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Loveless v. Loveless : Brief of Appellant

Utah Court of Appeals

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Richard L. Halliday; Jenkins & Halliday.

Brent D. Yoiung; Ivie & Young; Attorneys for Appellant.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO 970184-CA

IN THE UTAH COURT OF APPEALS

BRENT V. LOVELESS)
)
Plaintiff and)
Appellee,)
)
vs)
)
JEANNE MCNEIL LOVELESS) Appellate No. 970184-CA
)
Defendant and) Priority No. 10
Appellant.)

BRIEF OF DEFENDANT/APPELLANT
JEANNE MCNEIL LOVELESS

APPEAL FROM FINAL JUDGMENT AND ORDER
OF THE FOURTH DISTRICT COURT, THE
HONORABLE ANTHONY W. SCHOFIELD, PRESIDING

RICHARD L. HALLIDAY (4582)
JENKINS & HALLIDAY
Attorney for Defendant/Appellant
2002 East 11500 South
Sandy, UT 84092
Telephone: (801) 571-4770
FAX: (801) 571-4770

BRENT D. YOUNG
IVIE & YOUNG
Attorneys for Plaintiff/Appellee
48 North University Avenue
P.O. Box 672
Provo, UT 84603
Telephone: (801) 375-3000

FILED

SEP 11 1997

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

BRENT V. LOVELESS)
)
Plaintiff and)
Appellee,)
)
vs.)
)
JEANNE MCNEIL LOVELESS) Appellate No. 970184-CA
)
Defendant and) Priority No. 16
Appellant.)

BRIEF OF DEFENDANT/APPELLANT
JEANNE MCNIEL LOVELESS

APPEAL FROM FINAL JUDGMENT AND ORDER
OF THE FOURTH DISTRICT COURT, THE
HONORABLE ANTHONY W. SCHOFIELD, PRESIDING

RICHARD L. HALLIDAY (4588)
JENKINS & HALLIDAY
Attorney for Defendant/Appellant
2002 East 11500 South
Sandy, UT 84092
Telephone: (801) 571-4770
FAX: (801) 571-4770

BRENT D. YOUNG
IVIE & YOUNG
Attorneys for Plaintiff/Appellee
48 North University Avenue
P.O. Box 672
Provo, UT 84603
Telephone: (801) 375-3000

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to *Utah Code Ann.*,
Section 78-2a-3(i) (1953 as amended).

IN THE UTAH COURT OF APPEALS

BRENT V. LOVELESS)
Plaintiff and)
Appellee,)
vs.)
JEANNE MCNEIL LOVELESS) Appellate No. 970184-CA
Defendant and) Priority No. 16
Appellant.)

BRIEF OF DEFENDANT/APPELLANT
JEANNE MCNIEL LOVELESS

ISSUES PRESENTED FOR APPEAL

1. Did the trial court err in refusing to award Defendant/Appellant an interest in the marital home?
2. Did the trial court abuse its discretion by failing to award Defendant/Appellant a reasonable portion of the value increase of the marital home during the marriage?
3. Did the trial court err in finding that the marital home was Plaintiff/Appellee's separate property?
4. Did the trial court err in allowing the testimony of an expert setting the value of the property at the time of separation instead of the time of divorce?
5. Did the trial court err in fixing the value of the

marital property as of the time of separation rather than the time of divorce?

6. Did the trial court err in awarding Plaintiff/Appellee a judgment for debts incurred after separation for Christmas gifts for his family and children?

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from a final Order of Judgment of the Fourth District Court in the above-entitled domestic matter distributing the assets and debts of the parties herein.

B. Disposition of the Case Below.

On September 3, and 18, 1996, the above-entitled matter came before the trial court for trial on the issues of the distribution of assets and debts of the parties. Evidence was presented at trial by way of testimony. Counsel for Defendant objected at trial and by way of a Motion in Limine (R. at 227) to the use of the separation date to determine the value of the marital real property and to the use of a cost analysis to determine the value of the marital real property, which objections were overruled by the trial court. Final arguments were submitted to the trial court in writing (R. at 285) and the trial court entered its Findings of Fact

and Conclusions of Law and Final Order of Judgment (R. at 350) awarding Plaintiff the marital real property free of any interest of Defendant yet requiring Defendant to pay marital debt. Defendant has appealed said Final Order of Judgment.

C. Statement of Facts.

1. The parties were married on March 11, 1994. At the time of marriage Plaintiff (hereinafter Brent Loveless) owned a home and real property in Payson City, Utah, owned a retirement program through his employment, and owned an insurance annuity.

2. After the marriage Defendant (hereinafter Jeanne) contributed furniture and other items to a garage sale for the purpose of obtaining funds to improve the basement in the home. (R. at 417-451)

3. Jeanne further contributed to the improvement of the home by paying her son to install plumbing in said basement. (R. at 440).

4. Jeanne further contributed by painting and helping with other work in improving said basement, as well as doing a large portion of the domestic chores for Brent Loveless and his children. (R. at 417-451).

5. Jeanne used her wages to purchase food, pay the

children allowances, gifts, entertainment, and to purchase items for the home such as blinds and decorations. (R. at 417-451)

6. Brent Loveless used his wages to pay the Mortgage on the home in the amount of \$21,382.00, contribute to his retirement in the amount of \$1,460.00, and contribute to his insurance annuity in the amount of \$1,600.00. (R. at 340)

7. During the marriage the parties filed joint tax returns wherein Brent Loveless claimed Jeanne and her daughter as dependants. (Defendant's Exhibit Nos. 1 & 2).

8. A large portion of the credit card debt incurred by Brent Loveless prior to the Divorce and after separation was to purchase Christmas gifts for his children and family. (R. at 322).

9. Brent Loveless entered the marriage with credit card debt of approximately \$1,300.00. (R. at 384).

SUMMARY OF ARGUMENT

The trial court erred in failing to find that the real property owned by Brent Loveless prior to the marriage changed character to marital property based upon the payment of over \$21,000.00 of the mortgage with marital funds, as well as Jeanne's other contributions to maintain and enhance

the property.

The trial court further erred in fixing the value of said property as of the date of separation rather than the date of divorce, and for accepting expert testimony valuing the property at the time of separation.

The trial court further erred by ordering Jeanne to pay one-half (1/2) of the debt incurred by Brent Loveless, including a \$1,300.00 debt he brought into the marriage and \$2,400.00 incurred after separation for groceries and Christmas gifts for his children.

The serious inconsistencies of trial court indicate a prejudice and abuse of discretion which requires the Appellate Court to substitute its judgment for that of the trial court on all issues of fact and law.

ARGUMENT

I.

THE TRIAL COURT ERRED BY REFUSING TO AWARD
JEANNE ONE-HALF OF THE VALUE THAT THE
MARITAL HOME INCREASED DURING THE MARRIAGE.

During the course of the marriage, Brent Loveless used marital funds (his wages) to pay \$21,382.00 toward the mortgage on the marital residence. During the course of the marriage the value of the home increase from \$98,000.00

(Plaintiff's Exhibit No. 17) to \$143,000.00. (Defendant's Exhibit No. 32). Said increase was due to an increase in the market as well as the finishing of living space in the basement.

Although the trial court has discretion in awarding property which is marital, separate or even inherited in divorce proceedings, (see e.g. Burt v. Burt, 799 P.2d 1169 (Ut. App. 1990)) the Utah courts have generally recognized that even separate property can lose its "separate character" and become marital property. Schaumberg v. Schaumberg, 875 P.2d 598 (Ut. App. 1994). In Schaumberg, Husband had purchased real property with inherited funds. Husband then used marital funds to make the payments on said property as well as make some improvements. Wife did not work and contributed no monies directly to the property. The Utah Court of Appeals found that the property had changed its character from a separate asset to a marital asset and ruled that Wife was entitled to one-half of the appreciation of the property after its purchase and not including the inherited funds used for said purchase. Id. at 603.

In the case before the Court, there is no dispute that the real property was separate prior to the marriage. As in

Schaumberg, thereafter Brent Loveless used marital funds to both maintain and improve said property. Moreover, Jeanne made contributions toward said property not made by the "Wife" in Schaumberg, including but not limited to money, furniture, decorations, and personal work. Further, as in Schaumberg, Brent Loveless asserted that all loans and debts, even those incurred in improving the house, were marital and requested that Jeanne pay one-half of said debts. (See e.g. Plaintiff's Exhibit 24) (R. at 214)(R. at 383). It seems clear that under the Court's analysis in Schaumberg, Jeanne would be entitled to one-half (1/2) of the appreciation of the marital real property during the marriage.

While this Court in Schaumberg awarded Wife a one-half (1/2) interest with no monetary contribution to the property on her part, the Utah Supreme Court has also made it clear that a sizable contribution is unnecessary to entitle a spouse to a full share of a property's value. In the case of Workman v. Workman, 652 P.2d 931 (Utah 1982) Wife contributed only a small portion towards the purchase and maintenance of property more or less inherited by Husband, yet she received a full share of its value upon divorce.

It should be pointed out that there are cases which

Brent Loveless claims appear to be in conflict with those cited above. In the case of Burke v. Burke, 733 P.2d 133 (Utah 1987) the Utah Supreme Court named several factors to be considered in determining whether premarital property, gifts and inheritances should be viewed as separate or marital property. Among them are the amount and kind of property to be divided; whether the property was acquired before or during the marriage; the source of the property; the health of the parties; the parties' standard of living, respective financial conditions, needs and earning capacity; the duration of the marriage; the children of the marriage; the parties' ages at the time of marriage and of divorce; what the parties gave up by the marriage; and the necessary relationship the property division has with the amount of alimony and child support to be awarded.

The Court in Burke stated that "[o]f particular concern . . . is whether one spouse has made any contribution toward the growth of the separate assets of the other spouse (citing Dubois v. Dubois, 504 P.2d 1380, 1381 (Utah 1987)), and whether the assets were accumulated or enhanced by the joint efforts of the parties. (citing Preston v. Preston, 646 P.2d 705, 706 (Utah 1982)). The Court went on to find that

Husband had done nothing to contribute to or enhance the value of the property inherited by Wife and was, therefore, not entitled to share in its value.

Closer examination shows that Burke is actually consistent with both Schaumberg and Workman. In Burke, Wife inherited the subject property without any debt or liens thereon. No payments were made with marital property to either maintain or enhance the property and, therefore, the property failed to change character from separate to marital property.

In the case before the Court, Jeanne made numerous contributions to the maintenance and enhancement of the property, not to mention the payment of over \$21,000.00 toward the debt on said property. As in Schaumberg, the fact that said payments were made with Brent Loveless' wages is irrelevant. Said monies were a marital asset when used to make the house payment just as they were a marital asset when used to contribute to Brent Loveless' retirement and insurance annuity, both of which, Brent Loveless agreed and the trial court ordered, Jeanne was entitled to a one-half (1/2) interest.

It should also be pointed out that the trial court failed to follow the analysis set forth in Burke in depriving Jeanne of an interest in the marital home. The trial court did find that Jeanne did make contributions to both the marriage and the property including over \$21,000.00 in marital income. (R. at 328). The trial court, however, claimed this was not significant because a large portion of the house payment went toward interest. The fact that a portion of mortgage payments goes to interest as well as principal is irrelevant. The payment of over \$21,000.00 was required to "maintain and enhance" the value of the property or it would have been lost. Moreover, such an amount can hardly be considered insignificant.

The trial court further attached significance to the fact that a good deal of the property's increased value was due to appreciation rather than the improvement thereto. The case law is clear, however, that when the property changes character it becomes marital property and the parties must divide all of the increased value including appreciation. The method of division used by the trial court herein is without precedent and unsupported in fact or law.

II.

THE TRIAL COURT ERRED IN SETTING THE VALUE
OF THE MARITAL REAL PROPERTY AT THE TIME
OF SEPARATION AND THE VALUE THEREOF SHOULD
BE FIXED AS OF THE DATE OF DIVORCE.

The trial court found that because the marriage had deteriorated to the point that Jeanne was looking for an apartment to live in back in June of 1995, but could not find one, the marriage was essentially over at the time of separation, in December of 1995, and the value of the real property should be set as of that date. (R. at 328). Such a holding is completely contrary to current Utah statute and to current case law.

In the matter of Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980), one of the parties purchased a home not only subsequent to separation but subsequent to the filing of the divorce action. In rejecting said party's attempt to protect the equity accumulated prior to the time of divorce the Utah Supreme Court held unequivocally that "[t]he marital estate is evaluated according to the existing property interests at the time the marriage is terminated by the decree of divorce". Id. at 1222. The Court further stated that "such an argument is contrary to the specific provisions of Section

30-3-5, U.C.A., 1953, and the rulings of this court in accordance therewith". Id.

After citing to Fletcher, above, the Utah Supreme Court reiterated said rule of law in the case of Berger v. Berger, 713 P.2d 695 (Utah 1985), wherein the Court ruled that an expert's opinion was inconclusive as to the valuation of marital property because it was not valued at the time of divorce. The only exception to the above rules is in a case where "one party has dissipated and asset, hidden its value, or otherwise acted obstructively". Peck v. Peck, 738 P.2d 1050, 1052 (Ut. App. 1987). There have never been any allegations in the case presently before the Court that any of the above exceptions are applicable, nor were there any findings of such.

The trial court in the present case has clearly erred first, by affixing the value of the marital real property as of the date of separation, rather than the date of divorce as required by law, and second, by accepting the evidence of Brent Loveless' expert regarding the value of the marital property at \$137,000.00 as of the date of separation rather than the evidence of Jeanne's expert which fixed the value of the property at \$143,000.00 at the time of divorce. Based

upon the value of the property at the time of marriage of \$98,000.00, Jeanne is entitled to an equitable distribution of one-half (1/2) of the \$45,000.00 increase therein.

III.

THE TRIAL COURT ERRED IN ORDERING JEANNE
TO PAY ONE-HALF (1/2) OF THE DEBT BRENT
LOVELESS INCURRED AFTER SEPARATION TO
PURCHASE CHRISTMAS GIFTS FOR HIS FAMILY.

After separation, Brent Loveless ran his personal Mastercard bill up from \$1,334.00 to \$3,716.00 for what he admitted to be groceries and Christmas gifts. (R. at 322). Moreover, Brent Loveless entered the marriage with a debt on his Mastercard of approximately \$1,300.00. (R. at 384). Brent Loveless continued to maintain a high balance on his Mastercard until the time of divorce, and the trial court somehow found that Jeanne was responsible for one-half of said amount. The trial court did not, however, suggest that Brent Loveless be responsible for paying any of Jeanne's post separation debt. Although the original debt had long been paid off by the time of divorce herein, any amount awarded to Brent Loveless should be reduced by the approximately \$2,400.00 that is obviously his personal debt and has nothing to do with the parties' marriage as well as the \$1300.00

originally on said card.

IV.

THE TRIAL COURT WAS COMPLETELY INCONSISTENT
IN ITS RULINGS TO THE POINT OF PREJUDICING
JEANNE AND WRONGFULLY FAVORING PLAINTIFF.

When looking at the trial court's rulings as a whole, it is hard to miss the inconsistencies that abound and have no explanation. How can the trial court find that the home was paid for with marital funds, as were the contributions to Brent Loveless' retirement and insurance annuity, and yet the home is separate property while the retirement and insurance annuity are marital property which must be split? How can the trial court find that the parties never commingled their monies and yet Jeanne, who made a fraction of the money that Brent Loveless did, is still responsible for one-half of all the debt he incurred, over and above what she has already paid herself without his help, and including post-separation groceries and Christmas gifts he gave to his family and children?

How can the trial court find that the property values should be set as of the time of separation, when the case law provided to the court during the Motion in Limine, during the trial and in closing argument clearly provides that values be

set as of the time of divorce and that opinion as to value at any other time not be accepted? How can the trial court refuse to grant Jeanne an equitable interest in the marital real property when the clear case law provided to the trial court at the Motion in Limine, during the trial, during closing argument and in the final trial brief provides for such a grant?

Such inconsistencies point to a prejudice of Jeanne in this matter or of a wrongful favoring of the Plaintiff to the point that the trial court has abused its discretion and its judgment of both the facts and law in this matter should be substituted by that of the Utah Court of Appeals.

CONCLUSION

The trial court erred in failing to find that the real property owned by Brent Loveless prior to the marriage changed character to marital property based upon the payment of over \$21,000.00 of the mortgage with marital funds, as well as Jeanne's other contributions to maintain and enhance the property.

The trial court further erred in fixing the value of said property as of the date of separation rather than the date of divorce, and for accepting expert testimony valuing

the property at the time of separation.

The trial court further erred by ordering Jeanne to pay one-half (1/2) of the debt incurred by Brent Loveless, including a \$1,300.00 debt he brought into the marriage and \$2,400.00 incurred after separation for groceries and Christmas gifts for his children.

The serious inconsistencies of trial court indicate a prejudice and abuse of discretion which requires the Appellate Court to substitute its judgment for that of the trial court on all issues of fact and law.

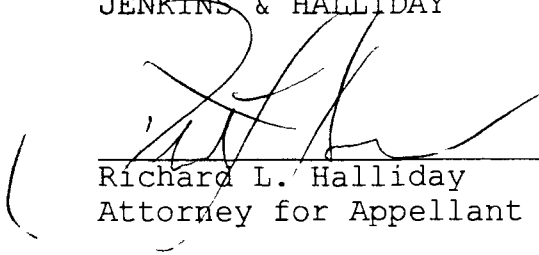
ADDENDUM

Defendant/Appellant Jeanne Loveless has appended hereto copies of the following documents:

1. Ruling. Dated December 10, 1996. (R. at 331).
2. Findings of Fact and Conclusions of Law. (R. at 346).
3. Order. (R. at 350).

DATED this 11th day of September, 1997.

JENKINS & HALLIDAY

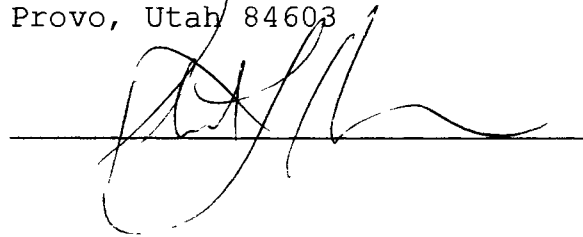


Richard L. Halliday
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that four (4) true and correct copies of the foregoing Appellant's Brief were mailed, postage prepaid, this 11th day of September, 1997 to the following:

Brent D. Young
P.O. Box 672
Provo, Utah 84603



**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

BRENT V. LOVELESS, Plaintiff,	CASE NUMBER: 964400123
vs.	DATED: DECEMBER 10, 1996
JEANNE M. LOVELESS, Defendant.	RULING ANTHONY W. SCHOFIELD, JUDGE

Trial was held September 3 and 18, 1996, at which Brent D. Young represented plaintiff Brent V. Loveless ("Brent") while Richard L. Halliday represented defendant Jeanne M. Loveless ("Jeanne"). Thereafter the parties were allowed time to submit post-trial briefs, which briefs were filed October 10, 1996. I now issue this ruling.

FINDINGS OF FACT

I find that the following facts have been proven by a preponderance of the evidence:

1. The parties were married March 11, 1994, a second marriage for each.
2. At the time of the marriage Brent was the custodial parent of his four minor children from a prior marriage and Jeanne was the custodial parent for her one minor daughter from her prior marriage.
3. Brent is a school teacher and works his summers at the Payson City

golf course. In the past he has worked in construction.

4. Prior to the marriage and after his earlier divorce, Brent built a new home in which he and his children were living at the time of this marriage. Brent did most of the construction himself.

5. At the time of the marriage the main floor of the home was complete.

6. Before the marriage Brent had finished two basement bedrooms and he had done much of the initial framing of the family room, the basement bathroom and one more bedroom. These last three rooms, however, were not completed at the time of the marriage.

7. Before the marriage Brent had landscaped the yards and property. He had planted the lawn and trees, created a garden space and installed the deck. The only landscaping which he had not completed was the flower beds, which were built and planted after the marriage.

8. In December 1993, only three months prior to the marriage, Brent refinanced the home. In order to refinance Brent had the home appraised. The appraised value in December 1993 was \$98,000.

9. The refinance loan on the home was in the sum of \$69,000, all of which was outstanding at the time of the marriage as the first payment on the new loan was due in March 1994, the first month of the marriage.

10. After the marriage the parties agreed to complete the downstairs bathroom and the one room to be a bedroom as they needed an additional sleeping room.

11. Brent spent over \$2,100 during the marriage in completing the downstairs rooms.

12. Essentially all of the materials and supplies used in the completion of the downstairs rooms were paid for by Brent although Jeanne paid around \$16 for blinds for the downstairs rooms and she paid \$150 to repair the dishwasher.

13. Brent performed some of the labor to complete the downstairs rooms but hired most out. Jeanne stained the doors and moldings for the new construction, installed the blinds and hung wallpaper in the kitchen.

14. A portion of the funds to complete the downstairs came from a garage sale which the parties held after the marriage.

15. Brent contributed all of the items for the garage sale other than one refrigerator which Jeanne contributed.

16. Jeanne also gave her son a washer, dryer and a water bed which she brought to the marriage in exchange for him providing the labor to install the bathroom fixtures.

17. During the marriage Jeanne purchased some flowers for the flower gardens of the home.

18. In June 1995 Jeanne felt the marriage was in trouble and, unknown to Brent, she applied for housing assistance and applied for occupancy in an apartment complex in Payson.

19. Because of the tight rental market, no vacancy in the complex existed at that time.

20. In December 1995 Jeanne separated from Brent and moved into the apartment complex.

21. Because of Jeanne's actions in applying to rent an apartment in June 1995 and in separating in December 1995, she treated the marriage as over at that time. It is appropriate the marriage be treated as over in December 1995. Thus, the respective interests of the parties in the home and other assets should be fixed as of that date.

22. During the marriage the parties paid over \$21,000 in house payments but because such a large share of the payments was applied to interest, in December 1995 the mortgage had a balance of \$64,000.

23. At the time of the parties separation in December 1995 the home had a value of \$137,000. At the time of trial it had a value of \$140,000 (Brent's appraiser fixed the value at trial at \$137,000 and Jeanne's appraiser fixed the value at trial at \$143,000.)

24. All but \$6,600 of the increase in the value of the home is attributable to appreciation as the real estate market in Utah County has been particularly strong during the time of this marriage. The balance of the increase in the value of the home is attributable to the completion of the basement rooms.

25. While Jeanne asserts an entitlement to an interest in the home, she has not demonstrated her right to such an entitlement because:

- a) Brent brought the home into the marriage,
- b) Brent paid for essentially all of the improvements to the

basement,

- c) Jeanne did little to improve the value of the home other than the routine maintenance which comes with living in the home and she purchased and planted some flowers and she stained the doors and moldings. In addition Jeanne gave her son a washer, dryer and bed in exchange for his labor.
- d) Brent paid the mortgage payments and the utilities on the home during the marriage.
- e) Prior to the marriage Jeanne had rent and utility expenses for the small home which she rented of approximately \$487 per month. After the separation she had rent and utility expenses of approximately \$361 per month. Because her net expense has decreased, she cannot claim a need for an interest in the home in lieu of alimony.
- f) The parties never commingled their incomes. Brent used his income for the family living expenses. Jeanne spent her income on her car payment, on some of the family extras such as alcohol and Sunday dinners, occasional allowances for the children and on family outings. She kept for herself the rest of her funds. Because she was able to keep a significant portion of her funds, while Brent paid the mortgage payments, Jeanne does not have a legitimate claim to a credit for the mortgage payments which

Brent made.

26. At the time of the marriage Jeanne worked at Walmart making \$6.20 per hour. At the time of separation she was earning \$7.50 working for Neways. At the time of trial she was earning \$9.00 per hour.

27. Brent's income has remained very flat during the marriage.

28. During the marriage Jeanne used her paycheck to pay her car payment and to provide some cash needs of the family, although the majority of the family living expenses came from Brent's income. The mortgage payment, utilities and most of the food expense came from his income.

29. During the marriage Brent made contributions to his retirement program in the sum of \$1,460. Jeanne is entitled to one-half of those contributions, or \$725.

30. During the marriage Brent made contributions to a life insurance annuity in the sum of \$1,600. Jeanne is entitled to one-half of those contributions, or \$800.

31. During the marriage the parties acquired a freezer for \$375 and a camper for \$375. These are awarded to Brent but Jeanne is entitled to one-half their value, or \$375.

32. During the marriage the parties acquired a boat. It was financed and has no equity value over its debt. It is awarded to Brent but he must make the payments thereon.

33. At the time of the marriage Brent had only limited credit card debt and he had his home mortgage. During the marriage he incurred additional credit card

debt of \$3,135. He incurred a debt to Dr. Farley for \$741 for a crown for Jeanne's tooth not covered by insurance. He incurred a debt to Nebo Credit Union in the sum of \$800. Each of these are marital obligations. A significant portion of the credit card debt was incurred after Jeanne began planning her separation in June 1995 and are expenses which Brent would not have incurred had he known of her plan to leave him when housing became available.

34. Brent also incurred a loan to buy a boat and an add-on loan for the boat of \$804. Because he is keeping the boat, he should be responsible for both of these loans.

35. At the time of the marriage Jeanne had considerable debt, including a car loan for her Chevrolet Beretta and debts to Dr. Dewey of \$670, to Mountain View Hospital of \$670, to Bonneville Collection of \$900 and to the lawyer from her first divorce of \$600. All of these were paid from marital funds during the marriage except \$80 of Dr. Dewey's bill. I assign neither party a benefit nor obligation from these marital payments.

36. Near the end of the marriage Brent borrowed \$1,000 from his father and \$2,000 from his sisters. The loans from the sisters were incurred after the parties separated while the loan from his dad was incurred just prior to separation. These funds were used on family expenses, although most were used for Brent's family expenses post-separation. These are separate debts for which Jeanne is not responsible.

37. Brent advanced \$300 to pay for an appraisal which Jeanne wanted of

the house. It is appropriate that she reimburse him for this. He also was required on a temporary basis to give to Jeanne \$500 of his tax refund to her to pay toward her attorney's fees. It is appropriate that Jeanne reimburse him for this.

38. Brent incurred attorney's fees of \$14,888.76, which fees are based upon counsel billing \$125 per hour. Given counsel's experience in domestic matters, this is a reasonable rate. It appears all of the time was necessarily incurred.

39. Brent asserts he spent a significant amount of fees in this case to protect against what he claimed was Jeanne's unwarranted effort to obtain a portion of the home equity.

40. As noted hereafter, Brent has prevailed in his defense of his separate ownership of the home.

41. Because Brent is the sole provider for his three minor children, and given the nature of his employment as a school teacher, he does not have the capability fully to respond to the attorney's fee bill which he has incurred.

42. Jeanne has incurred attorney's fees in the sum of \$5,688 which fees are based upon counsel billing \$125 per hour. Given counsel's experience in domestic matters, this is a reasonable rate. It appears all of the time was necessarily incurred.

43. At the outset of this case Brent was ordered, under a temporary order, to pay \$500 of his 1996 tax refund to pay toward Jeanne's attorney's fees. He did so.

44. While Jeanne appears to have the capacity over time to pay her own fees, she does not have the capacity to pay Brent's fees.

45. Brent asserts that he spent a larger amount of fees because Jeanne did

not properly respond to outstanding discovery requests and Brent claims he had to obtain that information through subpoena from others. In part, at least, he is correct in that assertion.

46. Because I have no specific evidence of how much added expense Brent incurred because of Jeanne's failure properly or timely to respond to the discovery, I have no factual basis to determine what amount of Brent's fees should be charged to Jeanne.

47. Each party should be required to bear their own attorney's fees.

ANALYSIS AND RULING

Based upon the foregoing findings of fact, I now rule as follows:

The home.

Because the home was Brent's before the marriage, because he paid the mortgage payments and utilities and paid the lion's share of the family living expenses, because he provided the financing for almost all of the improvement to the home during the marriage, and because this was a marriage of short duration (the parties married March 1994 and separated December 1995, although Jeanne began her plans to separate in June 1995), it is appropriate that Brent retain the house as a separate asset. Although it appreciated greatly in value during the marriage, the home was a separate asset prior to the marriage and Jeanne did little to enhance its value. The home should be awarded to Brent free of any claim from Jeanne.

Other property distributions.

Brent is awarded the camper and freezer, his retirement and his interest in the

life insurance annuity but is obligated to reimburse Jeanne for half of each as follows:

Camper	\$ 375
Freezer	\$ 375
retirement	\$1,450
life insurance	<u>\$1,600</u>
Total	\$3,800 / 2 = \$1,900

Brent also is awarded the boat and the debt thereon as the boat has no equity.

Debts.

Brent is assigned to pay the following marital debts but Jeanne is responsible to reimburse him for one-half thereof:

Visa	\$ 604
Mastercard	\$2,531
Dr. Farley	\$ 791
Nebo Credit Union	<u>\$ 800</u>
Total	\$4,726 / 2 = \$2,363.

Post separation Brent has paid the following marital obligations for which he is entitled to a reimbursement from Jeanne of one-half:

Shaffer & Assoc.	\$ 109
Columbia House	<u>\$ 77</u>
Total	\$ 186 / 2 = \$93.

I award Brent no claim against Jeanne for the loans which he borrowed from his father and sisters at or near the time of the separation or the boat add-on loan nor do I award him any claim against Jeanne for her debts paid during the marriage as those were marital payments.

Summary of financial adjustments.

Jeanne is entitled to payment of \$1,900 from Brent for her interest in personal property, retirement and life insurance. Brent is entitled to payment from Jeanne for

one-half of the marital debt of \$2,363 and one-half of the marital debt paid by Brent post-separation in the sum of \$93. Further, pursuant to a temporary order of the Court Brent paid \$500 of Jeanne's attorney's fees and \$300 for her appraisal of the home. She bears responsibility for each of these and must repay Brent for them. The summary of all of these payments is as follows.

Brent owes Jeanne:	\$1,900
Jeanne owes Brent:	\$2,363
	\$ 93
	\$ 500
	<u>\$ 300</u>
Total	\$3,256.

When these are offset Jeanne owes Brent \$1,356.

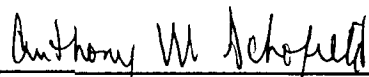
Attorney's fees.

Each party incurred significant attorney's fees. Brent particularly wants an award of fees as he felt that Jeanne needlessly caused him to incur significant fees in defending his claim to the home. In fact, however, each party has the ability to pay their own attorney's fees and neither has the ability to pay the other's fees. Each should be ordered to bear their own fees and costs in this matter.

Pursuant to Rule 4-504, Utah Code of Judicial Administration, Brent's counsel is directed to prepare proposed findings of fact, conclusions of law and an amended decree of divorce, consistent with this ruling but augmented as appropriate.

Dated this 10th day of December, 1996.

BY THE COURT:



ANTHONY W. SCHOFIELD, JUDGE

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 10th day of December, 1996:

RICHARD L HALLIDAY ATTY
2002 EAST 11500 SOUTH
SANDY UT 84092

BRENT D YOUNG ATTY
PO BOX 672
PROVO UT 84603

CARMA B. SMITH
CLERK OF THE COURT

By *Christine Jones*
Deputy Clerk

BRENT D. YOUNG
IVIE & YOUNG
Attorneys for Plaintiff
48 North University Avenue
P.O. Box 672
Provo, UT 84603
Telephone: (801) 375-3000

FILED 2-14-97
Fourth Judicial District Court
Utah County, State of Utah
KATHLEEN SMITH, Clerk
Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

BRENT V. LOVELESS,

Plaintiff,

v.

JEANNE M. LOVELESS,

Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
(TRIAL DATE SEPTEMBER 3, 18,
1996)

Civil No. 96440123
Judge Anthony W. Schofield

Trial was held September 3 and 18, 1996, at which Brent D. Young represented plaintiff Brent V. Loveless ("Brent") while Richard L. Halliday represented defendant Jeanne M. Loveless ("Jeanne"). Thereafter the parties were allowed time to submit post-trial briefs, which briefs were filed October 10, 1996. The court now makes and enters the following:

FINDINGS OF FACT

The court finds the following facts have been proven by a preponderance of the evidence:

1. The parties were married March 11, 1994, a second marriage for each.
2. At the time of the marriage Brent was the custodial parent of his four minor children from a prior marriage and Jeanne was the custodial parent for her one minor daughter from her prior marriage.
3. Brent is a school teacher and works his summers at the Payson City golf course. In the past he has worked in construction.
4. Prior to the marriage and after his earlier divorce, Brent built a new home in which he and his children were living at the time of this marriage. Brent did most of the construction himself
5. At the time of the marriage the main floor of the home was complete.
6. Before the marriage Brent had finished two basement bedrooms and he had done much of the initial framing of the family room, the basement bathroom and one more bedroom. These last three rooms, however, were not completed at the time of the marriage.
7. Before the marriage Brent had landscaped the yards and property. He had planted the lawn and trees, created a garden space and installed the deck. The only landscaping which he had not completed was the flower beds, which were built and planted after the marriage.

8. In December 1993, only three months prior to the marriage, Brent refinanced the home. In order to refinance Brent had the home appraised. The appraised value in December 1993 was \$98,000.

9. The refinance loan on the home was in the sum of \$69,000, all of which was outstanding at the time of the marriage as the first payment on the new loan was due in March 1994, the first month of the marriage.

10. After the marriage the parties agreed to complete the downstairs bathroom and the one room to be a bedroom as they needed an additional sleeping room.

11. Brent spent over \$2,100 during the marriage in completing the downstairs rooms.

12. Essentially all of the materials and supplies used in the completion of the downstairs rooms were paid for by Brent although Jeanne paid around \$16 for blinds for the downstairs rooms and she paid \$150 to repair the dishwasher.

13. Brent performed some of the labor to complete the downstairs rooms but hired most out. Jeanne stained the doors and moldings for the new construction, installed the blinds and hung wallpaper in the kitchen.

14. A portion of the funds to complete the downstairs came from a garage sale which the parties held after the marriage.

15. Brent contributed all of the items for the garage sale other than one refrigerator which Jeanne contributed.

16. Jeanne also gave her son a washer, dryer and a water bed which she brought to the marriage in exchange for him providing the labor to install the bathroom fixtures.

17. During the marriage Jeanne purchased some flowers for the flower gardens of the home.

18. In June 1995 Jeanne felt the marriage was in trouble and, unknown to Brent, she applied for housing assistance and applied for occupancy in an apartment complex in Payson.

19. Because of the tight rental market, no vacancy in the complex existed at that time.

20. In December 1995 Jeanne separated from Brent and moved into the apartment complex.

21. Because of Jeanne's actions in applying to rent an apartment in June 1995 and in separating in December 1995, she treated the marriage as over at that time. It is appropriate the marriage be treated as over in December 1995. Thus, the respective interests of the parties in the home and other assets should be fixed as of that date.

22. During the marriage the parties paid over \$21,000 in house payments but

because such a large share of the payments was applied to interest, in December 1995 the mortgage had a balance of \$64,000.

23. At the time of the parties separation in December 1995 the home had a value of \$137,000. At the time of trial it had a value of \$140,000 (Brent's appraiser fixed the value at trial at \$137,000 and Jeanne's appraiser fixed the value at trial at \$143,000.)

24. All but \$6,600 of the increase in the value of the home is attributable to appreciation as the real estate market in Utah County has been particularly strong during the time of this marriage. The balance of the increase in the value of the home is attributable to the completion of the basement rooms.

25. While Jeanne asserts an entitlement to an interest in the home, she has not demonstrated her right to such an entitlement because:

- a) Brent brought the home into the marriage,
- b) Brent paid for essentially all of the improvements to the basement,
- c) Jeanne did little to improve the value of the home other than the routine maintenance which comes with living in the home and she purchased and planted some flowers and she stained the doors and moldings. In addition Jeanne gave her son a washer, dryer and bed in exchange for his labor.
- d) Brent paid the mortgage payments and the utilities on the home during the

marriage.

- e) Prior to the marriage Jeanne had rent and utility expenses for the small home which she rented of approximately \$487 per month. After the separation she had rent and utility expenses of approximately \$361 per month. Because her net expense has decreased, she cannot claim a need for an interest in the home in lieu of alimony.
- f) The parties never commingled their incomes. Brent used his income for the family living expenses. Jeanne spent her income on her car payment, on some of the family extras such as alcohol and Sunday dinners, occasional allowances for the children and on family outings. She kept for herself the rest of her funds. Because she was able to keep a significant portion of her funds, while Brent paid the mortgage payments, Jeanne does not have a legitimate claim to a credit for the mortgage payments which Brent made.

26. At the time of the marriage Jeanne worked at Walmart making \$6.20 per hour. At the time of separation she was earning \$7.50 working for Neways. At the time of trial she was earning \$9.00 per hour.

27. Brent's income has remained very flat during the marriage.

28. During the marriage Jeanne used her paycheck to pay her car payment and

to provide some cash needs of the family, although the majority of the family living expenses came from Brent's income. The mortgage payment, utilities and most of the food expense came from his income,

29. During the marriage Brent made contributions to his retirement program in the sum of \$1,460. Jeanne is entitled to one-half of those contributions, or \$725.

30. During the marriage Brent made contributions to a life insurance annuity in the sum of \$1,600. Jeanne is entitled to one-half of those contributions, or \$800.

31. During the marriage the parties acquired a freezer for \$375 and a camper for \$375. These are awarded to Brent but Jeanne is entitled to one-half their value, or \$375.

32. During the marriage the parties acquired a boat. It was financed and has no equity value over its debt. It is awarded to Brent but he must make the payments thereon.

33. At the time of the marriage Brent had only limited credit card debt and he had his home mortgage. During the marriage he incurred additional credit card debt of \$3,135. He incurred a debt to Dr. Farley for \$741 for a crown for Jeanne's tooth not covered by insurance. He incurred a debt to Nebo Credit Union in the sum of \$800. Each of these are marital obligations. A significant portion of the credit card debt was incurred after Jeanne began planning her separation in June 1995 and are expenses which Brent

would not have incurred had he known of her plan to leave him when housing became available.

34. Brent also incurred a loan to buy a boat and an add-on loan for the boat of \$804. Because he is keeping the boat, he should be responsible for both of these loans.

35. At the time of the marriage Jeanne had considerable debt, including a car loan for her Chevrolet Beretta and debts to Dr. Dewey of \$670, to Mountain View Hospital of \$670, to Bonneville Collection of \$900 and to the lawyer from her first divorce of \$600. All of these were paid from marital funds during the marriage except \$80 of Dr. Dewey's bill. I assign neither party a benefit nor obligation from these marital payments.

36. Near the end of the marriage Brent borrowed \$1,000 from his father and \$2,000 from his sisters. The loans from the sisters were incurred after the parties separated while the loan from his dad was incurred just prior to separation. These funds were used on family expenses, although most were used for Brent's family expenses post separation. These are separate debts for which Jeanne is not responsible.

37. Brent advanced \$300 to pay for an appraisal which Jeanne wanted of the house. It is appropriate that she reimburse him for this. He also was required on a temporary basis to give to Jeanne \$500 of his tax refund to her to pay toward her

attorney's fees. It is appropriate that Jeanne reimburse him for this.

38. Brent incurred attorney's fees of \$14,888.76, which fees are based upon counsel billing \$125 per hour. Given counsel's experience in domestic matters, this is a reasonable rate. It appears all of the time was necessarily incurred.

39. Brent asserts he spent a significant amount of fees in this case to protect against what he claimed was Jeanne's unwarranted effort to obtain a portion of the home equity.

40. As noted hereafter, Brent has prevailed in his defense of his separate ownership of the home.

41. Because Brent is the sole provider for his three minor children, and given the nature of his employment as a school teacher, he does not have the capability fully to respond to the attorney's fee bill which he has incurred.

42. Jeanne has incurred attorney's fees in the sum of \$5,688 which fees are based upon counsel billing \$125 per hour. Given counsel's experience in domestic matters, this is a reasonable rate. It appears all of the time was necessarily incurred.

43. At the outset of this case Brent was ordered, under a temporary order, to pay \$500 of his 1996 tax refund to pay toward Jeanne's attorney's fees. He did so.

44. While Jeanne appears to have the capacity over time to pay her own fees,

she does not have the capacity to pay Brent's fees.

45. Brent asserts that he spent a larger amount of fees because Jeanne did not properly respond to outstanding discovery requests and Brent claims he had to obtain that information through subpoena from others. In part, at least, he is correct in that assertion.

46. Because I have no specific evidence of how much added expense Brent incurred because of Jeanne's failure properly or timely to respond to the discovery, I have no factual basis to determine what amount of Brent's fees should be charged to Jeanne.

47. Each party should be required to bear their own attorney's fees.

48. Defendant shall be restored her former name of McNeil.

From the foregoing Findings of Fact, the court now makes and enters the following:

CONCLUSIONS OF LAW

(1) That Mr. Loveless is entitled to be awarded the house as a separate asset, free of any claim from Jeanne;

(2) That the parties are entitled to a distribution of their personal property; retirement and life insurance annuity;

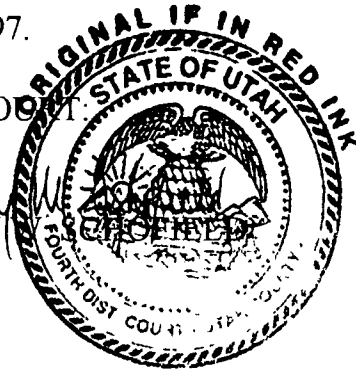
(3) The parties are entitled to an allocation of their marital debts;

- (4) That each party should pay his or her own attorney fees and costs;
- (5) That defendant is entitled to be restored her former name of McNeil.

Dated this 14th day of February, 1997.

BY THE COURT

Anthony M. Loveless
ANTHONY



Approved as to form:

RICHARD L. HALLIDAY
Attorney for Defendant, Jeanne M. Loveless

H:\COMMON\HEATHER\VLSS FOF

BRENT D. YOUNG
IVIE & YOUNG
Attorneys for Plaintiff
48 North University Avenue
P.O. Box 672
Provo, UT 84603
Telephone: (801) 375-3000

FILED 2-14-97
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

BRENT V. LOVELESS,

Plaintiff,

v.

JEANNE M. LOVELESS,

Defendant.

ORDER
(TRIAL DATE SEPTEMBER 3, 18,
1996)

Civil No. 96440123

Judge Anthony W. Schofield ✓

Trial was held September 3 and 18, 1996, at which Brent D. Young represented plaintiff Brent V. Loveless ("Brent") while Richard L. Halliday represented defendant Jeanne M. Loveless ("Jeanne"). Thereafter the parties were allowed time to submit post-trial briefs, which briefs were filed October 10, 1996. Based on the accompanying Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED:

1. **The home.** Brent is awarded the house as a separate asset. Although it appreciated greatly in value during the marriage, the home was a separate asset prior to

the marriage and Jeanne did little to enhance its value. The home is awarded to Brent free of any claim from Jeanne.

2. **Other property distributions.** Brent is awarded the camper and freezer, his retirement and his interest in the life insurance annuity but is obligated to reimburse Jeanne for half of each as follows:

Camper	\$375
Freezer	\$ 375
retirement	\$1,450
life insurance	\$1,600
Total	\$3,800 / 2 = \$1,900

Brent also is awarded the boat and the debt thereon as the boat has no equity.

3. **Debts.** Brent is assigned to pay the following marital debts but Jeanne is responsible to reimburse him for one-half thereof:

Visa	\$ 604
Mastercard	\$2,531
Dr. Farley	\$ 791
Nebo Credit Union	\$ 800
Total	\$4,726 / 2 = \$2,363

Post separation Brent has paid the following marital obligations for which he is entitled to a reimbursement from Jeanne of one-half:

Shaffer & Assoc.	\$ 109
Columbia House	<u>\$ 77</u>
Total	\$ 186 / 2 = \$93.

4. The court awards Brent no claim against Jeanne for the loans which he borrowed from his father and sisters at or near the time of the separation or the boat add-on loan nor is he awarded any claim against Jeanne for her debts paid during the marriage as those were marital payments.

5. **Summary of financial adjustments.** Jeanne is entitled to payment of \$1,900 from Brent for her interest in personal property, retirement and life insurance. Brent is entitled to payment from Jeanne for one-half of the marital debt of \$2,363 and one-half of the marital debt paid by Brent post-separation in the sum of \$93. Further, pursuant to a temporary order of the Court Brent paid \$500 of Jeanne's attorney's fees and \$300 for her appraisal of the home. She bears responsibility for each of these and must repay Brent for them. The summary of all of these payments is as follows.

Brent owes Jeanne:	\$ 1,900
Jeanne owes Brent:	\$2,363
	\$93
	\$ 500
	<u>\$ 300</u>
Total	\$3,256

When these are offset Jeanne owes Brent \$1,356.

6. **Attorney's fees.** Each party will bear their own fees and costs in this matter.

7. Defendant is restored her former name of McNeil.

Dated this 14th day of February, 1997.

BY THE COURT:

Anthony W. Scott
ANTHONY W. SCOTT



Approved as to form:

Richard L. Halliday
RICHARD L. HALLIDAY
Attorney for Defendant, Jeanne Loveless

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Order and Findings was mailed to the following, postage prepaid, on the 13th day of January, 1997:

Richard L Halliday
Attorney at Law
2002 East 11500 South
Sandy, UT 84092

Brent D. Young
BRENT D. YOUNG

H:\COMMON\HEATHER\VLSS.ORD