

1996

John D. Watson v. Camille K. Watson : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *John D. Watson v. Camille K. Watson*, No. 960344 (Utah Court of Appeals, 1996).

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IN THE UTAH COURT OF APPEALS

A10
DOCKET NO. 960344-CA

JOHN D. WATSON,

Plaintiff/Appellee,

vs.

CAMILLE K. WATSON,

Defendant/Appellant.

Case No. 960344-CA

Priority No. 15

BRIEF OF APPELLEE

APPEAL FROM THE FOURTH JUDICIAL COURT, UTAH COUNTY,
FROM A FINAL ORDER TERMINATING ALIMONY AND REQUIRING THE SALE
OF MARITAL HOME, BEFORE THE HONORABLE HOWARD H. MAETANI

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FILED

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COURT OF APPEALS

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JOHN D. WATSON,

vs.

Defendant/Appellant.

Priority No. 15

908, 918 (Utah App. 1995) (citing Cummings v. Cummings, 821 P.2d 472, 476 (Utah App. 1991)).

CONTROLLING STATUTORY PROVISIONS

Utah Code Annotated Section 30-3-5(6) (1992)

Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.

STATEMENT OF THE CASE

A. Nature of the Case

Camille K. Watson appeals from a final order of the Honorable Howard H. Maetani, Fourth District Court, terminating alimony and requiring the sale of the marital home pursuant to Utah Code Annotated Section 30-3-5(9) (R. 228-247).

B. Course of Proceedings and Disposition in Trial Court

A Decree of Divorce between appellee, John Watson, and appellant, Camille Watson, was entered on November 12, 1992 (R. 25-31). The parties, at that time, had three minor children. In the decree, the parties were awarded joint legal custody while Camille Watson was granted physical custody provided that John Watson received liberal and reasonable visitation rights. John Watson was ordered to pay alimony in the amount

of \$250.00 per month until Camille Watson either remarries or cohabitates with another person (R. 25). In addition, Camille Watson was awarded the marital home until she moves or the youngest child reaches the age of eighteen--provided that she did not remarry or cohabitate with another person (R. 30).

On or about November 27, 1995, John Watson filed with the Fourth District Court a Motion for an Order to Show Cause alleging that Camille Watson was cohabitating with Jerry Talbot, and requesting an order terminating alimony payment and requiring the sale of the marital home pursuant to the Divorce Decree (R. 57). An Order to Show Cause was signed that same day by Judge Howard Maetani (R. 87).

On February 1, 1996, an evidentiary hearing was conducted before Judge Maetani (R. 167-78; 2/1/96 Transcript). At the close of evidence, Judge Maetani took the matter under advisement and requested that counsel submit proposed findings of fact (2/1/96 Tr. at 217-18).

On April 8, 1996, the trial court issued a memorandum decision terminating Camille Watson's right to alimony and ordering the sale of the marital home (R. 209-224). The Findings of Fact and Conclusion of Law was signed by the trial court on May 2, 1996 (R. 228-247); also on May 2, 1996, Camille Watson filed a Notice of Appeal and this appeal followed (R. 252).

STATEMENT OF RELEVANT FACTS

On February 1, 1996, an evidentiary hearing on an order to show cause filed by the plaintiff/appellee, John Watson (“John”), was held before Judge Maetani in the Fourth District Court. The central issue at the hearing was whether the defendant/appellant, Camille Watson (“Camille”), was cohabitating with Jerry Talbot in violation of the parties 1992 divorce decree, which provided that if Camille remarried or cohabitated with another person, then her right to alimony would be terminated and her right to reside in the marital home would be dissolved. Several individuals testified at the hearing as follows:

A. Testimony of Robert N. Goode

Robert Goode testified that he was a private investigator with fifteen years of experience (seven years in surveillance experience in cohabitation cases) (2/1/96 Tr. at 9, 14). Goode testified that he had been hired by John to perform a “skip trace” on Jerry Talbot (“Talbot”) and broad surveillance on the residence of Camille located at 1668 North 390 West, Pleasant Grove, Utah (“Camille’s address”) (2/1/96 Tr. at 15, 17). A “skip trace” consists of “locating the primary residence of an individual” (2/1/96 Tr. at 11).

Early in Goode’s testimony he was asked by John’s counsel about a “skip trace” on Talbot and he responded: “. . . [W]e tried to verify whether or not Mr. Talbot had any other residences available to him. At the time that we were employed to do this Mr. Talbot had no other residences” (2/1/96 Tr. at 17). Camille’s counsel objected to this statement on foundation because more information as to “what [Goode] did to determine

whether [Talbot] has other residences or not” was needed (2/1/96 Tr. at 17). At this stage, the objection was sustained (2/1/96 Tr. at 17).

However, later in Goode’s testimony--following the introduction of detailed foundation evidence--he was allowed to render his opinion concerning the results of the “skip trace” he had conducted on Talbot (2/1/96 Tr. at 38-39). Goode’s opinion, based upon his ten month investigation and surveillance activities, was that “Talbot was residing” at Camille’s address during the period of December, 1994, to November, 1995; and that Camille and Talbot had a “family relationship” (2/1/96 Tr. at 39).

Goode’s opinion was based upon the information gained from the following investigative procedures: From December 17, 1994, through early February, 1995, Goode personally conducted surveillance on Camille’s home (2/1/96 Tr. at 15, 18). Goode used a stationary video surveillance system at Camille’s address from February, 1995, through April, 1995 (2/1/96 Tr. at 18). From April, 1995, through October, 1995, Goode personally conducted random checks on Camille’s address; and that a stationary video surveillance system was again used during the period of October through November, 1995 (2/1/96 Tr. at 18).

Goode testified to the following information concerning the location of Talbot’s primary residence and whether he and Camille were “cohabitating”: One, Talbot was present at the Watson home each night Goode personally surveilled the residence (2/1/96

Tr. at 18)¹; and that Talbot was never present at his mother's home in West Valley City during a three-four month period in early 1995, when Goode conducted surveillance on the house a couple of times per week (2/1/96 Tr. at 62-63). Two, Goode observed Talbot changing clothes in the master bedroom (2/1/96 Tr. at 19). Three, Goode testified that Talbot had access to the Watson home on a regular basis, and that he frequently was engaged in activities around the house. (2/1/96 Tr. at 24-26).

For example: Talbot used a garage door opener to access the home and he parked his cars in the garage (2/1/96 Tr. at 20). Talbot worked on his car in that garage (Id.). Talbot frequently used Camille's car (Id. at 23). Talbot, on numerous occasions, was in the home when Camille was not present and at times the Watson children were not present either (Id. at 31-32). Talbot cleaned the garage, worked in the yard, mowed the lawn, washed the cars, entered the home without knocking, returned to the home late at night when no lights were on, carried groceries into the home, and every other weekend, Talbot was present at the home with "dark-haired" children who were later identified as his children from a previous marriage (2/1/96 Tr. at 25, 26, 32, 37, 41-42, 57).

Four, Goode found two pieces of regular mail and other pieces of "junk" mail addressed to Talbot at Camille's address during trash can searches (2/1/96 Tr. at 27, 60-61). In addition, Goode traveled to Wendover, Talbot's former place of residence, spoke

¹Later, testimony regarding the video surveillance between January and March of 1995, indicated that there were a few days when Talbot was not present at the Watson home, but that on any many other days, he was present at the home and often spent the night there (2/1/96 Tr. at 50-58).

with his prior apartment manager, and at some point learned that Talbot had left Camille's address as a forwarding address (2/1/96 Tr. at 36). Goode also spoke with a former employer of Talbot's and was told that Talbot was using Camille's address on his W-2 form (2/1/96 Tr. at 30).

Five, Goode testified that he had observed Talbot and Camille together in the master bedroom, late at night, and with Camille wearing a white robe; that he had further observed Talbot follow Camille into the master bath; and that he also saw the shades on the window close (2/1/96 Tr. at 41). Goode also testified that he found an empty box of condoms in the trash can at the home (2/1/96 Tr. at 33).

B. Testimony of Craig Hilton

Craig Hilton lives directly across the street from Camille (2/1/96 Tr. at 73). He testified that he first saw Talbot two years prior to the hearing at Camille's home; and that he first met Talbot at a church social at which Talbot had attended with the Watson's daughter, Shawnie, approximately a year prior to the hearing date (2/1/96 Tr. at 74-75).

Hilton further testified that he has noticed Talbot in several different cars over the past two years and that one of those cars was a red corvette (2/1/96 Tr. at 76). Hilton stated that he had seen Talbot park the car in Camille's garage and that he had seen the car parked there overnight, and that Talbot had washed the corvette in Camille's driveway (2/1/96 Tr. at 75-76). In addition, Hilton testified that Talbot also drove a White Grand Am and a Ford Bronco; and that Camille drove a Ford Taurus with Talbot as a passenger (2/1/96 Tr. at 76-77).

Hilton testified that during the past two years he had seen Talbot: go to the mailbox once or twice; working in Camille's yard--including mowing the lawn on a regular basis; carrying groceries into Camille's house and taking the trash outside; riding bicycles with Camille; vacationing with Camille; arguing with Camille in her garage where he heard Camille beg Talbot not to leave because she loved him; talking with Shauna Farnsworth, a friend with whom Camille exercised weekly (2/1/96 Tr. at 78, 79, 80, 83-84, 85-86, 87). Hilton testified further that he had seen Talbot take a duffel bag into the house; and that he had seen Talbot's car leave Camille's house in the morning between seven and eight a.m. which caused him to assume that Talbot had spent the night at Camille's (2/1/96 Tr. at 80, 86-87). However, Hilton also testified that there had been periods of weeks where he hadn't seen Talbot at Camille's house; and that Talbot, when present, could, on occasion, have left Camille's after he went to bed (2/1/96 Tr. at 90).

Hilton testified that he last saw Talbot "a couple of weeks" before the hearing (2/1/96 Tr. at 79). Finally, Hilton testified that it was his opinion that when Talbot was present he was living with Camille (2/1/96 Tr. at 92).

C. Affidavit of Russell Ware

During the hearing, an affidavit of Russell Ware, a United States Postal Service employee, was submitted to the trial court. The affidavit stated that Ware has, on an occasional basis, delivered mail to Talbot at Camille's address (1668 North 390 West, Pleasant Grove) since early 1995 (2/1/96 Tr. at 96-97).

D. Testimony of Shauna Farnsworth

Shauna Farnsworth, a long-time friend and exercise partner of Camille's, testified that she visits Camille's home 3 to 4 times a week (2/1/96 Tr. at 99). She testified that Camille and Talbot had been dating for two years and that she had seen Talbot in Camille's home approximately six times (2/1/96 Tr. at 101). She testified that Camille drives a Taurus and that Talbot has driven a Corvette and a Grand Am both of which he has parked in the garage (2/1/96 Tr. at 101). She also testified that she and Camille have had conversations about Jerry--particularly at times when Camille and Talbot had been arguing or Camille was angry (2/1/96 Tr. at 102). In addition, Farnsworth testified that Camille and Talbot had taken week-end trips together (2/1/96 Tr. at 102-03). Farnsworth also testified that she had never seen Talbot or any of his possessions in the master bedroom and that she did not believe he was living with Camille (2/1/96 Tr. at 110-11).

E. Testimony of Jerry Talbot

Jerry Talbot testified that he resides at 3234 South 4000 West, West Valley City, Utah (2/1/96 Tr. at 122). Talbot testified that this was his mother's home and that he had been living there since September of 1994 (2/1/96 Tr. at 126). Talbot testified that his household furnishings were currently in storage (2/1/96 Tr. at 136). Talbot testified that in the past two years he has also resided in Wendover, Nevada, and Illinois, but that he receives mail at several addresses (2/1/96 Tr. at 123).

Talbot stated that he received his mail at his mother's house in West Valley City and the defendant produced evidence to that effect (Defendant's exhibits 7-27) (2/1/96 Tr.

at 153-59). Talbot testified that Plaintiff's Exhibit No. 3, an out-of-state bank statement addressed to him at Camille's house, was his and was related to a balance on a safety deposit box; and that his 1994 W-2 form from his work at Farencos was also addressed to him at Camille's house (2/1/96 Tr. at 124-25). He testified that he had these documents sent to Camille's rather than the West Valley City address--his mother's home where he claims to have resided since September of 1994--because he trusted Camille to forward him the documents whereas his mother would not (2/1/96 Tr. at 125-26).

Talbot testified that he was formerly employed by Farencos Industrial, a construction firm, and that he was frequently required to travel (2/1/96 Tr. at 123). Talbot testified that on the date of the hearing he did not have a bank account nor did he share one with Camille--nor did he have any other joint finances or property with her; and that he was not sure whether he had an account in December, 1994 (2/1/96 Tr. at 123-24, 130, 144, 160-61). Talbot stated that he operates on a "cash" basis (2/1/96 Tr. at 131).

Talbot testified that he and Camille had been dating "a little over two years" and that they were "good friends" who had a "trusting type relationship" (2/1/96 Tr. at 125, 127). Talbot testified that on most weeks he arrives at the Watson home on Friday evening and leaves either Sunday evening or often Monday morning (2/1/96 Tr. at 160). Talbot also testified that he's "never made an unannounced visit to Mrs. Watson's house" (2/1/96 Tr. at 147). However, Talbot also admitted: that he parked his Corvette and Grand Am in Camille's garage using a garage door opener he had in his vehicle when in Pleasant Grove, and that he has cleaned that garage and fixed the opener (2/1/96 Tr. at

128-29, 142). Talbot said that he had also driven Camille's car, purchased groceries and cooked for her and the Watson children, worked in the yard, collected the mail, taken out the trash, done the laundry and the dishes (but not his laundry because his mother washes his clothes at "home" in West Valley), driven the Watson children to school, taken the children and Camille camping and fishing (2/1/96 Tr. at 127, 129, 131, 137, 138-40, 142, 143). Talbot testified that his television set was in the master bedroom and his stereo in one of the children's room, that he had purchased a weed-eater for the yard, and that he had bought several items for Camille's children for Christmas, birthdays, or if they "need[ed] something and Camille [didn't] have the money" (2/1/96 Tr. at 133, 141).

Talbot agreed that his children have "stayed-over" at Camille's once or twice a month (2/1/96 Tr. at 131); and that he, Camille and their respective children had spent Christmas in 1994 together at the Watson home (2/1/96 Tr. at 134). In addition, Talbot testified that he had spent the night at Camille's, left for work from Camille's, and had been in the house on several occasions with the Watson children when Camille was not at home (2/1/96 Tr. at 129). He testified that "most often" when he spent the night, he slept on a couch in the living room, but that he had slept in the bedroom "on top of the covers" (2/1/96 Tr. at 134).

F. Testimony of Camille Watson

Camille Watson testified that she has never lived with Talbot (2/1/96 Tr. at 195). Camille also testified that Talbot never gave her money but has paid for groceries, on occasion (2/1/96 Tr. at 178-79); that she and Talbot do not have any joint accounts or

property (Id.); that Talbot, when present, had access to the home, including the kitchen, bathroom, and garage (2/1/96 Tr. at 182); that Talbot has been in the home with the children at times when she has been away, but that "it could be the case" that she has driven off with her children leaving Talbot in the home doing yard work, washing his car, and going in and out the front door (2/1/96 Tr. at 185, 187-88); that Talbot has parked all of his cars, at one time or another, in her garage (2/1/96 Tr. at 185); that during a period of four months Talbot's children were at the home every other week-end; (2/1/96 Tr. at 183-84); that she and Shauna Farnsworth usually exercise during the day (2/1/96 Tr. at 190); that she never gave Talbot access to a garage door opener but that she or the children would always open the garage for him (2/1/96 Tr. at 190-193); that she was the owner of the Bronco which Hilton testified he had seen Talbot driving (2/1/96 Tr. at 196).

G. Testimony of Rowella Talbot

Rowella Talbot ("Mrs. Talbot"), Jerry Talbot's mother, testified that Talbot has lived with her since November of 1994; that she usually does his laundry; that he spends "a lot of time" with Camille; that she had been receiving mail for Talbot for a long period of time before he moved-in; that Talbot spent Christmas of 1994 with her (2/1/96 Tr. at 205-212).

H. Testimony of Sherry Clements

Sherry Clements, Camille's older sister, testified: that she visits Camille 4 to 5 times per week to check on her, baby sit or exchange clothes; that she knows Talbot but

has never seen any of his personal property at the Watson home nor has he ever answered the phone when she has called; that she has seen Talbot at the Watson home on week-days; and that in the past two years she has not had an overnight visit with Camille at the Watson home (2/1/96 Tr. at 213-15).

SUMMARY OF ARGUMENT

The ultimate issue in this appeal is whether the trial court abused its discretion in concluding that Camille Watson and Jerry Talbot were “cohabiting”. In other words, did Camille and Talbot share a common residency in the Watson’s marital home and did they engage in sexual contact indicative of a conjugal relationship. Under Utah Code Annotated Section 30-3-5(6) (1992), with respect to the termination of alimony because of common residency, once that residency is established by John Watson, then Camille Watson has the burden of proving that the relationship was without sexual contact. However, with respect to the required sale of the marital home, it is unclear who has the burden of proof relating to sexual contact. Nonetheless, appellee has marshaled the evidence and will demonstrate to this Court that the trial court’s findings and conclusion of sexual contact was sufficient.

The trial court’s findings of fact have been largely undisputed by appellant, who has not properly marshaled the evidence nor demonstrated clear error. Therefore, this Court should assume that the findings are correct and proceed to an examination of the

trial court's application of those facts to the law. In addition, appellee has marshaled the evidence and will demonstrate the sufficiency of the trial court's findings.

Finally, an application of the facts to the law amply supports the trial court's conclusion of cohabitation: that Camille and Talbot shared, and intended to share, a common residence for more than a brief period of time; and that they engaged in sexual contact of a conjugal nature. Therefore, this Court should affirm the trial court's decision terminating alimony and requiring the sale of the marital home.

ARGUMENT

POINT I

THE TRIAL COURT'S FINDING OF FACTS ARE NOT "CLEARLY ERRONEOUS"

A. Standard of Review

Appellant opens her argument by claiming "the trial court abused its discretion and committed error in its findings of fact" (Br. of Appellant at 15). Although the basic contention of appellant's argument is that the trial court committed error in concluding that Talbot and Camille shared a common residence, appellant, in reality, is challenging the trial court's "findings of fact."² While this Court is not bound by the "conclusion"

²It should be noted that appellant never mentions the trial court's formal "findings of fact" in her statement of facts. Instead she questions only the trial court's summary of the evidence; and does so without demonstrating how any error in the summary resulted in error in the "findings", which under appellant's argument would, of course, have led to the erroneous "conclusion" by the trial court under the abuse of discretion standard of review in "cohabitation" cases.

reached by the trial court as to whether a given set of facts constitute cohabitation, this Court will only disturb the trial court's factual findings (i.e., the given set of facts) where they are "clearly erroneous"--or so lacking in support as to be against the clear weight of the evidence. *See, Haddow v. Haddow*, 707 P.2d 669, 671 (Utah 1985); *Doelle v. Bradley*, 784 P.2d 1176, 1178 (Utah 1989). *See also, Sigg v. Sigg*, 905 P.2d 908, 918 (Utah App. 1995) (citation omitted).

Moreover, when challenging a finding of fact, appellant must properly "marshal the evidence" or this Court will not address the challenge. *See Robb v. Anderson*, 863 P.2d 1322, 1328 (Utah App. 1993) citing *Gillmore v. Gillmore*, 745 P.2d 461, 462 (Utah App. 1987), cert. denied, 765 P.2d 1278 (Utah 1988) ("We review the evidence in a light most favorable to the trial court's findings and affirm if there is a reasonable basis for doing so"). Marshaling the evidence requires that appellant list all of the evidence supporting the finding and then appellant must "demonstrate that the marshaled evidence is legally insufficient to support the findings when viewing the evidence and inferences in a light most favorable to the decision" *Stewart v. Board of Review*, 831 P.2d 134, 138 (Utah App. 1992); and if appellant fails to marshal the evidence properly, then this Court must assume the findings of fact are correct and proceed to a determination of the accuracy of the trial court's conclusions of law and application of that law. *Crockett v. Crockett*, 836 P.2d 818, 820 (Utah App. 1992).

B. Appellant has Failed to Properly Marshal the Evidence.

Appellant has not properly marshaled the evidence. She has not listed all of the evidence supporting the findings, nor has she demonstrated the insufficiency of the findings having viewed the evidence in a light most favorable to the decision. Moreover, appellant cites no legal authority in support of her argument nor does she adequately cite to the trial record in support of the factual errors she claims. Therefore, this Court should assume the record supports the findings and proceed to a review of the trial court's application of the facts to the law.

C. The Factual Findings are Supported by the Evidence.

Regardless of appellant's failure to properly marshal the evidence, the evidence presented at trial is sufficient to support the trial court's factual findings. Appellee has listed all of the evidence in his Statement of Relevant Facts, and will demonstrate the lack of clear error in those findings. A copy of the trial court's "Findings of Fact and Conclusions of Law" is included in the Addenda at Tab 1.

Finding number one states that a former spouse's right to alimony terminates upon cohabitation with another person (Tab 1 at 12). This is a correct statement of the law. *See*, Utah Code. Ann. Section 30-3-5(6) (1992); Pendleton, 918 P.2d at 160 (Semantic distinction between "residing" in the 1992 statute and "cohabiting" in the 1995 statute is "inconsequential").

Finding number two accurately defines the term “cohabitation” (two-pronged test of “common residency” and “sexual contact”). *See, Haddow v. Haddow*, 707 P.2d 669, 670 (Utah 1985); *See, Knuteson v. Knuteson*, 518 P.2d 1376 (Utah 1980).

Finding number three correctly states the issue of the case (Appellant’s cohabitation) and its accompanying burden of proof (“preponderance of evidence”).

Finding number four correctly defines “common residence”. *See Haddow*, 707 P.2d at 672; *Sigg v. Sigg*, 905 P.2d 908, 917 (Utah App. 1995).

Finding number five is correct. It is undisputed that Camille’s primary residence--the Watson’s marital home--is located at 1668 North 3990 West, Pleasant Grove, Utah. Camille did deny that Talbot has ever lived with her at that address (2/1/96 Tr. at 195); and Talbot stated his primary residence was his mother’s home located at 3234 South 4000 West, West Valley City, Utah (2/1/96 Tr. at 122, 126).

Finding number six relates to forwarding addresses for mail delivery used by Talbot after he left Wendover, Nevada, in September of 1994. Talbot has received mail at Camille’s address (2/1/96 Tr. at 27, 60-61, 96-97, 124-25). During this period, Talbot also received mail at his mother’s West Valley City home (Id. at 153-59). Talbot did use Camille’s address as a forwarding address for an out-of-town bank statement and for the delivery of a W-2 form from a previous employer (Id. at 124-25). The trial court’s finding that Talbot left Camille’s address as a forwarding address with his apartment manager in Wendover, is a reasonable inference of the evidence: Goode, the investigator, testified that he personally spoke with the apartment manager and that during his stay in

Wendover he was “made aware” that Talbot had left Camille’s address as a forwarding address (Id. at 36).

Finding number seven is also correct: Camille and Talbot spent a substantial amount of time together at the Pleasant Grove address (2/1/96 Tr. at 125, 127, 160). *See also*, summary of Robert Goode, Craig Hilton, Rowella Talbot, and Shauna Farnsworth’s testimony in Appellee’s statement of relevant facts (*supra*, pp. 3-12). Furthermore, there is sufficient evidence to support the trial court’s inference that neighbors, friends, and a private investigator, “have seen both Mr. Talbot and Camille Watson appear to share a common abode in the [Watson marital] home the past two years, specifically during the period of December 1994 to November 1995” (R. 234-35; Tab 1 at 13-14).

For example, Robert Goode, the investigator, testified that he saw Talbot every night he personally conducted surveillance at Camille’s home (2/1/96 Tr. at 18). In addition, Talbot was observed by Goode, who surveilled Camille’s home for ten months, and by a neighbor, Craig Hilton, who lived directly across the street from Camille, to: park his cars in the garage (Id. at 20, 75-76); and work in the yard and mow the lawn (Id. at 81-87). In addition, Hilton testified that he observed Talbot: take out the trash, argue with Camille, vacation with Camille, and leave the residence in the morning between 7-8 a.m. (Id. at 83-87); and Goode, the investigator, testified that he saw Talbot: frequently use Camille’s car, be present at the home when Camille and/or her children were absent, enter the home without knocking, utilize a garage door opener, and bring his children over to the home every other weekend (Id. at 23, 26, 32, 37, 41-42, 57).

Finding number eight--that Talbot always parked his car(s) in the same place in Camille's garage and appeared to have access to a garage door opener --is amply supported by the record through the testimony of Goode, Hilton, Talbot and Camille. (2/1/96 Tr. at 20, 75-77, 128-29, 185). Moreover, Talbot's description of his corvette as being "like another one of his children' and that "it doesn't stay out on the street' is sufficient evidence to support a reasonable inference that Talbot's car(s) were always in the garage. (2/1/96 Tr. at 150-51).

Finding number nine--that Camille and Talbot have spent the night together at the Watson home--is also well-supported by the testimony of Goode, Hilton, Talbot and Camille (2/1/96 Tr. at 41, 55-59, 86-87, 129, 134, 160, 181). In fact, Talbot testified that, on most weeks, he arrives at the Watson home on Friday evening and leaves Sunday night or Monday morning (Id. at 160).

Finding number ten that Talbot cleaned the garage, washed the cars, took out the trash, picked up the mail, mowed the lawn during summer months and purchased a weed-eater for use at the home is supported by the testimony of Goode, Hilton, Talbot and Camille. (2/1/96 Tr. at 127, 129, 133).

Finding number eleven that Talbot played with Camille's children and exercised visitation with his own children at her home is supported by the testimony of Goode, Talbot and Camille (2/1/96 Tr. at 41-42, 57, 131, 134, 183-84).

Finding number twelve that Talbot bought groceries for the home and cooked meals for the family is supported by sufficient evidence. Talbot admitted to buying

groceries for Camille and cooking meals for the children, and Camille testified he helped buy groceries for her when they were together (2/1/96 Tr. at 131, 132, 178-79, 183).

Finding number thirteen states that the trial court found the testimony of Goode and Hilton “to carry” greater weight than the testimony of Camille, Talbot, Mrs. Talbot and other defense witnesses (R. 234, “Findings” at 14). This finding, pertaining to witness credibility, is within the sound discretion of the trial court. *See*, Rule 52(a), U.R.C.P.; State v. Pena, 869 P.2d 932, 936 (Utah 1994).

Findings numbered fourteen through sixteen are also demonstrative of the testimony at trial. Finding number fourteen, and the inference derived therefrom, that if Talbot really lived with his mother in West Valley City, then he would have no need to have mail forwarded to Camille’s address, is supported in the record. Talbot testified he was living with his mother since September of 1994 (2/1/96 Tr. at 126). Finding number fifteen is also correct. It acknowledges that Talbot received mail at both Camille’s home and his mother’s home (2/1/96 Tr. at 124-25, 153-59). Finding number sixteen that Camille and Talbot had no joint accounts or operating expenses except for groceries and that Talbot operated on a “cash only” basis is also supported by the record (2/1/96 Tr. at 123-24, 130, 131, 144, 160-61, 178-79). In addition, the trial court’s inference, that “any physical evidence regarding shared expenses” would be difficult or impossible to produce because of Talbot’s cash-based financial method, is reasonable.

Finding number seventeen is a correct statement of the law with respect to the determinative value of shared financial obligations as a factor in establishing

cohabitation. Haddow, 707 P.2d at 673 (Shared financial obligations is not requisite element of cohabitation, but may be a significant factor for trial court's to address).

The evidence produced in support of the facts listed in finding number eighteen amply supports the trial court's accorded weight to these facts and the trial court's conclusion that "Talbot and [Camille] were sharing a common residence for more than a brief period of time. (Statement of Relevant Facts, *supra*, pp. 3-13).

Finding number nineteen (Tab 1 at 19) is an issue of factual application to law and will be addressed, *infra*, at Point II of Appellee's argument. However, finding number twenty, which shifts the burden of proof of sexual contact to the defendant once plaintiff has established "common residency" is correct under the statute in effect at the time of the parties' divorce in 1992. *See also*, Pendleton v. Pendleton, 918 P.2d 159, 160 (Utah App. 1996).

Nevertheless, substantial evidence of sexual contact between Camille and Talbot is sufficiently, and correctly, recited by the trial court in findings numbered twenty-one through twenty-six. (*See, supra*, Statement of Relevant Facts, pp. 3-13). Besides, appellant does not argue that the trial court's finding of sexual contact was "clearly

erroneous”.³ Therefore, this Court should assume that the trial court’s findings of facts are correct. Robb, 863 P.2d at 1328; Crockett, 836 P.2d at 820.

Finding number twenty-seven--the establishment of cohabitation between Camille and Talbot by a preponderance of evidence--requires an application of fact to law that will be addressed, *infra*, at Point II of Appellee’s argument.

Finally, finding number twenty-eight is a correct statement of the provisions of the parties’ divorce decree which requires a division of the equity in, and the sale of, the marital home upon cohabitation of Camille with another person (R. 25, 30).

Because the trial court’s findings of fact have not been challenged or demonstrated to be “clearly erroneous”, this Court should use these findings as the “given circumstances” to be applied to the legal elements of “cohabitation”.

POINT II

THE TRIAL COURT CORRECTLY APPLIED THE GIVEN FACTS TO THE LEGAL STANDARD OF “COHABITATION”

Utah Code Annotated Section 30-3-5(6) provides that the right to alimony shall terminate upon cohabitation of the receiver with another person. In addition, the Decree

³Appellant only argues that the trial court relied upon “circumstantial” evidence (Br. of Appellee at 21). Appellant complains that the trial court relied too heavily upon the empty box of condoms found in the trash can because it is equally possible that the devices could have belonged to someone besides Talbot (Br. of Appellant at 21). However, the trial court found only that evidence of packaging from male contraceptive devices had been found in the discarded trash at Camille’s residence and that any inferences therefrom were not adequately rebutted. (R. 230).

of Divorce executed by the parties here in 1992 provides that the marital home shall be sold and its equity divided between the parties if Camille Watson cohabitates with another individual in the home (R. 30). The standard of “cohabitation” is the same for alimony and equitable distribution of the marital home. Haddow, 707 P.2d 669, 674 (Utah 1985). The trial court found that John Watson had established, by a preponderance of the evidence, that Camille Watson was cohabitating with Jerry Talbot. Therefore, the trial court ordered that alimony be terminated retroactive to January 1, 1995, and that the marital home be sold according to the procedures set forth in the Decree of Divorce. Appellant argues that this order constitutes an “abuse of discretion.”

This Court is not bound by the ultimate conclusion of the trial court with respect to “whether given circumstances constitute cohabitation.” Haddow, 707 P.2d at 671; Pendleton v. Pendleton, 918 P.2d 159, 160 (Utah App. 1996). However, this Court will not disturb the facts found by the trial court unless they are “clearly erroneous”. Sigg, 905 P.2d at 918; Pendleton, 918 P.2d at 160. As set forth in Point I, the factual findings in this case are legally sufficient. Therefore, they constitute the “given circumstances” to be applied by this Court to the legal standard of cohabitation.

In Haddow v. Haddow, 707 P.2d 669, 672 (Utah 1985), the Utah Supreme Court set forth the test for “cohabitation.” The Court concluded that there are “two key elements to be considered” in making a determination of cohabitation: “common residency” and “sexual contact evidencing a conjugal association.” Haddow, 707 P.2d at 672.

A. The Given Facts in this Case Establish “Common Residency”

Courts in Utah have defined “common residency” as “the sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of time.” Haddow, 707 P.2d at 672. *See also*, Pendleton, 918 P.2d at 160; Sigg, 905 P.2d at 917. In Haddow, several factors were used by the court in determining whether the given circumstance arose to the level of “common residency”: One, the amount of time spent by the third person at the marital home. Two, whether the time spent together between the third person and the spouse receiving alimony and in possession of the home (“receiving spouse”) evidenced “continuity” and was for more than a brief period of time. Three, whether the third person kept or moved into the home personal objects such as furniture and clothing. Four, whether the third person and the receiving spouse had joint financial obligations or property, or other shared living expenses. Five, whether the third party had access to the home (such as a key) or had spent time alone in the home when the receiving spouse was not present. Haddow, 707 P.2d at 673.

In Haddow v. Haddow, the Utah Supreme Court reversed the trial court’s finding of “cohabitation” on grounds that, although the third person spent a “substantial” period of time at the party’s home, the given facts and circumstances did not establish “common residency.” 707 P.2d at 674. The court based its decision on the following factors: one, that the third person had no key to the home nor had he spent any time alone in the home; two, no furniture or personal items beyond some clothing and toiletry articles belonging

to the third person were kept in the home; three, the car belonging to the third person parked at the home was not relevant of the third person's presence because he used another car for his daily activities; and four, that the receiving spouse and third person did not share living expenses.

This Court recently addressed the issue of "cohabitation" in Pendleton v. Pendleton, 918 P.2d 159 (Utah App. 159). In its analysis, this Court examined Haddow and found that the Utah Supreme Court had focused primarily on "whether [the third person] traveled freely in and out of [the receiving spouse's] home"; and that the two determinative facts used by the Supreme Court in finding no "common residency" were that the third person "had no key to the house and that he did not spend time there when Mrs. Haddow was away." Pendleton, 918 P.2d at 160. Applying Haddow to the facts in Pendleton, this Court found that the element of "common residency" had been established: The third person's job in real estate required frequent out-of-town travel; the third person spent ninety percent of his "in town" time--four to five nights a week--at the home; he had his own key; and he had free access to the home and spent time there alone. Pendleton, 918 P.2d at 161.

In this case, like Pendleton, Talbot had access to Camille's home and he spent time there alone. The testimony of the investigator, Robert Goode, established that Talbot had a garage door opener and that he always parked his cars in the same place in the garage (2/1/96 Tr. at 20); and that he was frequently at the home when neither Camille nor the Watson children were present (Id. at 31-32). Goode had conducted

surveillance at the house and in person and by video camera for ten months (2/1/96 Tr. at 15, 18).

Goode testified further that Talbot was present at the Watson home each night Goode personally surveilled the residence (2/1/96 Tr. at 18); and that Talbot was never present at his mother's home in West Valley City during a three to four month period in early 1995, when Goode conducted surveillance on the house a couple of times per week (2/1/96 Tr. at 62-63). Goode had also observed Talbot changing clothes in the master bedroom (2/1/96 Tr. at 19); and he testified that Talbot had access to the Watson home on a regular basis, and that he frequently was engaged in activities around the house. Camille's neighbor, Craig Hilton, also testified to Talbot's intimate involvement in activities at the house which included doing yard work, mowing the lawn, washing the cars, carrying groceries and taking out the trash (2/1/96 Tr. at 78-87).

Moreover, Talbot, himself, admitted to: typically spending three to four days of the week at the Pleasant Grove house (2/1/96 Tr. at 160); having possession of a garage door opener, fixing the garage door opener, always parking his car in the garage (2/1/96 Tr. at 128-29, 142); and, frequently spending time in Camille's home with her children when she wasn't there. (2/1/96 Tr. at 129-130). Furthermore, Camille admitted that "it could be the case" that she and her children have been away from the house while Talbot was left in the home doing yard work, washing his car, and going in and out the front door (2/1/96 Tr. at 185, 187-88).

In addition, Talbot testified that he and Camille had been dating “a little over two years”, that he had driven Camille’s car, purchased groceries and cooked for her and the Watson children, worked in the yard, collected the mail, taken out the trash, done the laundry and the dishes, driven the Watson children to school, baby-sat the children, taken the children and Camille camping and fishing (2/1/96 Tr. at 127, 129, 131, 137, 138-40, 142, 143). Talbot testified that his television set was in the master bedroom and his stereo in one of the children’s room, that he had purchased a weed-eater for the yard, and that he had bought several items for Camille’s children for Christmas, birthdays, or if they “need[ed] something and Camille [didn’t] have the money” (2/1/96 Tr. at 133, 141). Talbot further agreed that his children have “stayed-over” at Camille’s once or twice a month (2/1/96 Tr. at 131); and that he, Camille and their respective children had spent Christmas in 1994 together at the Watson home (2/1/96 Tr. at 134).

The given circumstances of this case clearly establish that Talbot and Camille shared a “common residency” in the Watson’s marital home for a period of ten months to two years prior to the trial court proceeding. Talbot had access to the house, spent three to four days a week at the house, brought his children frequently to the house, and regularly engaged in domestic activities and tasks that only a resident would perform. Accordingly, this Court should conclude that the trial court did not abuse its discretion in finding that appellee had established by a preponderance of the evidence that Talbot and Camille Watson shared a common residence.

B. The Given Facts of this Case Support the Trial Court's Finding of "Sexual Contact"

The second required element for "cohabitation" is "sexual contact evidencing a conjugal association". Haddow, 707 P.2d at 672. This prong of the "cohabitation" test has not been as clearly defined by courts.

However, appellant has not adequately argued that the trial court's findings and conclusion of "sexual contact" between Camille and Talbot. Appellant's entire argument on sexual contact consisted of one paragraph which contains no citation to the record nor any supporting legal argument. Appellant only argues that the evidence surrounding the empty box of condoms found in the trash at the home "was very circumstantial." (Br. of Appellant at 21).

Nonetheless, when viewing this case as a whole, there was plenty of evidence before the trial court, and before this Court, to establish a conjugal relationship between Camille and Talbot. Both Talbot and appellant admitted to having a "close" relationship for over two years (2/1/96 Tr. at 125, 127, 184-84). Family, friends, and neighbors knew of this on-going, close relationship which clearly evidenced more than friendship:

Craig Hilton testified, a neighbor, testified that: he observed Talbot and Camille argue, heard Camille beg Talbot not to leave because she loved him, and saw Talbot's car leave the house between seven and eight a.m. which led him to believe that Talbot had spent the night (2/1/96 Tr. at 84).

Talbot testified that he would not take a bath or shower, or use the bathroom when Camille was using it (2/1/96 Tr. at 135-36), however, Robert Goode testified that Talbot was present at the house each night he personally conducted surveillance, that he observed Talbot changing clothes in the master bedroom, and that he had observed Talbot and Camille in the master bedroom--late at night with Camille in a white robe--before he observed the two of them enter the master bathroom and then close the window shades (2/1/96 Tr. at 15, 18, 19, 41). Talbot admitted to taking the trash out of Camille's house. (Id. at 143). Goode also testified to finding an empty box of condoms in the garbage (Id. at 33).

Talbot, himself, admitted to spending approximately three nights per week at Camille's house and to sleeping on occasion in the master bedroom (2/1/96 Tr. at 134, 160). Shauna Farnsworth, a close friend of Camille's, knew about the relationship between Camille and Talbot and she knew when the couple was arguing (Id. at 101, 102). Farnsworth also testified that Camille and Talbot had vacationed together (Id. at 102-03).


The given facts taken as a whole clearly support the trial court's finding of "sexual contact": Talbot and Camille had a close relationship for over two years; they vacationed together, they spent the night together at the Watson home on a weekly basis, and they were observed together late at night in the master bedroom and bathroom. *See Haddow*, 707 P.2d at 672 (Court affirmed finding of sexual contact based on facts that couple regularly spent the night together, dated for over fourteen months, and vacationed together). None of this evidence was rebutted, nor did appellant establish that her

relationship with Talbot was “without any sexual contact” as required by Utah Code Annotated Section 30-3-5 (1992). Accordingly, this Court should conclude that the trial court did not abuse its discretion because the evidence sufficiently establishes “sexual contact” between appellant and Talbot.

CONCLUSION AND PRECISE RELIEF SOUGHT

Appellee, John Watson, asks that this Court affirm the ruling of the trial court’s order terminating alimony and requiring the sale of the marital home which was correctly based upon the established cohabitation of Camille Watson and another. John Watson asks that he be awarded costs according to the Utah Rules of Appellate Procedure, and that this Court order that appellant compensate him for any alimony paid after January of 1995, as ordered by the trial court. Finally, pursuant to Rule 33 of the Utah Rules of Appellate Procedure, John Watson asks that this court award him reasonable attorney’s fees expended on appeal.

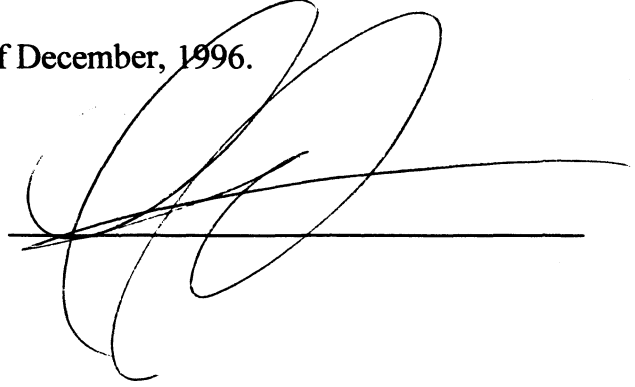
DATED this 17th day of December, 1996.



Chris D. Greenwood
Counsel for John Watson

CERTIFICATE OF MAILING

I hereby certify that I hand-delivered, two (2) true and correct copies of the foregoing Brief of Appellee to James C. Haskins, Haskins & Associates, 5085 South State Street, Murray, Utah 84107 this 17th day of December, 1996.

A handwritten signature in dark ink, consisting of a large, stylized 'R' or 'B' shape, is written over a horizontal line.

ADDENDA

Tab 1

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

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IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY
STATE OF UTAH

JOHN D. WATSON,
Plaintiff,

vs.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
EVIDENTIARY HEARING RE:
DEFENDANT'S COHABITATION

Case No. 924402232

CAMILLE K. WATSON,
Defendant.

Judge Howard H. Maetani
District Court Judge

This matter came before the Court on Plaintiff's Order to Show Cause filed on or about November 27, 1995, alleging that Defendant was cohabitating. The Court determined that an evidentiary hearing should be held on this issue. On February 1, 1996, an evidentiary hearing was held on the issue of cohabitation before Judge Howard Maetani. Both parties were present at the hearing. Chris Greenwood represented Plaintiff, John D. Watson, James Haskins represented Defendant, Camille K. Watson. Testimony was heard, evidence was presented by the parties, and argument was made by counsel. The Court has reviewed the file, considered the memoranda of counsel, and the evidence presented and upon being advised in the premises, now makes the following memorandum decision and findings of fact:

MEMORANDUM DECISION

A. STATEMENT OF FACTS

Procedural History

On or about November 12, 1992 a Decree of Divorce was entered for these parties on the grounds of irreconcilable differences. The Decree provided that Plaintiff pay alimony to Defendant in the amount of \$250.00 per month until such time as the Plaintiff remarried or cohabitated. See *Decree of Divorce* ¶ (15). Additionally, Defendant was awarded the marital residence until the first of three express triggering events occurred, specifically, "(a) Defendant remarries or cohabitates with any other person . . ." See *Decree of Divorce* ¶¶ 5, 5(a). Further, Defendant was given the right to purchase Plaintiff's equity interest in the home for \$18,000.00 at any time prior to the occurrence of the first of any of three triggering events found in Paragraph 5. See *Decree of Divorce* ¶ (5).

The *Decree of Divorce* also states that if the Defendant did not exercise her option to purchase prior to the occurrence of any of three triggering events, then the residence would be sold at fair market value and the monies divided pursuant to provisions found in the *Decree of Divorce*. See *Decree of Divorce* ¶ (5).

Plaintiff filed a *Motion for Order to Show Cause* on or about

November 27, 1995, alleging that Defendant had been cohabitating with Mr. Jerry Talbot. Plaintiff requested an Order terminating alimony payments and enforcing the provisions of the *Decree of Divorce* regarding disposition of the marital home. The hearing on that motion was scheduled before Judge Howard H. Maetani on December 12, 1995. That hearing was stricken. Subsequently, this matter was set for an evidentiary hearing before Judge Anthony Schofield on January 11, 1996 on the cohabitation issue. On or about January 11, 1996, Judge Schofield moved to recuse himself. The matter was referred to Judge Lynn W. Davis for reassignment. The matter was reassigned to Judge Howard H. Maetani for evidentiary hearing on February 1, 1996.

The evidentiary hearing of February 1, 1996 was held on the issue of cohabitation before Judge Howard H. Maetani. Testimony was taken at the hearing, evidence was presented, and the argument of counsel was heard.

At close of evidence, the Court took the matter under advisement. Additionally, the Court requested counsel to submit proposed Findings of Fact within 15 days and gave counsel 10 days to submit any responses. Counsel to request a Ruling at the end of the time period allotted.

Subsequently, on or about February 2, 1996, Plaintiff filed *Motion to Reopen Evidence and Memorandum in Support* thereof.

On or about February 20, 1996, Defendant filed *Response to Motion to Reopen Evidence*. On or about February 27, 1996, Defendant filed *Closing Argument and Proposed Findings of Fact and Conclusions of Law*.

On or about March 8, 1996, Plaintiff filed *Plaintiff's Proposed Findings of Fact and Conclusions of Law*. On or about March 25, 1996, Plaintiff filed a *Notice to Submit for Decision*.

Evidence Presented At Trial

Counsel waived Opening Statements. Several witnesses testified regarding the issue of Defendant's alleged cohabitation with Mr. Jerry Talbot.

Plaintiff called Robert N. Goode to testify. Mr. Goode testified that he is a licensed private investigator with over 14 years of experience and had been hired to do surveillance on Camille Watson's residence, located at 1668 North 390 West, Pleasant Grove, Utah. Mr. Goode testified that he began surveillance on the home in December of 1994, and that surveillance continued in the following fashion: From December 17, 1994 through February 1995 Mr. Goode personally conducted surveillance on the residence; from February 1995 through April 1995 a stationary video surveillance system was utilized; from April 1995 to October 1995 Mr. Goode did random checks of the residence; October 1995, use of the stationary video system was

resumed; surveillance was discontinued in November 1995.

Mr. Goode also testified that he had performed a "skip trace" on Mr. Jerry Talbot and that trace indicated Mr. Talbot's principle domicile and residence was the home at 1668 North 390 West, Pleasant Grove, Utah during the period of December 1994 to November 1995. Mr. Goode testified that he personally witnessed Mr. Talbot spending the night with Defendant in Pleasant Grove and not at any other address, including that of Mr. Talbot's mother in West Valley City. During the period January to March, 1995, Mr. Goode travelled to Mr. Talbot's mother's home in West Valley City once or twice a week. On each occasion, Mr. Goode never observed Mr. Talbot, nor Mr. Talbot's car present at the home.

Mr. Goode also testified to the following matters:

1). That Mr. Jerry Talbot was present at the residence located at 1668 North 390 West, Pleasant Grove, Utah, each night that he personally surveilled the residence.

2). That Mr. Talbot's car was parked in the garage in the same place each time he checked the residence.

3). That Mr. Goode observed Mr. Talbot entering and leaving the residence having changed clothes.

4). That Mr. Goode observed Mr. Talbot changing clothes in the master bedroom on one occasion.

5). That Mr. Goode observed Mr. Talbot present in the master bedroom with Defendant and observed him follow her into the master bathroom.

6). Mr. Goode also observed Mr. Talbot use a garage door opener to obtain access to the residence; work on his car in the garage at the residence; use Defendant's car frequently; arrive and leave from the residence when Defendant was not present; clean the garage; do yard work at the home; enter the home without knocking; return late at night when all the lights in the home were off; carry groceries into the home; carry a duffel bag and weight belt into the home and return to the car without the duffel bag. Mr. Goode also observed children other than the Watson children at the home every other weekend on a regular basis.

7). Mr. Goode testified regarding other actions he took in the investigation. Mr. Goode went to Mr. Talbot's former residence in Wendover and spoke to the apartment manager who informed him that Mr. Talbot had left the address at 1668 North 390 West, Pleasant Grove, Utah as his forwarding address. Mr. Talbot found several pieces of mail in the trash showing that Mr. Talbot was using the Pleasant Grove address as his mailing residence. See Plaintiff's Exhibits #3 and 4. Mr. Goode also recovered packaging for male prophylactic devises when searching

the trash. *See Plaintiff's Exhibit #2.* Mr. Goode contacted Mr. Talbot's former employer, and was informed that Mr. Talbot was using the Pleasant Grove address on his W-2 form as a forwarding address. *See Plaintiff's Exhibit #4.*

8). Mr. Goode testified that in his opinion, Mr. Talbot was living in the Defendant's home in Pleasant Grove from approximately December 1994 until November of 1995.

9). Plaintiff then called Craig Hilton to testify. Mr. Hilton testified that he lives in a home across the street from Camille Watson and has full view of the Watson residence. Mr. Hilton testified that he had met Mr. Talbot about two years ago at Camille Watson's home. Mr. Hilton testified that approximately one year ago, he was present when Jerry Talbot attended a church related "Daddy - Daughter" party with Camille Watson's daughter. Mr. Hilton testified that he saw the Watson residence every day, and that he has observed Mr. Talbot leaving from the residence several times between 7:00 a.m. and 8:00 a.m., apparently leaving for work. Mr. Hilton testified that Mr. Talbot was not there every day. Mr. Talbot was there for several days at a time when he was present, and appeared to be living there. Mr. Hilton observed that Mr. Talbot parked his red Chevrolet Corvette and white Pontiac Grand Am in the garage at Defendant's home. Mr. Hilton has observed Mr. Talbot drive

Defendant's car on several occasions. Mr. Hilton has witnessed Mr. Talbot work on the house and yard, go to the mailbox, wash the cars, often when the Defendant was not present. Mr. Hilton has witnessed Mr. Talbot with Defendant riding bicycles together and arguing in the garage. Mr. Hilton also testified that he observed Mr. Talbot playing with the Watson children in the yard. Mr. Hilton expressed his opinion that Jerry Talbot was living at Defendant's home during the period of December 1994 to November 1995.

Plaintiff called Mr. Russell Warr as the next witness. Mr. Warr did not appear in person to testify, rather, his testimony was offered by Affidavit. See Plaintiff's Exhibit #6. Mr. Warr is a United States Postal employee, whose route includes delivering mail to the residence at 1668 North 390 West, Pleasant Grove, Utah. Mr. Warr indicated in his Affidavit that since early 1995, (about January or February) he delivered mail to Mr. Talbot at 1668 North 390 West, Pleasant Grove, Utah on an occasional basis.

Mr. Jerry Talbot, Defendant's boyfriend, was called to testify. He testified that he has been dating Defendant for about two years. In 1994, he did live in Wendover, Utah and worked at Ferrenco. He testified that he did not have mail sent to 1668 North 390 West, Pleasant Grove, Utah, 84062. He

the trash. *See Plaintiff's Exhibit #2.* Mr. Goode contacted Mr. Talbot's former employer, and was informed that Mr. Talbot was using the Pleasant Grove address on his W-2 form as a forwarding address. *See Plaintiff's Exhibit #4.*

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beginning in November 1995. He testified that his home furnishings are in storage except for his weed-eater, television and radio which are at the Pleasant Grove address. He either purchased or gave these items as gifts to Defendant's children.

Mr. Talbot testified that he does not share any joint bank accounts with Defendant. He testified that he does not deposit his paychecks in a bank account, but rather, cashes them and pockets the cash. Further, Mr. Talbot testified that he transacts with cash. Mr. talbot testified that he does not share living expenses with Defendant, but he has purchased gifts and paid for groceries on occasion.

Mrs. Shauna Farnsworth, a close personal friend of Defendant, testified that she visits Defendant 3 or 4 times per week to go jogging. Mr. Farnsworth testified that Mr. Talbot was present at the home when she and Defendant go out jogging. Mrs. Farnsworth also testified that she has been in Defendant's bedroom on occasion, and did not observe anything in the room that could be identified as belonging to Mr. Talbot.

Defendant, Camille Watson, testified that the residence located at 1668 North 390 West, Pleasant Grove, Utah, is the principle place of residence for herself and the parties' minor children. She testified that she has an affectionate relationship with Mr. Talbot and has been dating him for about

two years. She testified that Mr. Talbot has been in her home at times when she was not present. During the period of December 1994 to February 1995 she testified that Mr. Talbot's children were in her home every other weekend on a monthly basis.

Defendant testified that Mr. Talbot spent Christmas of 1994 with her and her children. She testified that Mr. Talbot has entered her home late at night through the garage door and has spent the night. Ms. Watson testified that Mr. Talbot stayed in a spare bedroom when he did spend the night. She testified that Mr. Talbot cashes his paychecks and uses his money to buy groceries on occasion for her and her children.

Rowella Talbot, Mr. Talbot's mother, testified that Mr. Talbot currently lives with her in West Valley City, Utah and has been continuously living with her since November 1994. She testified that Mr. Talbot's furniture is in storage in Delta, Utah. She testified that during the time period of December 1994 through March 1995, that there were no nights during the week when he was not sleeping at home. Mrs. Talbot testified that her son Jerry Talbot, had spent the 1994 Christmas holiday with her. She also testified that Mr. Talbot had taken some of his personal belongings, such as a radio and television set to Defendant's home for Defendant's children to use.

Defendant's counsel presented as exhibits, approximately 20

pieces of mail, that had been addressed to Mr. Jerry Talbot at his mother's address in West Valley City, Utah.

B. ANALYSIS

FINDINGS OF FACT

1. Pursuant to Utah statute, "Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person." See Utah Code Ann. § 30-3-5(9) (Supp. 1995). The language of the statute places the burden upon the obligor to establish cohabitation on the part of the obligee. In the case at bar, it is Plaintiff's burden to establish that Defendant has cohabitated.

2. The Utah Supreme Court has defined cohabitation in relation to a two-prong test: ". . . [T]here are two key elements that need to be considered in determining whether or not an individual has cohabitated with a person of the opposite sex: (1) residency and (2) sexual contact evidencing a conjugal association." See *Haddow v. Haddow*, 707 P.2d 669, 670 (Utah 1985). Further, the Utah Supreme Court has said that residency contemplates more than a temporary stay. See *Knuteson v. Knuteson*, 518 P.2d 1376 (Utah 1980).

3. At issue in this case is whether or not Plaintiff has established by a preponderance of the evidence that Defendant had

a common residence with Mr. Jerry Talbot for more than a brief period of time, and whether there is sexual contact between them evidencing a conjugal association.

4. (1) Common Residency: Common residency means "the sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of time." See *Sigg v. Sigg*, 276 Utah Adv. Rep. 50, 54 (November 7, 1995); *Knuteson v. Knuteson*, 619 P.2d 1387, 1389 (Utah 1980).

5. In this case, Defendant admits that the home located at 1668 North 3990 West, Pleasant Grove, Utah is her primary residence and also that of her minor children. Defendant denies that Mr. Talbot lives or has ever lived at that address. Mr. Talbot denies that he has ever lived at that address.

6. Mr. Talbot has given the address of 1668 North 390 West, Pleasant Grove, Utah as a forwarding address to his employer and prior landlord and an out-of-state bank. Mr. Talbot has received mail at 1668 North 390 West, Pleasant Grove, Utah. Mr. Talbot has also received mail at his mother's address in West Valley City.

7. Mr. Talbot and Defendant spent a substantial amount of time together at the Pleasant Grove address. Close neighbors, personal friends, and a private investigator have seen both Mr. Talbot and Camille Watson appear to share a common abode in the

home over the past two years, specifically during the period of December 1994 to November 1995.

8. Mr. Talbot parked his car in the same place in Defendant's garage on a regular basis and appeared to have access to the home via a garaged door opener.

9. Mr. Talbot and Defendant have spent the night together at the Pleasant Grove residence.

10. Mr. Talbot cleaned the garage, washed the cars, took out the trash, and picked up the mail. Mr. Talbot mowed the lawn during the summer months and purchased a weed-eater for use at the home.

11. Mr. Talbot played with Defendant's children and exercised visitation with his own children from a previous relationship at the Pleasant Grove residence.

12. Mr. Talbot bought groceries for the home and cooked meals for the family.

13. The Court has considered the testimony of the witnesses regarding the issue of Mr. Talbot's residency at 1168 North 390 West, Pleasant Grove, Utah. The Court finds that the testimony of the uninterested parties, Mr. Goode and Mr. Hilton to carry the greater weight in this instance. Camille Watson, Mr. Talbot, Mrs. Rowella Talbot, and Defendant's friends who testified were interested parties whose bias was apparent.

14. Additionally, there were discrepancies in their testimony which were never adequately resolved. For example, Mr. Talbot and his mother testified that Mr. Talbot lived with his mother in West Valley City, and has done so since he left Wendover in December 1994. Mr. Talbot also testified that he had used the Pleasant Grove address for forwarding purposes, believing that Defendant would forward his mail onward in a responsible manner. If Mr. Talbot has lived with his mother since his return from Wendover, he would have no need for a forwarding address in Pleasant Grove, and no need to involve Defendant in forwarding his mail. Additionally, the bank statement from the State Bank of Prairie de Rocher was dated July 27, 1995. See Plaintiff's Exhibit #3. This was far after the time that Mr. Talbot moved from Wendover, when a forwarding address might have been needed, and in the middle of the time period that he testified to living with his mother.

15. The Court realizes that there is no question that Mr. Jerry Talbot was receiving mail both at his mother's home in West Valley City, and at Defendant's residence in Pleasant Grove. Mr. Talbot testified that he had several different mailing addresses over the past few years. It is entirely possible that his mother was continuing to receive some of his mail during the time period in question.

16. The Court notes the evidence that Mr. Talbot and the Defendant did not share any joint bank accounts. Defendant and Mr. Talbot also testified that they did not share any joint expenses for operating the home, except for grocery purchases. However, evidence was presented that Mr. Talbot did not have any in-state bank accounts open during the time period in question, that he cashed any payroll checks and dealt with his finances on a cash only basis. Thus, any physical evidence regarding shared expenses would be difficult, if not impossible to prove.

17. In Utah, although the sharing of financial obligations surround the maintenance of a household may be significant, it is not a requisite element of cohabitation. See *Haddow v. Haddow*, 707 P.2d 669, 673 (Utah 1985).

18. The Court has considered the evidence which indicates that Mr. Talbot had unrestricted access to the home, even when Defendant was not present; assumed duties and responsibilities consistent with a resident; exercised visitation with his children there; bought groceries and fixed meals at the home; used the home for his own convenience; brought some items of personal property into the home; and used the Pleasant Grove address as a mailing address. The Court gives this evidence the greater weight in establishing that Mr. Talbot and Defendant were sharing a common residence for more than a brief period of time.

19. Based upon the weight of the evidence presented, the Court finds that Plaintiff has proven by a preponderance of the evidence that Mr. Jerry Talbot and Defendant were sharing a common abode for more than a temporary stay at the Pleasant Grove address for the past two years. Further, the Court finds that for approximately a ten month period, during the period of December 1994 to November 1995, Mr. Talbot resided with Defendant. Close neighbors, personal acquaintances, and professional investigators have seen and documented Mr. Talbot and Defendant residing together.

20. Once residence with a person of the opposite sex is established, the burden shifts to the obligee to establish that the relationship is without any sexual contact. See Wacker v. Wacker, 668 P.2d 533, 534 (Utah 1983).

21. (2) Sexual contact: Sexual Contact means sexual contact of a type that evidences a conjugal relationship. *See Haddow v. Haddow*, 707 P.2d 669, 670 (Utah 1985). The Court recognizes that there will almost never be a situation where there is an eyewitness to such sexual conduct, therefore, the Court must look to the overall picture.

22. Both Defendant and Mr. Talbot admitted that they had a close, personal relationship with each other. Defendant characterized it as an "affectionate" relationship in her

testimony. Mr. Talbot characterized it as "dating" in his testimony. Both of them testified that the relationship had been ongoing for about two years. Both Defendant and Mr. Talbot have held themselves out to friends and neighbors as having a close personal relationship evidencing more than friendship.

23. Mr. Goode testified that he had observed the Defendant and Mr. Talbot in the master bedroom, and the master bath at the same time.

24. Mr. Talbot and Defendant testified that there were several times when Jerry Talbot spent the night in the home. Their testimony differed however, on where he slept on those occasions. Defendant stated that Mr. Talbot slept in a "spare" bedroom. Mr. Talbot stated that he slept on the couch. They both admitted that on at least one occasion Mr. Talbot slept on the bed in the master bedroom. Mr. Goode and Mr. Hilton's testimony indicated that Mr. Talbot and Defendant had spent the night at Defendant's residence on a routine and ongoing basis during the period of December 1994 and November 1995.

25. Physical evidence of discarded packaging from male contraceptive devises were found in the trash discarded from Defendant's residence. That evidence was never adequately rebutted.

26. The Court realizes that much of the evidence is

circumstantial regarding sexual contact between Defendant and Mr. Talbot, however, taken as a whole, the evidence suggests that there has been sexual contact.

27. The Court finds that cohabitation between Defendant and Mr. Jerry Talbot has been established by a preponderance of the evidence. Therefore, pursuant to Utah Code Ann. § 30-3-5 (9) (1995 Supp.) the Court finds that Plaintiff's obligation to pay alimony is terminated, retroactive to January 1, 1995.

28. Based upon Defendant's cohabitation, the Court finds that the provisions of the parties' Decree of Divorce regarding a division of the equity in the marital home should be invoked and the marital home sold.

29. Finally, both parties have requested an award of attorney fees and costs in this matter, however, neither party has submitted an affidavit of attorney fees, nor was any evidence presented regarding need and ability to pay. The Court has no evidence upon which to make findings regarding the reasonableness of the fees, the hours expended, or the need of one party over the other in regards to the issue of attorney fees. Therefore, the Court finds that each party should be responsible to pay their own attorney fees and costs in this matter.

C. DECISION

CONCLUSIONS OF LAW

1. The Court concludes that Plaintiff has established by a preponderance of the evidence cohabitation on the part of the Defendant.

2. The Court concludes that pursuant to Utah Code Ann. § 30-3-5 (9) (1995 Supp.), Plaintiff's obligation to pay alimony to Defendant is terminated, retroactive to January 1, 1995.

3. The Court concludes that the provisions of the parties' Divorce Decree regarding disposition of the marital home are invoked and the home is to be sold.

4. The Court concludes that each party is responsible to pay their own attorney fees and costs.

5. Plaintiff's Motion to Reopen Evidence is DENIED.

DATED 'this 2 day of May, 1996.

BY THE COURT:

Howard H. Maetani
ORIGINAL
HOWARD H. MAETANI
Fourth District Court Judge
IN K

Approved As to Form:

James C. Haskins
Attorney for Defendant

Tab 2

have failed the plain mandate of justice if it had refused to allow the defense.

We think that the same principle applies with greater force in this case, where summary judgment was granted prior to discovery (within two months and one week of the filing of the complaint) and where respondent did not argue that it had been surprised or disadvantaged, but argued only that the Rules of Civil Procedure precluded appellants' defense.

This Court, in applying Utah R.Civ.P. 8(c) in *Cheney*, made the following observations, which were recently quoted in *Williams v. State Farm Insurance Co.*, Utah, 656 P.2d 966, 970 (1982), and *Eie v. St. Benedict's Hospital*, 638 P.2d at 1193-94:

It is true, as plaintiff insists, that Rule 8(c), U.R.C.P., requires that affirmative defenses be pleaded. It is a good rule whose purpose is to have the issues to be tried clearly framed. But it is not the only rule in the book of Rules of Civil Procedure. They must all be looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute. What they are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required. Our rules provide for liberality to allow examination into and settlement of all issues bearing upon the controversy, but safeguard the rights of the other party to have a reasonable time to meet a new issue if he so requests. Rule 15(b), U.R.C.P., so states. It further allows for an amendment to conform to the proof after trial or even after judgment, and indicates that if the ends of justice so require, "failure so to amend does not affect the result of the trial of these issues." This idea is confirmed by Rule 54(c)(1), U.R.C.P.: "[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party

has not demanded such relief in his pleadings."

14 Utah 2d at 211, 381 P.2d at 91 (citation omitted).

Also, in *Williams v. State Farm Insurance Co.*, 656 P.2d at 971, reviewing at length the standards that apply to a determination of the adequacy of pleadings raising the affirmative defense of fraud, particularly under Rules 8(c) and 9(b), this Court concluded:

It is evident from these statements that the fundamental purpose of our liberalized pleading rules is to afford parties "the privilege of presenting whatever legitimate contentions they have pertaining to their dispute," subject only to the requirement that their adversary have "fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved." *The functions of issue-formulation and fact-revelation are appropriately left to the deposition-discovery process.* The rules "allow examination into the settlement of all issues bearing upon the controversy," with latitude for proof that extends beyond the pleadings, where appropriate. Rule 15(b). It also appears from the cited decisions that *these principles are applied with great liberality in sustaining the sufficiency of allegations stating a cause of action or an affirmative defense.*

(Citations omitted; emphasis added.) Addressing specifically Rule 9(b), the Court in *Williams* added:

"Fraud" or "fraudulent" are terms of uncertain meaning. They are conclusions that must be fleshed out by elaboration and by consideration of the context in which they are used. This is why Rule 9(b) requires that the circumstances constituting fraud "shall be stated with particularity," a requirement we have construed to require *allegation of the substance of the acts constituting the alleged wrong.*

656 P.2d at 972 (emphasis added).

[12] In light of the fundamental purpose of our pleading rules to afford the

HADDOW v. HADDOW

Cite as 707 P.2d 669 (Utah 1985)

Utah 66!

Ingrid Mae HADDOW, Plaintiff
and Appellant,

v.

John David HADDOW, Defendant
and Respondent.

No. 18368.

Supreme Court of Utah.

Sept. 30, 1985.

parties the privilege of presenting whatever legitimate contentions they have pertaining to the dispute, appellants are not as a matter of law foreclosed from asserting defenses based on "fraud" by their failure to use the term "fraud" or a derivative thereof or by their failure to allege each and every element of common-law fraud. The overriding inquiry urged in *Cheney* and *Williams* is whether appellants' factual allegations gave fair notice of the issues raised and an opportunity to meet them and whether surprise or disadvantage would result if the defense or defenses were allowed. Both the timing of respondent's motion for summary judgment and the specificity of appellants' averments preclude imposing a Rule 12(h) waiver in this case. The substance of the acts constituting the alleged wrong was pleaded with particularity in appellants' averment that the bank's representatives "promised appellants that their signatures were for appearances only and that no collection actions, legal or otherwise, would be brought against Ronald or Margie Swenson based on said signatures." This specific allegation, combined with appellants' general averment that neither party intended the signatures to have effect and that these representations induced their signatures, gave fair notice that appellants were denying personal liability on the note because of respondent's alleged misrepresentations. In *Berkeley Bank for Cooperatives v. Meibos*, discussed *supra*, this Court affirmed a jury verdict that similar facts constituted fraud in the inducement.

Accordingly, summary judgment is reversed, and this case is remanded to the district court for further consideration consistent with this opinion.

WE CONCUR:

HALL, C.J., and STEWART, HOWE and DURHAM, JJ., concur.

ZIMMERMAN, J., does not participate herein.

Former husband sought order requiring former wife to pay one half of equity in home in which she was living pursuant to divorce decree which established equitable lien if former wife cohabitated with a male person. The Third District Court, Salt Lake County, Bryant H. Croft, J., imposed the lien, and former wife appealed. The Supreme Court, Durham, J., held that though relatively permanent sexual relationship existed between former wife and a male companion, there was no common residence; thus, former wife was not required under divorce decree to pay former husband one half of equity in home in which she was living.

Reversed.

Howe, J., concurred in result.

Hall, C.J., filed a dissenting opinion.

1. Divorce ¶261, 286(8)

Determination of whether given circumstances constitute "cohabitation" which requires enforcement of equitable lien under terms of divorce decree, is really a mixed question of fact and law and the Supreme Court is not bound by conclusion reached by trial court.

2. Divorce ¶184(1)

In reviewing trial court's action in divorce case, the Supreme Court is vested with broad equitable powers.

3. Divorce —247

Under statute [U.C.A.1953, 30-3-5(3)] providing that court order to pay alimony to former spouse shall be terminated if it is established that former spouse is residing with person of opposite sex, "common residency" means sharing of common abode that both parties consider their principal domicile for more than a temporary or brief period of time.

See publication Words and Phrases for other judicial constructions and definitions.

4. Divorce —247

Under statute [U.C.A.1953, 30-3-5(3)] providing that court order to pay alimony to former spouse shall be terminated if it is established that former spouse is residing with person of opposite sex, "sexual contact" means participation in a relatively permanent sexual relationship akin to that generally existing between husband and wife.

See publication Words and Phrases for other judicial constructions and definitions.

5. Divorce —252.5(1)

Although relatively permanent sexual relationship existed between former wife and male companion, there was no common residency; thus, former wife was not required under divorce decree, which required former wife to pay one half of equity of house in which she was living if she cohabited with a male person, to pay former husband one half of equity in home where male companion did not move any furniture into home or keep any personal items there other than toiletry articles, and male companion did not pay any of former wife's living expenses or consistently share with her any assets.

6. Divorce —252.5(1)

In case involving enforcement of equitable lien on home used by custodial parent, "cohabitation" means to dwell together in common residence and to participate in sexual contact that evidences a larger conjugal relationship.

David O. Drake, Costa Mesa, Cal., for plaintiff and appellant.

John D. Parken, Salt Lake City, for defendant and respondent.

DURHAM, Justice:

This is an appeal from a decision in which the trial court found that appellant was cohabiting with a man and ordered her to pay to her former husband one-half of the equity in the home in which she was living, pursuant to an equitable lien established in the divorce decree. Because we believe that the trial court improperly construed the language of the decree, we reverse.

The parties in this action, appellant Ingrid Haddow and respondent John Haddow, were divorced on September 11, 1980. Mrs. Haddow waived her right to alimony. She was awarded custody of the parties' three children, who ranged in age from seven years to thirteen years. Mr. Haddow was ordered to pay child support in the amount of \$450 per month, and Mrs. Haddow was awarded the parties' home, subject to an equitable lien in favor of Mr. Haddow of half the equity in the home. The equity was to be payable upon any of the following occurrences: all of the children ceased to reside in the house or Mrs. Haddow moved out of the house, remarried, or "cohabited with a male person."

After the divorce, Mr. Haddow entered the house and took several items without Mrs. Haddow's permission. Thereafter, in February 1982, Mrs. Haddow obtained a temporary restraining order enjoining Mr. Haddow from coming to the house without her express permission. A short time later, Mr. Haddow filed a motion for an order requiring Mrs. Haddow to pay him one-half of the equity in the home because she was allegedly cohabiting with a man.

At trial, the testimony centered on the nature and extent of appellant's relationship with her boyfriend, Hy Hudson. There was no dispute that Mr. Hudson spent most of his free time with appellant. The trial court found that Mr. Hudson had dinner at appellant's house five or six times

a week, that on those occasions he usually stayed until sometime between 10:30 p.m. and midnight, and that he would often return in the morning to have coffee or breakfast with appellant before work. The court also found that Mr. Hudson spent the night with appellant approximately once a week. There was testimony that Mr. Hudson left some clothes at appellant's house and that she did some of his laundry and sometimes took clothes to the dry cleaner for him. Mr. Hudson occasionally showered and changed at the house, particularly when he worked late and was going out for the evening with appellant. Mr. Hudson maintained a separate residence, however, living at his parents' home. Although Mr. Hudson used appellant's mailing address for a couple of bank accounts, he testified that he also received mail at his ex-wife's address, as well as at his parents' home. There was no evidence that Mr. Hudson and appellant shared any assets or had any joint financial accounts, projects, or liabilities. On several occasions, Mr. Hudson gave appellant money to reimburse her for the food he ate. He also took her car to be serviced at the car dealership where he worked. Beyond that, Mr. Hudson made no financial or tangible contributions to appellant or to her household, nor did he share living expenses with her in any sense.

[1,2] On appeal, Mrs. Haddow challenges the trial court's conclusion that she was cohabiting with Mr. Hudson. In its memorandum decision, the trial court stated that there was no substantial conflict in the testimony as to the facts of the relationship between appellant and Mr. Hudson and that the controversy was whether their conduct constituted cohabitation within the meaning of the divorce decree. Although the trial court labeled its resolution of that question a "finding of fact," the determination of whether given circumstances constitute cohabitation requires the application of the terms of a court order to a given set of facts. This process is in reality a mixed question of fact and law, and we are not bound by the conclusion reached by the trial court. See *Owll v. Clark*, Utah, 658

P.2d 585, 586 n. 1 (1982). Moreover, in reviewing a trial court's actions in a divorce case, we are vested with broad equitable powers. See *Read v. Read*, Utah, 594 P.2d 871, 872-73 (1979).

In reaching its decision, the trial court did not specify its definition of "cohabitation." As the trial court pointed out, the term "cohabitation" does not lend itself to a universal definition that is applicable in all settings. As a legal concept, cohabitation has been the determinative issue in cases involving validity of marriage, see, e.g., *Boyd v. Boyd*, 228 Cal.App.2d 874, 39 Cal.Rptr. 400 (1964); legitimacy of offspring, see, e.g., *Burke v. Burke*, 216 Or. 691, 340 P.2d 948 (1959); criminal prosecution of cohabitants, see, e.g., *State v. Barlow*, 107 Utah 292, 153 P.2d 647 (1944); and statutory and nonstatutory termination of alimony payments, see, e.g., *Kaplan v. Kaplan*, 186 Conn. 387, 441 A.2d 629 (1982) (statutory); *Simms v. Simms*, 245 Ga. 680, 266 S.E.2d 493 (1980) (statutory); *In re Clark*, 111 Ill.App.3d 960, 444 N.E.2d 136 (1983) (statutory); *Zipparo v. Zipparo*, 7 A.D.2d 616, 416 N.Y.S.2d 321 (1979) (not statutory); *In re Marriage of Vasconcellos*, 58 Or.App. 390, 648 P.2d 1358 (1982) (not statutory), as well as the enforcement of equitable liens, as in the present case. To some extent, the meaning of the term depends upon the context in which it is used. Nonetheless, a majority of cases and statutes that attempt to fix a definition of "cohabitation" follow the dictionary definition, which is: "To live together as husband and wife." *Black's Law Dictionary* 238 (5th ed. 1979); *Webster's Ninth N. Collegiate Dictionary* 257 (1984).

Neither the word "cohabitation" nor a variation of it appears in U.C.A., 1953, Title 30, chapter 3, the statutory provision governing divorce. However, language we believe was drafted for the same purpose the cohabitation clause in the divorce decree is found in section 30-3-5(3), which calls for the termination of alimony payments under certain circumstances. That section reads:

Any order of the court that a party pay alimony to a former spouse shall be terminated upon application of that party establishing that the former spouse is residing with a person of the opposite sex, unless it is further established by the person receiving alimony that the relationship ... is without any sexual contact.

Although this statute pertains exclusively to termination of alimony, we find it noteworthy that the statute predicates termination of spousal support on a showing that the former spouse is "residing" with a person of the opposite sex. Once residence is established, alimony obligations are terminated unless the recipient can show that the relationship is "without sexual contact." *Wacker v. Wacker*, Utah, 668 P.2d 533 (1983). This Court has already said that the residency contemplated by the statute is more than a temporary stay. See *Knuteson v. Knuteson*, Utah, 619 P.2d 1387, 1389 (1980) (where it was held that a stay of two months and ten days did not establish a "settled abode" (quoting *Webster's New Twentieth Century Dictionary*, 2d ed.)). However, in neither *Knuteson* nor *Wacker* were we called upon to define sexual contact.

We also note that neither the record nor the divorce decree itself indicates whether the cohabitation clause was stipulated by the parties to the decree or whether it was imposed by the divorce court. If the parties inserted the clause, they gave no testimony at trial as to how they intended it to be interpreted. If the divorce court judge inserted the clause, we are without benefit of his opinion in this matter since he did not hear this matter below and is now retired from the bench.

[3,4] We therefore decide that there are two key elements to be considered in determining whether appellant was cohabiting with Mr. Hudson: common residency and sexual contact evidencing a conjugal association. Consistent with our holding in *Knuteson*, 619 P.2d at 1389, common residency means the sharing of a common abode that both parties consider their prin-

cipal domicile for more than a temporary or brief period of time. Sexual contact means participation in a relatively permanent sexual relationship akin to that generally existing between husband and wife.

[5] We first address the aspect of sexual contact. As noted above, the trial court found that Mr. Hudson spent the night with appellant an average of once a week. The findings do not indicate how long this conduct continued, but the record does show that at the time of trial, Mr. Hudson and appellant had been dating each other exclusively for about fourteen months. The court also found that appellant and Mr. Hudson had taken a vacation together to Hawaii, "sleeping in the same bed and having sexual relations," and that the couple had spent at least one night together in Elko, Nevada. So even if we disregard the possibility that sexual relations occurred on occasions when Mr. Hudson visited appellant's home but did not remain overnight, we are satisfied that the findings below on this point establish the presence of a relatively permanent sexual relationship.

In reaching his decision, the trial judge, who admittedly was hindered by a lack of applicable standards, placed considerable emphasis on the sexual aspect of the relationship between appellant and her boyfriend and on the effect on appellant's children of the exposure "to a bed and board arrangement between the custodial parent and a member of the opposite sex." Although we agree with the trial judge that this case involves a sensitive situation and we are similarly distressed by the circumstances of this trial where the children were called upon to testify as to the nature and extent of their mother's sleeping arrangements, we decline to predicate the disposition of the family home on such factors alone. The effect on the children of appellant's relationship with Mr. Hudson might be relevant in a custody dispute, assuming the requisite showing of substantial and material change in circumstances had been made, see *Becker v. Becker*, Utah, 694 P.2d 608 (1984), but custody is not at issue in this case and sexual contact, even

if extensive, does not alone constitute cohabitation. A fair reading of the language of this decree regarding payment of defendant's lien simply does not dictate such a result. In this regard, we find persuasive the reasoning of the Iowa Supreme Court in a similar case dealing with an equitable lien triggered by a cohabitation clause in a divorce decree:

We take it from the ordinary meaning of the term, and gather from the obvious thrust of the dissolution decree, that a sexual relation was part of the intended definition. Cohabitation, in order to mature the lien, was to be with a person of the opposite sex. On the other hand the sexual relationship was only a part of the intended definition, not the whole of it. Another ingredient was dwelling, the fact of residing or living in the residence.

In re the Marriage of Gibson, Iowa, 320 N.W.2d 822, 823-24 (1982).

We turn now to the second part of our test for cohabitation: common residency. It is clear from the record that Mr. Hudson spent a substantial amount of time at appellant's home. However, the trial court made no finding that Mr. Hudson either spent any time at the home when appellant was not there or had a key to the house. These circumstances seem particularly significant on the question of whether Mr. Hudson was living with appellant, since a resident will come and go as he pleases in his own home, while a visitor, however regular and frequent, will schedule his visits to coincide with the presence of the person he is visiting. The language in *Burke v. Burke*, 216 Or. 691, 340 P.2d 948 (1959), summarizes this point well. There the court noted, "Cohabitation is not a sojourn, nor a habit of visiting, nor even remaining with for a time; the term implies continuity." *Id.* at 950 (quoting *In re Wray's Estate*, 93 Mont. 525, 19 P.2d 1051 (1933)). Further, there was testimony that Mr. Hudson did not move any furniture into appellant's home or keep there any personal items other than toiletry articles, a few items of clothing that appellant laundered or had dry cleaned, and one picture album. At trial, great emphasis was

placed on the fact that Mr. Hudson brought the picture album to appellant's home and left it there. However, we fail to see any determinative significance in the presence of any one or all of these portable items in appellant's residence.

Nor do we find critical the fact that Mr. Hudson left a van belonging solely to him parked at appellant's home for several months. Mr. Hudson testified that he had no other place to store the van and that he used it primarily for occasions when he and appellant took his five children and her three children on outings together. Since Mr. Hudson's children live with their mother in a neighborhood close to appellant's home, we believe it was not unreasonable for Mr. Hudson to park his van in appellant's driveway for a period of time. It appears that, as Mr. Hudson claimed, the van was in storage at appellant's home, not kept on the premises for the convenience of daily use. On this point, we also note that throughout respondent's testimony on his two-week surveillance of Mr. Hudson's activities, the presence or absence of Mr. Hudson's Datsun, and not the van, was the criterion used to determine whether Mr. Hudson was at appellant's residence. It is apparent that even respondent assumed Mr. Hudson used the Datsun for his daily commuting, whereas the presence of the van told nothing of Mr. Hudson's whereabouts.

Our review of out-of-state case law discloses that in some jurisdictions a third element, shared living expenses, is either an essential ingredient of cohabitation, *In the Matter of Marriage of Edwards*, 73 Or.App. 272, 698 P.2d 542 (1985), or evidence of it, *In re Marriage of Roope*, 122 Ill.App.3d 56, 460 N.E.2d 784 (1984). Although we do not consider the sharing of the financial obligations surrounding the maintenance of a household to be a requisite element of cohabitation, we do find it significant that Mr. Hudson did not pay any of appellant's living expenses or consistently share with her any of his assets. For example, Mr. Hudson did not contribute anything to appellant's mortgage pay-

ments, the insurance on her house, or her utility bills. His occasional payments to appellant for purchasing food and dry cleaning his clothes were reimbursements and evidence an intent to bear his own expenses, not an intent to contribute to appellant's household. Nor does it appear that Mr. Hudson considered his van, which he purchased during the time he and appellant were dating, the property of appellant. He alone paid for the van and for the insurance on it. We also note that appellant and Mr. Hudson rarely used each other's automobile, except at times when Mr. Hudson took appellant's Oldsmobile to perform mechanical maintenance on it and left his Datsun in its place.

In view of these circumstances, it is clear that neither appellant nor Mr. Hudson considered appellant's home Mr. Hudson's principal residence. It is therefore our opinion that the common residency element of cohabitation has not been established. Once again, the Iowa Supreme Court's language in *Gibson* is pertinent:

The time petitioner's boyfriend spent in the dwelling was extensive, easily sufficient to qualify as residence if time alone controlled. But the time was not spent as a resident. He maintained a separate residence and shared none of the expenses of this one. He did not even have a key or freedom to enter it except when petitioner was present. In simple terms he did not live there.¹

Gibson, 320 N.W.2d at 824.

[6] In reaching our decision today, we construe this divorce decree so as to preserve what we believe to be the intent of the parties, while avoiding an interpretation that is guaranteed to heighten the tension between them and unnecessarily jeopardize the interests of the minor children. Thus, we hold that in a case involving the enforcement of an equitable lien on the home used by the custodial parent, "cohabitation" means to dwell together in a common residence and to participate in sex-

ual contact that evidences a larger conjugal relationship. While we do find sufficient evidence of sexual contact between appellant and Mr. Hudson, the facts as found by the trial court do not support a finding of common residency.

Reversed. Costs are awarded to appellant.

STEWART and ZIMMERMAN, JJ., concur.

HOWE, J., concurs in the result.

HALL, Chief Justice (dissenting):

I do not join the Court in reversing the trial court because the judgment is supported by substantial evidence and is reasonable and proper under the facts and circumstances of this case. In accordance with the time-honored standard of appellate review, the issue presented is best left to the determination of the trial court.

In reaching its conclusion to reverse, the majority applies a sterile definition of the term "cohabitation" which is not in context with the usage of the term in the decree of divorce. As was observed by the trial court, the term "cohabitation" does not lend itself to a universal definition that is applicable in all settings. This is particularly evident in the instant case. Plaintiff is certainly "cohabiting with a male person" at least on a part-time basis.

The fallacy in applying such a sterile definition of the term "cohabitation" can be seen by applying the definition to a situation where one cohabits with more than one male person during the week or, conversely, where the male person is otherwise occupied and therefore only able to cohabit weekly.

I would affirm the judgment of the trial court.



theless, we are persuaded here that the evidence of nonresidence was sufficient to conclude that there was no cohabitation.

GIBSON v. BOARD OF REVIEW OF INDUS. COM'N Utah 67

Cite as 707 P.2d 675 (Utah 1985)

Catherine G. GIBSON, Plaintiff,

v.

BOARD OF REVIEW OF the INDUSTRIAL COMMISSION OF UTAH, and Department of Employment Security, Defendants.

No. 20501.

Supreme Court of Utah.

Oct. 1, 1985.

Worker who quit her employment with Internal Revenue Service sought unemployment compensation benefits. The Board of Review of Industrial Commission affirmed decision of administrative law judge finding her ineligible for unemployment benefits on ground she voluntarily quit work without good cause. Worker appealed. The Supreme Court held that worker lacked good cause for quitting.

Affirmed.

Howe, J., dissented.

1. Social Security and Public Welfare ◄659

On questions of mixed law and fact, Supreme Court will not substitute its judgment for that of Board of Review of Industrial Commission so long as its interpretation has warrant in record and reasonable basis in law.

2. Social Security and Public Welfare ◄658

Information that worker was forced to undergo operation directly related to her job stress could not be considered by Supreme Court, where worker did not adduce evidence of such compelling nature at hearing or at any juncture on proceeding below, although she was admonished by administrative law judge to give all testimony pertinent to her unemployment compensation claims since she would not be afforded future opportunity to give verbal testimony.

3. Administrative Law and Procedure ◄669

Issues not raised before administrative agency are waived on appeal.

4. Social Security and Public Welfare ◄402

Worker lacked good cause for quitting her employment, where worker's reason for quitting her job with Internal Revenue Service was that she had philosophical differences with Internal Revenue Service audit procedures which she found to be unjust, and worker did not give Service opportunity to work out whatever problem led to grievances.

Reed M. Richards, Ogden, for plaintiff;
K. Allan Zabel, Salt Lake City, for defendants.

PER CURIAM:

Catherine G. Gibson seeks judicial review of a decision by the Board of Review of Industrial Commission of Utah which affirmed the decision of the administrative law judge finding her ineligible for unemployment benefits pursuant to section 34-5(a) of the Utah Employment Security Act on the ground that she voluntarily quit work without good cause. We affirm.

Gibson had been employed by the I.R. since September 1, 1978, when she was assigned to work in the audit division the Ogden service center in April 1981. Prior to that assignment, she had worked as a tax auditor and was "basically happy." Her duties in the new job included review of computer-selected tax returns to determine whether or not returns should be audited. Under I.R.S. guidelines, tax returns were not selected for auditing purposes unless the audit was cost effective. Gibson felt that as a result, middle and lower income taxpayers were singled out while high income taxpayers were passed over for audit. This attacked her sense of justice and integrity. She developed stress-related physical symptoms which a physician attributed to her work. Gibson looked for other work, but quit in October 1981.

1. In *Gibson*, the evidence established the stability of the boyfriend's separate residence more clearly than did the evidence in this case. None-

Tab 3

pay alimony until Joyce's death, remarriage, or cohabitation. The divorce decree provision reflects the requirement of Utah Code Ann. § 30-3-5(6) (1989) that

[a]ny order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.¹

In August 1993, Robert became aware that Joyce had entered into a relationship with Bill. Suspecting Joyce and Bill were cohabiting, Robert filed a petition to terminate alimony in October 1993, ceased making alimony payments to Joyce, and deposited the alimony payments otherwise due into an escrow account pending the resolution of his petition.

The trial court found that Bill was not "residing" with Joyce and, therefore, that alimony should not be terminated. The court concluded that "residence" required "some sort of duration" and because Bill's sharing of Joyce's residence was for a temporary period of time, Bill was not a resident. The court did not make clear why it regarded the arrangement as temporary, a characterization that is somewhat curious in view of the fact it had gone on for some time and was still going on as of the time of trial, albeit with less consistency.

STANDARD OF REVIEW

[1] Whether Joyce was "residing" with Bill is a mixed question of fact and law. *Haddow v. Haddow*, 707 P.2d 669, 671 (Utah 1985). While we defer to the trial court's factual findings unless they are shown to be clearly erroneous, we review its ultimate conclusion for correctness. *See id.*

1. The version of the statute in force at the time of this action uses the term "residing" but makes clear that both residency and sexual contact are required to terminate alimony. Utah Code Ann. § 30-3-5(6) (1989). The divorce decree refers to "cohabitation" as a basis for terminating alimony, as does the most recent version of the statute. Utah Code Ann. § 30-3-5(9) (Supp.1995). The

APPLICABLE LAW

[2] The issue in this case is whether or not Bill "resided" with Joyce. "Common residency means the sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of time." *Haddow v. Haddow*, 707 P.2d 669, 672 (Utah 1985). It implies continuity, not simply a habit of visiting or a sojourn. *Id.* at 673. In *Haddow*, the Utah Supreme Court determined that Ms. Haddow did not share a common residence with Mr. Hudson although the two spent considerable time together. *Id.* at 673-74. The Court focused on whether Mr. Hudson traveled freely in and out of Ms. Haddow's home. *Id.* at 673. The two determinative facts were that Mr. Hudson had no key to the house and that he did not spend time there when Ms. Haddow was away. The Court explained its focus on these facts as follows:

These circumstances seem particularly significant on the question of whether Mr. Hudson was living with appellant, since a resident will come and go as he pleases in his own home, while a visitor, however regular and frequent, will schedule his visits to coincide with the presence of the person he is visiting.

Id. Furthermore, the Court determined that the presence or absence of Hudson's portable possessions in Ms. Haddow's home, such as clothes, toiletries, furniture, and photo albums, were not of determinative significance. Finally, the Court stated that the sharing of living expenses is not a requisite element of residency. *Id.*

[3] Although neither the presence of portable possessions nor the sharing of living expenses is dispositive, either may nonetheless be indicative of maintaining a shared household and be regarded as some evidence of residency. *Sigg v. Sigg*, 905 P.2d 908, 918 (Utah App.1995). For example, while it is

semantic distinction is inconsequential. Cohabitation is comprised of the same two elements: (1) common residency and (2) sexual contact evidencing a conjugal association. *Haddow v. Haddow*, 707 P.2d 669, 672 (Utah 1985). In this case, sexual contact has been admitted. Therefore, we need only be concerned with the residency element.

not important if the two share assets in a general sense, it may indeed be relevant if one party pays the other's mortgage, the insurance on his or her house, or the utility bills—actions which would be quite atypical for a mere visitor, even a regular and frequent visitor. *See Haddow*, 707 P.2d at 673-74. In *Sigg*, the court regarded it as some evidence of residency that the two shared living expenses, ate together and shared food expenses, and kept clothing in the same home. *Sigg*, 905 P.2d at 918.

ANALYSIS

[4] In this case, the largely undisputed facts establish that Bill resided with Joyce. Although his job in real estate required much out-of-town travel, he stayed with Joyce ninety percent of the time when he was in town, spending four to five nights during such weeks at her home. Bill had his own key to Joyce's home. He came and went from Joyce's home three to four times daily, even when she was not there. Joyce had ostensibly given him the key so that he could check on the house to prevent theft and wrongdoing by Joyce's twenty-year-old son, who lived with her until a "physical confrontation over drugs" caused him to move out. However, she did not retrieve the key from Bill or terminate his free access to the home after her son was incarcerated a few months later.²

Although the two main factors found by the *Haddow* Court to establish residence are clearly present in this case, namely that Bill had a key to the house and that he spent time there when Joyce was away, other factors support the conclusion that Bill was a resident in Joyce's home and not merely a guest. Joyce and Bill ate almost all meals

together when Bill was in town—invariably at Joyce's house if not dining out. In addition, Bill kept clothing and other personal effects at Joyce's home. (He also kept some of his belongings at his apartment, some in his car, and some at the home of his estranged wife.)

A couple of factors relied on by Joyce in support of her position merit comment. While it is true that Bill did not assist in any way with the cost of maintaining Joyce's home, the sharing of living expenses is not required to show residency in this context. *See Haddow*, 707 P.2d at 673. Nor is it dispositive that, at the time of trial, Bill had no clothes or other possessions in the home. The trial court correctly minimized this easily arranged fact, focusing instead on the several-month period preceding trial.

CONCLUSION

Bill does indeed reside with Joyce for purposes of alimony analysis. This, combined with ongoing sexual contact, is enough to terminate Robert's obligation to pay alimony under the divorce decree. We reverse the judgment appealed from.³

DAVIS, Associate P.J., and BILLINGS, J., concur.



2. Even though Bill maintained his own apartment for a time, he rented it only one day prior to the filing of Robert's petition. The trial court suspected that Bill rented the apartment knowing of the imminence of the petition, questioned the "genuineness" of the lease, and discounted the significance of the apartment in its analysis. There is evidence to suggest that Bill used the apartment as more of an office than a personal residence. When in town, Bill spent only one to two hours a day at the apartment, checking messages and mail. Bill's nephew actually lived in the apartment, although Bill claimed this was only because it was a "very bad neighborhood"

and he wanted the nephew to keep an eye on it so that "nothing would come up missing." Bill slept at the apartment on only rare occasions. When he did, he was usually in Joyce's company.

3. Joyce also claims Robert should pay attorney fees and costs on appeal pursuant to Utah Code Ann. § 30-3-3(1) (1995), which allows the court to award costs and attorney fees incurred in defending an action for alimony. However, due to our disposition of this case, the claim for attorney fees is denied. *See Carter v. Carter*, 584 P.2d 904, 906 (Utah 1978).

ed in the Wasatch Front region, no evidence shows that these jobs were actually available to Hoskings. First, nowhere in the report is there a meaningful discussion of the duties required in the occupations described. The report lacks any analysis of whether Hoskings could actually perform the duties required in these occupations given his disabilities. Furthermore, the report fails to show that these particular occupations are actually available, i.e., that the demand for such jobs has not been fully met by the workforce. Moreover, no evidence is contained in the report that would indicate Hoskings himself had a reasonable opportunity to be employed in these jobs, i.e., assuming some of these positions are available in general, what is the realistic prospect that an employer will choose a man in his mid-fifties with a bad ankle and other health problems to fill one of them?

[13] Although the report claims to have considered "job availability" in the computer searches, no discussion as to what is meant by this term is contained in the report. In describing the second manual search, the report alleges that the four occupations found are "reasonably available in southwestern or northeastern regions of Utah." However, the report contains no evidence that these particular jobs are actually available to a person with the same disabilities as Hoskings. It is insufficient for Salt Lake City Corporation to allege that a particular occupation is generally available to the public at large, without providing further evidence that the particular occupation is actually available to Hoskings. In other words, in order to sustain its burden under the odd lot doctrine, an employer must prove that an actual job is regularly and continuously available to the applicant, within a reasonable proximity of his or her usual residence or residences, and that the applicant has a reasonable opportunity to be employed in the particular job.⁹

Although we conclude that Salt Lake City Corporation failed in a more general way to

9. Of course, the employer does not become an employment agency for the applicant. The employer is not required to find a particular position for an applicant, much less arrange for an interview. Rather, the employer must only prove

meet its burden in this regard under the odd lot doctrine, we also conclude that the Commission's finding as to job availability was, at a more technical level, not based on a residuum of competent legal evidence.

The Commission based its finding that other work was available to Hoskings exclusively on the Intracorp report. However, as we indicated above, the Intracorp report is hearsay. Thus, although this report was admissible during the administrative proceedings held before the Commission, it cannot be the sole basis for the Commission's finding. Rather, the Commission must base its findings on legally competent evidence—a finding cannot be based solely on hearsay.

CONCLUSION

In view of the statute regarding permanent total disability in effect at the time of Hoskings's injury, it may have been improper for the Commission to consider the Intracorp report on the issue of rehabilitation. If not, the Commission nonetheless erred, given the residuum rule, in finding that Hoskings could be rehabilitated. Further, Salt Lake City Corporation failed to sustain its burden under the odd lot doctrine to prove the existence of a regular, steady job that was actually available to Hoskings. Alternatively, in light of the residuum rule, the Commission erred in finding that Salt Lake City Corporation had met this burden.

Accordingly, we reverse the Commission's order and remand with instructions to reinstate the administrative law judge's decision.

DAVIS, Associate P.J., concurs.

BILLINGS, J., concurs in result.



that an actual job does exist in the usual residence or residences of the applicant and that he or she has a reasonable opportunity to be employed in that job.

3. Divorce ⇨247

Although neither presence of portable possessions nor sharing of living expenses is dispositive of whether person is residing with person of opposite sex such that alimony obligation would terminate pursuant to statute, either may nonetheless be indicative of maintaining shared household and be regarded as some evidence of residency. U.C.A. 1953, 30-3-5(6).

4. Divorce ⇨247

Former wife was "residing" with person of opposite sex with whom she was having a sexual relationship and, thus, former husband's alimony obligation terminated pursuant to statute and divorce decree, where person of opposite sex had his own key to former wife's home, came and went from home three to four times daily even when former wife was not home, stayed at home ninety percent of time when he was in town, ate almost all his meals with former wife, and kept clothing and other personal effects at former wife's home. U.C.A.1953, 30-3-5(6).

See publication Words and Phrases for other judicial constructions and definitions.

Kathryn Schuler Denholm, Salt Lake City, for Appellant.

J. Bruce Reading and Wesley D. Hutchins, Salt Lake City, for Appellee.

Before ORME, P.J., and DAVIS and BILLINGS, JJ.

OPINION

ORME, Presiding Judge:

Robert Pendleton appeals the trial court's denial of his petition to terminate alimony based on his claim that his ex-wife is cohabitating with a person of the opposite sex. We reverse.

PROCEDURAL HISTORY

Robert Pendleton and Joyce Pendleton were divorced in March 1991. Joyce was awarded monthly alimony. Paragraph 13 of the divorce decree states that Robert is to

Joyce A. PENDLETON, Plaintiff
and Appellee,

v.

Robert L. PENDLETON, Defendant
and Appellant.

No. 950314-CA.

Court of Appeals of Utah.

May 31, 1996.

Former husband petitioned to terminate alimony, claiming that his former wife was cohabiting with person of the opposite sex. The District Court, Salt Lake County, Kenneth Rigtrup, J., denied petition. Former husband appealed. The Court of Appeals, Orme, P.J., held that former wife was residing with person of opposite sex with whom she was having a sexual relationship and, thus, former husband's alimony obligation terminated pursuant to statute and divorce decree.

Reversed.

1. Divorce ⇨286(6.1)

Whether former wife is "residing" with member of opposite sex, such that former husband's alimony obligation terminates under divorce decree, presents mixed question of fact and law; Court of Appeals defers to trial court's factual findings on issue unless they are shown to be clearly erroneous, and reviews its ultimate conclusion for correctness.

2. Divorce ⇨247

For purposes of determining whether former spouse is sharing common residency with member of opposite sex such that alimony obligation would terminate pursuant to statute, "common residency" means sharing of common abode that both parties consider their principal domicile for more than temporary or brief period of time; common residency implies continuity, not simply habit of visiting or sojourn. U.C.A.1953, 30-3-5(6).

See publication Words and Phrases for other judicial constructions and definitions.