2002

Kelley v. Kelley : Reply Brief

Utah Court of Appeals

James C. Haskins; Haskins & Associates; Attorney for Appellee.
Steven Kuhnhausen; Bart J. Johnsen; Richman & Richman; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

SONIA KELLEY, Appellee, vs. WAYNE KELLEY, Appellant.	Case No. 20020657-CA Priority 15 ORAL ARGUMENT SCHEDULED AUGUST 26, 2003 9:30 A.M.

REPLY BRIEF OF THE APPELLANT

On appeal from the Second District Court
For Davis County, State of Utah
Honorable Rodney S. Page, Presiding

Steven Kuhnhausen (1861)
10 West Broadway, Suite 603
Salt Lake City, Utah 84101

Bart J. Johnsen (7068)
RICHMAN & RICHMAN, L.L.C.
60 South 600 East, Suite 100
Salt Lake City, Utah 84102

Attorneys for Appellant

James C. Haskins
HASKINS & ASSOCIATES, P.C.
357 So. 200 East, Suite 300
Salt Lake City, Utah 84114
Attorneys for Appellee

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60 South 600 East, Suite 100
Salt Lake City, Utah 84102

Attorneys for Appellant

James C. Haskins
HASKINS & ASSOCIATES, P.C.
357 So. 200 East, Suite 300
Salt Lake City, Utah 84114
Attorneys for Appellee

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I. THE TRIAL COURT'S DETERMINATION THAT THE LENGTH OF THE PARTIES' TWO MARRIAGES WAS AN EXTENUATING FACTOR FOR AN AWARD OF ALIMONY LONGER THAN FIVE YEARS WAS AN ERROR IN LAW AND THEREFORE AN ABUSE OF DISCRETION

In Kelley v. Kelly, 2000 UT App. 236, 9P.3d 171, ¶28 (hereinafter "Kelley I") the Court of Appeals remanded and specifically and unequivocally instructed the trial court to limit the duration of the alimony award to the length of the common law marriage to wit: five years unless the trial court made "further findings addressing whether extenuating circumstances exist as to satisfy section 30-3-5(7)(h), Rehn, 1999 UT App 041 at ¶ 14." Id. In Wayne's Brief of Appellant, (hereinafter "Kelley II") Wayne asserted that the trial court erred as a matter of law by finding extenuating circumstances to exist upon which to award alimony for a length of time in excess of the five year common law marriage based merely upon the total length of the parties' two marriages. Wayne asserted that the trial court erred as a matter of law because the Court of Appeals in Kelley I limited the duration of alimony to five years absent "further findings" of extenuating circumstances and its failure to make "further findings" as required by the appeals court was an error in law. In her responsive brief, Sonia argues that the standard of review, correction of legal error, asserted by Wayne is incorrect and that an abuse of discretion standard must be applied. Sonia's argument incorrectly construes the status of this case and seeks to impose the issues presented to and decided by the appeals court in Kelley I. Sonia seeks to require Wayne to once again establish that the trial court abused its discretion in

awarding alimony for a longer period than the common law marriage even though Wayne previously established abuse of discretion and the matter was remanded for further findings as to extenuating circumstances. The trial court's failure to follow the law as established in Kelley I was error and the appeals court should grant no deference to the trial court's conclusion.

Rulings of a trial court based upon a flawed legal conclusion are an abuse of discretion. Searle v. Searle, 2001 UT App 367, 38 P.3d 307, ¶21 (analyzing the standard of review in context of a Rule 60(b) motion). In the present matter, the trial court was instructed by the Court of Appeals to limit the duration of the alimony to five years, absent specific findings of extenuating circumstances. The trial court's legal conclusion is flawed because its findings of fact from remand are essentially the same as the findings of fact from the first trial, with the exception that the trial court simply added the words "extenuating circumstances" (R. pp. 1845-46.) (See Findings of Fact and Conclusions of Law, attached hereto as Addendum Exhibit A, and Findings of Fact and Conclusions of Law on Remand from the Court of Appeals, attached hereto as Exhibit B.) Specifically, the Court of Appeals stated that the trial court's findings were "inadequate to support an alimony award for a period of sixteen years" Kelley, 2000 UT App 236 at ¶28 and it remanded ". . . for the entry of further findings addressing whether extenuating circumstances exist" Id. The trial court's failure to make and enter further findings addressing whether extenuating circumstances exist that justify an award of alimony for a

period longer than the length of the parties' marriage was an error in law and as such, constitutes an abuse of discretion.

Furthermore, a trial court's failure to properly analyze the parties' circumstances in regard to the standards of law is an abuse of discretion. Naranjo v. Naranjo, 751 P.2d 1144, 1147 (Utah Ct. App. 1988) (analyzing the standard of review in the context of an award of alimony). On remand, the trial court abused its discretion by failing to properly analyze the facts of the case and apply them to the standards of law as directed by the Court of Appeals. Wayne argued in his appellate brief and reiterates herein that the trial court's error in law by failing to follow the specific instructions of the appellate court is an abuse of its discretion.

II. WAYNE IS NOT REQUIRED TO MARSHAL THE EVIDENCE FROM BELOW BECAUSE THE FINDINGS OF FACT ARE NOT DISPUTED

Sonia argues that Wayne failed to marshal the evidence from below to support his argument that the trial court abused its discretion when awarding alimony for a period longer than five years and thus, Wayne's appeal should be denied. However, Wayne is not required to marshal the evidence because the findings of fact made by the trial court are undisputed and are basically the same findings of fact that were reviewed in Kelley I. When asserting that findings of fact made by the trial court are clearly erroneous or unsupported by the evidence, the appellant is required to marshal the evidence from below to support the findings of fact. Moon v. Moon, 1999 UT App. 12, ¶7, 973 P.2d 431. In this case, Wayne does not dispute that the evidence presented below supports the

findings of fact made by the trial court, i.e., that the parties had two marriages that, when combined, totaled approximately 18 years, that Sonia has need for alimony, and that Wayne has the ability to pay. The issue before the Court herein is that the findings of fact made by the trial court on remand do not support a conclusion of law that extenuating circumstances exist so as to justify an award of alimony for a period longer than the length of the common law marriage. Because Wayne is not asserting that the findings of fact are clearly erroneous or unsupported by the evidence, it is not incumbent upon Wayne to marshal the facts to support those findings. Sonia's argument to the contrary is misplaced and should be rejected.

III. THE TOTAL TIME OF THE PARTIES' TWO MARRIAGES IS NOT AN EXTENUATING CIRCUMSTANCE UPON WHICH TO BASE ALIMONY FOR A PERIOD LONGER THAN THE LENGTH OF THE MARRIAGE

Sonia argues that the trial court did not abuse its discretion in considering the total time of the parties' two marriages in awarding alimony for a period of time longer than the common law marriage. In support of her argument, Sonia incorrectly relies on a statement in Kelley I, quoting Whyte v. Blair, 885 P.2d 791, 793-94 (Utah 1994) where the Utah Supreme Court held that the actual duration of the relationship predating the order establishing the common law marriage is recognized. Kelley, 2000 UT App. 236 at ¶28. The language that Sonia relies upon does not support her argument that the length of the parties' two marriages can be considered an extenuating circumstance so as to justify an award of alimony longer than the period of the common law marriage. The Kelley I court relied on the Whyte language to indicate that Sonia's and Wayne's common law

marriage actually predates the date of the order establishing the marriage, not that both marriages can be counted for alimony purposes. The conclusion of the court in Kelley I directly follows the language quoted by Sonia in her brief and clarifies the court's purpose in citing Whyte.

> In Whyte v. Blair, 885 P.2d 791 (Utah 1994), the supreme court held that when a non-solemnized marriage is established under section 30-1-4.5, the actual duration of the relationship, predating such establishment, is recognized. *See id. at 793-94.* **Hence, upon entry of the order establishing the marriage here, Wayne and Sonia were remarried on July 18, 1994, thereby terminating her entitlement to alimony under the first decree.**

Kelley, 2000 UT App. 236 at ¶28 (emphasis added.)

In this matter it is undisputed that Wayne and Sonia entered into a common law marriage as of the date of their first divorce and the length of the parties' common law marriage was five years. Kelley, 2000 UT App. 236 at ¶28. It is also undisputed that the trial court based the award of alimony upon the length of the parties' two marriages, Sonia's need for alimony, and Wayne's ability to pay. The total length of the parties' two marriages does not rise to the level of an extenuating circumstance. The findings must still evaluate the factors contained in the record that would support a conclusion that extenuating circumstances exist. Rudman v. Rudman, 812 P.2d 73, 76 (Utah Ct. App. 1991). Sonia and Wayne are not unusual in having been married to each other more than once, and it is not unusual for parties who divorce and change their mind to live in a common law marriage before deciding to legitimate their reconsideration. See Clark v. Clark, 2001 UT App. 44, 27 P.3d 538 (parties lived together in a common law marriage

subsequent to an 18 year solemnized marriage). The statutory presumption for an award of alimony is that alimony will be awarded for the length of the marriage rather than the relationship. See U.C.A. §30-3-5(7)(h). Section 30-3-5(7)(h) allows a trial court to make a finding of extenuating circumstances to warrant alimony for a period longer than the length of the marriage. Id. Holding that remarriage to the same partner to establish a long-term award of alimony constitutes an extenuating circumstance is contrary to the statutory presumption against such awards. See Johnson v. Johnson, 855 P.2d 250 (Utah Ct. App. 1993) (holding that awarding non-terminable alimony in order to allow the wife to maintain a standard of living violated the statutory presumption against such an award because standard of living must be considered in every alimony award). The trial court's conclusion of law that the length of the parties' two marriages was an extenuating circumstance sufficient to justify an award of alimony for longer than the statutory requirement of the length of the marriage is erroneous and should be reversed.

Additionally, if Sonia's argument that the trial court can consider the total length of the parties' two marriages as an extenuating circumstance justifying an order of alimony for a period longer than the second marriage was correct, it makes the remand from the Court of Appeals merely an exercise rather than an actual remand with instructions. The Court of Appeals remanded to the trial court to limit alimony to a period of five years or for "entry of further findings addressing whether extenuating circumstances exist as to satisfy section 30-3-5(7)(h)." Kelley, 2000 UT App 236 at ¶28. Instead of limiting alimony to five years or making further findings, the trial court on

remand simply added the words "extenuating circumstances" to its previous findings of fact and ordered alimony to continue for 16 years. The Court of Appeals in Kelley I could have affirmed the initial award of alimony based upon the length of the two marriages. See DeBry v. Noble, 889 P.2d 428, 444 (Utah 1995) (Appellate court can affirm on any ground) However, Kelley I did not affirm and clearly remanded for a limitation on the time frame or for further findings setting forth extenuating circumstances to justify an award of alimony for a length of time longer than the common law marriage. The Court of Appeals already understood that the trial court found that there was a long-term marriage. Had this been enough, there would have been no need to remand for further findings on extenuating circumstances. The trial court's further findings do not support a conclusion of extenuating circumstances and thus, the remand trial court abused its discretion. The trial court's award of alimony for 16 years was erroneous and such award should be reversed and limited to five years total.

CONCLUSION

The trial court's determination that the total length of time of the parties' two marriages was an extenuating circumstance to award alimony for a period of time longer than the parties' second marriage was an error in law and thus an abuse of discretion.

The trial court's findings of length of marriage, needs of the recipient, and the obligor's ability to pay fail to rise to the level of extenuating circumstances to justify an alimony award of longer than the length of the marriage.

The trial court's award of alimony for 16 years should be reversed and the award of alimony should be limited to a total of five years.

RESPECTFULLY SUBMITTED this 21 day of July, 2003

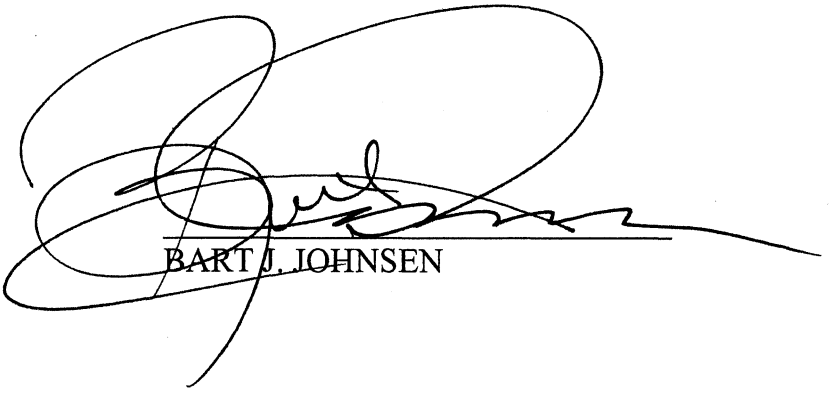
RICHMAN & RICHMAN, L.L.C.

BART J. JOHNSEN
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of July, 2003, two true and correct copies of the foregoing REPLY BRIEF OF THE APPELLANT were HAND-DELIVERED to:

James C. Haskins
HASKINS & ASSOCIATES, P.C.
Attorneys for Appellee
357 So. 200 East, Suite 300
Salt Lake City, Utah 84114



BART J. JOHNSEN

ADDENDUM

Tab A

7/1/99

B.L. DART (818)
DART ADAMSON DONOVAN & HANSON
310 South Main Street; Suite 1330
Salt Lake City, Utah 84101
Telephone: (801) 521-6383

MARK A. LARSEN (3727)
LARSEN & MOONEY LAW
50 West Broadway, Suite 100
Salt Lake City, Utah 84101-2006
Telephone: (801) 364-6500

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

IN AND FOR DAVIS COUNTY, STATE OF UTAH

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SONIA KELLEY,	:	
Petitioner,	:	**FINDINGS OF FACT AND**
v.	:	**CONCLUSIONS OF LAW**
WAYNE KELLEY,	:	Civil No. 944700827DA
Respondent.	:	Judge Rodney S. Page

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The above-entitled consolidated matters came on regularly for trial on the 3rd and 4th days of December, 1998, petitioner appearing in person and by her attorneys, B. L. Dart and Mark A. Larsen, respondent appearing in person and by his attorney, Ellen Maycock and the Court having heard testimony from witnesses and having received various documentary evidence and the matter having been argued and submitted and the Court being fully advised, hereby makes the following:

FINDINGS OF FACT

1. The Court finds that the parties were married to each other on the 24th day of May 1980, in Ft. Worth, Texas.

2. During this marriage the parties had two children born as issue of this marriage, to wit: Christopher W. Kelley, currently 14 years of age, born February 5, 1985 and Erin Renee Kelley, currently eight years of age, born September 9, 1990.

3. Over the course of the marriage respondent worked primarily in construction. He founded and was the owner of Altex Construction in Alaska involved in work on the DEW line and other government contracts.

4. In 1990 DSI was created. Respondent owns 55% of DSI's stock. DSI was involved in the construction of government facilities and modification of government facilities to insulate those facilities from terrorism. This work was worldwide.

5. During the marriage between the parties respondent's work was such that it required him to be away from home for extended periods which included on occasion renting apartments in which to stay. This occurred on one occasion in Colorado and on one occasion in Texas. Because of the nature of his work, he was home intermittently, was gone for long periods of time on a regular basis and was very seldom at home on a long-term, continuous basis.

6. In 1993 and 1994 DSI became involved with the Mathews Companies, corporations which were in difficulty at that time. DSI sought to take over Mathews to shore it up so that Mathews would be able to perform under various contracts on which DSI

had contingent liability and also to improve DSI's financial situation. These were the facts as of Spring of 1994.

7. The parties were not unfamiliar with the vicissitudes of the construction business. They experienced a bankruptcy while they were in Texas. They had given a deed in lieu of foreclosure on the residence in which they had lived in the State of Washington.

8. The transactions between DSI and Mathews Companies required that respondent individually indemnify Mathews Companies by signing bonds for Mathews Companies' performance which would expose his assets to considerable risk.

9. In discussions between the parties, respondent told petitioner about this problem and the need to preserve and protect the family home. He proposed that the parties should enter into a divorce so that the home could be placed in petitioner's name to protect it from potential of creditors because of the concerns he had related to the DSI/Mathews Companies transaction. He represented to the petitioner that the parties were not going to be separated and that nothing would change from how they had lived before.

10. During the spring and summer of 1994, the parties agreed to and did enter into a divorce action, resulting in a divorce being entered on the 18th day of July, 1994, in the District Court of Davis County, Civil No. 944700827DA. The Court finds that the agreement between the parties to divorce was an agreement for a non-traditional divorce

which created a legal fiction only, designed to protect the residence of the parties from the threat of creditors.

11. In connection with the divorce action petitioner contacted an attorney. Respondent waived his rights. Both of the parties attended a parenting class and the Court accepts the testimony of Dr. Marty Hood and finds it is credible that during the intermission halfway through the parenting class, respondent approached her and told her that the divorce the parties were going through was only a business thing and that the children would never know there was even going to be a divorce and that there was no real need for them to continue to attend the class on how to deal with the children in a divorce situation. He further told her that there was not going to be a separation. The result of respondent's statements was that Ms. Hood signed a Certificate of Completion allowing the parties to leave before the class was completed.

12. Under the Decree of Divorce petitioner was awarded the custody of the minor children of the parties subject to respondent's rights of visitation. The petitioner was awarded the house and furnishings. Respondent was awarded his stock in DSI and the parties' investment in property in Kodiak, Alaska. It was further provided that respondent would be responsible for the payment of all debts up to June 1994.

13. Respondent was to pay child support of $1,000 a month for the two minor children of the parties and alimony of $1,000 a month to the petitioner. He was further ordered to maintain health insurance for the children and life insurance on himself for the benefit of the children. The divorce was granted to the petitioner on her Complaint.

14. At that time, the Court finds DSI was a viable, but closely held, corporation which listed considerable assets, including the balance sheet of March 31, 1994, introduced as Exhibit No. 3, reflecting a book value of $1,134,828.09. The Court further finds, however, the value is found by a number of factors and book value is only one of those factors. Because DSI is a closely-held corporation, and its primary assets were accounts receivable and similar assets, this brings into question its true value. There is no question that the respondent's interest in DSI had some value and that respondent's interest in the Kodiak property also had some value. The Kodiak property was generating $10,000 per month in income and, at that time, it was expected to produce for a period into the future.

15. At the time of the entry of the Decree of Divorce in July, 1994, the mortgage payment on the home awarded to the petitioner was $2,400 a month, which was $400 more than the combined support and alimony award to the petitioner. This was at a time when petitioner had not worked outside of the home for a considerable period of time and was not employed earning any income, although she graduated from college.

16. Prior to the divorce the standard of living of the parties was one in which respondent would give to petitioner $7,500 a month to pay bills. This arrangement had existed for some substantial period of time. Also, at the time of the divorce respondent was receiving a draw through his employment with DSI in the amount of $8,000 a month and was further receiving a distribution on the Kodiak property of $10,000 a month, a combined amount of $18,000 a month.

17. Following the entry of the Decree of Divorce in July, 1994, there was no change in the relationship of the parties and in their living arrangements. The parties continued to live the same as they had prior to the divorce. Titles to marital residence was not transferred until after this action was filed. The title to the Kodiak property was never transferred. The parties continued to maintain a joint checking account. The parties filed a joint 1994 income tax return, reflecting that they were husband and wife as of the end of 1994. The parties continued to cohabit with sexual relations. The children, who at that time were nine and three and one-half years of age, were never told about any changes in their parents' relationship.

18. In July, 1994, the parties appeared at a counseling class and told the counselor that this divorce was only for business purposes and that the children would never know that the parties were divorced. The parties continued to socialize together; they attended a Christmas party together in December 1994, each held the other out as a married couple. No one in the community was told of the divorce at that time. During this time, respondent maintained an apartment in Texas.

19. Respondent represented that he was concerned about his business dealings and the possibility of telephone surveillance, telling the petitioner that he could not talk with her on the phone.

20. In May 1995, respondent sent petitioner an anniversary card in which he indicated he loved her and a wish for another 15 years. See Exhibit No. 6.

21. In the summer of 1995, as part of a family vacation, the parties traveled to Mexico, , shared a room and had sexual relations.

22. In October 1995, respondent faxed a letter to petitioner expressing his love and looking forward to being with petitioner at Christmas so that things could again be the way they had been. See Exhibit No. 8.

23. In the fall of 1995, petitioner became suspicious that there was another woman. Respondent told petitioner that his relationship with the other woman was only a fling and that it was over. The parties' relationship was reestablished and everything continued as it had in the past during their marriage, including their sexual relationship.

24. During the entire period from the entry of the Decree of Divorce the financial relationship remained the same and respondent provided petitioner with funds at the same standard of living which had existed prior to the entry of the Decree of Divorce.

25. In the spring of 1996, petitioner found out that respondent's relationship with the other woman had not terminated. In May 1996, there was an altercation which was primarily precipitated by a visitation dispute, resulting in the police being called and the filing of criminal charges against respondent. Following this altercation, respondent cut petitioner off from funds as they had previously been provided. Because of this action, petitioner sought legal counsel and subsequently filed actions including a Petition to Modify and pleadings setting forth theories of a common law marriage and fraud.

26. The Court finds that there was no fraud or misrepresentation in connection with the divorce in 1994. Petitioner was college educated, and the Court finds that her

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claimed reliance on the representations of respondent was not justifiable. Given the circumstances at that time, however, neither party expected the property aspects of the divorce to be valid nor implemented.

27. The Court finds that as of the entry of the Decree of Divorce on July 18, 1994, petitioner knew that they would have to remarry. As of that day, the parties were unmarried. They continued their marital relationship, they continued to cohabit, they continued to treat each other as married, they had joint checking accounts, and respondent maintained all of his personal property at the marital residence. The parties filed joint income tax returns for the 1994 year. Respondent sent petitioner money from which she serviced joint debts. The parties maintained joint credit cards. The parties held themselves out as married in the area of their domicile in Davis County, and in that area of the domicile had the reputation of being married. They held themselves out to their children as married. The parties continued to cohabit and hold each other out as spouse through April of 1996. The parties had a reputation in the community for being married and all of these actions arise out of a contract between two consenting parties.

28. The Court has heard much testimony regarding DSI's value. It is difficult to set the value of DSI. The Court finds that the critical day of valuation is the day of the Court's ruling. As of this time DSI is bereft of value except for receivables and a lien on the Bear Hollow house, which are of questionable value. In 1997 DSI did receive a substantial settlement in litigation in which it was involved in the amount of $1,900,000,

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relief of debt and an agreement to hold DSI harmless. The net payment to DSI was $1,300,000 after the deduction of attorneys' fees and costs.

29. The money from DSI's net settlement was used primarily for the purchase of a Mercedes 600SL and the construction of a large residence in Summit County, known as the Bear Hollow property. These expenditures were primarily for the benefit of respondent. The settlement funds were not used to retire DSI's substantial outstanding debt.

30. With regard to the Kodiak property, its value is now negative, and the Court is unaware of its value, if any, now.

31. Respondent has an interest in Omega Oil. From the testimony it is not clear whether this interest is a 10% interest in stock or an option to acquire 10% of the stock . Respondent is the president of Omega Oil and from Omega Oil receives a monthly income of $6,000 since June of 1996. Based upon the evidence before the Court, the Court is unable to set a value on respondent's interest in Omega Oil.

32. Respondent is the title owner of property in Summit County known as the Bear Hollow property located at 2525 Bear Hollow Drive, Park City, Utah, which is more particularly described as:

> Lot 27, Block 5, Cedar Draw Estates, according to the official plat thereof, recorded in the official records of the Summit County Recorder.

The value of this property is in question. There has been testimony of from $2,000,000 to $1,500,000. Against this property there is a primary trust deed obligation of $500,000 and a second trust deed obligation of $250,000. In addition, there is a $958,000 mechanic's

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lien which has been filed by DSI and which currently is in litigation. The parties' equity interest in the Bear Hollow house, therefore, currently is in litigation in Summit County, Utah.

33. The Court finds the home at 1995 South Maple Ridge Drive, Bountiful, Utah, has a value of $345,000, subject to a first mortgage obligation of $236,000 and an attorney's lien from Louise Knauer, petitioner's prior attorney, of $10,000, resulting in a remaining equity of $109,000.

34. The Court finds that respondent has manipulated his corporations by taking funds through loans and not as income with these withdrawals as he sees fit. This is not a traditional method of compensation, and respondent has manipulated his income as he has seen fit.

35. The Court finds that respondent has used the assets of these businesses to meet his own living expenses and to purchase property for his own interest. The Mercedes 600SL is an example.

36. The Court finds that historically respondent has had an income in excess of $10,000 a month with funds received from the Kodiak property and a salary of $8,000 from DSI. Currently respondent receives a salary of $6,000 a month from Omega Oil. In addition, respondent has received funds through loans not reflected as income from his various businesses. Consistent with his past manipulations, respondent currently has manipulated his income to limit his income presented in this proceeding.

37. The Court finds that the income amounts reflected above coincide with the amount of funds utilized by the parties to meet ongoing family expenses, both prior to the entry of the Decree of Divorce in July, 1994, and since that time.

38. The Court finds that respondent currently has the ability to produce income at the amount of $10,000 a month and finds that his income is in this amount.

39. Petitioner has sought and obtained employment and currently has the ability to earn an income on an hourly rate of $8.71 per hour in the gross amount of $1,498 a month on a full-time basis. This amount would be subject to taxes. She is capable of working full time, but is working on a part-time basis by choice.

40. The gross income of the parties exceeds the child support guideline.

41. The Court finds that each of the parties have incurred attorneys' fees in this action. The Court further finds that there has been certain obstreperous conduct on the part of respondent with respect to discovery, making it difficult to process and prosecute this action. The Court further finds that respondent has a substantial ability to earn an income.

42. As to the fees incurred by petitioner while represented by Louise Knauer, the Court heard testimony from Louise Knauer and finds that those fees were necessarily incurred. The work performed was reasonable and necessary for the prosecution of this action. The Court further finds that petitioner has no funds with which to pay these fees. The attorney's fees petitioner incurred for the services of Louise Knauer in the amount of $10,951 were reasonably and necessarily incurred.

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43. As to the fees incurred by petitioner while represented by B. L. Dart and Mark A. Larsen, the Court finds that substantial work was performed, that a large amount of this work was necessary to prosecute this case to a conclusion through trial. The Court further finds that petitioner has no funds with which to pay these fees. The request for attorney's fees of Dart and Larsen is the amount of $46,574.95, as reflected in Exhibit Nos. 15 & 16. The Court finds that this is excessive, that these are two well-qualified lawyers, either of whom could have individually tried the case without the need of the other. Under all the facts and circumstances of this case the Court finds that the reasonable amount for the attorneys' fees incurred by these attorneys for their reasonable and necessary services is the sum of $25,000 for which respondent should be responsible to petitioner.

Based upon the preceding findings of fact, the Court enters the following conclusions of law:

CONCLUSIONS OF LAW

1. Petitioner has failed to show fraud by clear and convincing evidence.

2. There was a common law marriage entered into by the parties by reason of their ongoing relationship. This common law marriage commenced immediately following the entry of the Decree of Divorce on the 18th day of July, 1994, and will terminate at such time as the Decree of Divorce enters in this case.

3. The parties have now been separated since June 1996, the differences between them are irreconcilable and petitioner is entitled to a divorce from respondent on the grounds of irreconcilable differences.

4. In June of 1996, respondent elected to terminate the parties ongoing relationship and his financial support of petitioner. These actions constituted a substantial change of circumstances.

5. Based upon the change of circumstances which the Court has found and, further, based upon the common law marriage of the parties, the Court hereby modifies the terms of the former settlement to provide for the following award:

a. Petitioner is awarded the equity of the parties in the home and real property at 1995 South Maple Ridge Drive, Bountiful, Utah, subject to petitioner assuming its outstanding indebtedness.

b. Petitioner is awarded all furniture and fixtures located therein.

c. Petitioner is awarded one-third of respondent's equity in the Bear Hollow property, and respondent is awarded two-thirds of his equity in the Bear Hollow property, subject to outstanding liens against it. The property is more particularly described as:

> Lot 27, Block 5, Cedar Draw Estates, according to the official plat thereof, recorded in the official records of the Summit County Recorder.

Respondent is ordered to pay all taxes, utilities, debt and Trust Deed Notes on the Bear Hollow house. The parties at their mutual expense are to retain an independent appraiser to establish an appraisal value for the Bear Hollow property. The property is currently listed for sale and should continue to be listed for sale over a multiple board listing under terms that the property is to

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be sold for any cash offer for 90% or more of the appraised value. Each party shall be apprised of any offers and have the right of open communication with the listing realtor. If any other offers are received which one party desires to accept and the other party does not desire to accept, then the party desiring to accept the offer shall have the right to come before the Court to request that the property be sold for this offer and the Court will then make a determination of whether this sale is to occur on these terms.

d. Respondent is awarded his interest in the property in Kodiak, Alaska, subject to any outstanding obligations owing thereon. This property is more particularly described as follows:

> That portion of Lot two (2), Block ten (10), New Kodiak Subdivision, according to Plat 72-2, located in this Kodiak Recording District, Third Judicial District, State of Alaska, which lies within the following described property:
>
> That portion of United States Survey Number 559, located in the Kodiak Recording District, Third Judicial District, State of Alaska, more particularly described as follows:
>
> Beginning at Corner No. 1 of United States Survey Number 1797, as shown on the Plat of Kodiak Townsite, United States Survey Number 2537B, as accepted by the Commissioner of the General Land Office, September 11, 1941, said point being an unnumbered corner of United States Survey Number 559, the TRUE POINT OF BEGINNING of this description;
>
> Thence N 44 degrees 22' W, a distance of 56.58 feet;

Thence N 45 degrees 50' E, a distance of 138.09 feet;
Thence S 44 degrees 10' E, a distance of 131.38 feet;
Thence S 45 degrees 50' W, a distance of 138.00 feet, more or less, to a point of intersection with a line drawn S 44 degrees 22' W, a distance of 78.06 feet, more or less, to the TRUE POINT OF BEGINNING.

e. Respondent is awarded his stock or option interests in Omega Oil.

f. Respondent is awarded any property currently in his possession, including furniture and furnishings and any interest, if any, in the Mercedes 600SL.

g. Respondent is awarded certain personal property and to the extent it is in the possession of petitioner and with reference to Exhibit P34, these items are as follows:

(1) The floor standing globe.

(2) The Baldwin piano with delivery to occur after the last child reaches majority or has moved from the home, whichever occurs first. Petitioner shall have the responsibility of maintaining the piano and having it tuned annually.

(3). One-half of the power and hand tools. The tools are to be divided under an arrangement that petitioner is to make a List "A" and a List "B", dividing the tools. Respondent will then have the choice of which list of tools he desires and will be awarded those tools. Petitioner will be awarded the rest.

6. With regard to the indebtedness of the parties, petitioner should assume and pay the first mortgage obligation on the house and real property at 1995 South Maple Ridge Drive, Bountiful, Utah. Respondent is ordered to assume and pay all other liabilities and debt incurred during this marriage, including but not limited to any liabilities in connection with DSI, the Bear Hollow property and Omega Oil.

7. The Court finds that petitioner is entitled to be and is awarded the custody of the minor children of the parties, subject to respondent's reasonable rights of visitation, which right of visitation shall be, at a minimum, consistent with the schedule provided under the Minimum Visitation Guidelines set forth in Title 30-3-35, Utah Code Annotated. The respondent shall have the right to visit with the children irrespective of the payment of child support. During visitation, there shall be no phone calls to the children unless there is an emergency. Visitation should be specifically scheduled on a monthly basis one month in advance and if respondent is scheduled to have the children for a visitation, he must give the petitioner at least 24 hours' notice of his intent not to exercise the scheduled visitation.

Respondent should have such other extended visitation as agreeable to the parties mutually.

8. The Court finds that respondent's obligation to petitioner for child support, taking into consideration the amount of alimony awarded, shall be the sum of $2,000 a month and this award of child support shall commence with the month of December, 1998. So long as respondent is current on his obligation for child support, he can claim one of the children as a deduction for income tax purposes, which right to declare one of the children

as a deduction for income tax purposes shall not arise until he has used his net loss carry forward as reflected on his income tax returns.

9. As a further obligation of child support, respondent shall pay health and accident insurance for the benefit of the minor children and shall be responsible for two-thirds of any uninsured medical, dental, orthodontia and counseling expenses for the minor children of the parties.

10. Based upon the financial circumstances of the parties the Court finds that petitioner's reasonable monthly expenses, exclusive of liability for income taxes is the sum of $5,000 a month. Respondent has detailed expenses of $10,500 a month, a substantial portion of which relates to the Bear Hollow home, which is currently listed for sale and which it is anticipated will be sold in the near future.

11. Based upon the current financial circumstances of the parties the Court finds that respondent shall pay to petitioner alimony in the sum of $3,000 a month and petitioner is awarded alimony in this amount commencing with the month of December, 1998. Petitioner's entitlement to alimony, based upon the marriage of the parties from 1980 to 1996, should be for the period of 16 years or until such time as petitioner remarries, cohabits or the death of either party. Alimony under this judgment should commence with the month of December, 1998.

12. The Court further finds that the alimony and child support in the combined amount of $5,000 is an amount which petitioner should receive from respondent retroactive to the date of the first Order entered by Commissioner Dillon in this action. Respondent

shall receive credit for any payments which he has made against this obligation, which payments will be applied pro rata to child support and alimony with 2/5 to be applied to child support and 3/5 to be applied to alimony. The Court finds that from the entry of the Temporary Order through the month of February, 1999, based on this calculation and reflecting credits for payments, there are arrearages which shall be reduced to judgment in the amount of $93,586.00. These arrearages do not give credit to respondent for a claimed payment on the first mortgage on petitioner's home in December, 1996, in the amount of $6,902.25. If respondent can document this payment, then it would constitute a reduction against the above balance.

The Court finds that the arrearages reflected above are for alimony and child support with $37,434.40 as arrearages in child support and $56,151.60 as arrearages in alimony.

13. As to the fees incurred by petitioner while represented by Louise Knauer, the Court awards attorneys' fees to petitioner in the form of a judgment for the services of Louise Knauer in the amount of $10,951.

14. As to the fees incurred by petitioner while represented by B. L. Dart and Mark A. Larsen, the Court awards petitioner a judgment for the amount of $25,000 attorneys' fees.

15. The award of attorneys' fees shall be reduced to judgment with the judgment for the past-due support.

16. Petitioner is further awarded her costs incurred in this action in the sum of $2,890.76 as reflected on Exhibit Nos. 15 & 16.

17. The judgments entered in this action for arrearages of child support and alimony and for attorneys' fees should be filed in the State of Alaska to attach respondent's interest in the Kodiak property and in Summit County, Utah, to attach respondent's interest in the Bear Hollow property.

Dated this 20th day of July, 1999.

BY THE COURT:

Rodney S. Page

Rodney S. Page, District Court Judge

APPROVED AS TO FORM:

Ellen Maycock

ELLEN MAYCOCK
Attorney for Respondent

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MAILING CERTIFICATE

I hereby certify that on the 1 day of July, 1999, I mailed a copy of the foregoing to:

Ellen Maycock
Attorney for Respondent
50 West Broadway, Suite 800
Salt Lake City, UT 84101

David Benard, Esq.
523 Heritage Blvd., #1
Layton, UT 84041

Shannon K. Minkel

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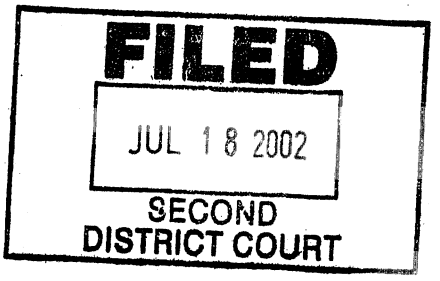
Tab B

COPY



James C. Haskins (#1406)
HASKINS & ASSOCIATES, P.C.
Attorneys for the Plaintiff
357 South 200 East, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 539-0234
Facsimile: (801) 539-5210

IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR DAVIS COUNTY (DIVISION I)
STATE OF UTAH

SONIA KELLEY, Petitioner, vs. WAYNE KELLEY, Respondent.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND FROM THE COURT OF APPEALS** Civil No. 944700827 Judge Rodney S. Page

This case is before the Court on remand from the Court of Appeals, *Kelley v. Kelley*, 9 P.3d 171 (Utah Ct. App. 2000), wherein the Court of Appeals affirmed this Court's decision is certain respects and reversed on others. On remand, the only remaining issues are (1) the proper allocation of the properties acquired by the parties during the term of their common law marriage; and (2) whether "extenuating circumstances" justify an award of alimony to the Petitioner for a period of time longer than the five year term of the common law marriage. These issues were tried before the Court on August 16, 2001, with James C. Haskins, of Haskins & Associates, P.C.,

representing the Plaintiff Sonia Kelley and Martin W. Custen representing the Respondent, Wayne Kelley. The Court, having considered the evidence submitted at the trial of this case as well as the evidence submitted at trial on remand, together with the post-trial memoranda of the parties, and having entered its Memorandum Decision on April 10, 2002, being fully advised in the premises, pursuant to Utah R. Civ. P. 52 now enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The parties were initially married on May 24, 1980, and two children were born as issue of that marriage. The parties were divorced for the first time pursuant to a stipulated decree of divorce entered on July 18, 1994.

2. The original decree of divorce awarded to the petitioner the home of the parties, subject to the indebtedness thereon; the furniture and fixtures; and two vehicles in her possession. The respondent was awarded any other interest the parties had in real estate, including the Alaska property, subject to the indebtedness thereon. The respondent was also awarded the vehicle in his possession, certain furniture and fixtures, and his stock in DSI International, Inc. ("DSI") together with any interest the parties had in that company.

3. The original decree awarded the petitioner $1,000.00 per month child support, and $1,000.00 per month alimony. The alimony was to be terminated in three years, upon remarriage of the petitioner, or by operation of law, whichever occurred first.

4. Following the original decree of divorce, the parties immediately entered into a common law marital relationship. They continued to act just as they had before the decree was entered. The children were not told of the divorce. The parties filed joint income tax returns in 1994, and continued to hold themselves out as a married couple. The respondent continued to provide the petitioner with approximately $7,500.00 per month to meet family expenses, just as he had done prior to the decree being entered. None of the titles to the property awarded in the decree were ever changed until the parties began having difficulty in 1996.

5. During the course of the common law marriage, the petitioner acquired no additional property. The real property awarded to the petitioner in the original divorce decree was thereafter her separate property. However, during the period of the common law marriage, petitioner's home appreciated in value, and the principal due on the home was reduced by payments on the mortgage made from monies of the marital estate. During the trial on remand, however, the parties stipulated that the respondent would waive any claim to that increase in equity in exchange for the petitioner's paying

the attorney fees owing to Ms. Louise Knauer that the respondent was previously ordered to pay, and the Court approved that stipulation.

6. While the evidence at the original trial suggested that the DSI stock had some value, it was impossible to ascertain that value because of DSI's substantial debt structure, and with DSI's purchase of the Mathews Company, its liabilities far exceeded its receivables. The settling of the F & D lawsuit, which provided some $1.3 million in settlement to DSI, did not substantially change that, inasmuch as DSI invested that money in a new venture to develop high-end residential property. Thus, significant debt over and above the settlement amount still existed. The only real value that DSI has is its good will value, which value is best reflected in the fact that the Elga Company was willing to loan $25,000 to the respondent using the respondent's remaining stock in DSI as collateral, to enable the respondent to gain release of his passport from the Office of Recovery Services, State of Utah. When the respondent defaulted on the loan, the stock was defaulted to Elga. The Court finds that the value of DSI's good will at the time of the original decree of divorce in 1994 was $25,000.00, which is essentially the same value that the good will would have had in 1998, when the stock was defaulted.

7. In July, 1996, the respondent purchased, in his own name, certain property in Park City, Utah, known as the Bear Hollow property. The property was titled in respondent's name alone. The respondent obtained a loan of $250,000.00 in his name on the Bear Hollow property from Olympus Holdings, Ltd., in 1997. He used the

$250,000.00 to begin construction on the Bear Hollow property and to pay various other personal expenses.

8. Olympus Holdings, Ltd. ("Olympus"), was a Washington corporation created for the purpose of facilitating a loan to the respondent. The money for the loan came from a Mr. Charles Walch and certain unnamed investors in Switzerland. It was a high-interest loan carrying approximately 18 percent interest. The respondent, along with Mr. Fred Frink, facilitated the organization of Olympus, and both acted as officers and directors. Elaine Gerber, a friend of the respondent, also served as an agent for Olympus.

9. Subsequently, the respondent obtained a construction mortgage on the Bear Hollow property from On Line Lending in the amount of $500,000.00 in his own name. The Olympus loan was subordinated to the On Line loan, so that the On Line loan took first position on the Bear Hollow property.

10. After this time, DSI also invested large sums in the development of the Bear Hollow property. DSI filed a lien against the Bear Hollow property and subsequently brought an action against the parties herein, Olympus, and others, seeking to determine the priority of the numerous claims on the property, *DSI International, Ind. v. Wayne Kelley, et al., Civil No. 980700264 (3rd Dist. Ct. Utah, Summit County)*, and that case remains pending.

11. In the Spring, 1999, the Bear Hollow property was sold. From the proceeds of sale, the loan to On Line Lending was paid off, and also a check was issued to Olympus to pay off its mortgage on the property. That check was issued to Elaine Gerber, a friend of the respondent, in the amount of $361,146.00 in April, 1999, and sent to her address in Texas, where she was residing with the respondent. She, in turn, endorsed the check over to Walch Investments, the company of Mr. Charles Walch, who provided some of the money for the initial loan from Olympus on the Bear Hollow property.

12. No portion of the $361,146.00, referred to in paragraph 11, above, was property of the respondent, and thus no portion of that amount was a marital asset.

13. Certain funds from the proceeds of sale of the Bear Hollow property remain in escrow and are held by the Court in that proceeding pending a determination of the interests of DSI and the other parties to that litigation in the Bear Hollow property.

14. Whatever interest the petitioner or the respondent may have in the proceeds from the sale of the Bear Hollow property is a marital asset of the parties herein.

15. During the course of the common law marriage, respondent purchased certain furniture and fixtures for the Bear Hollow property from marital assets.

16. The furniture purchased by the respondent during the course of the common law marriage consisted of the following:

Item	***Purchase Price***	***Disposition***
Girls canopy bed	$ 900.00	1995 Maple Ridge, Bountiful, UT
Girls matching chest	$ 800.00	1995 Maple Ridge, Bountiful, UT
Girls matching night stand	$ 350.00	1995 Maple Ridge, Bountiful, UT
Girls matching desk & vanity	$ 600.00	1995 Maple Ridge, Bountiful, UT
Twin bed	$ 200.00	1995 Maple Ridge, Bountiful, UT
Twin bed	$ 200.00	Lost in move
Twin bed	$ 200.00	Respondent retained
Twin bed	$ 200.00	Respondent retained
Twin bed	$ 200.00	Respondent retained
King bed	$1,000.00	Respondent retained
King bed	$1,000.00	Respondent retained
Sofa	$3,500.00	Respondent retained
Sofa	$1,200.00	Respondent retained
Love Seat	$1,000.00	Respondent retained
Easy Chair	$ 750.00	Respondent retained
Easy Chair	$ 750.00	Respondent retained
Antique Table	$5,000.00	Sold with 2325 Bear Hollow
Dining Table	$7,500.00	Sold with 2325 Bear Hollow
Chest of Drawers	$1,000.00	Respondent retained
Chest of Drawers	$1,000.00	Respondent retained
Chest of Drawers	$1,000.00	Respondent retained
Chest of Drawers	$1,000.00	Respondent retained
Chest of Drawers	$1,000.00	Respondent retained
Chest of Drawers	$1,000.00	Damaged beyond repair

17. In September, 1995, as a result of his work on the F & D lawsuit for DSI, the Board of Directors of DSI gave the respondent a bonus in the range of $120,000.00. The respondent elected to take the bonus in the form of a new Mercedes-Benz 600 SL. The respondent ordered the vehicle for delivery in Europe.

18. In September, 1996, the respondent went to Germany to pick up the vehicle, which was paid for by DSI. The purchase order was made out in respondent's

name alone. He brought the car back to the United States and drove it for a period of time. In the Summer, 1998, the respondent sold the vehicle to Mr. Fred Frink, a business associate, for $95,000.00. The vehicle was titled in the respondent's name in Alaska at the time of the sale to Mr. Frink. The respondent signed a bill of sale in his own name on the vehicle to Mr. Frink. Mr. Frink paid the respondent $50,000.00 in cash, and signed a promissory note dated June 1, 1998, in favor of the respondent personally, for $45,000.00. At no time did any paperwork in conjunction with the vehicle ever indicate that it belonged to anyone other than the respondent.

19. The testimony of the respondent with respect to the Mercedes-Benz 600 SL was not credible. The value of the vehicle, representing a bonus paid to the respondent during the course of the common law marriage, was $95,000.00.

20. In 1996, Ms. Teresa Turner purchased an E-Class Mercedes-Benz automobile. The Respondent arranged for the purchase of the vehicle and provided a certified check to the dealer for the purchase price of approximately $30,000.00. Of that amount, $20,000.00 was provided by Ms. Turner as part of an inheritance she received from her aunt. The balance of $10,000.00 was provided by the respondent, but was a repayment by the respondent of a loan made to him in the amount of $10,000.00 by Ms. Turner at the time she sold her prior vehicle.

21. In 1998, the respondent arranged for the purchase of a 1998 Oldsmobile for Ms. Elaine Gerber, to be picked up in Illinois in her name and with her money.

22. In 1998, the respondent purchased an engagement ring for Ms. Gerber for approximately $24,000.00. He paid twenty percent down and agreed to pay the balance in one year, with interest. The balance owing on the ring after payment of the down payment approximated the value of the ring.

23. Any interest which the respondent owns in Omega Oil is speculative, at best.

24. The parties herein had been married for a total of fourteen years when the original decree of divorce was entered in July, 1994. As part of the original decree, the parties stipulated to child support in the amount of $1,000.00 per month, and alimony of $1,000.00 per month. The alimony was to terminate in three years, upon the petitioners' death or remarriage, or by operation of law, whichever first occurred. At the time of the original decree, the petitioner had not worked outside the home since the time of her marriage in 1980. She had no income. Her expenses during the course of the common law marriage far exceeded the $2,000.00 per month provided in the decree. Her house payment alone, without considering any other expenses, was $2,400.00 per month. The respondent had been providing her approximately $7,500.00 per month to meet family expenses.

25. The provisions of the 1994 decree were clearly inadequate as evidenced by the parties continued actions. They continued to reside together in a common law relationship just as though no decree had ever been entered. The respondent continued to provide support to petitioner and the children in the amount in excess of $7,000.00 per month, just as he had before. The petitioner and the children continued in the lifestyle to which they had become accustomed. It was not until after the parties began having difficulty in 1996 that things changed.

26. Subsequently, the Commissioner established temporary support and alimony of $6,000.00 per month. At trial, based upon the petitioner's gross income of $1,486.00 per month, and respondent's historical income of $10,000.00 per month, and in light of the expenses of the parties, the Court set child support at $2,000.00 per month and alimony at $3,000.00 per month.

27. The parties have been married continually, in either a solemnized marriage or a common law marriage, from 1980 through July of 1999, more than eighteen years.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of this case pursuant to Utah Code Ann. §30-3-16.1 (1969).

2. Any allocation of the parties property acquired during the term of the common law marriage requires a systematic approach wherein the Court categorizes

that property as part of the marital estate or as separate property belonging to one or the other of the parties. *Burt v. Burt*, 799 P.2d 1166 (Utah Ct. App. 1990).

3. Each party is presumed to be entitled to his or her own separate property and fifty percent of the marital property, absent exceptional circumstances justifying a different result. *Burt v. Burt,* 799 P.2d 1166, 1172 (Utah Ct. App. 1990).

4. The DSI stock was the separate property of the respondent and, in any event, the value of that stock did not increase during the term of the common law marriage. There are no exceptional circumstances justifying any departure from the presumption that the value of the DSI stock, as the respondent's separate property, should be awarded to the respondent.

5. The property known as the Bear Hollow property was purchased by the respondent during the term of the common law marriage and, to whatever extent either party herein owned any interest in the Bear Hollow property (which is presently in dispute in the Summit County litigation), the proceeds of sale are a marital asset. There are no exceptional circumstances justifying any departure from the presumption that the proceeds of the sale of the Bear Hollow property, to whatever extent either party owned an interest therein, as a marital asset, should be awarded equally to the parties herein.

6. No portion of the funds used by Elaine Gerber to pay off the Olympus loan was the property of the respondent, and those funds were neither a marital asset nor his own separate property, but belonged to a third party.

7. The antique table and dining room table identified in Finding of Fact No. 16 above, were fixtures sold with the Bear Hollow property, and the value of those assets is reflected in the sales price of that property. Thus, the parties' interest in those assets will be determined by the outcome of the litigation presently pending in Summit County, Utah. Whatever interest, if any, the parties may have in the proceeds of the sale of the Bear Hollow property should be awarded equally to the parties as set forth in Conclusion o f Law No. 4, above.

8. The other items identified in Finding of Fact No. 16 above, with the exception of the first four items listed, are marital assets which normally would be distributed equally between the parties. However, exceptional circumstances justify an award of these items to the respondent, in light of his obligation to pay the marital debts incurred during the course of the common law marriage. As to the first four items listed, these were gifts to the respondent's daughter, and those items belong to her and are neither marital assets nor the separate assets of either of the parties herein.

9. As to the Mercedes-Benz 600 SL, the value of that vehicle was a bonus paid to the respondent during the course of the common law marriage, and thus the value of that vehicle is a marital asset. No exceptional circumstances justify any departure from the presumption that, as a marital asset, the value of that asset should be divided equally between the parties.

10. As to the E-Class Mercedes Benz purchased by Teresa Turner, while $10,000.00 of the purchase price was provided by the respondent, those funds represent the repayment of a loan to Ms. Turner which is not a marital asset, but represent the respondent's separate property. No exceptional circumstances justify any departure from the presumption that, as his separate property, those funds should be awarded to the respondent.

11. As to the engagement ring purchased by the respondent for Ms. Elaine Gerber, the Court finds that the balance due on the ring, with interest, would approximate the value of the ring, and thus the ring has no value as a marital asset.

12. As to the respondent's interest in Omega Oil, the Court finds that any such interest is speculative, at best, but is in any event the separate property of the respondent. No exceptional circumstances justify any departure from the presumption that, as his separate property, his interest in Omega Oil, whatever it may be, should be awarded to the respondent.

13. Based upon (1) the long duration of the parties' marriage; (2) the standard of living to which the petitioner and the parties' children have become accustomed (which was encouraged by the respondent); (3) the needs of the petitioner and her inability to make more than $1,486.00 per month; and (4) the respondent's ability to make substantially more than the petitioner, the Court finds these extenuating

circumstances to justify the Court in extending alimony beyond the term of the common law marriage. *See* Utah Code Ann. § 30-3-5(7)(h) (Supp. 1999).

DATED this 16th day of July, 2002.

BY THE COURT:

Rodney S. Page

RODNEY S. PAGE
Second Judicial District Court Judge

APPROVED AS TO FORM:

Martin W. Custen

Martin W. Custen
Attorney for Respondent

1546