

2002

Sonia Kelley v. Wayne Kelley : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Kelley v. Kelley*, No. 20020657 (Utah Court of Appeals, 2002).
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APPLICABLE STATUTES

Utah Code Ann. § 30-3-5.

Disposition of property--Maintenance and health care of parties and children--Division of debts--Court to have continuing jurisdiction--Custody and parent-time--Determination of alimony--Nonmeritorious petition for modification.

...

(7)(a) The court shall consider at least the following factors in determining alimony:

(i) the financial condition and needs of the recipient spouse;

(ii) the recipient's earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support;

(iv) the length of the marriage;

(v) whether the recipient spouse has custody of minor children requiring support;

(vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and

(vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (7)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived

or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

(f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(g)(i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this Subsection (7).

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

(h) Alimony may not be ordered for a duration longer than the number of

years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

...

STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-28-3(2)(h) (1999).

STATEMENT OF ISSUES; STANDARD OF REVIEW

I.

Whether the District Court abused its discretion in determining that the long duration of the parties' solemnized and unsolemnized marriages was one factor to consider in awarding the Petitioner alimony pursuant to Utah Code Ann. § 30-3-5 for a period of time greater than the five-year period of the parties' unsolemnized marriage.

Standard of Review: The District Court's application of a statute to its findings of fact is reviewed for an abuse of discretion. *Clark v. Clark*, 27 P.3d 538 (Utah 2001).

II.

Whether the District Court abused its discretion in determining that extenuating circumstances existed which justified an award of damages for a period of time greater than the five-year period of the parties' unsolemnized marriage.

Standard of Review: The District Court's application of a statute to its findings of fact is reviewed for an abuse of discretion. *Clark v. Clark*, 27 P.3d 538 (Utah 2001).

STATEMENT OF THE CASE

A. Nature of the Case. This is an appeal from the District Court's findings of fact, conclusions of law, and judgment on remand from the Court of Appeals in the case of *Kelley v. Kelley*, 9 P.3d 171 (Utah Ct. App. 2000).

B. Course of the Proceedings and Disposition Below. The Petitioner, following a fourteen-year marriage to the Respondent, was originally divorced from him pursuant to a stipulated decree of divorce entered on July 18, 1994. Following the divorce, however, the relationship between the parties remained unchanged and the District Court below determined, *inter alia*, (1) that the parties entered into a common law marriage commencing immediately following the entry of the original decree of divorce; (2) that the Petitioner was entitled to a Decree of Divorce effective as of July, 1999, from the common law marriage; and that the Petitioner was entitled to the payment of alimony for a period of 16 years, based upon the duration of parties' marriages. The Respondent appealed, and this Court affirmed on the common law marriage issue but reversed and remanded in part, determining that, in the absence of extenuating

circumstances, alimony could not be awarded for a period greater than the five year term of the unsolemnized common law marriage. *Kelley v. Kelley*, 3 P.3d 171, 180 (Utah Ct. App. 2000). On remand, the District Court made additional findings of fact and conclusions of law, determined that there were such extenuating circumstances, and awarded alimony for a period of ten years commencing December, 1998. This appeal followed.

C. Statement of Facts.

1. The parties were initially married on May 24, 1980, and were divorced for the first time pursuant to a stipulated decree of divorce entered on July 18, 1994. (Finding of Fact No. 1, R. at 1834.)

2. 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. (Finding of Fact No. 3, R. at 1835.)

3. Following the original decree of divorce, the parties immediately entered into a common law marital relationship. 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. (Finding of Fact No. 4, R. at 1835.)

4. 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. (Finding of Fact No. 24; R. at 1841.)

5. 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. (Finding of Fact No. 25; R. at 1842.)

6. 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. (Finding of Fact No. 26; R. at 1842.)

7. 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. (Finding of Fact No. 27; R. at 1842.)

8. On remand from the Court of Appeals, the District Court determined that the following facts were extenuating circumstances which justified an award of alimony for a period longer than the term of the parties' common law marriage: (1) the long duration of the parties' marriage; (2) the standard of living to which the petitioner and the parties children had 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. (Conclusions of Law No. 13; R. at 1845.)

SUMMARY OF ARGUMENT

- I. THE RESPONDENT IDENTIFIES THE WRONG STANDARD OF REVIEW ON APPEAL. THE APPLICATION OF A STATUTE BY THE DISTRICT COURT TO ITS FACTUAL FINDINGS IS REVIEWED FOR AN ABUSE OF DISCRETION, NOT FOR “CORRECTNESS.”

The District Court’s determination on remand in this case involves an application of Utah Code Ann. § 30-3-5 (1999) to the Court’s factual findings, and any such application is reviewed for an abuse of discretion, not for correctness.

See, e.g., Clark v. Clark, 27 P.3d 538 (Utah 2001). *Rehn v. Rehn*, 974 P.2d 306 (Utah Ct. App. 1999), and *Endody v. Endrody*, 914 P.2d 306 (Utah Ct. App. 1999), are distinguishable.

- II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONSIDERING THE TOTAL LENGTH OF THE PARTIES’ MARRIAGES AS ONE FACTOR IN AWARDING ALIMONY FOR AN EXTENDED PERIOD.

Utah Code Ann. § 30-3-5(7)(h) contains no limitations concerning what factors the District Court may consider as extenuating circumstances justifying an award of alimony for a period of time longer than the parties’ marriage. Nor is there any Utah case law establishing any such limitations. The District Court

properly considered a number of factors, in addition to the length of the parties' marriage, in finding the existence of such extenuating circumstances.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THE EXISTENCE OF EXTENUATING CIRCUMSTANCES IN THIS CASE.

The Respondent's argument is based solely upon his view of the evidence presented to the Court after the remand of this case to the District Court following the Respondent's first appeal in this case. It fails to take into account the totality of evidence offered by the parties in this protracted litigation, and amounts to an argument that the Court's factual findings are clearly erroneous. Because the Respondent has failed to marshal the evidence in favor of the Court's findings, however, the Respondent cannot prevail on this issue.

ARGUMENT

I. THE RESPONDENT IDENTIFIES THE WRONG STANDARD OF REVIEW ON APPEAL. THE APPLICATION OF A STATUTE BY THE DISTRICT COURT TO ITS FACTUAL FINDINGS IS REVIEWED FOR AN ABUSE OF DISCRETION, NOT FOR "CORRECTNESS."

In *Kelley v. Kelley*, 9 P.3d 171, 179 (Utah Ct. App. 2000) (hereinafter "*Kelley I*") this Court reversed the District Court's determination awarding the

Petitioner Sonia Kelly alimony for a period of sixteen years and “remand[ed] for the entry of further findings addressing whether extenuating circumstances exist as to satisfy section 30-3-5(7)(h),” *quoting Rehn v. Rehn*, 974 P.2d 306 (Utah Ct. App. 1999). The Respondent now challenges the District Court’s application of the cited statute to its additional factual findings and the determination, based upon extenuating circumstances, that alimony would be awarded for a period in excess of the five year duration of the parties’ common law marriage (the District Court ordered that alimony be paid for a period of ten years). The Respondent, citing *Rehn, supra*, and *Endrody v. Endrody*, 914 P.2d 1166, 1169 (Utah Ct. App. 1996), asserts that the adequacy of the District Court’s finding of extenuating circumstances presents a question of law which is reviewed for correctness.

Rehn and *Endrody* are both distinguishable. In *Rehn*, the Court held only that “[w]hether a trial court’s findings of fact in awarding attorney fees are sufficient is a question of law which we review for correctness.” *Rehn*, 974 P.2d at 313. *See also Endrody, supra*, 974 P.2d at 1169. No award of attorney fees is at issue in the present appeal. In *Endrody*, the Court also held that “whether a trial court’s equitable powers over divorce proceedings allow it to invade a valid, inter vivos trust, is [a question] of law reviewed for correctness.” *Endrody*, 914 P.2d at 1168. Again, no such issue is present in this appeal.

In *Clark v. Clark*, 27 P.2d 538 (Utah 2001), the Utah Supreme Court noted that an appeal

involv[ing] a review of the trial court's application of statutory requirements to factual findings . . . is a mixed question of law and fact. *See Platts v. Parents Helping Parents*, 947 P.2d 658, 661 (Utah 1997). We apply the same standard used by the court of appeals: a trial court's findings of fact will not be reversed unless they are clearly erroneous, and the trial court's application of the statute to those findings will not be reversed absent an abuse of discretion.

Id. See also *Searle v. Searle*, 38 P.3d 307, 314 (Utah Ct. App. 2001); *Thomas v. Thomas*, 987 P.2d 603, 606 (Utah Ct. App. 1999).

Consequently, the Respondent has identified the wrong standard of review in this case, and only by meeting the higher abuse of discretion standard may the Respondent prevail on this appeal. Moreover, even if a correction of error standard is applicable, which it is not, the District Court correctly applied Utah Code Ann. § 30-3-5 and its rulings on remand should not be disturbed.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONSIDERING THE TOTAL LENGTH OF THE PARTIES' MARRIAGES AS ONE FACTOR IN AWARDING ALIMONY FOR AN EXTENDED PERIOD.

The Respondent takes the position that the District Court was prohibited as a matter of law from considering the total length of time the parties were married in

considering the duration of the alimony award. As noted by this Court in *Kelley I*, however,

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.

Kelley I at 180. Nothing in *Kelley I* suggests that the total duration of the parties' married relationship cannot be considered *as one factor* in the determination of the extenuating circumstances justifying extended alimony. Rather, the Court in *Kelley I* held only that alimony attributable to the marriage at issue in that case — the unsolemnized or “common law” marriage — could not be awarded for a longer period of time than that marriage in the absence of extenuating circumstances. Clearly, one such justification for extended alimony has to do with the duration of the total relationship. Therefore, once a common law marriage has been established, it is relevant to consider other periods during which the parties were married as one factor to consider in deciding the duration of alimony to be awarded. Indeed, the statutory framework for alimony awards in Utah compels this result. Utah Code Ann. § 30-3-5(7) provides that the Court *shall*, “in determining alimony,” consider “the length of the marriage.” Clearly, an unusual and extenuating circumstance in this case is the fact that, while the parties

technically obtained a divorce on July 18, 1994 (Finding of Fact No. 1, R. at 1834).
their relationship thereafter did not change in any fashion whatsoever (Finding of
Fact No. 4, R. at 1835). *See also* Findings of Fact Nos. 10,¹ 11,² 17,³ 18,⁴ and 20,⁵

¹“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.”

²“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.”

³“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 to their parents’ relationship.”

⁴“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.”

⁵“In May, 1995, respondent sent petitioner an anniversary card in which he indicated he loved her and a wish for another 15 years.”

related to the second Decree of Divorce (Findings of Fact and Conclusions of Law, R. at 1659 — 1664; Appellee’s appendix.) During the period of the common law marriage, and despite the provisions of the first divorce decree, the Respondent provided support to Petitioner and the children in the amount of \$7,000.00 per month, just as he had done before the original Decree of Divorce (Finding of Fact No. 25; R. at 1842) and despite the terms of the original decree pursuant to which he was in fact obligated to pay much less. The complete continuity of the parties’ relationship in all respects during the term of the common law marriage justified the Court in treating the long duration of the relationship as one factor to consider in ordering alimony for an extended period.

There is virtually no case law in Utah addressing the issue of what does or does not constitute an “extenuating circumstance” for purposes of awarding extended alimony pursuant to Utah Code Ann. § 30-3-5(7)(h). The determination whether such circumstances exist must be decided by the trial judge on a case by case basis. Here, the unique facts — involving a continuous married relationship for a period of at least 18 years in either a solemnized or unsolemnized marriage — justify the District Court’s determination to consider that long relationship as one extenuating circumstance in the decision to award extended alimony

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THE EXISTENCE OF EXTENUATING CIRCUMSTANCES IN THIS CASE.

The Respondent challenges the District Court's finding of extenuating circumstances in this case upon the ground that "the trial court's findings do not support its legal conclusion of extenuating circumstances, they only support its legal conclusion of the underlying award of alimony." (Brief of the Appellant, p. 9.) The Respondent's argument ignores the District Court's actual findings in favor of extenuating circumstances, where the Court focused on four extenuating circumstances in awarding extended alimony: "(1) the long duration of the parties' marriage; (2) the standard of living to which the petitioner and the parties children had 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."

(Conclusions of Law No. 13; R. at 1845.) The Respondent erroneously suggests that the Court was limited to whatever new testimony and other evidence it received after remand to address the issue of extenuating circumstances. (Brief of the Appellant, p. 10) This argument is startling; nothing in *Kelley I* required the Court to take *any* additional testimony or evidence in the case. Rather, in determining the existence of extenuating circumstances, the Court of Appeals

clearly left the District Court free to consider the entire record in the case, and not merely the additional evidence offered by the parties at the invitation of the Court. Thus, the District Court was free to rely upon, among other things, its prior findings of fact in determining the existence of “extenuating circumstances.” In *Rehn v. Rehn*, 974 P.2d 306, 311 (Utah Ct. App. 1999), the Court of Appeals reversed an award of extended alimony because the District Court “failed to explicitly use the term ‘extenuating circumstances’ in its findings.” Here, the District Court did identify the precise reasons it relied upon in determining that extenuating circumstances justified an award of extended alimony. Indeed, in its Memorandum Decision setting forth its findings of extenuating circumstances, the Court notes as follows:

The Court next turns to the question of whether there are extenuating circumstances which would justify the Court in awarding alimony to the petitioner for a period longer than the five year length of the common law marriage. In that regard, the Court finds that these parties had been married a total of fourteen years when the Decree of Divorce was entered in July, 1994. As part of that Decree, the parties stipulated to child support in the amount of \$1,000 per month, and alimony of \$1,000 per month. The alimony was to terminate in three years, upon petitioner’s remarriage, or by operation of law, whichever occurred first. At the time of the Decree, petitioner had not worked out of the home since their marriage in 1980. She had no income. Her expenses far exceeded the two thousand 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 per month to meet family expenses.

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. Respondent continued to provide support to petitioner and the children in the amount in excess of \$7,000 per month, just as he had before. The petitioner and the children continued in the lifestyle to which they had been accustomed. It was not until after the parties began having difficulty in 1996 that things changed.

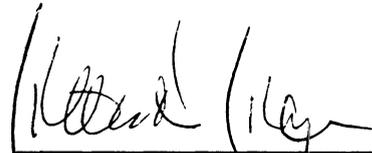
(Memorandum Decision, R. at 1617 — 1618, Appellee's Appendix.) Essentially, the Respondent asserts that all of these findings are without support in the record because there is allegedly no support for them in the record of the proceedings following the remand of the case. In making this argument, the Respondent ignores virtually all of the other evidence in the voluminous trial record to argue, in effect, that the additional findings of fact entered by the Court are clearly erroneous. To prevail on any such argument, it is incumbent upon the Respondent to marshal the evidence supporting the findings he challenges. *Kelley I*, 9 P.3d 171, 178 (Utah Ct. App. 2000). The Respondent has not undertaken this burden, and thus he is unable to show that the Court's findings are clearly erroneous. Further, "to determine if the findings are against the clear weight of the evidence and thus clearly erroneous, we view the facts in the light most favorable to the

findings.” *Kelly I* at 178. Viewing the findings of the trial court in this fashion, it is apparent that the Court’s reliance on four separate extenuating circumstances to award extended alimony in this case was entirely proper.

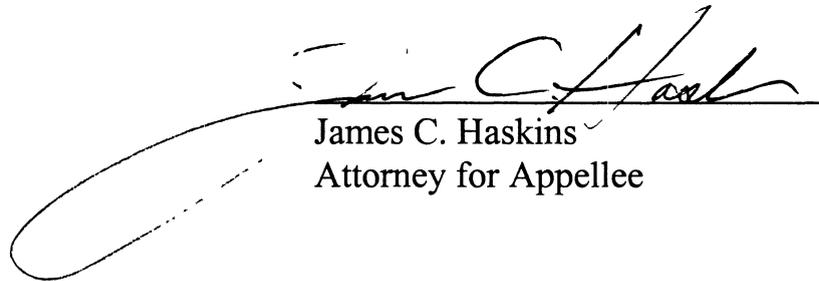
CONCLUSION

For all of the foregoing reasons, the judgment of the District Court addressing the existence of extenuating circumstances in this case should be affirmed.

DATED this 16th day of June, 2003.



Thomas N. Thompson
Attorney for Appellee



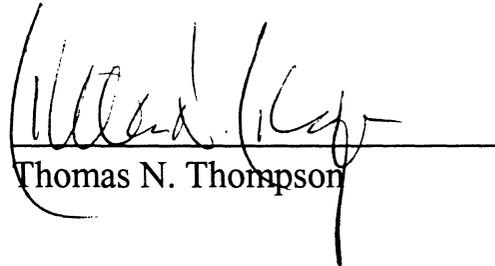
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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of June, 2003, two true and correct copies of the foregoing Brief of Appellee were served by first class mail, postage pre-paid, as follows:

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APPENDIX A

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
IN AND FOR DAVIS COUNTY, STATE OF UTAH

---ooo000ooo---

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

---oooOOOooo---

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

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,

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

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.

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

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 Juicial 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 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.

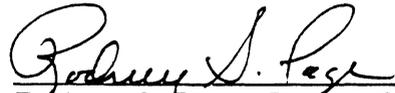
15. The award of attorneys' fees shall be reduced to judgment with the judgment for the past-due support.

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

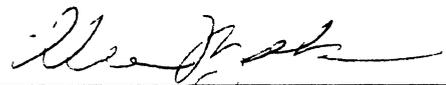
17 The judgments entered in this action for arrearages of child support and alimony and for attorneys' fees should be filed in the State of Alaska to attach respondent's interest in the Kodiak property and in Summit County, Utah, to attach respondent's interest in the Bear Hollow property

Dated this 20th day of July, 1999

BY THE COURT


Rodney S Page, District Court Judge

APPROVED AS TO FORM:


ELLEN MAYCOCK
Attorney for Respondent

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

Shirley K. Minked

APPENDIX B

SECOND DISTRICT COURT

SECOND DISTRICT COURT, STATE OF UTAH

2007 APR 16 P 3:46

COUNTY OF DAVIS, FARMINGTON DEPARTMENT

Sonia Kelley Plaintiff. v. Wayne Kelley Defendant	MEMORANDUM DECISION Case No. 944700827 Judge: Rodney S. Page
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This matter originally came before the Court for trial on December 3rd, 4th and 9th of 1998; after closing arguments on December 9th the Court issued its findings, conclusions and judgment from the bench. Plaintiff's attorney was directed to prepare findings and decree in accordance with the Court's ruling. Because of various objections filed by the parties to the proposed documents, the findings and decree were not signed by the Court or filed until July 20, 1999.

On August 23, 1999, respondent filed his Notice of Appeal. On August 23, 2000, the Court of Appeals made its ruling. The Court of Appeals affirmed the Court's decision in certain respects and reversed on others. The Court of Appeals remanded to the Court the question of property distribution and the duration of alimony for further findings and ruling.

After numerous attempts by the parties to resolve the issues, short of trial, the matter was set for further hearing on those issues on August 16, 2001. Following the trial, counsel elected to submit their closing arguments by way of memorandum.

The Court, having reviewed the evidence from both the first and second trials, and having reviewed the memoranda submitted by counsel, and being fully advised in the premises, hereby rules as follows:

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

The decree awarded to the petitioner, the home of the parties subject to the indebtedness thereon, the furniture and fixtures, and the 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. Respondent was also awarded the vehicle in his possession, certain furniture and fixtures, and his DSI International stock, and any interest the parties had in DSI International.

The decree awarded the petitioner \$1,000 per month child support, and \$1,000 per month alimony. The alimony was to be terminated within three years, upon remarriage of the petitioner, or by operation of law, whichever occurred first.

At the time of the 1994 decree, the petitioner was not working, and had not worked since early in the marriage. Her expenses were far beyond the \$2,000 per month she was awarded in the decree. Her house payment alone was \$2,400 per month.

Following the divorce in 1994, 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

petitioner with approximately \$7,500 per month to meet family expenses, just as he had done prior to the decree being entered. None of the titles to property awarded in the decree were ever changed until the parties began having difficulty in 1996.

The questions now before the Court are: 1) the division of the separate property brought into the marriage, and any additions thereto, and of any property acquired during the common law marriage; and 2) whether there are any extenuating circumstances which would justify the Court in extending the alimony beyond the five year duration of the common law marriage.

As stated in petitioner's memorandum, the case of Burt vs. Burt, 779 P.2d 1166 (UT App. 1990) sets forth the procedure to be followed in regards to the property issues.

The Burt decision requires the Court to categorize the parties' property as being part of the marital estate, or separate property.

If the property is separate property, then presumption is that each of the parties is entitled to his/her own separate property except in exceptional circumstances.

As to marital property, it is presumed that each of the parties is entitled to one-half.

In applying that rationale to the property here before the Court, the Court finds as follows:

During the course of the common law marriage, petitioner acquired no additional property. The property awarded to her in the 1994 decree is separate property. However, the Court finds that during the period of the common law marriage, petitioner's home appreciated in value, and the principle due on the home was reduced by payments on the mortgage made from the monies from the marital estate. The increase in equity which resulted from the appreciation in value and reduction in principle would be a marital asset. However, during the trial in August,

the parties stipulated that respondent would waive any claim to that increased equity in exchange for petitioner's paying the attorney fees owing to Ms. Louise Knauer that the respondent was previously ordered to pay. The Court approved that stipulation.

As to the real property awarded to the respondent in the 1994 decree, there was no evidence to indicate that the Alaska property had appreciated in value.

The Court previously found that the DSI stock had some value at the time of the decree in 1994, but was not able to ascertain that value based upon the evidence presented at the trial. There is no question the DSI International had some value, but because of its substantial debt structure, it was impossible to ascertain that value. The evidence was that with its purchase of the Williams Company, its liabilities far exceeded its receivables. The settling of the F & D law suit, which provided some 1.3 million in settlement to DSI, did not substantially change that. The fact that DSI chose to invest that money in a new venture to develop high-end residential property did not substantially change the picture. Significant debt over and above the settlement amount still existed.

The Court concludes that the only real value that DSI has is reflected in its goodwill value, which may have attached as a result of its having acquired the Williams Company and the reputation attached thereto in the industry.

The Court finds that the goodwill value is best reflected in the fact that the Elgie Company was willing to loan \$25,000 on the stock to the respondent so that he could gain release of his passport from the Office of Recovery Services. The stock was pledged as security for the loan and when the respondent defaulted on the loan, the stock was forfeited to Elgie Corporation.

The Court finds that the goodwill value of \$25,000, which attached to the corporation in 1998, was essentially the same value it would have had at the time of the decree in 1994.

The Court therefore concludes that DSI stocks value remained about the same and therefore, whatever interest the respondent retains in the DSI stock or DSI is not a marital asset.

In July of 1996, respondent purchased certain property in Park City known as the Bear Hollow property. That property was titled in respondent's name alone. Respondent obtained a loan of \$250,000 in his name on the Bear Hollow property from Olympus Investments in 1997. He used the \$250,000 to begin construction on the Bear Hollow property and to pay various other personal expenses.

Olympus Investment was a Washington corporation set up for the purpose of facilitating the loan to the respondent. The money came from a Mr. Charles Walch and certain unnamed investors in Switzerland. It was a high-interest loan carrying about eighteen percent interest. The respondent, along with Mr. Fred Frink, facilitated the organization of the Olympus Investment Corporation, and acted as officers and directors. Elaine Gerber, a friend of the respondent, also served as an agent for Olympus Investment.

Subsequently, the respondent obtained another construction mortgage on the Bear Hollow property from On Line Lending in the amount of \$500,000 in his name. The Olympus Investment loan was subordinated to the On Line loan, so that the On Line loan took first position on the Bear Hollow property.

After this time, DSI International also invested large sums in the development of the Bear Hollow property. DSI filed a lien against the Bear Hollow property and the parties in this matter seeking to regain their invested money, and to determine the priority of the numerous claims on

the property. That case is still pending in Summit County. In the Spring of 1999, the Bear Hollow property was sold. From the proceeds, the loan to On Line Lending was paid off, and also a check was issued to Olympus Investment to pay off their mortgage on the property. That check was issued to Ms. Elaine Gerber, a friend of the respondent, in the amount of \$361,146 in April of 1999, and sent to her at 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 Investment on the Bear Hollow property.

The Court finds the evidence insufficient to prove that the \$361,146, or any part thereof, was actually the property of the respondent, and thus a marital asset.

There are still additional funds being held in escrow by the Court in Summit County pending a determination of interests of DSI and the parties in the Bear Hollow property.

The Court concludes that whatever interest the parties may have in the proceeds of the sell of the Bear Hollow property is a marital asset and each should be awarded one-half of any such sums.

The Court finds that during the course of the common law marriage, respondent purchased certain furniture and fixtures for the Bear Hollow residence from marital assets. The Court would find that the items which were attached to the Bear Hollow residence and sold with it are fixtures, and their value is reflected in the sale price of the Bear Hollow residence.

The other items of furniture listed on Plaintiff's Exhibit 32 are marital assets, with the exception of the items purchased for the girls, which belong to them.

As to the items of furniture listed on the exhibit, the Court regards them as used items with a value generally in the range of one-third their purchase value. The Court would award those items to the respondent in light of his obligation to pay the marital debts incurred during the course of the common law marriage.

In September of 1995, as a result of the work on the F & D law suit for DSI International, the Board of Directors elected to give respondent a bonus in the range of \$120,000. He, at the time, elected to take that bonus in the form of a new Mercedes 600 SL. Respondent ordered the vehicle for delivery in Europe.

In September of 1996, he went to Germany to pick up the vehicle. It was paid for by DSI International. 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 of 1998, respondent sold the vehicle to Mr. Fred Frink, a business associate, for \$95,000. The vehicle was titled in his name in Alaska at the time of the sale to Mr. Frink. Respondent signed a bill of sale in his own name on the vehicle to Mr. Frink; and Mr. Frink paid respondent \$50,000 cash and signed a note to respondent personally for \$45,000 dated June 1, 1998. At no time did any paperwork in conjunction with the vehicle ever indicate that it belonged to anyone other than the respondent.

The Court finds that the testimony of the respondent in regards to the vehicle is less than credible. The Court finds that the value of the vehicle was a bonus paid to respondent during the course of the marriage and that petitioner is entitled to one-half of its value, or \$47,500.

In 1996, Ms. Teresa Turner purchased an E class Mercedes. Respondent arranged for the purchase of the vehicle and provided a certified check to the dealer for the purchase price in the approximate amount of \$30,000. The Court finds that \$20,000 of that amount was provided by

Ms. Turner as part of an inheritance she received from her aunt. The balance of \$10,000 was provided by the respondent, but was repayment for a loan made to respondent in the amount of \$10,000 by Ms. Turner when she sold her prior vehicle.

The Court concludes that neither the vehicle nor the \$10,000 supplied by respondent are part of the marital estate, and that petitioner has no interest therein.

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. The Court finds that the vehicle was the property of Elaine Gerber and the respondent had no interest therein.

Lastly, the Court turns to the purchase of an engagement ring by the respondent for Ms. Gerber in the Summer of 1998. The respondent paid approximately \$24,000 for the ring. He paid twenty percent down and agreed to pay the balance in one year together with interest.

The Court concludes that the balance owing on the ring with interest would approximate the value of the ring. It has no value as a marital asset.

The Court further concludes that any interest which the respondent has in Omega Oil is speculative, at best, and that stock or interest is awarded to him free and clear of any claim of the petitioner.

The Court next turns to the question of whether there are extenuating circumstances which would justify the Court in awarding alimony to the petitioner for a period longer than the five year length of the common law marriage. In that regard, the Court finds that these parties had been married a total of fourteen years when the Decree of Divorce was entered in July, 1994. As part of that decree, the parties stipulated to child support in the amount of \$1,000 per month, and alimony of \$1,000 per month. The alimony was to terminate in three years, upon petitioner's

remarriage, or by operation of law, whichever occurred first. At the time of the decree, petitioner had not worked out of the home since their marriage in 1980. She had no income. Her expenses far exceeded the two thousand per month provided in the decree. Her house payment alone, without considering any other expenses, was \$2,400 per month. The respondent had been providing her approximately \$7,500 per month to meet family expenses.

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. Respondent continued to provide support to petitioner and the children in the amount in excess of \$7,000 per month, just as he had before. The petitioner and the children continued in the lifestyle to which they had been accustomed. It was not until after the parties began having difficulty in 1996 that things changed.

Subsequently the Commissioner established temporary support and alimony of \$6,000 per month. At trial, based upon the petitioner's gross income of \$1,486 per month, and respondent's historical income of \$10,000 per month, and in light of the expenses of the parties, the Court set child support at \$2,000 and alimony at \$3,000 per month.

The Court would find that the parties have been married continually, in either a regular or common law marriage, from 1980 through July of 1999, some eighteen-plus years.

The Court concludes that, based upon the long duration of the marriage, the standard of living to which the petitioner and the children have become accustomed and were encouraged in by the respondent, the needs of the petitioner and her inability to make more than \$1,486 per month, and the respondent's ability to make substantially more, (and all these being

extraordinary circumstances). justify the Court in extending alimony beyond the term of the common law marriage.

From the foregoing findings and conclusions, the Court enters judgment as follows:

The Court hereby orders that the Decree of Divorce heretofore entered by the Court be amended to award to the parties equally whatever interest the parties may have in the Bear Hollow law suit presently pending in the Summit County Court.

That the petitioner be awarded judgment against the respondent in the sum of \$47,5000 as her share of the Mercedes 600 SL.

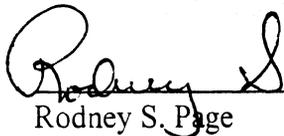
That the respondent pay alimony to the petitioner at the rate of \$3,000 per month from December, 1998 for a period of ten years, or until remarriage of the petitioner, whichever occurs first.

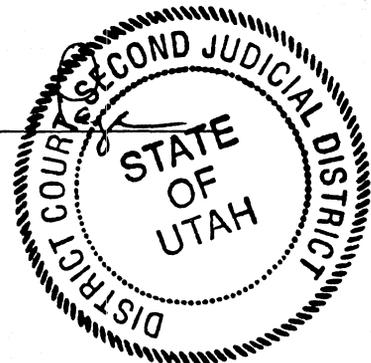
Each of the parties are to pay their own attorney fees and hold the other harmless thereon.

Petitioner's counsel is to prepare findings and judgment in accordance with the Court's ruling, and submit the same to opposing counsel at least five days before it is submitted to the Court for signature.

Dated this 10th day of April, AD 2002

BY THE COURT:


Rodney S. Page
District Court Judge



CERTIFICATE OF MAILING

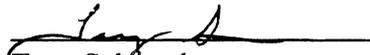
I hereby certify that I mailed a true and correct copy of the foregoing ruling to:

James C. Haskins
357 South 200 East, Suite 300
Salt Lake City, UT 84111

and

Mr. Martin W. Custen
1004 24th Street
Ogden, UT 84401

postage prepaid this 10th day of April, AD 2002.

By 
Tracy Schroeder,
Deputy Court Clerk