

2007

## Wilson v. Wilson : Reply Brief

Utah Court of Appeals

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**BENTLEY WILSON,**

**Case No. 20070359-CA**

**VS.**

**BRENDA HALTON WILSON,**

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT, DATED MARCH 27, 2007, DENYING RELIEF TO THE PETITIONER, ENTERED IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, THE HONORABLE GARY D STOTT, PRESIDING.

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**ORAL ARGUMENT REQUESTED**

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UTAH APPELLATE COURTS  
APR 28 2008

BENTLEY WILSON,

Case No. 20070359-CA

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IN THE UTAH COURT OF APPEALS

BENTLEY WILSON,

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vs. )  
)  
)

Case No. 20070359-CA

BRENDA HALTON WILSON,

)

## ARGUMENT

**POINT I: THE FACT THAT THE AMENDED FINDINGS OF FACT ARE  
BASED UPON STIPULATION DOES NOT NULLIFY THE TRIAL  
COURT’S OBLIGATION TO MAKE FINDINGS REGARDING  
THE STATUTORY ELEMENTS.**

Appellant contends that the Amended Findings of Fact, Conclusions of Law and Amended Decree did not carry over the determination of child support and alimony established in the temporary order. In support of his position, Appellant first contends that to adopt Appellee's position that the alimony and child support award contained in the temporary order was carried over into the Amended Decree is tantamount to upholding a legally deficient determination of alimony and child support lacking the requisite findings of fact on the statutorily defined factors.

**A. Appellee does not Dispute that the Amended Findings are Devoid of the Required Factual Findings.**

A review of the Amended Findings of Fact reveals that there is not a single finding of fact that is relevant to the determination of child support and alimony. (R. 347-370; Addendum, Exhibit “D”) Explicitly, there is not a single finding as to the Appellant or Appellee’s current or historical gross and net income. There is not a single finding as to either’s ability to earn or their respective needs. There is not a single reference to the child support guidelines.

In the responsive brief filed by the Appellee, she does not dispute the total absence of any relevant findings in the Amended Findings of Fact and relies only on the contents of the temporary order that recites the representation of Appellant that he had a gross monthly income at the time of the temporary order of \$10,000 and a statement that the Appellee contended that she was currently unemployed. (R. 98-101) There is no question that in the Amended Findings, the court does not even convert those representations into factual findings. Further, there is not a shred of documentation or even a signed affidavit attesting to those representations.

**B. Appellee Does not Dispute the Requirements of the Relevant Statutes Regarding Findings of Fact for the Determination of Child Support and Alimony.**

Importantly, the Appellee does not contest the assertion made by the Appellant that Utah statutes require a trial court to make specific findings in sanctioning a child support or alimony award.

**1. Findings Requirements for a Child Support Award**



U.C.A. 78-45-7(2) and (3) (1998 as Amended) provides:

(2) If no prior court order exists, a substantial change in circumstances has occurred, or a petition to modify an order under Subsection **78-45-7.2(6)** has been filed, the court determining the amount of prospective support shall require each party to file a proposed award of child support using the guidelines before an order awarding child support or modifying an existing award may be granted.

(3) If the court finds sufficient evidence to rebut the guidelines, the court shall establish support after considering all relevant factors, including but not limited to: (a) the standard of living and situation of the parties; (b) the relative wealth and income of the parties; (c) the ability of the obligor to earn; (d) the ability of the obligee to earn; (e) the ability of an incapacitated adult child to earn, or other benefits received by the adult child or on the adult child's behalf including Supplemental Security Income; (f) the needs of the obligee, the obligor, and the child; (g) the ages of the parties; and (h) the responsibilities of the obligor and the obligee for the support of others.

(4) When no prior court order exists, the court shall determine and assess all arrearages based upon the Uniform Child Support Guidelines described in this chapter.

There is no question that the “[f]ailure of the trial court to make findings on all material issues is reversible error unless the facts in the record are ‘clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.’ ” *Acton v. J.B. Deliran*, 737 P.2d 996, 999 (Utah 1987) (quoting *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983)). In addition, “[t]he findings ‘should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.’ ” *Id.* (quoting *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979)). *See also, Jefferies v. Jefferies*, 752 P.2d 909 (Utah App. 1988) (U.C.A. 78-45-7

requires the trial court to consider at least the seven factors listed therein).

## **2. Findings Requirements for an Alimony Award**

U.C.A. 30-3-5(8) (2006 as Amended) provides:

(8)(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. . . .

The Court in *Olsen v. Olsen*, 586 Utah Adv. Rep. 6 (Utah App. 2007) (quoting *Jones v. Jones*, 700 P.2d 1072, 1074 (Utah 1985)) and *Sill v. Sill*, 164 P.3d 173 (Utah App. 2007, Utah Code section 30-3-5(8)(a) held that the trial court consider “at least” certain named factors, including, in part: “(i) the financial condition and needs of the recipient spouse; (ii) the recipient's earning capacity or ability to produce income; [and] (iii) the ability of the payor spouse to provide support.” Utah Code Ann. 30-3-5(8)(a)(i)-(iii) (Supp.2007); *see also Rehn v. Rehn*, 974 P.2d 306 (Utah App. 1999) (In determining the amount of alimony, “a trial court must consider the needs of the recipient spouse; the earning capacity of the recipient spouse; [and] the ability of the obligor spouse to provide support.”). The findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was

reached.” *Andrus v. Andrus*, 169 P.3d 764 (Utah App. 2007) (internal quotation marks omitted). “A trial court’s failure to provide adequate findings is reversible error when the facts are not clear from the record.” *Id.*

**C. The Fact that the Amended Findings and Decree were Based upon Stipulation does not Nullify the Trial Court’s Duty to Make the Required Findings.**

Appellee, in Point I of her brief alleges that the fact that the Amended Findings, Conclusions and Decree were based upon stipulation eliminates the duty of the trial court to make the required factual findings on the required elements for establishing a level of child support and alimony (Appellee’s Brief at 9). However, the Appellee fails to cite even a single case or legal authority in support of her contention.

Contrary to the assertion of the Appellee, Utah law is clear that the presence of a stipulation does not affect the trial court’s obligation of make the required factual findings. The content of U.C.A. 78B-12-201 (2008 as Amended) is clear:

(1) In any matter [stipulated or adjudicated] in which child support is ordered, the moving party shall submit: (a) a completed child support worksheet; (b) the financial verification required by Subsection 78B-12-203(5); (c) a written statement indicating whether or not the amount of child support requested is consistent with the guidelines; and (d) the information required under Subsection (3).

(2) (a) If the documentation of income required under Subsection (1) is not available, a verified representation of the other party’s income by the moving party, based on the best evidence available, may be submitted. (b) The evidence shall be in affidavit form and may only be offered after a copy has been provided to the other party in accordance with Utah Rules of Civil Procedure or Title 63, Chapter 46b, Administrative Procedures Act, in an administrative proceeding. . .

(4) A stipulated amount for child support or combined child support and alimony is adequate under the guidelines if the stipulated child support amount or combined amount equals or exceeds the base child support award required by the guidelines.

*Id.*

Importantly, as provided in subpart (4), the presence of a stipulation does not relieve the parties of providing all the required financial information and documentation, it only is appropriate if it meets or exceeds the guidelines.

Further, Rule 103 of the Utah Rules of Civil Procedure, amplifies the requirements accompanying the requirement for the filing of the required child support worksheets.

(a) When filing a child support worksheet required by Utah Code Section 78-45-7.3, a party shall: (a)(1) file the worksheet in duplicate and the clerk of court shall send one copy to the Administrative Office of the Courts; or (a)(2) file one worksheet with the court, send the information on the worksheet electronically to the Administrative Office and so indicate on the worksheet. **(b) The court shall not enter the final decree of divorce, final order of modification, or final decree of paternity until the completed worksheet is filed.** (Emphasis added)

There can be no question that the statutes outlining the requirements for an alimony and child support award are not conditioned on whether the award is adjudicated or stipulated. The statute requires definitive findings. The statutes relating to the required components of any final order of child support or alimony, work sheets, etc., do not differentiate between stipulated amounts and those determined by the court. The logic behind the Appellant's position is clear. The trial court has a duty to ensure that any order, stipulated to or not, meets the purposes and requirements of the relevant statute.

In matters relating to child support, the Court has adjudicated that the child support award does not belong to the custodial parent, rather, it belongs to the child. ("The right to support from the parents belongs to the minor children and is not subject to being bartered away, extinguished, estopped or in any way defeated by the agreement or conduct of the parents." *Hills v. Hills*, 638 P.2d 516, 517 (Utah 1981)). Accordingly, the court has a special obligation to ensure that any stipulation is based upon established facts required by the worksheet and that it meets the requirements of the guidelines. Finally, to aid the determination of any subsequent contention of the parties that the circumstances of the parties have changed requiring a modification of an award, the court has to have a valid verifiable basis for the prior order.

As it relates explicitly to the rights of a court to question a stipulation of the parties, the Court's determination in *Andrus v. Andrus*, 169 P.3d 754 (Ut. Ct. App. 2007), is instructive. In that case, the husband challenged the trial court's decision to adhere to Paragraph 6 in the Stipulation, which precluded consideration of wife's income in calculating Husband's child support payments. The Court held first that right to support from the parents belonged to the minor children and cannot be subject to being bartered away, extinguished, estopped or in any way defeated by the agreement or conduct of the parents." *Id.*, citing *Hills v. Hills*, 638 P.2d 516, 517 (Utah 1981) and *Gulley v. Gulley*, 570 P.2d 127, 128-29 (Utah 1977). The Court then held that the trial court's decision to apply Paragraph 6, even after the other provisions dealing with alimony and child support

were invalidated, was an abuse of discretion because it allowed the wife to avoid her statutory and inalienable common law duty to provide financial support to her children. *Id.*

In this case, without any findings or information related to the parties' current gross and net income, ability to earn, needs, and other relevant facts, the trial court could not determine if either or both of the parties were fulfilling their statutory duty.

The case law is clear that the parties may not so stipulate to deprive the trial court of jurisdiction and its statutory obligation. In *Sill v. Sill*, 164 P.3d 415 (Utah App. 2007), the Court considered the enforceability of a non-modification clause<sup>1</sup> and determined that the non-modification clause, even if incorporated into a decree does not divest the trial court of its statutory continuing jurisdiction. *Id.* Generally, the Utah appellate courts have held that "a parties' stipulation as to property rights in a divorce action, although advisory and usually followed unless the court finds it to be unfair or unreasonable, is not necessarily binding on the trial court." *Colman v. Colman*, 743 P.2d 782, 789 (Utah App. 1987). Thus, a trial court clearly can refuse to enforce an agreement of the parties. *Id.*

As it specifically relates to alimony in this case, all the information that the trial court has was a representation of the Petitioner's gross income and a representation that

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<sup>1</sup>

The subject settlement agreement included a stipulation specifying that "[t]he provisions of th[e] [A]greement shall be non-modifiable as shall the Decree of Divorce which implements it with the sole exception that if all of the assets have not been disclosed and divided in th[e] [A]greement, those may be brought back before the [c]ourt for appropriate disposition." *Id.*

the Respondent was not working at the time. There was no information as to the Petitioner's net income and his needs and no information on the ability of the Respondent to work, her historical income and her needs. Utah's case law is clear that a determination of alimony based only on gross income is reversible error. In *Andrus*, the husband made the argument that the trial court abused its discretion by calculating his alimony obligations based on his gross monthly income instead of his net income.

The Court held that in determining alimony, a trial court must consider, along with other factors not under attack in the instant appeal, "the ability of the payor spouse to provide support." *Id.* The Court held that the trial court's "findings of fact must show that the court's judgment or decree follows logically from, and is supported by, the evidence. The findings should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Id.* *Rasband v. Rasband*, 752 P.2d 1331, 1334 (Utah Ct. App. 1988) (quoting *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987)) (internal quotations and citation omitted). The Court continued that a trial court's failure to provide adequate findings is reversible error when the facts are not clear from the record. *See id.* at 1334-35 (vacating an alimony award and remanding for adequate findings).

In applying the law to the facts of the case, the Court held in *Andrus*,

Here, the trial court arrived at its alimony award by awarding Wife half of Husband's monthly disposable income. The trial court determined Husband's disposable income by subtracting certain expenses, including housing, food, transportation, and child support, from Husband's stipulated

gross monthly income. The findings of fact are silent on the issue of Husband's tax obligations and monthly net income. Even though there is some evidence in the record concerning the amount of taxes Husband pays, including testimony by Wife and documentary evidence provided by Husband, we cannot ascertain how or if the trial court contemplated Husband's duty to pay taxes in calculating his disposable income. The trial court's findings of fact are not sufficiently detailed to show the steps it took determining Husband's disposable income. **We therefore reverse and remand for adequate findings that will show proper consideration of Husband's net income.** (Emphasis added)

*Id.*

**POINT II: THE DISPUTED PROVISIONS OF THE AMENDED FINDINGS, CONCLUSIONS AND DECREE ARE AMBIGUOUS AND SHOULD BE CONSTRUED IN ACCORDANCE WITH THE INTENTIONS OF THE PARTIES.**

The Appellant contends that the disputed language in the Amended Findings is ambiguous. The relevant language is as follows:

8. The Petitioner has requested a reduction in both child support, **which has previously been ordered in the amount of \$2,100.00 per month**, and alimony **which has been ordered in the amount of \$4,000.00 per month**. The issue of whether or not a reduction should be granted shall be reserved for a period of six months so that each party is able to obtain further information regarding the Petitioner's actual income.

9. The Petitioner was awarded the physical custody of the minor children during the months of August and September. Therefore, this issue of the amount of Petitioner's actual child support obligation for August 2004 and September 2004 is reserved for final determination by the Court.

**10. All other issues are reserved.**

**16.** All other issues not resolved herein are reserved for further hearing by the trial court. (Emphasis added)

(R. 347-370: Addendum, Exhibit "D")



The Appellant contends that the highlighted language set out above was intended to mean that the Petitioner had requested a modification to reduce the amount of child support and alimony that had been ordered **during the period from the entry of the temporary order to the date of the Amended Findings, Conclusions and Decree.** It was a modification only of the temporary alimony and child support levels that were intended to be affected by paragraph 8. If the Appellant did nothing during the specified six month period of time, only his right to seek a modification of the support during the period from the entry of the temporary order to the Amended Decree would be affected. Appellant contends that the level of prospective alimony and child support, commencing with the entry of the Amended Decree, were never intended to be affected by Paragraph 8 or was the paragraph to be construed as incorporating the terms of the temporary order. Rather, the level of permanent support and alimony were issues included in paragraph 16, as matters that the parties reserved.

It is respectfully submitted that if the above cited provision is read fairly, a reasonable person would conclude that it could be interpreted as Appellant contends. One could also argue that the interpretation urged by the Respondent and found by the lower court could also be extracted from reading the relevant provisions cited above.

Importantly however, the actions of the parties upon the entry of the Amended Decree constitute the best proof of what the parties intended. If the Respondent really believed that the alimony and child support levels from the temporary order were intended to carry over into the Amended Decree, there would have been no reason to

conduct discovery related to the income and expenses of the parties. However, the Record reflects that the Respondent/Appellee was sending discovery requests in August, 2005, long after the expiration of the six-month period. (R. 445) In fact, on August 19, 2005, the Respondent filed **eleven (11) subpoenas duces tecum** addressed to the Appellant's employers, banks and other sources from which the information required to assess alimony and child support could be obtained. (R. 379-444)

The Pretrial Conference held on December 8, 2005, primarily dealt with the demands of each of the parties regarding discovery. Respondent actually obtained an Order detailing the Appellant/Petitioner's obligation to supply requested information on January 9, 2006. (R. 471-473) Ongoing discovery was discussed in the Pretrial Conference of January 31, 2006. (R. 474) The Petitioner/Appellant was conducting discovery on the income and expenses of the Respondent in January, 2006 (R. 475-80).

Importantly, the only issue that could possibly have been referred to in the Amended Findings' reservation of issues, was the assessment of child support and alimony. There were no other financial or other issues existing at the time of the Amended Decree.

The law is clear that the courts interpret a divorce decree according to established rules of contract interpretation." *Moon v. Moon*, 973 P.2d 431 (Utah App. 1999)(quoting *Taylor v. Hansen*, 958 P.2d 923, 928 (Utah Ct. App. 1998)). As long as the language of the decree is not ambiguous, the court looks to its plain language to determine its effect.

*See Dixon v Pro Image Inc* , 987 P 2d 48 (Utah 1999) ("If the contract is written and the language employed is not ambiguous, the parties' intentions are determined from the plain meaning of the language ")

However, language in a written document is ambiguous if its terms *may be understood* to support two or more plausible meanings *Whitehouse v Whitehouse* 790 P 2d 57(Utah Ct App 1990) If the language of a judgment is obscure or ambiguous, the rules that apply to the construction of ambiguous contracts apply *Lucky Seven Rodeo Corp v Clark*, 755 P 2d 750, 753 (Utah Ct App 1988) The cardinal rule of interpretation is to give effect to the parties' intentions *Heimer v S.J. Groves & Sons Co* , 790 P 2d 107 (Utah Ct App 1990) Therefore, extrinsic evidence as to the parties' intention may be received and considered, *Lucky Seven Rodeo Corp* 755 P.2d at 753, and "the entire record may be resorted to for the purpose of construing the judgment " *Park City Utah Corp v Ensign Co* , 586 P 2d 446, 450 (Utah 1978)

In summary, the threshold question of whether or not a writing is ambiguous is a question of law for a court to decide *Faulkner v Fainsworth* 665 P.2d 1292, 1293 (Utah 1983), *Property Assistance Corp v Roberts*, 768 P 2d 976, 977 (Utah Ct App 1989) This initial determination does not require resort to extrinsic evidence *Zions First Nat'l Bank v National Am Title Ins Co* , 749 P 2d 651, 653 (Utah 1988), *Seashores Inc v Hancey*, 738 P 2d 645, 647 (Utah Ct App 1987) Language in a written document is ambiguous if the words used may be understood to support two or more plausible

meanings. *Property Assistance Corp.*, 768 P.2d at 977. A court is justified in determining that a contract or order is ambiguous if its terms are either unclear or missing. *Faulkner*, 665 P.2d at 1293. When a judgment is "obscure or ambiguous, the entire record may be resorted to for the purpose of construing the judgment." *Park City Utah Corp. v. Ensign Co.*, 586 P.2d 446, 450 (Utah 1978); *accord Land v. Land*, 605 P.2d 1248, 1251 (Utah 1980). The court must then adopt a construction "which will make the judgment more reasonable, effective, conclusive, and . . . which brings the judgment into harmony with the facts and the law." *Park City*, 586 P.2d at 450 (quoting *Moon Lake Water Users Ass'n v. Hanson*, 535 P.2d 1262, 1264 (Utah 1975)). In resolving an ambiguity, it is appropriate to consider both the context in which the document applies and the "purpose which was sought to be accomplished." *Progressive Acquisition*, 806 P.2d at 244. Furthermore, because "the cardinal rule of interpretation is to give effect to the parties' intentions," *Williams v. Miller*, 794 P.2d 23, 26 (Utah App. 1990), when a divorce decree is ambiguous "extrinsic evidence as to the parties' intention may be received and considered." *Id.*

It is respectfully submitted that the relevant language is in fact, ambiguous and that the Appellant is entitled to a reversal of the trial court's order in this matter for a hearing as to the parties' intent or more logically, based upon the pattern of conduct of the parties of conducting discovery relevant to child support and alimony, a ruling adopting the Appellant's position on the basis that it is the only position that is consistent with the

subsequent actions of the parties and the statutory duty of the court to enter the required findings of fact

**POINT III: RESPONDENT DOES NOT DISPUTE THE LAW RELATING TO THE INTERPRETATION OF TEMPORARY ORDERS.**

Important to the disposition of this matter, the Respondent does not contest the basic law regarding the interpretation of temporary orders. There is no question that payments that become due and payable under a temporary order may be reduced to judgment after the entry of the final decree. *Druce v. Druce* 738 P.2d 633 (Utah 1987). Importantly, “[w]hen a temporary order is followed by a permanent order, **the temporary order merges** into the permanent order.” See *Birch Creek Irrigation v. Prothero*, 885 P.2d 990,994, (Utah 1993) and also *Searle v. Searle*, 38 P.3d 307 (Ut. Ct. App. 2001).

The long accepted doctrines relating to the enforceability of temporary orders and their status upon entry of a final order are consistent only with the Appellant’s position that Paragraph 8 related only to the modification of the temporary order during the period before the entry of the Amended Decree and that the establishment of prospective support and alimony were reserved pending the discovery by the parties.

**CONCLUSION**

Based upon the law and the facts of this case, Appellant requests an order reversing the district court’s determination and adjudging that the Temporary Order of August 11, 2004, terminated on the entry of the Decree of Divorce, October 7, 2004.

Appellant requests that the matter be remanded for a hearing on child support and alimony levels and arrearages, if any, to be effective with the entry of the Decree, October 7, 2004.

Dated this 24 day of April, 2008.



ROSEMOND G. BLAKELOCK, ESQ

Attorney for Petitioner/Appellant

#### CERTIFICATE OF MAILING

I certify that on the 24 day of April, 2008, two copies of the Appellant's Reply Brief were mailed, postage prepaid, to the following:

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