-divorce acquisition of assets during the entire trial. In closing argument, Mr. Larew stated:

> "As far as its identity being lost, we've identified promissory notes coming out of the Kidder account, Exhibit No. 78, containing the notes, funds drawn out of the Kidder account with identification on the checks being drawn out that it was going for a particular transaction, particular procedure, which resulted in a promissory note being received by Mr. Coats.
>
> "It's identity has not been lost, has not been commingled with other funds. Mrs. Coats' name is not on any of those notes. She has no legal interests in any of them of any sort and the most that can be argued is that she has an equitable interest by virtue of her marriage. But that fails as it's Mr. Coats' own property.

The Court asks: Are you saying that any sub-division or speculative adventure that the Defendant had gone into, using the funds of Kidder-Peabody and so forth, should be kept completely out of the marital assets?

Mr. Larew: Not necessarily. I think that could be that way. I think that is a fact question. I think that depends on how well they were segregated and maintained and not commingled and lost to identity

The Court: Are you saying that he should retain the Kidder-Peabody stocks and all those assets, and that the sub-division, Brandon, would use that one and the note payable on that should be payable on the marital estate?

Mr. Larew: No, I am saying the notes payable--on which note payable, Isabel Coats or the one he's-- he's...

The Court: The notes payable to Isabel Coats and to the Kidder-Peabody funds. He owes money back to that fund?

Mr. Larew: That's right, he does. I think those are--the Kidder-Peabody funds I think is, without question, still maintained by way of its integrity; it's gone in and out without losing that integrity.

The Court: If he loses the fund from the Kidder-Peabody to assimilate wealth during the marriage, does that become part of the marital estate?

Mr. Larew: That accumulation--yes, yes.

The Court: Then you are saying his notes back to Kidder-Peabody would also be part of the marital estate?

Mr. Larew: Not the principal. The note amount due that he borrowed from the Kidder-Peabody notes he may have written to Kidder-Peabody well I must be missing something because I see the principal comes out of Kidder, the principal comes into a note and if that money is drawn off for living expenses for payments, then yeah, that increase, whatever that increase whatever--whatever it's used for is part of the marital estate. But that principal does not, by coming out into a note, transform it into a marital asset.

The Court: Then you are saying you adopt the position taken by the Plaintiff in their Exhibit No. 90 and not 91? No. 90 is the one without the Kidder-Peabody--No, 91 is without the Kidder-Peabody; 90 is the one with Kidder-Peabody.

Mr. Larew: Well, to the extent they eliminate the Kidder-Peabody, yes, I would. That's--I don't think the Kidder-Peabody is appropriately a part of the marital estate. [TR 1288-1290]

Later on in closing, Mr. Larew states:

> I want to address the promissory notes to make sure that we are clear on that. 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 commingled or lost through exchange. They were clearly identified and readily traceable. Would the Court have any questions about those? [TR 1305]

Clearly, the Appellant failed to genuinely raise the issue before the trial Court. The Court never had a real opportunity to rule on the "post-divorce assets" issue. Defendant allows the Court to admit the Plaintiff's Exhibits P-90 and P-91 which includes the Promissory Notes. At one point, Defendant even accepted the Plaintiff's exhibit P-90 which values the Notes as a marital asset. Defendant's counsel in closing stated:

> The Court: Then are you saying you adopt the position taken by the Plaintiff in their Exhibit 90 and not 91? No, 90 is the one without Kidder-Peabody. No, 91 is without the Kidder-Peabody; 90 is the one with Kidder-Peabody.
>
> Mr. Larew: Well, to the extent that they eliminate Kidder-Peabody, yes, I would. That's--I don't think the Kidder-Peabody is appropriately part of the marital estate. [TR 1290]

The Defendant's own exhibit, the Defendant's Balance Sheet, D-59, contains these Notes as assets. The Appellant is arguing against his own exhibits submitted at trial.

B. <u>The Defendant is now attempting for the first time to value some assets at the time of divorce rather than at the time of trial</u>. These are the only assets and/or liabilities that Defendant attempts to value at the time of divorce rather than at the time of trial. Without argument, Defendant accepts the position that all other assets are valued at the time of trial. In and of itself, that is a new issue before the Court.

B. <u>EVEN IF THE ISSUE OF $148,000 IN NOTES HAD BEEN RAISED AT THE TRIAL, THE TRIAL COURT'S DETERMINATION THAT THE NOTES SHOULD BE INCLUDED IN THE MARITAL ESTATE IS APPROPRIATE</u>.

<u>Mortenson v. Mortenson</u>, P.2d 304 (Utah 1988), states that

equitable property division pursuant to the divorce statute should generally award property acquired by one spouse by gift and inheritance, or a property acquired in exchange thereof, to the spouse who received the gift, together with any appreciation or enhancement of its value, unless the other spouse has by his or her effort or expense contributed to the enhancement, maintenance or protection of that property, thereby acquiring equitable interest in it, or if property has been consumed or its identity lost through commingling or exchanges or when acquiring spouse's new gifts of interest bearing to the other spouse. Burt v. Burt, 799 P.2d 1166, (Utah App. 1990), the Court states that inherited or donated property may be part of the marital estate, subject to division incident or to divorce, if non-receiving spouse augments, maintains or protects property through his or her efforts, the parties having inextricably commingled the property with the marital property so that it has lost its separate character or the recipient spouse has contributed to all or part of the property to the marital estate. In Dunn v. Dunn, 802 P.2d 1314 (Utah App. 1980) the Court states that premarital property will lose its separate distinction when the parties have inextricably commingled it in the marital estate, or when one spouse has contributed all or part of the property in the marital estate.

Plaintiff's accountant testified that the Kidder-Peabody account was used on a daily basis by the Defendant and could not be considered a separate asset of the Defendant. He further testified that the Defendant had four bank accounts which he was using and money would be transferred from Kidder-Peabody into these bank accounts. [TR 560] Mr. Petersen testified that there was no way to show that it was not commingled with Defendant's personal life. [TR 562] The Defendant

testified that he would go ahead and do principal loans or loans on second mortgages to make it easier for people to purchase. These were essentially bridge loans. He further testified that when the notes were repaid, they were spent for living purposes. [TR 915-916] None of this testimony was ever controverted.

It is clear from the evidence presented to the trial Court that the Promissory Notes were commingled and became part of the marital estate.

C. THE MARITAL ESTATE SHOULD BE DETERMINED AT THE TIME OF TRIAL IN A BIFURCATED DIVORCE PROCEEDING.

Bifurcation occurred in this matter when the parties were divorced on March 15, 1991. The parties specifically agreed that all issue, except the granting of the Decree of Divorce, were reserved for further determination by the Court at a time convenient to the Court and counsel.

The Defendant argues that $148,000 in Promissory Notes was post-divorce and should not have been valued in the marital estate.

The bifurcation was necessary to the Plaintiff's mental and physical health. A letter was submitted from Dr. Lowry A. Bushnell stating that the Plaintiff was under extreme mental anguish and anxiety due to the long process of the settlement of her pending divorce. Dr. Bushnell goes on to recommend that for the Plaintiff's good and well-being that the parties be divorced prior to the settlement. A letter was submitted from the psychotherapist, Thomas G. Harrison, stating that the parties' divorce be granted as soon as possible in order to allow the family to even out emotionally. A letter from Bishop James E. Gleason was submitted which stated that the Defendant had invited a new girl friend and her children to live in with him and this is clearly an embarrassment to the Coats children

while at school, and that the stresses arising out of this situation would be partially alleviated if their father was no longer married to their mother. As such, the bifurcation was necessary to the well-being of the Plaintiff and the parties' children. Even though the parties were divorced, all property issues remained outstanding. As such, the standards set forth in Howell v. Howell, 155 Utah Adv. Rep. 18, should apply. In Howell, the Court stated that the standard of living in setting alimony should consider the standard of living during the marriage up to the time of trial. The same standard should apply to valuation of the estate. The bifurcation was necessary to the well-being of the Plaintiff and the minor children. However, the only issue that was resolved by the issue of bifurcation itself was the termination of the marriage. There had been no discovery, no assessment of value, no settlement proposals; in fact, the proceedings had only begun. All other remaining issues were reserved. Therefore, the Howell standard applies, and the Court properly valued the Promissory Notes at the time of trial.

It is not unusual that cases arise where a divorce must be granted. In the present case, two experts and an ecclesiastical leader indicated that divorce was essential to the well-being of Plaintiff and the children. If the Court determined valuation of the marital estate at the time of divorce in bifurcated proceedings, the result would be that there would be no bifurcated proceedings and families would suffer. So little is known about the marital estate at the time of bifurcation that a reasonable attorney would never advise bifurcated proceedings if it would impact the position of the estate. The purpose of bifurcated proceedings is to protect the emotional interest of the spouse and children. This Court cannot

allow bifurcated proceedings to be lost as a remedy for that purpose.

II.

THE LOWER COURT'S RECOGNITION OF THE $270,000 DEBT OWED TO ISABEL COATS IS FULLY SUPPORTABLE BY THE EVIDENCE.

The Trial Court's Assessment when Judging Credibility of the Witness Should Not be Disturbed on Appeal.

Findings of Fact in divorce appeals are subject to the clearly erroneous standard of review such that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah Rules of Civil Procedure, Rule 52(a); Jense v. Jense, 784 P.2d 1249, 1251 (Utah App. 1989).

Reed v. Reed, 806 P.2d 1182 (Utah 1991), states that the District Court's Findings of Fact are based on a Judgment of the credibility of the witnesses. It is the province of the trier of fact who assesses the credibility of witnesses, and we will not second guess the trial court when there is reasonable evidence to support its findings. Utah Rules of Civil Procedure, Rule 52(a) states:

> "**Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground."

The Appellant argues that the lower Court erred in failing to

recognize the full amount of debt that Defendant owed to his mother. The Defendant requested that Isabel Coats be called as a witness out of order because she had to return to California. Mrs. Coats testified on direct examination to the authenticity of a Promissory Note executed by Peter M. Coats (Exhibit No. 50). She testified that it was an open-ended Note and that she did not recall the exact day when she received it. She testified that the money was disbursed in increments from her Kidder-Peabody margin account as necessary for the Brandon Canyon development. She testified that she would contact her brother, Fred Moreton, at Kidder-Peabody and would either write him a letter or telephone and follow up with the letter regarding the disbursement. Mrs. Coats was handed Exhibit P-50 and asked whether the letters attached to the Note represented the draws against the Note and she replied, "yes." She testified that the Promissory Note was bona fide and that she expected repayment. On cross-examination, Mrs. Coats testified as follows:

> Q. Mrs. Coats, I am going to hand you the original note which has been marked as Defendant's Exhibit No. 50, and I am going to go through a bit of your testimony. You testified to the Court that you received that note during January of 1990. Is that correct?
>
> A. I am sorry, counsel, I do not know that it was January it came. It probably was put in the bottom of a file drawer and I can retrieve it.
>
> Q. I did understand your testimony correctly when I heard you say to the Court that you received it before March 3, 1990; that is the second page of the document?
>
> A. I believe so, yes.
>
> Q. Ms. Coats--
>
> A. It was.
>
> Q. --Isn't it true, and I want to ask this question to you in the straight-forward fashion, isn't it true that this note was manufactured by Peter Coats after the commencement of these proceedings and sent to you at a date long after

Kathryn Coats commenced these proceedings for divorce?

A. No.

Q. So you received then that note in its original form on a date sometime in early 1990?

A. Yes.

Q. Ms. Coats. I want you to look at the notary stamp on that document. Do you see who it was notarized by?

A. Yes.

Q. What's the name there?

A. Janet H. Wilkinson.

Q. Do you know Janet H. Wilkerson?

A. Yes.

Q. That is Peter's secretary? Do you know that she didn't begin to work for Peter until after January 1990 sometime?

A. I didn't know when she started to work.

Q. I want to ask you--

A. May I answer: I do not know that the note I have is notarized.

Q. Isn't this the note you have in front of you? You testified this is the original note.

A. Yes, but I don't know whether this business on it at the bottom was there when I got the note.

Q. You told the Court that it was, you received in its current form. Do you change your testimony at this point?

A. I cannot be sure, sir.

Q. I will ask you this question, and I preface it with something which the Court may take judicial notice of, and I would ask the Court to do so, that the notary bond is issued in this State for four year's of validity; that is, that it is only valid for four years. Ms. Coats, you notice that the stamp date on the expiration for Janet Wilkerson is September 10, 1995. Do you see that on the document in front of you?

A. It must be on this thing. Yes, I see it, yes.

Q. You subtract from 1995, it would not be possible for this notary bond to have been issued prior to September 20,

1991. So do you realize that?

A. I did not realize that, and I do not realize that--I'm sorry, I do not. I was looking at the top part of the note that Peter signed to Wally and me.

Q. I'm going to ask you the question one more time. This note in fact was manufactured by Peter and sent to you long after these divorce proceedings began, wasn't it?

A. No.

Q. Didn't Peter indicate to you that as a result of the pre-trial in front of the Court and the assertion that there was no evidence documenting the $400,000 in liability to you, that you would have to have a note, and he sent you this note?

A. No.

Q. And you say that even in light of the fact that this note could not have existed in its present form prior to September 20, 1991?

A. As I say, I do not know that this bottom was on the note he sent me.

Q. Ms. Coats, these copies of the letters, did you prepare those on a date subsequent to September 20, 1991, at your son's request?

A. No, I did not. [TR 988-991]

She further testified:

Q. Continuing this cross-examination, your Honor, if I may. As I understand your testimony, the documents the Court has admitted, Defendant's Exhibit No. 50, the promissory note, then this supplemental documents that support the funds you loaned to Peter, is that--

A. That's for Brandon Canyon, for this last question.

Q. As I understood your testimony, you loaned up to $400,000, and as the note says it was from $400,000, that Peter was not to borrow in excess of that amount in any event.

A. He was not to borrow more than $400,000 under this note. I do not know if it was--the note was never--.

Q. Alright. And he borrowed he borrowed--you've written letters to your brother and told your brother to make changes or disbursements so that it could be accomplished?

A. Yes.

Q. That is the intent of the document?

A. That's the intent of the document. [TR 999]
In closing argument, the Plaintiff's counsel argued that the Defendant is not beyond creating documents because D-50 is a document where the notary stamp had an expiration date of September 20, 1995, and the date on the Note was January, 1990. Plaintiff's counsel argued pursuant to Utah Code Annotated § 46-1-3(4) which states that each notary public shall be commissioned for the term of four years unless the commission is revoked under Utah Code Annotated § 46-1-16, or resigned.

Melody J. Rasmussen, CPA assisting Defendant in his case, testified as to the loan. The Plaintiff's counsel objected to this witness based on lack of foundation. The Court overruled these objections and held that Ms. Rasmussen's testimony was relevant and also allowed the introduction of Exhibit D-72 into evidence. This exhibit contained numerous letters and accountings from Mrs. Coats, but Isabel Coats did not testify to their authenticity. In addition, copies of the checks which Defendant claimed to be interest payments on loans were contained in Exhibit D-72. Ms. Rasmussen testified that as of April 30, 1992, there was $401,000 owing on the note and $10,025 of accrued interest owed. [TR 1379]

The Defendant testified that there was a debt owed back to his mother, however, he was unable to testify as to the amount.

The Defendant's argument that the lower Court rejected the claim of $411,000 on the assumption that the testimony of Mrs. Coats directly contradicted testimony of the accountant is erroneous. The Court stated:

"The Court has to determine what is most believable, what was the best testimony, and I questioned counsel on what the CPA yesterday testified to as far as the accounting, and the Court is not persuaded that she--and I am not stating--well, I believe she is stating it truthfully for the information that she had, and the Court is not making any accusations as far as any information being generated, except that the Court cannot reconcile in its mind if there was an obligation of $411,025, that when the mother was here and on the stand, that would not,

have been brought out, especially when they said she had to leave and they wanted to get her on: So what I am saying is I am adopting $270,000 as the note due Isabel Coats." [TR 499-500]

Defendant makes the argument that Plaintiff's accountant, Randy Petersen, acknowledges that he was aware of Defendant's $400,000 claim concerning the Note to Mrs. Coats and acknowledged that if there was such a valid Note, then Defendant should be given the liability deduction. Plaintiff does not dispute this argument by Defendant. Plaintiff, her counsel and expert were all aware of Defendant's allegations, but allegations are not facts. The Defendant also makes note of testimony of David Evans who testified that he also learned of a lien of Mrs. Coats for $400,000 and, in fact, a property search on property owned by Peter Coats revealed a $400,000 Trustee note; however, this simply identified a recorded document and is not evidence of an actual Note.

The trial Court's assessment of the credibility of witnesses should not be disturbed on appeal and in this instance, the lower Court gave more weight and credibility to the testimony of Isabel Coats, the holder of the Note, finding that Defendant could have recalled Isabel Coats if the Note were more than she testified, but she was not recalled.

III.

THE LOWER COURT DID NOT ERR IN CHARGING DEFENDANT WITH THE MARITAL ASSET VALUE OF $57,300 FOR THE BRANDON CANYON DEVELOPMENT.

The Defendant acquired a real estate development project known as Brandon Canyon during the course of the marriage. [TR 1048-1049] The Defendant funded Brandon Canyon through his mother and his Kidder-Peabody account. [TR 1048-49] The Plaintiff valued Brandon Canyon as follows [Exhibit P-91]:

#23 BC $ 30,899 [DBS D-58]

#24	28,000	[testimony]
#28	18,750	(DBS D-58]
#15	165,000	[testimony]
#16	171,900	[testimony]
#17	176,900	[testimony]
	$591.449	

The Defendant valued Brandon Canyon at $319,117 [Exhibit D-99]. The Court adopted Defendant's valuation of Brandon Canyon. Paragraph 14(i)(2) of the Supplemental Findings of Fact and Conclusions of Law states:

> "The Brandon Canyon cash amount stated as a negative dollar value of $6,266.00 should be eliminated. In addition, the note on Lot 23 for Brandon Canyon, Lots 4, 15, 16 and 17, Brandon Canyon, should all be eliminated. The Court is not thoroughly convinced that the Court has received all of the information relating to Brandon Canyon as an asset. However, the Court is reasonably persuaded that the values stated by the Defendant of $319,117.00 is a reasonable value to be attributed to Brandon Canyon, except for the fact that the Defendant has received or will receive additional money for the sale of lots, for example, he has already sold Lot 16 for $171,900.00 The Court finds that as Brandon Canyon is developed and the lots are finished, the Defendant will sell more homes and will receive additional profit. The Court finds that the evidence is so conflicted that it will be necessary to adopt some arbitrary number to determine the value. Accordingly, the Court is convinced that the value of Brandon Canyon is at least some portion of Lot 16 which has been sold, and the value stated by the Defendant of $319.117. While it is arbitrary, the Court finds that the only reasonable method for placing a value on Brandon Canyon is to take one-third of the value of the sale of Lot 16, which was $171,900.00 and add that to the values stated by the Defendant. Accordingly, Court finds that the value of Brandon Canyon is $319,117.00 plus $57,300.00 for a total value of $376,417.00 and Brandon Canyon will be awarded to the Defendant at that value."

The Court appears to take an arbitrary position in valuing Brandon Canyon. Plaintiff's Exhibit No. 31 originally had Lot 16 valued at $85,517. However, that amount is modified in exhibit P-90 after the Defendant testified that Brandon Canyon Lot No. 16 was sold for $171,900. The Defendant testified as of April 30, 1993, that the value of Lot 16 was $105,000, and that value was included in the value of $319,117 presented by Defendant as the value of Brandon Canyon. It would appear that the Judge's ruling regarding Lot 16 of Brandon

Canyon was not all that arbitrary and is more favorable to the Defendant's position than was realized at the time of the trial. The lower Court could have taken the difference between $171,900 less $105,000 and assigned an additional value of $65,000 to Brandon Canyon rather than the $57,300 which the Court found there was no abuse of discretion.

IV.

THE DEFENDANT WAS GIVEN THE CREDIT OF $4,300 FOR PLAINTIFF'S SALE OF THE FAMILY BOAT.

In reviewing the Supplemental Findings of Fact and Conclusions of Law and Supplemental Decree of Divorce, the Defendant was given credit for the Plaintiff's sale of the family boat. Paragraph 14(h) of the Supplemental Findings of Fact states:

> "The Court has received a great amount of testimony regarding the boat and its value, but the Court was persuaded from the outset, and is even more convinced after hearing all of the testimony, that the Plaintiff had possession of the boat, she did not have sufficient funds to pay her expenses and to raise her children because the Defendant was not paying child support or alimony as ordered, and she sold the boat to meet the family needs. The best evidence before the Court is that the Plaintiff received $4,300.00 from the sale of the boat. While the Court is of the opinion that the boat was worth more than $4,300.00, and in fact, the Plaintiff received more than $4,300.00, but after the payment for repairs and other costs, the net benefit to the Plaintiff was $4,300.00. It was as a result of actions on the part of the Defendant, by his failure to pay support as ordered, that the Plaintiff received only $4,300.00 for the sale of the boat. The Court finds $4,300.00 to be the best value to be attributed to the boat, and the boat should be awarded to the Plaintiff. However, in light of amounts, which are discussed later, the amount attributed to the value of the boat to the Plaintiff will be taken off of the division of assets."

Therefore, the Appellant is mistaken regarding this issue; the Defendant has been given credit and this issue should be dismissed. He will receive the credit when he pays the estate equalization.

CONCLUSION

The Appellant's argument that the lower Court erred in determin-

ing that approximately $148,000 in Promissory 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 was genuinely raised for the firs time on this Appeal. The Appellant failed to genuinely raise the issue before the trial Court and the Court never had a real opportunity to rule on the post-divorce assets issue. In addition, even if the issue of the $148,000 of notes had been raised at the trial, the trial Court's determination that the Notes should be included in the marital estate is appropriate based on the evidence presented at trial that the Promissory Notes were commingled and became part of the marital estate. Finally, the marital estate should be determined at the time of the trial and bifurcated divorce proceeding. The evidence clearly indicates that bifurcation was necessary for the well-being of the Plaintiff and the minor children, and that the only issue which was resolved by the issue of bifurcation itself was the termination of the marriage. There have been no discovery, no assessment of value, no settlement proposals; in fact, the proceedings had only begun. All other remaining issues were reserved. As such, the Court properly valued the Promissory Notes at the time of the trial.

The lower Court's recognition of the $270,000 debt owed to Isabel Coats is fully supportable by the evidence. The trial Court's assessment of the credibility of the witnesses should not be disturbed on Appeal, and in this instance, the lower Court gave more credibility to the testimony of Isabel Coats, the holder of the Note.

The lower Court did not err in charging Defendant with the marital asset value of $57,300 for the Brandon Canyon development.

The Judge's ruling regarding Lot 16 of Brandon Canyon is more favorable to the Defendant's position, and it is clear there was no abuse of discretion in this matter.

The Defendant was given the credit of $4,300 for Plaintiff's sale of the family boat and Appellant is mistaken regarding this issue. The Defendant will receive the credit when he pays the estate equalization.

CROSS-APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

7. Did the Court commit error by awarding Defendant rights of visitation without supervision in contradiction to the expert testimony presented to the Court.

8. Did the Court commit error by directing the Plaintiff to replace Mr. Tom Harrison with another counselor as the children's counselor.

9. Did the Court commit error by directing that the payment of alimony would terminate ten years from the date of commencement, which date of the commencement for the payment of alimony was June 16, 1992.

10. Did the Court commit error in its finalization of Plaintiff's Exhibit No. 91 as follows:

a. By valuing Northridge furnishings at $4,500 and awarding the furnishings at that value even though the Defendant has testified at trial that the value of said property was $18.000;

b. By discounting notes receivable on Plaintiff's Exhibit 91 at a discount rate of 20% instead of 10%;

c. By eliminating Target Capitol as an asset of the marital estate even though the parties agreed that it was an asset;

d. By failing to recognize the entire liability of the Plaintiff to her father, Kenneth Tuck, which was incurred during the

divorce proceedings to pay attorney's fees, expert fees, and to maintain the family when he failed to pay support.

11. Did the Court err by failing to award the Plaintiff all attorney's fees and costs incurred in these proceedings.

12. Did the Court err by failing to award the Plaintiff reasonable fees for the experts, i.e., accountants, appraisers, engineers and other experts who appeared on her behalf and assisted her in the preparation and presentation of her case.

13. Did the Court err by allowing the Defendant to be awarded any of the minor children as dependents for the purposes of filing his state and federal income taxes.

STATEMENT OF FACTS

1. The Plaintiff was 19 years old at the time of marriage and had completed one year of college. The Defendant had completed three years of undergraduate education and attended college the last time in 1982. [TR 700]

2. The Plaintiff testified that she anticipates attending Holland's College in Roanoke, Virginia, in a program for displaced homemakers. The Plaintiff testified that she was going to study psychology and obtain a Master's Degree so that she could pursue a career as a school psychologist. [TR 701]

3. The Plaintiff testified that she has not worked even part-time since she was in high school and has not been employed on a regular basis. [TR 703]

4. The Plaintiff testified that she did not have any marketable skills. [TR 703]

5. The Plaintiff testified that she tried to attend USF Real Estate Examination Course this last summer and did not complete the

course, but that it is her desire to complete her education. [TR 700]

6. The Plaintiff testified that it is her desire based on the report of Dr. Reisinger and reviewing the testimony of Mr. Harrison that there be supervised visitation. [TR 202]

7. The Plaintiff testified that the Defendant has demonstrated violent behavior immediately preceding the parties' separation in 1989-1990. [TR 766]

8. The Plaintiff testified that on one occasion in the middle of the night, she was asleep when the Defendant threw a lamp across the room then he went downstairs and punched a hole in the wall because he was angry that Plaintiff had hung up a necklace on a hook so he ripped it off the wall and then broke the necklace. [TR 766-767]

9. The Plaintiff testified to Exhibit No. P-34, a letter written by the Defendant stating that he was a sexaholic. [TR 203]

10. The Plaintiff testified that there had been virtually no visitation by the Defendant since March, 1992, with the exception of one visitation that occurred in December, 1991.

11. The children's therapist for almost two years, Thomas J. Harrison, LCSW, testified that Mr. Coats has significant emotional problems and mental health disorder. [TR 664]

12. Mr. Harrison testified that the Defendant is in need of significant treatment individually and is in need of treatment with his children conjointly before he should be allowed to visit with them without supervision. [TR 664]

13. Mr. Harrison testified that he believed there is a potential for danger to the children if visitation occurred without supervision. [TR 665]

14. Mr. Harrison testified that Defendant has a history of a

sexual addiction as well as a chemical addiction. [TR 666]

15. Mr. Harrison testified that a sexual addiction is a need for constant sexual involvement with those other than to whom they are married, a need for adrenal experience. [TR 667]

16. Mr. Harrison testified that a sex addiction is similar to an addiction like chemical or alcohol addictions. [TR 667]

17. Mr. Harrison testified that sexual addiction is recognized by professionals in the area of psychology as well as by the American Medical Association. [TR 667] And, Mr. Harrison testified that there is a treatment center in the United States for the treatment of sexual addiction. [TR 668]

18. Mr. Harrison testified that sexual addiction is recognized as having phases of deterioration of personality [TR 668]; and ultimately, as one of the phases of deterioration, the person addicted actually becomes a person of violence or anger which is uncontrollable. [TR 668]

19. Mr. Harrison testified that upon conversations with the children, they have experienced that kind of anger and violence by their father. [TR 668]

20. Mr. Harrison testified that ultimately it was a desirable goal for the Defendant to have a normal relationship with his children and a relationship which would allow unsupervised visitation, but that goal should be very guarded due to the fact that there has been no real attempt by the Defendant to receive individual therapy and continue with long-term treatment to assist or prepare to align himself appropriately with the children in the future. [TR 669]

21. Mr. Harrison testified regarding his concerns that Defendant has an inability to relate to personal needs of the children; that he

has an agenda; that he has an inability to understand the children's feelings; to count their feelings, to relate to how they feel. The children shared this information to Mr. Harrison through play therapy and conversational therapy and they indicated lack of interaction with their father which says their father does not have the ability to move out of his own personality, his own needs, and relate appropriately to the children. [TR 671]

22. Mr. Harrison testified that he saw strong signs of a personality disorder. [TR 672]

23. Mr. Harrison testified that he had seen no improvement whatsoever in Defendant in regards to his mental disorder and personality disorder and that Defendant is unable to be a functional parent to his children. [TR 672]

24. Mr. Harrison testified that he is concerned for the children's emotional safety and personal safety. [TR 673]

25. Mr. Harrison testified that he has not personally witnessed interaction between Mr. Coats and the children. [TR 674]

26. Mr. Harrison testified that he had a minor difference with the Defendant and hung up the telephone with Mr. Coats because he had already shared with Mr. Coats what he was going to do for the children. Mr. Harrison felt that the Defendant was angry, frustrated and wanted Mr. Harrison to do something which Mr. Harrison thought was not proper for him to do. [TR 680]

27. Mr. Harrison testified that on a supervised level, the Defendant should have regular visitation but without any overnight visitation. [TR 686]

28. Plaintiff's Exhibit P-14 was submitted without objection. Exhibit P-14 is the psychological visitation evaluation conducted by

Mercedes Reisinger, Ph.D. Dr. Reisinger recommended that:

a. Mrs. Coats continue in individual therapy as well as with her support group (co-dependency group).

b. Mr. Coats become involved in individual treatment as well as pursuant to recommendations made by the Golden Valley Treatment Center for involvement in Sexaholics Anonymous.

c. The children continue in treatment with Tom Harrison, licensed social worker, L.C.S.W., with whom they appear to have developed a therapeutic relationship and have him as a safe haven.

d. Mr. Coats and the children become involved in therapy with a family therapist, preferably recommended by Mr. Harrison, so they can work together in the children's best interest. The issues to be resolved include the children's perceptions of Mr. Coats' abusive behavior and the children's fear of their father. Mr. Coats may need to meet with Katie alone to resolve issues between then.

e. Mrs. Coats needs to abstain from giving the children any negative information relating to their father which will cause them to be placed in the middle of the conflict. If the children become aware of negative behavior by their father, Mrs. Coats should serve as a support and reassure that she can take care of the problem herself and that it does not belong to the children.

f. Mr. Coats should not continue to push for unsupervised visitation until the problems between the children and himself are resolved. If Mr. Coats could on a consistent basis provide safety and security for the children and assume a parental role without sharing adult information, the children would likely be more willing to pursue a relationship with him. The period of time for Mr. Coats' strict adherence without challenge to the visitation Order on a consistent

basis will likely instill the most sense of trust in the children.

g. The adjustment from supervised to unsupervised visitation should be determined by the children's therapist as well as by the family therapist based upon the children's progress in their relationship with their father. Once visitation is determined to be unsupervised, these need to be outlined specifically in order to avoid conflicts. At no time should Mr. Coats have visitation with the children and have a female companion present unless he plans to remarry. Overnight visits should be reserved for later when the children feel comfortable with them. These should never be forced. It is likely that Peter, Jr., will be able to have unsupervised and overnight visits sooner than the girls. However, this should not be pushed too quickly.

h. If at all possible, as soon as the intensity between Mr. and Mrs. Coats is reduced in terms of their own relationship, therapeutic mediation should assist them in coming to terms with providing the children with the opportunity of having a safe and healthy relationship with both parents. [TR 659]

29. The Defendant testified that he was involved with a relationship group which had 25 people in the class which dealt with issues of divorce and children and being able to communicate on a fair basis. [TR 1419]

30. The Defendant testified that he had been to see a psychologist, Dr. Kenneth Jackson, who is a therapist in Provo. [TR 1420] He did not say how often.

31. The Defendant testified that he has not taken the children to see Dr. Jackson. [TR 1422]

32. The Defendant testified that Dr. Reisinger's report was in

error and that he did not accept it. [TR 1418-1419]

33. Francis Gomez testified that she supervised visitation between the Defendant and his children from September 12 through December 26, 1991. [TR 960]

34. She observed ten visits for three hours each. Her role was to supervise the interaction. Ms. Gomez stated that she did not observe any indication of abuse [TR 962] She testified that the interaction with the oldest daughter was very conflictive. [TR 963]

35. Ms. Gomez testified that at one point, the oldest daughter, Katie, expressed fear of her father. [TR 963]

36. Ms. Gomez testified that Defendant was very effective at setting limits with his children and, as to his parenting, he needs to improve when it comes to assertiveness and problem solving. [TR 964]

37. Ms. Gomez testified that the children were attached to their father, they were happy to meet with him, and enjoyed the visits. [TR 964]

38. Ms. Gomez testified that she did not see any need for supervision, that the children have been raised in an open system meaning that they are open to express their feelings and thoughts, that children who are abused are very secretive, and that she does not see that in these children. [TR 965]

39. The Defendant testified that the value of the Northridge furnishings is $18,000. [TR 1456] On cross-examination, the Defendant testified that his values may be retail value. [TR 1456]

40. The parties agreed that Target Capitol was an asset of the marital estate, and agreed on it value. [Exhibits D-59, P-91]

41. The Court admitted Plaintiff's Exhibit No. 5 as the

deposition testimony of Kenneth Tuck who had been previously called, sworn and testified in the case as a witness for the purpose of a trial. [TR 540-541] Plaintiff's Exhibit No. 5 was admitted without objection.

42. Kenneth Tuck testified that the Plaintiff had executed Promissory Notes to him for $4,350, $3,785, $7,649, $11,237, $4,951, $4,290 and $4,725. [Deposition pp. 4-8]

43. Mr. Tuck testified that the Promissory Notes were payable at a rate of 9%. [Deposition p. 8]

44. Mr. Tuck testified that it was not his intent to forgive the Promissory Notes and he expected full payment. [Deposition p. 9]

45. Mr. Tuck testified that most of the bills were for professionals and, as the bills would come in, he would pay for them. [Deposition p. 13]

46. Plaintiff testified that she borrowed money from Mr. Tuck signed Promissory Notes for the amounts borrowed. [TR 739]

47. Plaintiff testified that she owes Mr. Tuck in excess of $40,000 incurred for living expenses, attorney's fees and expert witnesses. [TR 740]

48. The Plaintiff testified that she was willing, as long as she was not paying taxes, to allow Defendant to use one or even two of the children as dependents, but when she was required to pay taxes, she wanted those dependant exemptions for herself. [TR 765]

49. The Plaintiff testified that if the exemptions would provide the Defendant greater benefit, then she was willing to allow him to purchase those exemptions for the value of the cost to her. [TR 765]

50. The Plaintiff provided foundation to Plaintiff's Exhibit No. P-37, entitled Plaintiff's Attorney's Fees. She further testified

that Exhibit No. P-37 did not contain time for June 1, 2, 3 and 4, and that 35 hours of additional time had been incurred during those four days for trial preparation, preparation for argument, etc. [TR 777]

51. The Plaintiff testified that the fee would be $185 an hour for the combined time of her attorney and his legal assistant for 35 additional hours. [TR 777]

52. The Plaintiff testified that it was her desire to be awarded all the attorney's fees and that she did not have the ability to pay these fees independently of an award by the Court. [TR 778]

53. The Plaintiff testified that the total attorney's fees subtracting the Judgments for prior attorney's fees already awarded and not including the amounts owed to her father, is $17, 936, and that she should be awarded those fees plus all that her father had paid. [TR 779]

54. The Plaintiff testified that she incurred expert fees in the case and it is her desire to be awarded 100% of those expert fees which total $14,200. [TR 780-781]

55. Plaintiff's counsel testified as to the need and reasonableness of his fees. [TR 842]

56. Plaintiff's counsel testified that he was an attorney licensed to practice law in the State of Utah and has been licensed to practice law for twenty years. He testified that he practices exclusively litigation, trial, and that approximately 95% of his practice is in domestic practice. He testified that he has conducted seminars for other attorneys on many issues, and has also conducted seminars for Judges throughout the State on issues relating to domestic law. He has also served on the Family Law Standing Committee of the Utah State Bar, he has been Chairman of that Committee and has

conducted services for the Bar and for the community, both for the lay community and the legal community as well as the judicial community, and has served on that Committee for about five years. He testified that he bills at the rate of $140 per hour but will bill the Plaintiff at the rate of $135 per hour because within 30 days after the Plaintiff retained his services, his fees were increased to $140. [TR 2843]

57. Plaintiff's counsel testified that his legal assistant, Dee Ann Keller, has had twelve years of experience in the legal community. He testified that she generally saves clients an extraordinary amount of money by taking their telephone calls, helping them through problems which occur, helping them with preparation of their documents, by helping them to get to Court and by helping them get their problems solved. He further testified that his effective billing rate for trial time is $185 an hour which includes Dee Ann Keller's time. [TR 280-282]

58. Defendant's counsel did not cross-examine Plaintiff's counsel or object to the reasonableness of the attorney's fees.

59. The Plaintiff testified that experts in this case were necessary because of Defendant's failure to cooperate in discovery and payment of support. [TR 778-779]

SUMMARY OF THE ARGUMENT

1. The Court committed error by awarding Defendant rights of visitation without supervision in contradiction to the expert testimony presented to the Court. The lower Court fully erred in refusing to adopt the positions of Dr. Mercedes Reisinger and the children's therapist, Thomas Harrison. Dr. Reisinger's report was admitted into evidence without objection or cross-examination and stands on its own as the preponderance of evidence on the issue of

visitation. Both professionals clearly stated that supervised visitation would be necessary and in the children's best interest. The evidence presented by Dr. Reisinger and Mr. Harrison is overwhelming, and it is clear that the Court simply ignored the evidence presented and abused its discretion by entering the Order which it did.

2. The Court committed error by directing the Plaintiff to replace Mr. Thomas Harrison with another counselor as the children's counselor. The Court's rationale behind this was that there existed animosity between the Defendant and Mr. Harrison. However, the Court failed to recognize the recommendation of Dr. Reisinger who stated that the children should continue in therapy with Mr. Harrison. In addition, Mr. Harrison had been treating the children for almost two years, and the children had gained trust and confidence. It is clear that the Judge failed to consider the children's best interest in this matter and considered only the best interest of the Defendant.

3. The Court committed error by directing that alimony would terminate ten years from the date of commencement which was June 16, 1992. The parties in this case were married over thirteen years, constituting a long-term marriage. In Watson v. Watson, 837 P.2d 1 (Utah App. 1992), the Court upheld and awarded permanent alimony based upon a six-year marriage. The facts in the Watson case are similar to the facts in the present case, and it is clear that the Court abused its discretion by limiting the term of alimony.

4. The Court committed error in its finalization of Plaintiff's Exhibit P-91 as follows:

a. By valuing Northridge furnishings at $4,500 even though the Defendant has testified at trial that the value of said property was $18,000. The only evidence regarding valuation of the Northridge

property was the Defendant's own testimony. The Court was clearly in error by arbitrarily reducing the amount from $18,000 to $4,500.

b. By discounting notes receivable from Plaintiff's Exhibit No. 91 as a discount rate of 20% instead of 10%. Plaintiff no longer seeks relief on this issue and accepts the Court's valuation.

c. By eliminating Target Capitol as an asset of the marital estate even though the parties agreed that it was an asset. Even though there was no testimony regarding this asset, it's value was undisputed based on Plaintiff's Exhibit P-91 and Defendant's Exhibit D-59. The Court simply refused to include it in the marital estate, and the case should be reversed on this issue with instructions to set the value stipulated by both parties and include Target Capitol as an asset of the marriage which is awarded to Defendant.

d. By failing to recognize the entire liability of the Plaintiff to her father which was incurred during the divorce proceedings to pay attorney's fees, expert witness fees, and to maintain the family. The testimony regarding liability owed to Plaintiff's father was undisputed. Therefore, the Court should recognize the entire liability owed by Plaintiff to her father.

5. The Court erred by failing to award the Plaintiff all attorney's fees and costs incurred in these proceedings. The Plaintiff testified pursuant to Plaintiff's Exhibit P-5 and Exhibit P-37 that her attorney's fees were in excess of the $20,000 awarded by the Court as attorney's fees. Such award entirely ignored the liability owed to Tuck. Plaintiff's counsel testified to the amount and reasonableness of attorney's fees and Defendant's counsel did not object. The Court made the finding on the total legal fees but simply ordered Defendant to pay only $20,000 of those fees offering no

explanation of the reduction and failure to recognize the liability to Mr. Tuck. Because of the evidence of Plaintiff's attorney's fees is adequate and undisputed, the Court abused its discretion in not awarding all the fees.

6. The Court erred by failing to award the Plaintiff reasonable fees for experts, i.e., accountants, engineers, appraisers and other experts who appeared on her behalf and assisted her in the preparation and presentation of her case. Plaintiff testified that she incurred expert witness fees in the case and that it was her desire to be awarded 100% of those expert fees which total $14,200. Peterson v. Peterson, 818 P.2d 1305 (Utah App. 1991), applies to the facts of this case, and the Plaintiff should be awarded expert fees in the sum of $14,200. The Plaintiff testified that she would have to liquidate the marital estate in order to pay expert fees and attorney's fees if the Court did not award such fees. The lower Court's decision to deny expert fees in this case should be reversed with instruction to award $14,200 in expert fees.

ARGUMENT

V.

THE COURT COMMITTED ERROR BY AWARDING DEFENDANT RIGHTS OF VISITATION WITHOUT SUPERVISION IN CONTRADICTION TO THE EXPERT TESTIMONY PRESENTED TO THE COURT.

The statutory standard governing visitation is "best interest of the child." U.C.A. § 30-3-10. The lower Court clearly erred by refusing to adopt the positions of Dr. Mercedes Reisinger and the children's therapist, Thomas Harrison. Dr. Reisinger's report was admitted without objection or cross examination and stands on its own as the preponderance of evidence. Notably, Dr. Reisinger's evaluation was a visitation evaluation done only for the purpose of determining appropriate visitation by the Defendant who is an admitted sex addict.

Both professionals clearly stated that supervised visitation would be necessary and in the children's best interests. The only contradiction to their recommendation of supervised visitation is the Defendant's own testimony, which certainly cannot be relied upon as an expert, and statements made by Ms. Francis Gomez, who was hired by the Defendant to supervise the visitation and certainly did not qualify as an expert. Ms. Gomez did write a report on her own volition regarding visitation, and even in her own report, she stated that she noticed a remarkably conflicted relationship between the Defendant had the oldest daughter. The evidence presented by Dr. Reisinger and Mr. Harrison is overwhelming and clear that Defendant's visitation should be supervised. The Court clearly ignored the evidence presented and abused its discretion by entering an Order which contradicted the evidence presented. The Court clearly chose to simply ignore the testimony of the experts and particularly the report of Dr. Reisinger. It was as if the visitation evaluation and the report were never written. Greater abuse of this issue could not have been committed by the Court. The matter should be remanded with instruction to follow the recommendations of the experts.

VI.

THE COURT COMMITTED ERROR BY DIRECTING THE PLAINTIFF TO REPLACE MR. TOM HARRISON WITH ANOTHER COUNSELOR AS THE CHILDREN'S COUNSELOR.

The Court ordered that the Plaintiff replace the children's therapist, Thomas Harrison, with another therapist. The Court's rationale behind this was that there existed animosity between the Defendant and Mr. Harrison. [TR 493]

The Court, however, failed to recognize the recommendation of Dr. Reisinger that states that the children should continue in therapy

with Mr. Harrison. In addition, Mr. Harrison had been treating the children for almost two years and the children had gained trust and confidence. It is clear that the Judge failed to consider the children's best interest in this matter, but considered only the interest of the Defendant. Simply because Defendant testified that he did not like Mr. Harrison, the Court ordered the change. Again, the Court abused its discretion by placing Defendant's interests ahead of the children's. This matter should be reversed

VII.

THE COURT COMMITTED ERROR BY DIRECTING THAT ALIMONY WOULD TERMINATE TEN YEARS FROM THE DATE OF COMMENCEMENT WHICH WAS JUNE 16, 1992.

Trial Courts have broad discretion in making alimony awards. Haumont v. Haumont, 793 P.2d 421-423 (Utah App. 1990). The appeals Court will not upset a trial Court for the award of alimony so long as the trial Court exercises its discretion within the appropriate legal standards, Id. The Court will not disturb the trial Court's award of spousal support absent a showing of clear and prejudicial abuse of discretion, Paffel v. Paffel, 732 P.2d 96-100 (Utah 1986).

The Courts have developed three factors which must be considered in affixing a reasonable alimony award:

a. Financial conditions and needs of the wife;

b. The ability of the wife to produce income for herself;

c. The ability of the husband to provide support.

Jones v. Jones, 700 P.2d 1072 (Utah 1985). Failure to consider the Jones factors in fashioning alimony awards constitutes an abuse of discretion. Stephens v. Stephens, 54 P.2d 952, 958 (Utah 1988).

The matter of appropriate alimony was addressed in Gardner v. Gardner, 748 P.2d 1076 (Utah 1988). An alimony award should after a

marriage such as this and to the extent possible, equalize the parties' respective standard of living and maintain the standard of living as close as possible to that standard of living enjoyed during the marriage. Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985), Higley v. Higley, 676 P.2d 379-381 (Utah 1983), Davis v. Davis, 749 P.2d 647 (Utah 1988). The Court reaffirmed its position in Gardner when it restated the three factors for consideration of alimony and stated that all three factors must be considered and the ultimate test of propriety of an alimony award is whether, given all of these factors, the party receiving alimony will be able to support himself or herself "as nearly as possible at the standard of living...enjoyed during the marriage." Jones, 700 P.2d 1075 (quoting English 565 P.2d 411).

The majority of the Court intended the principle stated in Gardner and reaffirmed in Davis to have particular significance when it stated:

> An alimony award should, after a marriage as this and to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage.

In Howell v. Howell 802 P.2d 1209 (Utah App. 1991, the Court applied the equalization standard in conjunction with the Jones factors. The Court stated:

> Trial courts must consider the following factors in setting alimony: (1) the financial needs of the recipient spouse; (2) the recipient's ability to produce income; and (3) the ability of the payor spouse to provide support. Davis v. Davis, 749 P.2d 649 (Utah 1988)

The parties in this case were married over thirteen years, constituting a long-term marriage. In Watson v. Watson, 837 P.2d 1 (Utah App. 1992), the Court upheld an award of permanent alimony based upon a six-year marriage. The facts in Watson are similar to the facts in the present case; both Mrs. Coats and Mrs. Watson did not

work outside the home but remained in the home to care for the children. Mr. Watson had an average gross income of $93,688.75, and Mr. Coats' average gross income was determined to be $137,596. It is clear that the Court abused its discretion by limiting the term of alimony.

VIII.

THE COURT COMMITTED ERROR IN ITS FINALIZATION OF PLAINTIFF'S EXHIBIT P-91 AS FOLLOWS:

Standard of Review. A standard of review applicable to appeals involving divorce decrees is Dunn v. Dunn, 802 P.2d 1314 (Utah App. 1990). The Court stated that in a divorce proceeding:

> Determining and assigning values to marital property is a matter for the trial court, and this court will not disturb those determinations absent a showing of clear abuse of discretion. To permit appellate review of the property distribution, the distribution must be based upon adequate factual findings and must be in accordance with the standards set by this state's appellate courts. We will not disturb a trial court's findings unless they are clearly erroneous, that is, against the clear weight of the evidence, or unless we reach a definite and firm conviction that a mistake has been made.

A. BY VALUING NORTHRIDGE FURNISHINGS AT $4,500 EVEN THOUGH THE DEFENDANT HAS TESTIFIED AT TRIAL THAT THE VALUE OF S A I D PROPERTY WAS $18,000.

Defendant testified that the value of the Northridge furnishings were $18,000. [TR 456]

On cross-examination, Plaintiff's Exhibit P-80 was admitted into evidence listing the personal property located at Northridge along with certain values.

On cross-examination, the Defendant testified that his values may be retail; however, the Defendant accepted $18,000 as the value of the Northridge furnishings. The Judge stated in his Bench ruling that:

> Now the Northridge furnishings, I am not persuaded that, as the Defendant was on the stand and testified, that he understood the appraisal situation as far as personal property is concerned, I know he didn't. I think he was stating what the allowable was that the property had to him, and probably it is good property, and probably it cost that much, and it was

valuable. It is very understandable for him to give the opinions that he did.

But this court is not persuaded by that, and I just have to arbitrarily--I'm no appraiser and I can't sit down and go over each one of those items and say it should be this and that. I am cutting that appraisal down to one-fourth. I think that's about what the other appraisals have been, and I am awarding the property to him for the sum of $4,500.

The only evidence regarding valuation of the Northridge property was the Defendant's own testimony as to the values. The Court was clearly in error by arbitrarily reducing the amount from $18,000 to $4,500. The case should be reversed on this issue with instructions that the value of the "Northridge personal property" is $18,000

B. BY DISCOUNTING NOTES RECEIVABLE ON PLAINTIFF'S EXHIBIT NO. 91 AS A DISCOUNT RATE OF 20% INSTEAD OF 10%.

Plaintiff no longer seeks relief on this issue and accepts the Court's valuation.

C. BY ELIMINATING TARGET CAPITOL AS AN ASSET OF THE MARITAL ESTATE EVEN THOUGH THE PARTIES STIPULATED THAT IT WAS AN ASSET.

Both parties agreed that Target Capitol was an asset. Even though there was not testimony regarding this asset, its existence and value is undisputed but the Court simply refused to include it in the marital estate. This case should be reversed on this issue with instructions to include Target Capitol as an asset of the marriage, set the value stipulated by both parties, and award the asset to Defendant as agreed.

D. BY FAILING TO RECOGNIZE THE ENTIRE LIABILITY OF THE PLAINTIFF TO HER FATHER WHICH WAS INCURRED DURING THE DIVORCE PROCEEDINGS TO PAY ATTORNEY'S FEES, EXPERT FEES AND TO MAINTAIN THE FAMILY.

In considering this issue, the Court will need to recognize that the liability to Mr. Tuck includes attorney's fees and expert fees, and when determining this issue, the Court must consider VIII.D., IX.

and X. as part of this point. The trial Court did not recognize the liability owed to Mr. Tuck and failed to recognize that the bulk of the liability was attorney's fees, expert fees and living expenses incurred because Defendant failed to pay support as ordered by the Temporary Order.

The Court admitted Plaintiff's Exhibit No. 5 without objection as the trial testimony of Plaintiff's father, Kenneth Tuck, who had been previously called, sworn and testified at deposition in the case as a witness for the purpose of trial. Mr. Tuck testified that the Plaintiff, had executed Promissory Notes to him for $4,350, $3,785, $7,649, $11,237, $4,951, $4,290 and $4,725. Mr. Tuck testified that the Promissory Notes were payable at the rate of 9% and that he expected full payment of these Notes. He testified that most of the bills were for professionals and as bills would come in, he would pay for them. The Plaintiff also testified that she borrowed money from her father, Mr. Tuck, and signed Promissory Notes for the amounts borrowed. The Plaintiff testified that she owed her father in excess of $40,000 incurred for living expenses, attorney's fees and expert witness fees. The testimony regarding liability owed to Mr. Tuck was undisputed. Therefore, the Court should recognize the entire liability owed by Plaintiff to her father, which was incurred during the divorce proceedings to pay attorney's fees, Muir v. Muir, 847 P.2d 736 (Utah App. 1992), expert witness fees, Peterson v. Peterson, 818 P.2d 1305-1309 (Utah App. 1991), and to maintain the family.

IX.

THE COURT ERRED BY FAILING TO AWARD THE PLAINTIFF ALL ATTORNEY'S FEES AND COSTS INCURRED IN THESE PROCEEDINGS.

A trial Court may use its sound discretion to award attorney's fees in divorce proceedings pursuant to Utah Code Annotated § 30-3-3

(1989). Peterson v. Peterson, 818 P.2d 1305-1309 (Utah App. 1991); Val v. Val, 810 P.2d 489-493 (Utah App. 1991).

In using its sound discretion, the trial Court must take into account three factors: (1) the financial need of the receiving spouse; (2) the ability of the other spouse to pay; and (3) the reasonableness of the requested fee. Bell v. Bell, 810 P.2d 493 (Utah App. 1991); Rasband v. Rasband, 752 P.2d 1331, 1337 (Utah App. 1988). The District Court has discretion to order either party to pay the other party's attorney's fees in a divorce action. Utah Code Annotated § 30-3-3 (1989); Maughan v. Maughan, 770 P.2d 156, 162, (Utah App. 1989). Where the "evidence supporting the reasonableness of the requested attorney's fees is both adequate and entirely undisputed...the court abuses it's discretion in awarding less than the amount requested unless the reduction is warranted by one or more of the established factors." Martindale v. Adams, 777 P.2d 514, 517-518 (Utah App. 1989) The Plaintiff testified pursuant to Plaintiff's Exhibit P-5 (the liability to Mr. Tuck) and Exhibit P-37, when taken together, that her attorney's fees were substantially in excess of the $20,000 awarded by the Court as attorney's fees. Such award entirely ignored the liability to Mr. Tuck and the fees he had paid for Plaintiff. The Plaintiff's counsel then testified to the amount and reasonableness of attorney's fees. The Defendant's counsel did not object. 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. Because the evidence of Plaintiff's attorney's fees is adequate and entirely undisputed, the Court abused its discretion. All of the fees paid by Plaintiff's father and all fees incurred

and/or outstanding for the trial should be awarded to Plaintiff.

X.

THE COURT ERRED BY FAILING TO AWARD THE PLAINTIFF REASONABLE FEES FOR EXPERTS, I.E., ACCOUNTANTS, APPRAISERS, ENGINEERS AND OTHER EXPERTS WHO APPEARED ON HER BEHALF AND ASSISTED HER IN THE PREPARATION AND PRESENTATION OF HER CASE.

Plaintiff testified that she incurred expert witness fees in the case and that it was her desire to be awarded 100% of those expert fees which totaled $14,200. [TR 780-781]

In closing argument, Plaintiff's counsel argued that the Court may award expert fees. Counsel went on to argue that if there were ever a case where the expert fees were justifiably incurred and made necessary by lack of cooperation and contemptuous behavior by the opposing party, it was in this case. The Judge stated from the Bench:

> The court has read the case of Peterson v. Peterson and I am not persuaded. I am sure Mr. Craig Peterson will probably not agree with this, but I am not persuaded that the case completely holds that professional experts, accountants, doctors, engineers and so forth, that it goes completely that far.
>
> I think it does go to the situation as far as the marital patentings of the parties, evaluators and I think the case also, I don't think it hold's this alone, but I know it says at one point that it can come off the top out of the marital assets of the marital parties.
>
> What I am saying again, I am going to deny an order for any professional fees in this case.

The standard for reviewing an award of costs is an abuse discretion standard. Morgan v. Morgan, 795 P.2d 684 (Utah App. 1990). Weiss v. Weiss, 179 P.2d 109 (Utah 1947), states that the Court has sound discretion to weigh circumstances of the parties and determine whether one spouse should give financial assistance to the other spouse to prosecute or defend a divorce action. The appellate Court must then determine whether the trial Court was within its sound discretion in awarding or not awarding the disputed costs. Peterson

v. Peterson, 818 P.2d 1305-1309 (Utah App. 1991), specifically states:

> Section 30-3-3 empowers a court to use its sound discretion to define costs of those reasonable amounts that are reasonably expended to prosecute or defend a divorce action. We also hold that Utah Code Annotated § 30-3-3 empowers a court to use it sound discretion in determining whether the award of costs based on need and ability to pay.

It is clear that the Peterson standard applies to the facts of this case, and that Plaintiff should be awarded expert fees in the sum of $14,200. In Savage v. Savage, 658 P.2d 1206 (Utah 1983), the Court justified an award of attorney's fees and stated that the Plaintiff does not have to liquidate the assets of the marital estate which are awarded to her in order to pay her attorney's fees. In the present case, the Plaintiff testified that she would have to liquidate the marital estate in order to pay expert fees and attorney's fees if the Court does not award such fees. The lower Court's decision to deny expert fees in this case should be reversed and the Court instructed to award Plaintiff $14,200 in expert fees.

XI.

THE COURT ERRED BY ALLOWING THE DEFENDANT TO BE AWARDED ANY OF THE MINOR CHILDREN AS DEPENDENTS FOR THE PURPOSE OF FILING STATE AND FEDERAL TAX RETURNS.

The trial Court's awarding the tax exemption to the Defendant violates the supremacy clause of the United States Constitution in light of the 1982 Tax Reform Act and its effect on 26 U.S.C., § 152(e) (1988). Trial Court's award of the tax exemption is contrary to federal law and Utah's interpretation of the general requirement imposed by § 152(e) of the Internal Revenue Code. Martinez v. Martinez, 754 P.2d 69, 72 (Utah App. 1988) and Fuller v. Fullmer, 761 P.2d 942, 950 (Utah App. 1988). The trial Court was without jurisdiction to enter an Order contrary to the provisions of the Internal Revenue Service code.

In addition, this Court recently held in Allred v. Allred, 835 P.2d 974 (Utah App. 1992) that as to the tax issue, relying on Motes v. Motes, 786 P.2d 232 (Utah App. 1989), and 26 U.S.C. § 152(e) (1988) from the federal tax code, that the trial Court's award of the exemption to the non-custodial parent must meet two requirements before an exemption may be awarded to a non-custodial parent. First, the non-custodial parent must have a higher income and provide the majority of support for the child; second, the trial Court must, from its findings, determine that by transferring the dependency exemption to the non-custodial parent, it is not only in the best interests of the parties, but, more importantly, it is also in the best interests of the child, which in all but exceptional circumstances will trans-late into an increased support level for the child. No such finding was made in this case and the Defendant cannot be awarded the exemptions.

CONCLUSION

1. The Court committed error by awarding Defendant rights of visitation without supervision in contradiction to the expert testimony presented to the Court. The lower Court fully erred in refusing to adopt the positions of Dr. Mercedes Reisinger and the children's therapist, Thomas Harrison. Dr. Reisinger's report was admitted into evidence without objection or cross-examination and stands on its own as the preponderance of evidence on this issue. Both professionals clearly stated that supervised visitation would be necessary and in the children's best interest. The evidence presented by Dr. Reisinger and Mr. Harrison is overwhelming, and it is clear that the Court simply ignored the evidence presented and abused its discretion by entering the Order which is now appealed.

2. The Court committed error by directing the Plaintiff to

replace Mr. Thomas Harrison with another counselor as the children's counselor. The Court's rationale behind this was that there existed animosity between the Defendant and Mr. Harrison. However, the Court failed to recognize the recommendation of Dr. Reisinger who stated that the children should continue in therapy with Mr. Harrison. In addition, Mr. Harrison had been treating the children for almost two years, and the children had gained trust and confidence. It is clear that the Judge failed to consider the children's best interest in this matter and considered only the interest of the Defendant.

3. The Court committed error by directing that alimony would terminate ten years from the date of commencement which was June 16, 1992. The parties in this case were married over thirteen years, constituting a long-term marriage. In Watson v. Watson, 837 P.2d 1 (Utah App. 1992), the Court upheld and awarded permanent alimony based upon a six-year marriage. The facts in the Watson case are similar to the facts in the present case, and it is clear that the Court abused its discretion by eliminating the term of alimony.

4. The Court committed error in its finalization of Plaintiff's Exhibit No. 91 as follows:

a. By valuing Northridge furnishings at $4,500 and ordering the furnishings at that value even though the Defendant has testified at trial that the value of said property was $18,000. The only evidence regarding valuation of the Northridge property was the Defendant's own testimony as to the values. The only evidence before the Court was the Defendant's valuation, and the Court was clearly in error by arbitrarily reducing the amount from $18,000 to $4,500.

b. By discounting notes receivable from Plaintiff's Exhibit No. 91 as a discount rate of 20% instead of 10%. Plaintiff no longer

seeks relief on this issue and accepts the Court's valuation.

c. By eliminating Target Capitol as an asset of the marital estate even though the parties agreed that it was an asset. Even though there was no testimony regarding this asset, it's value was undisputed based on Plaintiff's Exhibit P-91 and Defendant's Exhibit D-59. The Court simply refused to include it in the marital estate, and the case should be reversed on this issue with instructions to set the value stipulated by both parties and include Target Capitol as an asset of the marriage.

d. By failing to recognize the entire liability of the Plaintiff to her father which was incurred during the divorce proceedings to pay attorney's fees, expert witness fees, and to maintain the family. The testimony regarding liability owed to Plaintiff's father, Kenneth Tuck, was undisputed. Therefore, the Court should recognize the entire liability owed by Plaintiff to her father which was incurred during the divorce proceedings to pay attorney's fees, expert fees, and to maintain the family.

5. The Court erred by failing to award the Plaintiff all attorney's fees and costs incurred in these proceedings. The Plaintiff testified pursuant to Plaintiff's Exhibit P-5 and Exhibit P-37 that her attorney's fees were in excess of $20,000 awarded by the Court as attorney's fees. Such award entirely ignored the liability owed to Mr. Tuck. Plaintiff's counsel testified to the amount and reasonableness of attorney's fees and Defendant's counsel did not object. The Court made the finding on the total legal fees but simply ordered Defendant to pay only $20,000 of those fees offering no explanation of the reduction and failure to recognize the liability to Mr. Tuck. Because of the evidence of Plaintiff's attorney's fees

is adequate and undisputed, the Court abused its discretion, and all the fees paid by Plaintiff's father and all fees outstanding for the trial should be awarded to the Plaintiff.

6. The Court erred by failing to award the Plaintiff reasonable fees for experts, i.e., accountants, engineers, appraisers and other experts who appeared on her behalf and assisted her in the preparation and presentation of her case. Plaintiff testified that she incurred expert witness fees in the case and that it was her desire to be awarded 100% of those expert fees which total $14,200. Peterson v. Peterson, 818 P.2d 1305 (Utah App. 1991), applies to the facts of this case, and the Plaintiff should be awarded expert fees in the sum of $14,200. The Plaintiff testified that she would have to liquidate the marital estate in order to pay expert fees and attorney's fees if the Court did not award such fees. The lower Court's decision to deny expert fees in this case should be reversed and instructed to award $14,200 in expert fees.

DATED this 3rd day of December, 1993.

LITTLEFIELD & PETERSON

CRAIG M. PETERSON
Attorney for Plaintiff/Appellee

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, a true and correct copy of the foregoing, BRIEF OF RESPONDENT AND CROSS-APPELLANT, this 3rd day of December, 1993, to Craig S. Cook, Esq., 3645 East 3100 South, Salt Lake City, Utah 84109.

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