

1986

Guido C. Porco v. Vincenza Mangio Porco : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

John Spencer Snow; Snow & Halliday; Attorney for Respondent.

Joseph H. Gallegos; Michael R. Sciumbato; Gallegos & Sciumbato; Attorneys for Appellant.

Recommended Citation

Brief of Respondent, *Porco v. Porco*, No. 860150 (Utah Court of Appeals, 1986).

https://digitalcommons.law.byu.edu/byu_ca1/53

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT OF THE STATE OF UTAH

GUIDO C. PORCO,)	
)	
Plaintiff-)	
Appellant,)	Case No. 20854 860150-CA
)	
vs.)	BRIEF OF RESPONDENT
)	
VINCENZA MANGIO PORCO,)	
)	
Defendant-)	
Respondent.)	

APPEAL FROM A JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
UTAH COURT OF APPEALS Judge John A. Rokich, Judge Presiding
BRIEF

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO. 860150-CA

JOHN SPENCER SNOW
261 East 300 South
Salt Lake City, UT 84111
Telephone: (801) 364-4940
Attorneys for Defendant-
Respondent

JOSEPH H. GALLEGOS
MICHAEL R. SCIUMBATO
GALLEGOS & SCIUMBATO
333 South Denver Street
Salt Lake City, UT 84111
Telephone (801) 364-6522
Attorneys for Plaintiff-Appellant

FILED
JAN 15 1986

IN THE SUPREME COURT OF THE STATE OF UTAH

GUIDO C. PORCO,)	
)	
Plaintiff-)	
Appellant,)	Case No. 20854
)	
vs.)	BRIEF OF RESPONDENT
)	
VINCENZA MANGIO PORCO,)	
)	
Defendant-)	
Respondent.)	

APPEAL FROM A JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
Honorable John A. Rokich, Judge Presiding

JOHN SPENCER SNOW
261 East 300 South
Salt Lake City, UT 84111
Telephone: (801) 364-4940
Attorneys for Defendant-
Respondent

JOSEPH H. GALLEGOS
MICHAEL R. SCIUMBATO
GALLEGOS & SCIUMBATO
333 South Denver Street
Salt Lake City, UT 84111
Telephone (801) 364-6522
Attorneys for Plaintiff-Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

GUIDO C. PORCO,)	
)	
Plaintiff-)	Case No. 20854
Appellant,)	
)	BRIEF OF DEFENDANT-RESPONDENT
vs.)	
)	
VINCENZA MANGIO PORCO,)	
)	
Defendant-)	
Respondent.)	

TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL.....	4
STATEMENT OF FACTS.....	4
STATEMENT OF ARGUMENT.....	22
ARGUMENT.....	24
CONCLUSION.....	40

TABLE OF AUTHORITIES

Cases:

<u>Allen vs. Allen</u> , 25 Utah 2d 87, 475 P.2d 1021 (1970).....	24
<u>Anderson vs. Anderson</u> , 13 Utah 2d 36, 368 P.2d 264 (1962).....	39
<u>Bates vs. Bates</u> , 560 P.2d 706, (Utah 1977).....	33
<u>Beardall vs. Beardall</u> , 629 P.2d 425 (Utah) 1981...	40
<u>Chandler vs. West</u> , 610 P.2d 1299 (Utah 1980).....	37
<u>Christiansen vs. Christiansen</u> , 667 P.2d 592 (Utah 1983).....	28
<u>Coleman vs. Coleman</u> , 664 P.2d 1155 (Utah 1983)....	32
<u>Dehm vs. Dehm</u> , 545 P.2d 525 (Utah 1976).....	25,34
<u>Despain vs. Despain</u> , 610 P.2d 1303 (Utah 1980)....	26,35
<u>English vs. English</u> , 565 P.2d 409 (Utah 1977).....	27
<u>Foulger vs. Foulger</u> , 626 P.2d 412 (Utah 1981).....	37

<u>Haslam vs. Haslam</u> , 657 P.2d 757 (Utah 1982).....	29,30
<u>Higley vs. Higley</u> , 676 P.2d 379 (Utah 1983).....	25,34
<u>Jeppson vs. Jeppson</u> , 684 P.2d 69 (Utah 1984).....	26
<u>Johansson vs. Johansson</u> , 65 P.2d 1316 (Utah 1983).	27
<u>Jones vs. Jones</u> , 700 P.2d 1072 (Utah 1985).....	31
<u>Kerr vs. Kerr</u> , 618 P.2d 1380 (Utah 1980).....	38
<u>Land vs. Land</u> , 605 P.2d 1248 (Utah 1980).....	35
<u>Larsen vs. Larsen</u> , 561 P.2d 1077 (Utah 1977).....	32
<u>McBride vs. McBride</u> , 29 Utah 2d 459, 511 P.2d 730 (Utah 1973) p. 32.....	36
<u>Olson vs. Olson</u> , 15 Utah Adv.Rep. 8 (No. 19280, Aug. 2, 1985 at p.27).....	30
<u>Scott vs. Scott</u> , 19 Utah 2d 267, 430 P.2d 580 (1967) at p.29.....	33
<u>Williams vs. Shearwood</u> , (No. 18512-Utah, Aug. 15, 1984 at p.23).....	26

STATUTES

Section 78-45(b)-3-6 Utah Code Annotated, (1953, as amended).....	32
--	----

STATEMENT OF ISSUES ON APPEAL

1. Did the plaintiff meet his burden of proof to demonstrate that there has been a material change of circumstances in order to establish grounds to terminate his alimony obligations?

2. Did the trial court err in its refusal to modify the Decree of Divorce between the parties to terminate alimony retroactively to March 1, 1984?

3. Should the trial court have awarded the plaintiff-appellant certain items of personal property for which he made claim in light of the language of the Decree of Divorce and the amount of time which has elapsed since the entry of the Decree of Divorce before the plaintiff-appellant made such demand?

4. Did the trial judge abuse his discretion in awarding attorney fees to the defendant-respondent?

STATEMENT OF FACTS

The parties to this proceeding were divorced from one another pursuant to a Decree of Divorce entered by the Third Judicial District Court in and for Salt Lake County, State of Utah on the 14th day of July, 1977. The plaintiff was ordered to pay to the defendant the sum of \$200.00 per month as alimony, through the Clerk of the Third Judicial District Court commencing with the month of May of 1977. The Decree of Divorce further provided that the payment of alimony by the plaintiff-appellant to the defendant-respondent would terminate upon the remarriage of the defendant-respondent and upon no other

condition. The defendant-respondent has not remarried.

The plaintiff-appellant filed a Petition to Modify the Decree of Divorce and sought relief by the termination of alimony in January of 1980. The Petition was heard by the Honorable David B. Dee on the 3rd day of September, 1980. Judge David B. Dee denied the plaintiff's Petition to Modify the Decree of Divorce for the termination of alimony payable to the defendant. Judge Dee further ordered that the right of the defendant to alimony was not conditioned upon her employment. The hearing was held on September 3, 1980, and indicated that the defendant had had an increase of income of \$3,500.00 per year since the entry of the Decree of Divorce. The court found no material change of circumstances to justify termination of alimony and, as indicated above, the defendant's employment was not conditioned upon her right to receive alimony from the plaintiff.

The plaintiff brought an additional Petition to Modify the Decree of Divorce and sought termination of the alimony. The Honorable Hal Taylor heard the matter on May 5, 1980. This separate Petition was decided on May 5, 1980, prior to another Petition before the Honorable David B. Dee and ruled upon by Judge Taylor in May of 1980. The finding of the Honorable Hal Taylor was that there was no modification of the alimony and that the plaintiff was ordered to continue his payments of \$200.00 per month to the defendant.

The plaintiff filed an additional Motion to terminate his alimony, which Motion was heard before the Honorable Kenneth

Rigtrup on October 14, 1981. Judge Rigtrup found no justification to modify the alimony award to the defendant and the plaintiff was ordered to continue his payments of \$200.00 per month to the defendant.

The defendant, however, filed an Order to Show Cause against the plaintiff for nonpayment of alimony and the same was heard on June 1, 1982, before the Honorable Larry Keller. The plaintiff was considered in contempt of court for his failure to pay the alimony payments to defendant. The plaintiff raised the issue of termination of alimony in the Order to Show Cause proceeding and filed his own Motion to terminate alimony before Judge Keller. Judge Keller granted a judgment in favor of the defendant for alimony arrearages in the sum of \$2,205.00 to and including April 30, 1982. The defendant was granted further relief by an automatic garnishment of the military retirement pay of the plaintiff. The court found no material change of circumstance and did not modify the Decree of Divorce as requested by the plaintiff. Judge Keller ordered the plaintiff to continue his payment at the rate of \$200.00 per month to the defendant for alimony.

The defendant filed an Order to Show Cause to obtain a new judgment for alimony arrearages against the plaintiff in May of 1984. The plaintiff, in turn, filed a Petition to Modify the Decree of Divorce. These two matters are the matters which were heard by the Honorable John Rokich. This matter was initially heard before the Domestic Relations Commissioner, Sandra Peuler, and her recommendation was issued on June 7, 1984. The

recommendation of the Domestic Relations Commissioner was that the plaintiff's Petition to Modify Alimony be denied. The plaintiff's request for the return of his items of personal property were further denied. The defendant was ordered to present to the plaintiff the life insurance policy requested within thirty days, if the said policy was in her possession. The Domestic Relations Commissioner recommended alimony arrearages be awarded to the defendant in judgment form in the amount of \$5,000.00 for the period of May 1, 1982, to and including May 31, 1984. There was no recommendation for a finding of contempt against the plaintiff. The Domestic Relations Commissioner recommended attorney fees in favor of the defendant in the sum of \$200.00.

The plaintiff objected to the Commissioner's recommendation on July 12, 1984. The matter was scheduled for trial before the Honorable Dean E. Conder and set for hearing on September 6, 1984. The plaintiff filed an Affidavit of Prejudice and claimed that Judge Conder should disqualify himself from hearing the case. As a result, Judge Conder deferred the case for further hearing. The matter came to trial on December 28, 1984, before the Honorable John Rokich.

The Motion of the defendant seeks a judgment for alimony arrearages, for contempt of court, and for an order stopping the plaintiff from harrassment of the defendant by continuously bringing petitions to modify the Decree of Divorce relative to the issue of alimony, and for an award of attorney fees. The plaintiff's Motion for Modification seeks the following:

1. Termination of alimony;
2. Return of certain personal property;
3. Surrender of a Metropolitan Life Insurance policy;
4. An award of attorney fees.

The plaintiff submitted a Plaintiff's Trial Brief at the hearing on December 28, 1984, and the defendant-respondent filed a Memorandum in Support of her Order to Show Cause and in opposition to the plaintiff's modification request, with said Memorandum being filed on the 5th day of February, 1985. The plaintiff-appellant misstated certain facts in his Trial Brief. The plaintiff represented to the court that the defendant deducted \$75.00 from each paycheck and deposited the same directly into her savings plan. The plaintiff failed to mention that the defendant drew these sums of money from her savings plan for her own care, support and maintenance and also for certain home improvements and repairs. The plaintiff further alleged that the defendant had several accounts with savings institutions which she had not disclosed through discovery requests. These bank accounts and one certificate of deposit were the specific moneys received from her son, Tony Porco. Tony Porco deposited certain sums of money into a joint account with his mother in order to provide her with certain funds in the event of his death. Tony Porco further provided the funds to acquire a certificate of deposit. The other certificate of deposit in the sum of \$3,000.00 was acquired by the defendant from her share of the bonds distributed to her under the Decree of Divorce. The plaintiff received an equal number of bonds

from the distribution of the marital estate. The plaintiff made no explanation as to what he had done with his share of the bonds.

The parties had a marriage of twenty-seven years of duration from 1950 to 1977. The plaintiff is now sixty years of age and in good health. The plaintiff served twenty-three years with the United States Army and had twelve subsequent years with civil service. The plaintiff had been retired for several years and had not elected to obtain employment to supplement his income. He received full medical coverage with free medical care at any local army base. The plaintiff received a life insurance benefit and had a complete retirement plan at his disposal. The plaintiff had and still has no dependents.

The defendant is sixty-five years of age with numerous health problems. (T.p.261). She has high blood pressure and has been treated by Dr. Lynn Lagerquist. The defendant sustained an industrial injury in the fall of 1983 to her back and underwent physical therapy for a substantial period of time. The defendant has the equivalent of a second grade education and has difficulty in communicating in the English language. The defendant has no sources of income other than her employment and the alimony payment which the plaintiff has refused and continues to refuse to pay.

The plaintiff alleged in his Trial Brief that the defendant had the availability of accumulating retirement benefits which will fully vest after ten years of employment. The defendant is not in good health and is expected to retire because of ill

health, which will result in no retirement benefits to her from the Holy Cross Hospital as she will not have accumulated ten full years of gainful employment. The defendant will not receive retirement benefits from the Holy Cross Hospital in light of her age and unlikelihood of her ability to perform ten consecutive and complete years of employment with the hospital. The plaintiff maintained that the defendant suffered no maladies which would prevent her from working; nevertheless, the defendant presented evidence concerning her medical condition and her permanent medical problems.

The plaintiff sought the termination of alimony payable to the defendant. The evidence indicated that the plaintiff received \$630.00 per month from his retirement benefits through the United States Government at the time of the Decree of Divorce. The plaintiff's last attempt at modification of the Decree of Divorce occurred in October of 1982. The plaintiff failed to demonstrate a material change of circumstances in his favor to justify the reduction or termination of alimony payable to the defendant. In October of 1982, the plaintiff's retirement benefits provided a gross monthly income of \$1,360.00 per month with an FICA deduction in the sum of \$215.00 per month, leaving a net monthly income of \$1,145.00 per month. In the summer of 1984, the retirement benefits payable to the plaintiff increased to \$1,404.00 per month as gross monthly income. The FICA deduction was \$202.19 leaving a net monthly pay in favor of the plaintiff in the sum of \$1,201.81. The defendant has not received updated information since June of

1984; however, the retirement benefits to the plaintiff have escalated and will continue to escalate on an annual basis as indicated by his payment history from the retirement program through the United States Government. His net monthly income from the retirement benefits through the United States Government has doubled since the entry of the Decree of Divorce.

The above-entitled court made inquiry of the plaintiff's counsel for an explanation as to what the plaintiff did with the money he received from his bonds from the marital estate, information from how his savings account in the sum of \$1,800.00 was expended and what disposition was made of the sum of \$21,000.00, which the plaintiff received as his share of the net proceeds from the sale of the marital residence. The plaintiff has refused and failed to disclose any such information to either the trial court or to defendant's counsel. The plaintiff was further requested to produce his 1982 and 1983 income tax returns by order of the trial court and has continued to refuse to do so and, as of this date, the defendant's attorney has received no such information.

The defendant clearly indicated that the proceeds which she received from the sale of her share of the bonds were used to purchase the savings certificate at Valley Bank & Trust Company, designated as Savings Certificate No. 24704-21, in the face amount of \$2,000.00. The other savings certificate designated as No. 24716-21 in the face amount of \$1,000.00 was purchased by her son, Tony Porco, wherein Tony Porco listed himself, his mother, and his sister, Maria Simister, as joint owners of the

savings certificate in order that his mother and his sister might share in those proceeds in the event of his death.

The defendant testified to the court that she used the proceeds from the sale of the marital residence to acquire her present home. Because of her incapability to obtain financing, the home was purchased in the name of her son and daughter, and, in turn, conveyed to her by them. The financing, through the mortgage lending institution, remains in the name of the two children because of the fact that the defendant did not qualify for such financing in light of her income.

The defendant testified that her current gross monthly income is \$860.80 per month, with total deductions in the sum of \$231.28 per month, leaving her a present net monthly income of \$629.52 per month. This is based upon her current rate of pay of \$5.34 per hour. The defendant further testified that her rate of pay in May of 1982 was \$4.83 per hour with a gross monthly income of \$830.76 per month and a net monthly income of \$612.69. The defendant experienced an increase of net monthly pay from \$612.69 to \$629.52 since the last attempt at modification of the Decree of Divorce by the plaintiff in May of 1982. The plaintiff has clearly had a more substantial increase of monthly income from his retirement pay, regardless of employment, as compared to that of the defendant since May of 1982. The defendant further testified that her 1981 monthly expenses were \$780.00 per month. She further testified that her current monthly expenses were approximately \$990.49 per month. The plaintiff's attorney attacked certain expenses of the

defendant, such as her utilities, transportation and telephone expenses. Even taking into consideration a deduction for some of those monthly expenses, the current monthly expenses of the defendant would be at least \$916.00 per month. This clearly indicates that she is in need of an excess of \$200.00 per month to meet her current monthly living expenses.

The plaintiff claims current monthly living expenses of \$1,280.00 in his Amended Answers to Interrogatories. The court expressed real concern over this fact that the plaintiff is presently living in the State of Texas in a rental property and that his monthly expenses are in excess of \$1,280.00. The plaintiff clearly has medical and dental care through his benefits from his employment without any charge to him. He has further benefits of the purchase of food, clothing and other supplies through the military base, which would give him a substantial reduction in his monthly expenses. His claims for vehicle repairs and parts are questionable in light of the fact that many of the invoices presented at trial were prepared in his own handwriting. The plaintiff claimed substantial expenses for repair of motor vehicles; nevertheless, he received a Jeep, a truck and a camper from the marital estate by virtue of the Divorce Decree. The defendant received no transportation from the Decree of Divorce and does not have a Utah operator's permit.

The plaintiff claims that the defendant acquired a substantial sum of money in the Holy Cross Employees' Federal Credit Union account as a result of the deductions made

semimonthly in the sum of \$75.00. The exhibit introduced into evidence clearly shows that the balance in the defendant's account as of August 23, 1984, was the sum of \$291.81. The defendant testified that she had slightly in excess of \$100.00 in the Holy Cross Federal Employees Credit Union account at the time of the trial of the case on December 28, 1984. The plaintiff's attorney argued that the defendant clearly started to withdraw the money from this account after this matter was underway in the trial court for modification by the plaintiff. The actual record from the credit union account does, however, clearly indicate that there were substantial withdrawals at periods of time prior to the initiation of this modification proceeding. In fact, the documents clearly indicate that the following sums of money were withdrawn from the credit union account under the following dates:

August 1, 1980	1,550.00
October 2, 1981	1,000.00
April 8, 1982	1,200.00
January 18, 1983	1,400.00
July 3, 1984	3,311.00 (T.p.65)

The defendant testified at the time of trial that she made a substantial withdrawal in July of 1984 because of numerous home improvements to be made to her home. The defendant further testified that the following home improvements were needed to the home: Carpet replacement, kitchen cabinets, new roof, aluminum fascia, wall insulation, wall papering, replacement of doors and the finishing of the basement. The defendant has

clearly used the credit union account as a vehicle to earn some interest on her income in order to withdraw the same for her own care, support and maintenance and for the home improvements.

At the time of trial, the defendant further testified that her son, Tony Porco, had provided her with approximately \$150.00 to \$200.00 per month for the two prior years in order to assist her with her care, support and maintenance of existing expenses. (T.p.269). The defendant's daughter testified that she was providing the defendant approximately \$60.00 per month as income for the past eighteen months to assist her in meeting her current and ongoing expenses. (T.p.74). This clearly indicates that the defendant had received in excess of \$3,480.00 from her two children in order to meet ongoing expenses because of the failure of the plaintiff to make alimony payments to assist her with her own care, support and maintenance.

The plaintiff-appellant argued that the defendant-respondent was withdrawing \$20.00 per month in order to purchase an individual retirement account. The defendant indicated that she had been placing \$20.00 per month into a retirement account in order to provide her with some source of income after she terminates her employment with the Holy Cross Hospital for medical reasons. The defendant shall have no other source of income after the termination of her employment by reason of her age and health reasons. The only other income sources she will have upon retirement will be her Social Security benefits. The plaintiff has made no voluntary payment in alimony to the defendant since 1977. The defendant has sought legal remedy

through the above-entitled court to obtain judgments and garnish the retirement of the plaintiff to provide some means of support. The defendant was required to garnish the plaintiff's military retirement pay in order to collect upon her 1982 judgment. She has not received any income from the plaintiff through alimony since the early summer of 1984, until she obtained the judgment of May 7, 1985. The defendant has had to resort to the children to supplement her income in order to meet her ongoing expenses.

At the time of trial, the plaintiff claimed that he did not have sufficient income in order to meet his ongoing expenses in that he claimed \$1,280.00 per month in expenses and yet received slightly in excess of \$1,200.00 per month as income. Nevertheless, the plaintiff never explained what he did with regard to the disposition of his camper and other motor vehicle. The court questioned his reasoning as to why he retained an old truck when, in fact, he had these other marital assets and his proceeds from the sale of the marital residence in excess of \$21,000.00. The plaintiff made three separate trips from the State of Texas since the modification proceeding in the spring of 1984. The plaintiff has continued to refuse to produce any documents concerning his income in order to properly advise the court. The defendant, nevertheless, did provide her 1982 and 1983 income tax returns to the court under a production of documents dated January 9, 1985. The income tax returns of the defendant clearly indicate substantial medical expenses which she has incurred and has been required to pay above and beyond

her medical insurance plan through her employment at the Holy Cross Hospital. Her medical plan is a standard eighty percent (80%) deductible coverage plan with a twenty percent (20%) obligation to pay for the expenses. The plan only covers fifty percent (50%) of dental care. The plaintiff failed to demonstrate at trial a material change of circumstances to justify the reduction and/or termination of alimony. The trial court awarded the defendant a judgment against the plaintiff for \$7,000.00 as alimony arrearages from May 1, 1982 to and including March 31, 1985. The defendant is now required to garnish the military retirement pay to collect on the alimony arrearage. The plaintiff has refused and continues to refuse to pay any ongoing alimony. Therefore, the defendant has to rely upon the alimony arrearage judgment to collect any sums of money for her care, support and maintenance from the plaintiff.

The plaintiff further argued that certain items of personal property should be returned to him. The defendant clearly testified that the handmade gun cabinet was made by her own son, Tony, and that it was not part of the marital estate and has been in the possession of Tony Porco. The defendant further testified that she had not seen and never had possession of the gold pocket watch, portable battery recharger and the 12' copper jumper cables. The defendant testified that the Coleman cooler was awarded to her under the Decree of Divorce as well as the Remington typewriter, horsepower motors and the four beer mug set. (T.p.75-76). The Decree of Divorce was specific as to certain handtools to be awarded to the plaintiff. The four beer

mug set is not a handtool. The Coleman cooler is not a handtool. The Remington manual typewriter was not a handtool and was thrown out because it was not functional at the time of the Decree of Divorce. The electric motors where not working at the time of the Decree of Divorce and were junked by the defendant. The weight set was a gift from the defendant to her son, Tony Porco, and is in the son's possession. The radial arm saw with cabinet and accessories is not a handtool as outlined in the Decree of Divorce and has been in the defendant's possession for the past eight years. The defendant testified that she purchased the radial arm saw with her own funds. The claims by the plaintiff for such items of personal property are unfounded. The said items do not qualify as personal property awarded to the plaintiff under the Decree of Divorce and were properly awarded to the defendant. The trial court upheld the recommendation of the Domestic Relations Commissioner that the items of personal property remain in the possession of the defendant.

The testimony of the defendant and of her daughter, Maria Simister, clearly indicate that the Metropolitan Life Insurance policy was cashed in several years ago by Maria Simister in 1980. Maria Simister testified that she paid the premiums since age sixteen and that her mother paid them prior to age sixteen. The defendant further testified that she had a life insurance policy with Metropolitan Life Insurance Company, which policy was issued on May 1, 1957. This life insurance policy was purchased by the defendant as the named insured and she has made

all of the premium payments thereon. This policy had a face value of \$1,000.00 and named Guido C. Porco as the beneficiary. The beneficiary was changed on August 24, 1978 by the defendant to her children. This is clearly a policy purchased and paid for by the defendant and is not a policy owned or acquired by the plaintiff. In other words, the plaintiff has never been the owner of any Metropolitan Life Insurance policy as claimed. The one life insurance policy was owned by Maria Simister. She cashed in this policy. She had the right to cash in the policy since she was the owner and had paid the premiums. The other life insurance policy was owned and paid for by the defendant. She is clearly entitled to this policy.

The individual retirement account of the defendant has been funded, to some extent, by her children and, in addition, they have provided her with income in order to meet her ongoing living expenses. The expenses for gas heating to the residence of the defendant were higher prior to the spring of 1984, in that the defendant obtained a coal and woodburning stove from her son in 1984 and, as a result, reduced her fuel bill. The defendant has, nevertheless, incurred the following expenses for heating, as were introduced at the time of trial:

- a) Purchase of wood permit (September 2, 1984) \$10.00
- b) Purchase of coal (September 25, 1984) \$90.16
- c) Tony Porco made two trips of 130 miles per trip to acquire wood for the woodburning stove \$53.30
- d) Cost of the chain saw to cut the wood \$200.00
- e) Gas and oil for chain saw \$7.50

f) 1 - chain \$16.00

g) Defendant estimates the purchase for additional coal for 1984-1985 year \$50.00

The defendant's son, Tony Porco, has expended in excess of sixteen hours of labor to pick up and cut the wood for the defendant. He has further expended an additional eight hours to split the wood for the defendant. With his labor at the rate of \$8.00 per hour, the defendant would be required to pay the sum of \$292.00. Therefore, the total additional heating expense incurred by the defendant, in addition to her Mountain Fuel Supply obligation, was \$458.96. This cost was, in addition to her Mountain Fuel Supply bills during the early winter of 1984 and 1985, which are set forth as follows:

- | | | |
|----|----------------------------|---------|
| 1) | September 28 to October 29 | \$46.50 |
| 2) | October 29 to November 29 | \$46.50 |
| 3) | November 29 to December 31 | \$46.50 |

The average monthly payment under the budget plan with Mountain Fuel Supply Company of the defendant is \$46.50 per month. Therefore, the heating expenses of the defendant are substantially greater than as indicated by the plaintiff's counsel at the trial of this matter on December 28, 1984. The defendant has attached hereto documentation to support these expenses.

The defendant-respondent has further incurred in excess of \$3,149.39 in home improvements during the year 1984. Copies of the invoices were attached to the Memorandum of the Defendant-Appellant in support of her Order to Show Cause and in

opposition to the plaintiff's modification dated February 5, 1985. The defendant further provided additional information to the court relative to her income. The gross income reported on her 1984 income tax return was \$11,846.13. This was indicated as her gross income for the 1984 year as represented by the W-2 form attached to the Memorandum.

The plaintiff-appellant argued that the modification of the Decree of Divorce should be retroactive as of March 1, 1984, the alleged date of the issuance of the Order to Show Cause. Counsel for both parties submitted memoranda of law relative to this issue.

The plaintiff alleged at trial that the defendant was underwriting the defendant's annuity, savings and retirement plan accounts; nevertheless, the defendant clearly indicated that the credit union account was practically depleted. The funds from the credit union account were used to support the defendant and for her home improvements. The defendant further indicated that she had received no ongoing alimony payments from the plaintiff since 1977 at the time of the Divorce Decree. The alleged savings and annuity accounts of the defendant were joint accounts placed in the names of the defendant and her son or her daughter by virtue of proceeds invested by her son from his own income. Tony Porco, the son, provided certain joint bank accounts and a savings certificate in his name and the name of his mother, the defendant, in order to assist her in the event of his death. The plaintiff's income has not financed in any manner nor has it supplemented any annuity, savings or

retirement plan of the defendant.

The trial court entered a judgment and order in favor of the defendant against the plaintiff denying the plaintiff's Petition to Modify the Decree of Divorce in reference to the reduction in alimony. The trial court further denied the plaintiff's petition for an award of personal property. The defendant was ordered to continue his ongoing alimony payments of \$200.00 per month without any change or modification. The plaintiff was awarded his right to make claim against the daughter, Maria Simister, and/or Metropolitan Life Insurance Company for the \$1,000.00 life insurance policy. The defendant was awarded attorney fees in the sum of \$1,500.00, plus her costs of court incurred in this action. The plaintiff was ordered to pay for his own attorney fees and for costs incurred by him in the proceeding.

The plaintiff-appellant alleges under the Statement of Facts in his Brief on Appeal that the Decree of Divorce provided that the alimony payments would terminate upon the defendant-respondent's remarriage. He further alleges, that Judge Snow's decision contains no such provision. It was the attorney for the plaintiff who prepared the Decree of Divorce and the Findings of Fact and Conclusions of Law not the defendant's attorney.

The plaintiff-appellant alleges that the defendant-respondent utilized the fund in her credit union account at Holy Cross Hospital for "household expenditures" T.P.225. The plaintiff-appellant, however, claims that the defendant-

respondent did not withdraw any funds from the account until after the hearing before the Domestic Relations Commissioner. The defendant-respondent has already indicated that a substantial portion of these funds were spent before the hearing before the Domestic Relations Commissioner.

The plaintiff-appellant claims that he purchased the items of personal property during his marriage to the defendant-respondent. There was no evidence that he actually purchased the items, which was produced at the time of trial. The plaintiff-appellant claims that he produced records showing the purchase of the radial arm saw; however, the actual money used to purchase the saw was that of the defendant-respondent, as testified to by her on the witness stand at the time of trial.

SUMMARY OF ARGUMENT

1. The evidence presented at the time of trial by the plaintiff-appellant failed to meet the test of the preponderance of the evidence. The plaintiff-appellant failed to demonstrate any material change of circumstances to justify the termination of alimony. The defendant-respondent demonstrated only slight increases in her income since the entry of the Decree of Divorce and more specifically since May of 1982. The plaintiff-appellant has had substantial increases in his income from his retirement benefits since May of 1982. The plaintiff-appellant failed to demonstrate any savings accumulation by the defendant-respondent. Therefore, the decision of the trial court should be upheld for the plaintiff-appellant's failure to meet his burden of proof.

2. The decision of the trial court to refuse to modify the Decree of Divorce retroactively to March 1, 1984 is correct. The defendant-respondent has submitted numerous cases which indicate that this is directly the position of the Utah State Supreme Court. There is no evidence to demonstrate that the trial court erred in its refusal to modify the Decree of Divorce or to modify it retroactively. This is clearly not the trend of the law and the trial court ruled in accordance with the decisions of this court.

3. The language of the Decree of Divorce clearly set forth the award of personal property of the parties. The items disputed by the plaintiff-appellant were clearly adjudicated at the time of trial and are clearly set forth in the Decree of Divorce. The matter as to the division of personal property is res judicata. It has been more than seven years since the entry of the Decree of Divorce when the plaintiff-appellant raises this issue. The matter is clearly untimely and the plaintiff-appellant has no right to seek a modification of the Decree of Divorce on this basis. The plaintiff-appellant had a period of thirty days from and after the entry of the Decree of Divorce in which to appeal the decision of the trial court as to the division of the marital estate. The plaintiff-appellant did not elect to do so and now tries to seek a remedy at this late date.

4. The trial court did not abuse its discretion in awarding the defendant-respondent her reasonable attorney fees. She clearly demonstrated the reasonableness and the need for such attorney fees. The defendant-respondent has been to court

on several occasions since the entry of the Decree of Divorce to defend her position against the plaintiff-appellant relative to his claims for relief as to the termination of alimony. The defendant-respondent has prevailed on every occasion. The defendant-respondent has been required to expend substantial sums of money in order to defend her position in this case. The trial court has wide latitude and discretion in making this judgment. The trial court fairly and equitably made its ruling.

ARGUMENT

POINT I

THE PLAINTIFF HAS THE BURDEN OF PROOF TO DEMONSTRATE THAT THERE HAS BEEN A MATERIAL CHANGE OF CIRCUMSTANCES IN ORDER TO ESTABLISH GROUNDS TO EITHER MODIFY OR TERMINATE HIS ALIMONY OBLIGATION.

The Utah State Supreme Court held that the burden of showing a substantial change of circumstances is upon the party petitioning for the modification of alimony and support provisions under the Divorce Decree. Allen vs. Allen, 25 Utah 2d 87, 475. P.2d 1021 (1970). In this specific case, the wife subsequently found employment, the former residence was sold and the proceeds divided, and one of the daughters had married and left the home and the other had secured gainful employment. The court found that these facts did not constitute a substantial change of material circumstances warranting modification of the alimony provisions of the Decree of Divorce. The facts and circumstances are substantially material in change as those compared to the defendant in this proceeding and the court did not consider those facts as substantial material change of

circumstance.

The Supreme Court of Utah further held that the divorce courts are deemed to have broad equitable powers in safeguarding the interests and welfare of children and the decree and orders in a divorce proceeding are of a different and higher character than judgments in an action at law. Dehm vs. Dehm, 545 P.2d 525 (Utah 1976). The Supreme Court of Utah held that an alimony award should, as far as possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage. Higley vs. Higley, 676 P.2d 379 (Utah 1983). The Supreme Court held that it would not disturb an trial court's distribution of property and award of alimony in a divorce proceeding, unless a clear and prejudicial abuse of discretion is shown. In this specific case, an award to a wife of \$100.00 per month permanent alimony was a clear and prejudicial abuse of discretion in view of the fact that the wife was forty-seven years old, had a high school degree, and no income, that her health was poor, that her efforts as a homemaker enabled the husband to build a career as an aircraft welder, that the husband had the ability to provide permanent support in an amount greater than \$100.00 per month, and that the award would not afford her a standard of living close to the standard of living enjoyed during the marriage. The court found, with respect to alimony, that the criteria in determining a reasonable award for support and maintenance included the financial conditions and needs of the wife, the ability of the

wife to produce a sufficient income for herself, and the ability of the husband to provide support. Id. at 381.

The purpose of alimony is to enable the spouse who receives alimony to maintain, as nearly as possible, a standard of living that was enjoyed during the marriage. Jeppson vs. Jeppson, 684 P.2d 69 (Utah 1984). The criteria to be considered in awarding alimony include financial conditions and needs of the wife, considering her station in life, her ability to produce a sufficient income for herself, and the ability of the husband to provide support. Id. at 69. The Supreme Court in this case held that a party who requests modification of a Divorce Decree must initially show that substantial change in circumstances of at least one of the parties has occurred. Id. at 69. Modification must be founded on a material change of circumstances. Despain vs. Despain, 610 P.2d 203 (Utah 1980). See also, Williams vs. Shearwood, No. 18512-Utah August 15, 1984.

The plaintiff-appellant referred to the case of Johansson vs. Johansson, 65 P.2d 1316 (1983). The husband in this case failed to sustain his burden of proving change of circumstances sufficient to justify modification of the \$100.00 alimony award where the husband merely alleged that the parties had only been married for six months, that he was not represented by counsel and that his wife was fully employed. The Supreme Court of Utah denied his appeal. The plaintiff further cites the decision of the Utah State Supreme Court in English vs. English, 565 P.2d 409 (Utah 1977). The Supreme Court held that an award of

\$1,000.00 in alimony and \$250.00 in child support per month was fair and equitable and should have been directed considering the parties' twenty year marriage, efforts of each party, and the monetary success of the marriage, various ventures, and the husband's earnings. The court considered the criteria of the financial conditions and the needs of the wife, the ability of the wife to produce a sufficient income for herself, and the ability of the husband to provide support. The Supreme Court in this specific case held that the most important function of alimony is to provide for the wife as nearly as possible at the standard of living which she enjoyed during the marriage and to prevent the wife from becoming a public charge. *Id.* at 409. The court further held that the length of the marriage and the contributions of each party to their joint financial success are not inappropriate measures to determine alimony.

The Supreme Court of Utah held that when a divorced husband's income has increased substantially and his former wife's income has increased much less, and the needs of the child have also increased, it is equitable that the husband pay increased child support. Christiansen vs. Christiansen, 667 P.2d 592 (1983). The trial court in this case did not commit reversible error in denying a decrease in alimony by not making findings of fact supporting the ruling in light of the trial court's findings concerning the financial status of the parties. The trial court properly refused to decrease the alimony payments. In this specific case, the Divorce Decree gave the custody of the children to the plaintiff and required the

defendant to pay alimony of \$650.00 per month and child support of \$275.00 per month per child. The defendant husband had increased his gross income considerably since the Decree of Divorce when his net income was approximately \$30,000.00 per year, or a substantial increase since the Decree of Divorce. The plaintiff-wife's net monthly income was \$550.00 and was not a substantial increase in her prior net monthly income. In the case at bar, the plaintiff has had a substantial increase in his income since the Decree of Divorce. In fact, the plaintiff has doubled his net monthly income since the entry of the Divorce Decree under his retirement program. The defendant-respondent has had only a slight increase in her income on a monthly basis. The net monthly increase for the plaintiff-appellant has been substantially greater than that of the defendant-respondent. Therefore, there should not be a termination or decrease in the alimony payment to the defendant-respondent.

The plaintiff cites the Utah State Supreme Court decision of Haslam vs. Haslam, 657 P.2d 757 (Utah 1982). The facts of this specific case indicate a substantial change in circumstances warranting modification of the alimony award since the Decree of Divorce. In this case, the former wife had obtained employment, experienced a substantial increase in income and accumulated some savings, while the former husband had retired and received income in approximately the same amount as he received at the time of the divorce some seventeen years previously. These are clearly not the facts and circumstances of the case before the court. The plaintiff was retired years

before the entry of the Decree of Divorce. The plaintiff has had a substantial increase in income from his retirement to the effect that it has doubled since the entry of the Divorce Decree. The defendant-spouse has been working in the housekeeping department of the Holy Cross Hospital earning a rather nominal income and has not had a substantial increase in income, especially since the last review of modification in 1982. The alleged accumulation of savings of the defendant-respondent by the plaintiff-appellant have no real foundation in that the defendant-respondent has withdrawn the sums placed into the credit union savings account for her care, support, maintenance and for home improvements. In fact, the defendant-respondent has had to rely upon income from her two children to meet some of her debts and obligations and has tried to develop an individual retirement account to provide herself with some retirement means at the rate of \$20.00 per month. The plaintiff-appellant has the benefits of complete medical coverage, special discount for purchases from the military base and will continue to receive increases in his military retirement pay. The defendant-respondent will not receive any retirement pay in light of her health, age and her mandatory future termination of employment before the retirement benefits will vest in her favor at the Holy Cross Hospital. At the same time, the plaintiff-appellant has failed to explain his substantial accumulation of savings and the expenditure of his share of proceeds from the sale of the home, his motorcycles and camper and the proceeds from the bonds which he acquired as a

result of the distribution of the marital facts. The facts in the case at bar clearly do not coincide with the facts in the case of Haslam vs. Haslam.

In the Supreme Court decision of Olson vs. Olson, 15 Utah Adv.Rep.8 (No. 19280; August 2, 1985) a decree of divorce was granted to plaintiff-wife. The wife contended that the trial court erred in awarding an insufficient amount of alimony, in ordering that the alimony terminate after two years, and in failing to treat the defendant's earnings capacity as an asset in dividing the marital property. The divorce decree granted the plaintiff alimony in the sum of \$1,600.00 per month for a period of two years. The plaintiff filed a Financial Declaration showing monthly living expenses of \$5,500.00 for the entire family before separation. She estimated the future living expenses for herself and the three minor children to be \$4,200.00 per month. The defendant filed a Financial Declaration showing his monthly expenses to be \$2,837.00. His income fluctuated, depending upon certain contracts. His gross income was \$76,485.00 in 1980, \$62,603.00 in 1981, and \$57,000.00 for the first nine months of 1982. At the time of trial, the defendant was negotiating a contract, which he expected to obtain, and would bring \$3,500.00 per month for the remainder of 1982. The Utah State Supreme Court held that it would not disturb the trial court's distribution of property and the award of alimony in a divorce proceeding, absent a clear and prejudicial abuse of discretion. The wife alleged that the trial court failed to consider the defendant-husband's ability

to provide support as shown by his historical earnings rather than his current income. The Utah State Supreme Court agreed with t the plaintiff's contention that the court's order that alimony terminate after two years was clear and prejudicial abuse of discretion. The court referred to the case of Jones vs. Jones, Utah 700 P.2d 1072, 1075 (1985). The Utah State Supreme Court modified the decree to provide for permanent alimony from defendant to the plaintiff. The court stated that the defendant could further petition the court to modify the decree under its continuing jurisdiction.

In summary, the defendant-respondent has not accumulated any substantial retirement. The purpose of alimony is to provide the defendant with the standard of living to which she was accustomed during the course of the marriage. The defendant-respondent has had to rely upon her children for means of support because of the plaintiff-appellant's failure to maintain his alimony payments in order for her to meet her standard of living. There has not been a material change of circumstances in favor of the plaintiff-appellant and he has failed to meet his burden of proof to justify a modification of the alimony by its termination or reduction.

POINT II

ALIMONY PAYMENTS CANNOT BE CHANGED OR MODIFIED AFTER THE
INSTALMENTS HAVE BECOME DUE.

The Supreme Court of the State of Utah held that alimony and support payments become unalterable debts as they accrue and, therefore, a periodic installment cannot be changed or modified after the installments have become due. Larsen vs.

Larsen, 561 P.2d 1077 (1977). See Section 78-45(b)-3-6 Utah Code Annotated (1953, as amended). The installments of support payments ordered in a divorce decree become vested in the recipient when they become due. Coleman vs. Coleman, 664 P.2d 1155 (Utah 1983). The court found that the defendant-husband knew what was required by the previous court order and he had the ability to comply with such order and he wilfully and knowingly failed and refused to do so. The court found that the defendant in that case to be in contempt of court. The plaintiff-appellant in the case at bar has clearly accrued certain installments of alimony for the support and maintenance of the defendant-respondent. Those payments have become vested and cannot be modified on a retroactive basis. Until an order of the court has been entered, no modification can occur.

A judgment for alimony payable in monthly or other periodic payments cannot be changed or modified after the installments have become due. Scott vs. Scott, 19 Utah 2d 267 430 P.2d 580 (1967). The Supreme Court of Utah held that the right to accrued alimony installment payments had vested in the wife on the due date of each installment and the wife was entitled to interest thereon at the legal rate until the payment was made, and the trial court had no power or authority to change or modify the Nevada judgment as to the accrued installments of alimony. Id. at 580. The defendant-appellant in the case at bar is not only entitled to a judgment for all arrearages in alimony but also for interest at the legal rate in accordance with the Supreme Court ruling.

The Supreme Court of Utah held that installments of alimony become vested when they become due, and the court has no power to modify the decree as to them; and, thereafter, interest accrues at the legal rate. Bates vs. Bates, 560 P.2d 706 (1977). The reasoning of the court was that it ill behooves a court to relieve a defaulting ex-husband from paying his alimony obligation because his ex-wife may be forced to live a life which is not approved by the judge, and which lifestyle is a result of not being able to collect her legal entitlements, and this is especially true when the ex-husband has made no motion to be relieved of his obligation to pay alimony. Id. at 707.

In summary, the Utah State Supreme Court has consistently held that any alimony installment payments become due and cannot be altered retroactively or modified until an order of the court. The relief sought by the plaintiff-appellant is clearly unfounded and, therefore, the defendant-respondent is entitled to the judgment for alimony which was awarded by the trial court. The defendant-respondent is further entitled to relief of interest at the legal rate in accordance with these Supreme Court decisions of twelve percent (12%) per annum.

POINT III

THE TRIAL COURT'S DISTRIBUTION OF PROPERTY IN A DIVORCE PROCEEDING IS NOT TO BE DISTURBED, UNLESS THERE IS A CLEAR AND PREJUDICIAL ABUSE OF DISCRETION.

The Supreme Court of Utah has held that it will not disturb an trial court's distribution of property and award of alimony in a divorce proceeding, unless a clear and prejudicial abuse of discretion is shown. Higley vs. Higley, 676 P.2d 379 (Utah

1983). The Supreme Court of Utah has further held that the divorce courts are deemed to have broad equitable powers in safeguarding the interests and welfare of the children and the decree and orders in a divorce proceeding are of a different and higher character than judgments in an action at law. Dehm vs. Dehm, 545 P.2d 525 (Utah 1976).

A husband appealed a decision of the trial court wherein the trial court acted within its discretion in applying the commonly accepted definition of the term "equity" interpreting a written stipulation of the parties which was incorporated into the divorce decree. The Supreme Court of Utah held that in dividing property between divorcing spouses, the trial court is governed by general principles of equity. Land vs. Land, 605 P.2d 1248 (Utah 1980). The trial court acted well within its discretion in applying the commonly accepted definition of the term "equity" to interpret a written stipulation incorporated into a divorce decree, wherein the parties agreed that the wife would receive as sole property a fifty percent interest in the "present equity" of certain real property and that the husband would receive as sole property a fifty percent interest in that "equity". Id. at 1249.

The Supreme Court of this State has held in both the formulation of a divorce decree or any modifications thereof, the trial court is vested with broad discretionary powers which may be disturbed by the appellate court only in the presence of clear abuse thereof. Despain vs. Despain, 610 P.2d 1303 (Utah

1980). The Supreme Court in that case affirmed the decision of the trial court which adopted a separation agreement as part of the terms of the decree of divorce by which the former wife relinquished any and all other claims against the former husband so as to constitute a complete separation and division of the marital estate and by such actions the former wife contracted away all rights to the trust res of the certain trust set up by the parties.

A petition was filed by an ex-wife asking that an eleven year rusty divorce decree be disinterred and vacated and asking the trial court, in substance and effect, to retry the case, or failing that, to reappraise the property right and support matters. The First District Court gave judgment to the wife for arrearages in child support payments after deducting payments made, and the ex-wife appealed. The Utah State Supreme Court held that the trial court did not abuse its discretion. The Utah State Supreme Court held that the refusal to vacate an eleven year, rusty divorce decree and to retry the case, or failing that, to reappraise the property right and support matters, but giving judgment to the ex-wife for arrearages in child support payments after deducting payments made, did not constitute an abuse of discretion. McBride vs. McBride, 29 Utah 2d 459, 511 P.2d 730 (1973).

A former husband appealed from an order of the Fourth District Court of Utah County granting the former wife's motion for modification of divorce decree. The Supreme Court of Utah held that no compelling reasons were shown by the former wife

which would warrant modifications of property disposition portion of the divorce decree. The Utah State Supreme Court held that the trial court sitting in a divorce matter retains continuing jurisdiction to make such modifications of the initial decree of divorce as it deems just and equitable, but where no appeal is taken from the original decree, change of circumstances must be shown to justify later modification. Foulger vs. Foulger, 626 P.2d 412 (Utah 1981). The Utah State Supreme Court further held that the trial court should be reluctant to grant modification of provisions of a divorce decree which dispose of real property and grant such modifications only upon showing of compelling reasons arising from substantial and material change in circumstances. Id. at 412.

The Utah Supreme Court in Chander vs. West, 610 P.2d 1299 (Utah 1980) held that where a property settlement agreement incorporated in a decree of divorce unequivocally required the husband to continue making mortgage payments, the husband could not subsequently avoid the obligation to continue making mortgage payments when the wife remarried and sold the house on the ground that the agreement had been entered into by mistake. The Utah State Supreme Court further held that property settlement are not sacrosanct and are not beyond the power of the court of equity to modify and it is within the trial court's authority to modify or eliminate an obligation to make payments if obviously changed circumstances under traditional equity standards so require. Id. at 1299.

In the case at bar, the plaintiff-appellant and defendant-respondent went to trial on their case. The matter was adjudicated by the trial court. Paragraph 3 of the Decree of Divorce awards the plaintiff-appellant his motor vehicles; namely, 1973 Chevrolet pickup truck, 1973 camper, 1965 International scout. He is also awarded various personal handtools, four shotguns, two rifles, pistol, personal possessions and effects now in his possession. In paragraph 4 of the Decree of Divorce, the defendant-respondent was awarded all of the furnishings and effects, including the fixtures and appliances and other personal property in the home of the parties not awarded to the plaintiff-appellant. It is clear from the language of the Decree of Divorce that the personal items of the plaintiff-appellant were awarded to the defendant-respondent. The plaintiff-appellant now seeks return of certain items to him more than seven years after the entry of the Decree of Divorce and the division of the personal property of the marital estate. The recommendation of the Domestic Relations Commissioner was that the items claimed by the plaintiff-appellant should remain with the defendant-respondent. The trial court upheld the recommendation of the Domestic Relations Commissioner.

POINT IV

THE TRIAL COURT HAS DISCRETION TO AWARD ATTORNEY FEES AND COSTS AGAINST ONE OF THE PARTIES IN A MODIFICATION PROCEEDING.

The plaintiff-appellant claims in his Brief on Appeal that an award of attorneys fees must rest on a basis of evidence of need and reasonableness. He cites the case of Kerr vs Kerr. 618

P.2d 1380, 1384 (Utah 1980). The plaintiff-appellant has brought numerous modification proceedings against the defendant-respondent and has failed to obtain any modification in the past. The defendant-respondent has had to defend these claims in each instance successfully. Once again, the trial court in this proceeding, has refused to modify the alimony provision in the Decree of Divorce as requested by the plaintiff-appellant. The income and expense information of both parties clearly indicates the need of the defendant-respondent to reimbursement for attorney fees, the issue of reasonableness was obvious to the trial court and the Honorable John Rokich awarded an attorney's fee in favor of the defendant-respondent in the sum of \$1,500.00 plus her costs of court incurred in the trial proceeding. The Utah State Supreme Court in the case of Anderson vs. Anderson, 13 Utah 2d 36, 368 P.2d 264 (1962) held that the trial court has discretion, upon examination of facts upon a motion for modification of a divorce decree, to determine if the circumstances do or do not demand an award of costs against one of the parties. The Utah State Supreme Court further held that the divorced wife was entitled to an award of counsel fees for contesting the petition of the modification of the divorce decree to award him custody of the children and to terminate an award of support money. Id. at 264.

Plaintiff brought a proceeding to enforce the divorce decree provision under which the ex-husband was obliged to pay any medical and dental care of the two minor children of the parties. The Fourth District Court awarded judgment for the

plaintiff and the ex-husband appealed. The Supreme Court of Utah held that the trial court correctly rules that the insurance premiums paid by ex-wife, who providently procured and paid for medical insurance which covered the medical and dental expenses in question were actually a necessary medical expense for the children for which the ex-husband was liable, although there was no detailed presentation of facts establishing the requisite factors to support an award of attorneys fees, the facts implicit in this proceeding and the evidence necessarily presented to the trial judge, together with the de minimis nature of the award, constituted a sufficient basis to sustain the trial court's exercise of its discretion in awarding the wife \$125.00 in attorney fees. Beardall vs. Beardall, 629 P.2d 425 (Utah 1981).

In summary, the trial court properly ruled based upon the issue of need and reasonableness that the defendant-respondent should be awarded her attorney fees in this case. The defendant-respondent was required to defend her position relative to certain claims made for modification by the plaintiff-appellant, for which he was unsuccessful. The court clearly has the discretion to award such attorney fees and properly did so.

CONCLUSION

The plaintiff-appellant has failed to establish his burden of proof to justify modification of his alimony payments to the defendant-respondent. There has not been a material change of circumstances in his favor. In fact, there has been an increase

of income by the plaintiff-appellant, which is substantially greater than any increase in the income by defendant-respondent. The plaintiff-appellant has failed to explain the investment and use of substantial sums of money received under the Decree of Divorce. The defendant-respondent is entitled to maintain a standard of living to which she was accustomed at the time of the Divorce Decree. Therefore, the trial court properly ordered the continuation of alimony payments in the sum of \$200.00 per month without reduction.

The defendant-respondent is clearly entitled to her judgment for alimony arrearage in that the installment payments of alimony became vested when they became due. The plaintiff-appellant cannot modify retroactively the prior order of the trial court.

The personal property in the possession of the defendant-respondent was properly awarded to her. The language in the Decree of Divorce clearly sets forth that property which was awarded to her. The plaintiff-appellant comes back in excess of seven (7) years later to make demand for certain items of personal property awarded to the defendant-respondent under the Decree of Divorce. The plaintiff-appellant has not shown any material change of circumstance to justify a modification of the property settlement in the Decree of Divorce. Therefore, the language of the Decree of Divorce is enforceable in that the plaintiff-appellant did not seek an appeal of the decision of the trial court relative to the division of the marital estate, as outlined in the Decree of Divorce.

The trial court properly awarded the defendant-respondent her reasonable attorney fees and for costs of court upon the basis of reasonableness and the evidence of need. The plaintiff-appellant has returned to the trial court on numerous occasions to seek a modification of the alimony without success. He has failed to demonstrate on each occasion a material change of circumstance and has caused the defendant-respondent to expend large sums of money in the defense of her position.

Dated this 14th day of January, 1986.

Respectfully submitted,

SNOW & HALLIDAY

By: John Spencer Snow
JOHN SPENCER SNOW
Attorney for Defendant-
Respondent
261 East 300 South
Salt Lake City, UT 84111
Telephone: (801) 364-4949

CERTIFICATE OF DELIVERY

I hereby certify that I delivered two copies of the Brief of Respondent to:

Michael R. Sciumbato, Esq.
GALLEGOS & SCIUMBATO
Attorneys for Plaintiff-Appellant
333 South Denver Street
Salt Lake City, UT 84111

on this 14th day of January, 1986.

John Spencer Snow