

1996

Arbra Johnson, Plaintiff and Appellee, vs. Merrill D. Johnson, Defendant and Appellant : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 96057-CA

IN THE UTAH COURT OF APPEALS

ARBRA JOHNSON, :
 :
 Plaintiff and :
 Appellee. :
 vs. :
 MERRILL D. JOHNSON, :
 :
 Defendant and : Case No. 96057-CA
 Appellant. :

APPELLANT'S REPLY BRIEF

APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT
COURT OF SALT LAKE COUNTY, THE HONORABLE SANDRA PEULER
FAILING TO REDUCE OR TERMINATE ALIMONY, FAILING TO FIND A
CHANGE OF CIRCUMSTANCES, AWARDED ALIMONY WITHOUT LOOKING
AT THE COMPLETE FINANCIAL CONDITION OF THE PLAINTIFF, AWARDED
IMPROPERLY, ATTORNEY'S FEES, AND FAILING TO FIND A CONTRACT
TO TERMINATE ALIMONY.

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Marilyn M. Branch
Clerk of the Court

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AGRUMENT

POINT I

MARSHALLING THE EVIDENCE IS NOT AN ISSUE IN THIS APPEAL
BECAUSE THE DEFENDANT IS NOT CHALLENGING THE
FINDINGS OF FACT

A failure to marshal facts can only occur in an appeal that challenges the court's Findings of Fact. See, for example, Ashton v. Ashton, 733 P.2d 147 (Utah 1987) and many other similar cases.

The Defendant challenges only the court's discretionary rulings. Consequently, the standard of review is "abuse of discretion" and not "clearly erroneous" as is incorrectly claimed on page 2 of the Brief of Appellee. See generally JACKSON, Utah Standards of Appellate Review, UTAH BAR JOURNAL, Vol. 7, No. 8, at 24-26, (1994) and the many cases cited therein. Consequently, failure to marshal evidence is not an issue in this appeal.

POINT II

IN DETERMINING THE RECEIVING SPOUSE'S STANDARD OF LIVING,
BOTH "NEEDS" AND "FINANCIAL CONDITION" MUST BE CONSIDERED

Standard of Living

In the Statement of Facts of the Brief of Appellee, the Plaintiff tries to paint a misleading picture of the Defendant's standard of living. The Defendant does "own" a motor home;

however, he owes more than it is worth. (Transcript pages 72 and 73.) The Defendant does not live in a condominium; he rents part of a duplex. (Transcript page 79.) The Defendant does take trips as stated; however, they are in his motor home and, in addition, for his 50th birthday he did take a trip to Hawaii. (Transcript page 81.)

This is not the standard of living of a wealthy person. His standard appears to be that of an average working person. The Plaintiff claimed to seek a similar standard of living at the hearing.

The courts have repeatedly affirmed that a function of alimony is to provide support for the receiving spouse as nearly as possible to the standard of living enjoyed during the parties' marriage. See Breinholt v. Breinholt, 905 P.2d 877, 879 (Utah App. 1995), and the cases cited therein. This is also now statutorily mandated. Section 30-3-5(7), Utah Code Annotated, as amended.

There are two elements of standard of living, i.e., "needs" and "financial condition". They both should be considered in setting alimony. The Plaintiff in the Brief of Appellee wants the court to only look at "needs".

Needs

In the Plaintiff's Financial Declaration (attached to

the Brief of Appellant), the Plaintiff included, among other expenses, the following expenses:

- a. Maintenance (residence) \$207.14;
- b. Clothing 186.00;
- c. Incidentals 170.66;
- d. Auto expense 167.71; and
- e. Auto payments 242.96,

all of which appear to be typical expenses of an average working person.

The Plaintiff at the hearing asked the court to help her with these expenses necessary for her to maintain her prior standard of living. All of those expenses or "needs" were accounted for and accepted when Judge Peuler used the Plaintiff's own Financial Declaration to determine the Plaintiff's needs. (Findings of Fact and Conclusions of Law, August 5, 1996, paragraph 7.)

The needs element of standard of living was met exactly as the Plaintiff requested. However, there are two elements of standard of living and the second element, "financial condition", was not considered by Judge Peuler.

Financial Condition

The trial court should have gone further and considered the receiving spouse's financial condition. Breinholt, at 879.

Instead, the trial court abused its discretion and found that it would be speculative to consider the Plaintiff's \$70,600.00 of equity in her house. (Findings of Fact and Conclusions of Law, August 5, 1996, paragraph 16.) A closer look at the testimony at the hearing demonstrates the court's abuse of its discretionary powers.

The testimony of the Plaintiff at the hearing was that she had just gotten a loan to finance her car. She stated further, that although she had considered a loan to refinance her house, she had not yet looked into it. (Transcript page 59.) Further questioning drew out that the Plaintiff did not then know how she would pay for a loan. (Transcript page 60.) However, the questions did not change her statement that she had "not yet" looked into a refinance of \$70,600.00 of equity.

In the Brief of Appellee, the Plaintiff argues against considering financial condition. The Plaintiff argues that net equity is meaningless unless the home is sold. The Plaintiff goes on to create a straw man argument wherein it is claimed that the Defendant did not present evidence of how the Plaintiff could obtain a "second mortgage" and etc. The questions at the hearing did not address a "second mortgage", which is the adding of additional debt. The questions at the hearing addressed "refinancing", which is the use of the equity and cancellation of

the original debt. A "second mortgage" was not at issue.

The questions at the hearing dealt with whether the Plaintiff had done anything to use her \$70,600.00 of equity to improve her position. This equity is a critical element of her financial condition. She should not be allowed to accumulate wealth, i.e., equity in her house, and at the same time assert that she "needs" more money from the Defendant in order to improve her standard of living.

The court abused its discretion by shutting its eyes to the \$70,600.00 of equity in the Plaintiff's house and by refusing to consider the Plaintiff's \$80,000.00 net worth. The Plaintiff is in excellent financial condition. That conclusion is not speculative. It is obvious. The court refused to consider an essential element of standard of living, i.e., the Plaintiff's excellent "financial condition."

The Plaintiff's argument that the Defendant failed to present evidence of the effects of refinancing leaves the Defendant in a "catch 22" situation. Had the Defendant brought in an expert witness to testify regarding how the house might be refinanced, then the Plaintiff would have objected and claimed that the expert's testimony was nothing but speculation. Consequently, the Defendant only asked, "Have you ever looked into getting a loan to refinance your house, ..." The

Plaintiff's reply was, "Not yet." (Transcript page 59.) For the Defendant to do more would have been cause for Plaintiff's objections.

\$300.00 Bonus

The Brief of Appellee skirts around the \$300.00 per month that the court awarded the Plaintiff in excess of her claimed needs. The Plaintiff's brief went to great pains to itemize all of the help the Plaintiff has asked for from various sources. The Brief of Appellee ignores the fact that all of these things were eliminated by the "needs" listed and accepted in her Financial Declaration.

The court found specifically that the Plaintiff's ability to produce income when added to her child support left her \$250.00 per month short of her expense needs. (Findings of Fact and Conclusions of Law, August 5, 1996, paragraphs 4, 5, 6, and 7.) The court then abused its discretion by awarding the \$250.00 "needs" shortfall, plus a \$300.00 per month bonus.

The court then went on and refused to look at the Plaintiff's "financial condition", which was excellent. When her available equity and net worth are considered, then her standard of living exceeded that of the Defendant. However, the court should not have even awarded the \$250.00 per month. For example,

the Plaintiff's claimed house maintenance expense was \$207.14. That expense and others should have been met by the Plaintiff's available equity and net worth. They are a part of her overall financial condition. For the court to not so decide was a further abuse of discretion.

(NOTE: This failure to consider "financial condition" also affects the trial court's attorney's fee decision as discussed in the Brief of Appellant.)

POINT III

THERE WAS AN ACCORD AND SATISFACTION SUPPORTED BY CONSIDERATION AND CONFIRMED BY THE PARTIES' ACTIONS

In the Brief of Appellee, the Plaintiff states, "there is a total lack of any type of consideration." This statement is not supported by the facts elicited at the hearing and identified in the Brief of Appellant. The Defendant's consideration was to continue health care coverage, to forgo an immediate petition to the court, and to continue to pay alimony. There is no lack of consideration for this Accord and Satisfaction.

Likewise, the Brief of Appellee ignores the law that a meeting of the minds may be proved by actions and conduct. Thornton v. Pasch, 139 P.2d 1002, 1003 (Utah 1943). This is

misguided. The standard of review in determining if a contract exists is correction of error, no particular deference being given to the trial court's ruling. Herm Hughes & Sons, Inc., v. Quintek, Inc., 834 P.2d 582 (Utah App. 1992).

The Plaintiff may have produced a self-serving set of notes from a call to the Defendant on March 18, 1995. However, that flies in the face of what the parties had done since October, 1994. The Defendant did as agreed and the Plaintiff accepted the benefits of the agreement. The appellate court should look at the parties' actions and conclude a contract was created, as a matter of law.

CONCLUSION

The correct standard of review is "abuse of discretion" in alimony cases and not "clearly erroneous". The Defendant is not challenging the court's Findings of Fact, only its Conclusions.

In order to examine standard of living, the court had to look at both "needs" and "financial condition" of the receiving spouse. The court failed to do this. Instead, the court awarded the Plaintiff's claimed needs, added on a \$300.00 per month bonus and refused to reduce alimony even though the Plaintiff's financial condition was excellent. This excellent

financial condition also requires the court to not award the Plaintiff any attorney's fee.

Finally, actions speak louder than words and the court should have found an accord and satisfaction based upon the parties' actions. Alimony would have then terminated in April, 1995.

DATED this 16th day of January, 1997.



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CERTIFICATE OF MAILING

I hereby certify that a full, true and correct copy of the above and foregoing APPELLANT'S REPLY BRIEF was placed in the United States mail at Richfield, Utah, with first-class postage thereon fully prepaid, on the 18th day of November, 1996, addressed as follows:

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