

2007

# Kynda Kay Richardson v. Kenneth Andrew Richardson : Brief of Respondent

Utah Court of Appeals

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FILED  
UTAH APPELLATE COURTS  
JAN 31 2008

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IN THE SUPREME COURT OF THE STATE OF UTAH

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KYNDA KAY RICHARDSON,	)	
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Respondent / Appellee,	)	Case No. 20070578-SC
	)	20060575-CA
v.	)	
	)	
KENNETH ANDREW RICHARDSON,	)	
	)	
Petitioner / Appellant.	)	

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BRIEF OF RESPONDENT

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On Writ of Certiorari to the Utah Court of Appeals

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BRIEF OF RESPONDENT

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KENNETH ANDREW RICHARDSON,	)	
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**STATEMENT OF JURISDICTION**

By virtue of having granted the Petition for Writ of Certiorari, this Court has jurisdiction over the instant appeal pursuant to Utah Code Ann. § 78-2-2(3)(a) (2002) and Utah Code Ann. § 78-2-2(5) (2002).

**STATEMENT OF ISSUES / STANDARDS OF REVIEW**

1. Whether the court of appeals correctly affirmed the trial court's broad discretion in issuing an equitable order for increased alimony upon the termination of child support. On certiorari, this Court does not review the decision of the trial court but rather that of the court of appeals. *Harper v. Summit County*, 2001 UT 10, ¶10, 26 P.3d 193 (citing *State ex rel. M.W. and S.W.*, 2000 UT 79, ¶8, 12 P.3d 80); see also *Landes v. Capital City Bank*, 795 P.2d 1127, 1129 (Utah 1990) (citing *Madsen v. Borthick*,

769 P.2d 245, 247 (Utah 1988)). The court of appeals' decision is reviewed for correctness. See *Orvis v. Johnson*, 2008 UT 2, ¶6, \_\_\_ P.3d \_\_\_ (citing *Massey v. Griffiths*, 2007 UT 10, ¶8, 152 P.3d 312).

Preservation of Issue Citation or Statement of Grounds for Review:

Petitioner preserved the alimony issue by way of motion presented to the trial court (See, e.g., R. 64-65).

2. Whether Petitioner is precluded from raising the tax results issue on certiorari due to the failure to preserve this issue in both the trial court and the court of appeals. This issue is reviewed by this Court as a matter of law for correction of error. See *438 Main Street v. Easy Heat, Inc.*, 2004 UT 72, ¶51, 99 P.3d 801 (quoting *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶14, 48 P.3d 968); see also *State v. Worwood*, 2007 UT 47, ¶¶18-19, 164 P.3d 397.

Preservation of Issue Citation or Statement of Grounds for Review:

Petitioner essentially concedes on certiorari that he failed to preserve this issue in both the trial court and the court of appeals. See Appellant's Brief, p. 1; see also Argument II set forth in the instant Brief of Respondent.

### DETERMINATIVE AUTHORITY

The constitutional provisions, statutes, ordinances, rules, and regulations, the interpretation of which is determinative, are set out verbatim with the appropriate citation in the body and arguments of the instant Brief of Respondent.

### STATEMENT OF THE CASE

This case involves an appeal from specific provisions in the Decree of Divorce dealing with the trial court's equitable award of alimony. The parties separated in January 2003, after a lengthy marriage that resulted in a total of six children, four of which were minors at the time of trial. Approximately seven months later, Kynda Kay Richardson filed for divorce, to which Kenneth Andrew Richardson responded.

The parties subsequently appeared before the district court for a bench trial, after which the trial court took the case under advisement. Almost four months later, the trial court issued a Memorandum Decision.

Mr. Richardson filed a Motion and Memorandum, requesting the trial court to reconsider its ruling, to which Ms. Richardson responded. Almost five months later, the trial court issued another Memorandum Decision, granting the Motion in part and denying it in part.

Thereafter, the trial court issued its Findings of Fact and Conclusions of Law and the Decree of Divorce. Mr. Richardson appealed. The court of appeals subsequently issued a Memorandum Decision affirming the award of alimony.

Mr. Richardson filed a Petition for Writ of Certiorari, which this Court granted.

#### **STATEMENT OF FACTS**

The facts are drawn in a light most favorable to the trial court's findings of fact and the evidence presented at trial. Cf. *Tucker v. Tucker*, 910 P.2d 1209, 1216 (Utah 1996).

1. The parties separated in January 2003 (R. 304:6:4-5).
2. Several months later, Ms. Richardson filed for Divorce, seeking, among other things, child support and alimony consistent with established legal principles (R. 1-8).
3. Kenneth Andrew Richardson responded (R. 12-17).
4. The parties appeared before the district court for a bench trial on February 8, 2005 (R. 44).
5. At the time of trial, the parties had been married for approximately twenty-five years (R. 304:6:4-5).
6. The parties had a total of six children over the course of the marriage, the following four of which were minors at the time of trial: Dana May Richardson (DOB: May 17, 1987); Kyle

Allen Richardson (DOB: July 19, 1988); Avery Keen Richardson (DOB: August 21, 1990); and Justin Wallace Richardson (DOB: March 25, 1993) (R. 2; R. 304:7-8; R. 47).

7. During trial, both parties provided detailed testimony over the course of almost four hours (R. 304:5-150).

8. Ms. Richardson testified, among other things, that the parties' two oldest children attended college while living with the Richardsons, and that the parties continued to financially support them during that time (R. 304:31:3-11).

9. After entertaining closing arguments by counsel, the trial court took the case under advisement (R. 304:151-93).

10. About four months later, on June 2, 2005, the trial court issued a fourteen-page Memorandum Decision, addressing, in detail, the issues presented by the parties at trial (R. 46-60). See R. 46-60, Memorandum Decision, a true and correct copy of which is attached hereto as Addendum A.

11. The trial court awarded Ms. Richardson, as the primary caretaker of the children, sole physical and legal custody of the parties' minor children (R. 47).

12. In its Memorandum Decision, the trial court duly considered the underlying factors relating to an award of alimony (R. 52-58), determining that a payment of \$420 per month to Ms. Richardson to be a "fair and reasonable award." (R. 57). The trial

court concluded that alimony should be paid for a period equal to the length of the marriage, which was approximately twenty-five years (*Id.*).

13. In conjunction with the alimony award, the trial court found that "a good part of the income needed by Ms. Richardson to maintain the appropriate standard of living is also attributable to child support payments" from Mr. Richardson (*Id.*). The court determined that as the parties' children reach the age of eighteen, over the next few years, Ms. Richardson's "income will be reduced disproportionately to the reduction of expenses both because the reasonable expenses associated for a time even with older children will not necessarily diminish to zero as they reach 18 years old" and, additionally, "because some expenses, such as mortgage, utilities and so on will not necessarily be significantly or proportionately reduced even when children do leave the home." (*Id.*).

14. Based on this, the trial court concluded "that it is reasonable to increase alimony to some extent as [Ms. Richardson's] income from child support payments goes down and as [Mr. Richardson's] expenses from such payments also diminish." (*Id.*). According to the trial court, "[t]his also contributes to the goal of maintaining a rough equivalence in the parties' standard of living after this long-term marriage." (*Id.*).



15. To implement the foregoing, the trial court determined that the "alimony payments due to [Ms. Richardson] should therefore increase by \$100 per month, beginning the first day of the month after which each child turns eighteen" so that "when the last child turns eighteen, [Mr. Richardson's] income will have increased by about \$1,375 per month, while commensurate alimony increases to [Ms. Richardson] will amount to \$400 per month, leaving [Mr. Richardson] with some cushion that takes into account the purported increased cost of living in Alaska and not reducing his standard of living below [Ms. Richardson]." (*Id.*).

16. Mr. Richardson subsequently filed a Motion and Memorandum for Reconsideration of Court's Ruling, asking that the trial court reconsider its findings and conclusions contained in its Memorandum Decision concerning, among other things, the award of alimony (R. 61-69). See R. 61-69, Motion and Memorandum for Reconsideration of Court's Ruling, a true and correct copy of which is attached hereto as Addendum B.

17. Ms. Richardson responded with an opposing Memorandum (R. 70-81). See R. 70-81, Memorandum in Opposition to the Motion for Reconsideration of Court's Ruling, a true and correct copy of which is attached hereto as Addendum C.

18. The trial court, approximately five months later, issued a thirteen-page Memorandum Decision (R. 103-17), granting the

Motion in part and denying it in part. See R. 103-17, Memorandum Decision, a true and correct copy of which is attached hereto as Addendum D.

19. Thereafter, the trial court issued its Findings of Fact and Conclusions together with the Decree of Divorce (R. 213-41). See R. 213-41, Findings of Fact and Conclusions of Law and the Decree of Divorce, a true and correct copy of which is attached hereto as Addendum E.

20. Mr. Richardson appealed (R. 257-58).

21. After full briefing, the court of appeals issued a Memorandum Decision in which it affirmed the award of alimony, concluding "that the trial court did not abuse its discretion in awarding Ms. Richardson incremental increases in alimony as her child support payments terminate." See *Richardson v. Richardson*, 2007 UT App 222U, a true and correct copy of which is attached hereto as Addendum F.

22. Mr. Richardson filed a Petition for Writ of Certiorari. This Court granted the Petition for Writ of Certiorari as to the following specific issue:

Whether the court of appeals erred in affirming the district court's award of an additional amount for alimony as each child of the Petitioner and Respondent reaches majority and Petitioner's obligation to pay support for each child terminates.

See Order granting Petition for Writ of Certiorari, dated October 23, 2007, a true and correct copy of which is attached hereto as Addendum G.

#### SUMMARY OF ARGUMENTS

1. The court of appeals correctly affirmed the trial court's broad discretion in issuing an equitable order for increased alimony upon the termination of child support. By so doing, the court of appeals correctly determined that the trial court duly considered Ms. Richardson's financial needs, her ability to support herself, and Mr. Richardson's ability to provide support.

The court of appeals' affirmance of the trial court's award of increased alimony is not only consonant with this Court's stated purpose of alimony, it is consistent with the dictates set forth in both Utah Code Ann. § 30-3-5(8)(c) ("the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial") and Utah Code Ann. § 30-3-5(8)(d) ("[t]he court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living").

The trial court's award of increased alimony, as affirmed by the court of appeals, constituted an "equitable order" relating to the obligations of the parties, which the trial court rendered

after due consideration of the parties' financial positions and their standard of living. Consequently, the court of appeals' affirmance of the trial court's award of increased alimony upon the termination of child support constitutes an attempt to equalize the parties' respective standards of living after a long-term marriage. The trial court's award, affirmed by the court of appeals, was not based on speculation, but rather on specific and detailed circumstances foreseeable at the time of the divorce.

In the course of advancing his argument in the court of appeals, Mr. Richardson neglected to follow a critical requirement underlying both appellate procedure and appellate advocacy, namely, the duty to marshal the evidence when challenging the trial court's findings of fact. In his arguments presented to the court of appeals, Mr. Richardson couched the increased alimony issue as simply involving an abuse of the trial court's discretion when actually he challenged the trial court's underlying findings of fact supporting the increased alimony award. In other words, Mr. Richardson simply took the same position as that in his Motion for reconsideration presented to the trial court, rearguing the evidence on appeal. By so doing, he made no attempt to marshal the evidence supporting the trial court's findings and then show that the findings are unsupported.

2. Mr. Richardson, as Petitioner, is precluded from raising the tax results issue on certiorari due to the failure to preserve this issue in both the trial court and the court of appeals. To preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue. This preservation requirement and its underlying principles apply not only to the trial court but throughout the appellate process.

The record on appeal evinces an awareness by Petitioner at trial of the alleged tax results issue. Moreover, it demonstrates that the argument generally made by Petitioner during closing argument, being wholly unsupported, did not alert the trial court to the argument that Petitioner now attempts to raise on certiorari. Further, Petitioner presented no tax results issue to the court of appeals. Consequently, this Court should decline to reach Petitioner's tax results issue because it was neither properly preserved in the trial court nor properly presented to the court of appeals.

In the event that this Court were to reach the tax results issue, Petitioner's argument is still without merit. The trial court's ruling clearly refers to the increase as "alimony". Nowhere does the trial court refer to it as support for adult

children. In sum, any supposed confusion under the tax code is specious at best.

#### ARGUMENTS

##### **I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S BROAD DISCRETION IN ISSUING AN EQUITABLE ORDER FOR INCREASED ALIMONY UPON THE TERMINATION OF CHILD SUPPORT.**

According to well-settled Utah law, "[t]he trial court has broad latitude" in making orders to establish alimony. *Jones v. Jones*, 700 P.2d 1072, 1074 (Utah 1985) (citing *Higley v. Higley*, 676 P.2d 379, 382 (Utah 1983); *Dority v. Dority*, 645 P.2d 56, 59 (Utah 1982); and *English v. English*, 565 P.2d 409, 410 (Utah 1977)). Further, the trial court's alimony determinations "are entitled to a presumption of validity." *Hansen v. Hansen*, 736 P.2d 1055, 1056 (Utah Ct. App.), *cert. denied*, 765 P.2d 1277 (Utah 1987)).

As described by this Court, "'[T]he most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage, and to prevent the wife from becoming a public charge.'" *Jones*, 700 P.2d at 1075 (quoting *English*, 565 P.2d at 411). In determining alimony awards, "the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial." Utah Code Ann. § 30-

3-5(8)(c) (Supp. 2005). Furthermore, "[t]he court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living." Utah Code Ann. § 30-3-5(8)(d) (Supp. 2005). The alimony award will not be disturbed by this Court "so long as the trial court exercises its discretion within the bounds and under the standards" set by this Court and has supported its decision with adequate findings and conclusions. See *Davis v. Davis*, 749 P.2d 647, 649 (Utah 1988); *Jones*, 700 P.2d at 1074.

This Court articulated the following three factors to be considered in determining alimony awards: (1) the financial needs and condition of the recipient spouse; (2) the ability of the recipient spouse to provide a sufficient income for himself or herself; and (3) the ability of the payor spouse to provide support. See *Jones*, 700 P.2d at 1075; *English*, 565 P.2d at 411-12.<sup>1</sup> The court of appeals correctly determined that the trial court had duly considered Ms. Richardson's financial needs, her ability to support herself, and Mr. Richardson's ability to provide

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<sup>1</sup>The trial court is also to consider the following additional factors in determining alimony: the length of the marriage; whether the recipient spouse has custody of minor children requiring support; whether the recipient spouse worked in a business owned or operated by the payor spouse; and whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage. See Utah Code Ann. § 30-3-5(8)(a)(iv)-(vii) (Supp. 2005); see R. 224-29.

support. See *Richardson v. Richardson*, 2007 UT App 222U, pp. 2-3; see also R. 214, 224-29 (evinced trial court's detailed consideration of the requisite three factors).

The court of appeals' affirmance of the trial court's award of increased alimony is not only consonant with this Court's stated purpose of alimony, it is consistent with the dictates set forth in both Utah Code Ann. § 30-3-5(8)(c) ("the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial") and Utah Code Ann. § 30-3-5(8)(d) ("[t]he court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living"). This is reflected by the court of appeals' detailed analysis of the trial court's alimony award set forth in the court of appeals' Memorandum Decision. See *Richardson*, 2007 UT App 222U at p. 3; see also R. 228-29. The trial court's award of increased alimony, as affirmed by the court of appeals, constituted an "equitable order" relating to the obligations of the parties, which the trial court rendered after due consideration of the parties' financial positions and their standard of living. See Utah Code Ann. § 30-3-5(1) (stating that "[w]hen a decree of divorce is rendered, the court may include in it equitable orders relating to children, property, debts or obligations, and parties).



Mr. Richardson contends that the court of appeals erred by affirming the trial court's automatic, future increases in its alimony award. Specifically, he argues that "[t]he court of appeals erred by affirming an order that required Mr. Richardson to pay increased alimony as a substitute for non-mandatory child support for adult children." See Appellant's Brief, p. 9. Like his argument propounded in the court of appeals, Mr. Richardson mischaracterizes<sup>2</sup> the considerations upon which the trial court based its alimony award. Contrary to Mr. Richardson's assertion, the trial court's ruling in no way delineates that the increases in alimony are for child support purposes.

Mr. Richardson also argues that the award of increased alimony as the parties' children turn eighteen and child support diminishes is contrary to law because it is speculative. See Appellant's Brief, pp. 13-17. Both the record on appeal and Utah law, however, demonstrate otherwise. See, e.g., R. 52-58.

This Court, in *Jones v. Jones*, 700 P.2d 1072 (Utah 1985), determined that the trial court's award of alimony was inadequate to allow the wife a standard of living even approaching that experienced during the marriage. In the course of its decision, the Court provided the following description of the marriage:

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<sup>2</sup>See *Richardson v. Richardson*, 2007 UT App 222U, pp. 1-2 (stating "that Mr. Richardson mischaracterizes the considerations upon which the trial court based the increases in alimony").

During most of the marriage, with the full consent and support of her husband, [the wife] devoted her time to raising their four children and donating her services to various social service organizations . . . . It is entirely unrealistic to assume that a woman in her mid-50's with no substantial work experience or training will be able to enter the job market and support herself in anything even resembling the style in which the couple had been living.

*Id.* at 1075; *see also Howell v. Howell*, 806 P.2d 1209, 1213 (Utah Ct. App. 1991) (considering the appropriateness of alimony after a long term marriage, where the wife (usually) has worked primarily in the home, has limited job skills, and is in her late forties or fifties).

As recognized by the court of appeals, the parties in the instant case had a long-term marriage, which, in turn, resulted in six children. *Richardson*, 2007 UT App 222U at p. 2. Ms. Richardson, for both the benefit of the family and Mr. Richardson's career, sacrificed her ability to acquire significant work skills and earning capacity to be the primary caretaker for a large family (R. 224, 228). Moreover, Ms. Richardson is middle-aged and is not likely to significantly increase her earning capacity to the standard of living enjoyed by the parties (*Id.*).

Consequently, the court of appeals' affirmance of the trial court's award of increased alimony upon the termination of child support constitutes an attempt to equalize the parties' respective

standards of living after a long-term marriage. The trial court's award, affirmed by the court of appeals, was not based on speculation, but rather on specific and detailed circumstances "foreseeable at the time of the divorce." See Utah Code Ann. § 30-3-5(8)(g)(i); see R. 52-58 (demonstrating detailed consideration by trial court of the parties' specific circumstances).

Generally, an appellate court may affirm the judgment appealed from "if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the" lower court to be the basis of its ruling. See *Bailey v. Bayles*, 2002 UT 58, ¶10, 52 P.3d 1158 (quoting *Dipoma v. McPhie*, 2001 UT 61, ¶18, 29 P.3d 1225. The appellate court will address an alternative ground for affirmance if it is apparent from the record and briefed and argued on appeal. *Dipoma*, 2001 UT 61 at ¶18.

Mr. Richardson's primary argument is that the court of appeals should not have affirmed the trial court's issuance of an order for increased alimony upon the termination of child support. In the course of advancing his argument before the court of appeals, Mr. Richardson neglected to follow a critical requirement underlying both appellate procedure and appellate advocacy, namely, the duty to marshal the evidence when challenging the trial court's findings of fact. *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991) ("If the

appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court . . ."). In his argument presented to the court of appeals, Mr. Richardson couched the increased alimony issue as simply involving an abuse of the trial court's discretion when actually he challenged the trial court's underlying findings of fact supporting the increased alimony award. See Appellant's Brief, pp. 10-13.<sup>3</sup>

When challenging the trial court's findings of fact, "[a]n [a]ppellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence." *In re Estate of Bartell*, 777 P.2d 885, 886 (Utah 1989). The burden of overturning factual findings is a heavy one, reflecting the policy that appellate courts do not sit to retry cases. *Id.*

In the court of appeals, Mr. Richardson simply took the same position as that in his Motion for reconsideration presented to the trial court, rearguing his evidence on appeal.<sup>4</sup> By so doing, he made no attempt to marshal the evidence supporting the trial

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<sup>3</sup>Findings of fact are overturned only if they are clearly erroneous. See Utah R. Civ. P. 52(a).

<sup>4</sup>Moreover, Mr. Richardson did not challenge the trial court's findings of fact concerning the estimation of his income, which served both as the basis and a material consideration underlying the trial court's award of increased alimony.

court's findings and then show that the findings are unsupported. In the course of making the award of increased alimony, the trial court entered, among other things, the following detailed findings of fact:

1. Ms. Richardson, by agreement of the parties and as the "primary caretaker of the children prior to the parties' separation" is entitled to "sole physical and legal custody" (R. 214);
2. Mr. Richardson's income for purposes of child support and alimony "is a total of \$65,000 per year, or \$5,417.00 per month" (see R. 216), and, after deductions, his net income before any alimony tax benefits is \$4,465.00 (R. 226);
3. Mr. Richardson's "reasonable expenses" are \$3,628.00 and therefore he has a "surplus of net income over expenses of about \$837.00 per month" (R. 227);<sup>5</sup>
4. Ms. Richardson's annual salary is "\$21,927.00 or \$1,827.00 per month" (see R. 217), and, after deductions, "[h]er net income for alimony purposes is . . . \$1,512.00, and with the child support payment of \$1,375.00 per month, her total net income "is therefore about \$2,897.00" (see R. 224);
5. Ms. Richardson's "work experience is relatively minimal because of the parties' decisions regarding how their family would function during the marriage, with only short periods of part time employment, and she does not appear to have developed any specialized job skills." (*Id.*);

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<sup>5</sup>By way of its Findings of Fact, the trial court noted that "[n]either party presented much evidence of their standard of living at the time of separation" and consequently, the court relied "primarily on evidence regarding their expenses as a fair substitute or approximation." See R. 224.

6. "There was no evidence that [Ms. Richardson] had either the opportunity or the capacity to earn more than what she is making now" and "she is fully employed in her present position at the present rate of pay" (*Id.*);
7. Ms. Richardson's general expenses "are reasonable, especially considering that she is caring for four (4) children" (see R. 224) and that her expenses total "\$3,306.00 per month", and that a "deficit between her income, including initial child support, and her reasonable expenses is therefore about \$409.00 per month" (R. 225);
8. "[I]t is significant that this is a long term marriage in which [Ms. Richardson] gave up her ability to improve her skills and earning capacity to care for a large family" (R. 228);
9. "[T]hat alimony in the amount of \$420.00 is a fair and reasonable award" (*Id.*);
10. "While a significant amount of [Ms. Richardson's] expenses can now be attributed to minor children in the home, a good part of the income needed by [her] to maintain the appropriate standard of living is also attributable to child support payments from [Mr. Richardson]." (*Id.*);
11. Because the children will reach the age of eighteen (18) by way of regular occurrence over the next few years, Ms. Richardson's "income will be reduced disproportionately to the reduction of expenses both because the reasonable expenses associated for a time even with older children will not necessarily diminish to zero as they reach eighteen . . . and because expenses . . . will not necessarily be significantly or proportionately reduce[d] even when children do leave home" (R. 228-29);
12. "[I]t is reasonable to increase alimony to some extent as [Ms. Richardson's] income from child support payments goes down and as [Mr. Richardson's] expenses from such payments also

diminish" and "[t]his also contributes to the goal of maintaining a rough equivalence in the parties' standard of living after a long-term marriage." (R. 229);

13. "The alimony payments . . . should therefore increase by \$100.00 per month, beginning the first day of the month after which each child turns eighteen (18)" (*Id.*);
14. "On this basis, when the last child turns eighteen (18), [Mr. Richardson's] income will have increase[d] by about \$1,375.00 per month, while commensurate alimony increases to [Ms. Richardson] will amount to \$400.00 per month, leaving him with some cushion that takes into account the purported increased costs of living in Alaska" and not reducing the parties' standard of living (*Id.*).

For this reason alone, which provides an alternate ground to affirm, this Court should affirm the court of appeals' affirmance of the trial court's award of increased alimony.

## **II. PETITIONER IS PRECLUDED FROM RAISING THE TAX RESULTS ISSUE ON CERTIORARI DUE TO THE FAILURE TO PRESERVE THIS ISSUE IN BOTH THE TRIAL COURT AND THE COURT OF APPEALS.**

The ruling from which Mr. Richardson appeals is the same award of alimony initially rendered by the trial court in its original Memorandum Decision issued in June 2005. Nevertheless, for essentially the first time in these proceedings, Mr. Richardson argues that "[t]he precedent set by the court of appeals causes confusing and inconsistent tax results." See Appellant's Brief, pp. 17-19.

"[I]n order to preserve an issue for appeal[,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶14, 48 P.3d 968 (citing *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998)). This preservation requirement places the trial court on notice of the asserted error and provides the trial court an opportunity for correction at that time in the course of the trial court proceeding. See *438 Main Street v. Easy Heat, Inc.*, 2004 UT 72, ¶51, 99 P.3d 801 (citing *Badger*, 966 P.2d at 847). For the trial court to be afforded the opportunity to correct the asserted error "(1) the issue must be raised in a timely fashion[,] (2) the issue must be specifically raised[,] and (3) the challenging party must introduce supporting evidence or relevant legal authority.'" *Id.* (citing *Brookside*, 2002 UT 48 at ¶14, 48 P.3d 968 (quoting *Badger*, 966 P.2d at 847)). "Issues that are not raised at trial are usually deemed waived.'" *Id.* This preservation requirement and its underlying principles apply not only to the trial court but throughout the appellate process. See *State v. Worwood*, 2007 UT 47, ¶¶18-19, 164 P.3d 397 (declining to reach state constitutional claim because petitioner, on certiorari, neither properly preserved the claim in the trial court nor properly presented it to the court of appeals).



Petitioner concedes on certiorari that he failed to raise the tax results issue. See Appellant's Brief, p. 1. As justification for the failure, Petitioner disingenuously claims that "[t]he tax issues were not raised because they did not become apparent until the Court of Appeals issued its decision." See *id.*

Petitioner's claim is without merit. The record demonstrates that any tax issue resulting from the trial court's alimony award was as apparent at the time of the trial court's ruling as it was when the court of appeals affirmed the same by way of its Memorandum Decision.

The closing argument of Petitioner's counsel also contradicts Petitioner's claim. In the course of presenting closing argument, Petitioner's counsel advanced the following:

And there's another more practical reason why we shouldn't. There is [sic] existing cases and tax cases that say as soon as you start tying alimony to child support, there is going to be a significant problem in that the whole amount could be calculated as alimony and when that happens there is a horrendous tax consequence and I'm not so sure that this petitioner wants to go in that direction and so as a practical matter, as a legal matter, we believe this case needs to be decided today on the facts that exist today.

(304:179:9-17). The aforementioned portion of Petitioner's closing argument evinces an awareness by Petitioner of the alleged tax results issue. Moreover, it demonstrates that the argument, being wholly unsupported, did not alert the trial court to the argument

that Petitioner now attempts to raise on certiorari.<sup>6</sup> Further, Petitioner did not present the tax results issue to the court of appeals. Consequently, because Petitioner's tax results issue was neither properly preserved in the trial court nor properly presented to the court of appeals, this Court should decline to reach it.

In the event that this Court were to reach the tax results issue, Petitioner's argument is still without merit. The trial court's ruling clearly delineates the increase as "alimony" (See R. 229 (specifically concluding that "it is reasonable to increase alimony to some extent as [Ms. Richardson's] income from child support payments goes down and as [Mr. Richardson's] expenses from such payments also diminish.") (Emphasis added)). Nowhere does the trial court refer to it as support for adult children. In sum, any supposed confusion under the tax code is specious at best.

#### **CONCLUSION**

Based on the foregoing, Ms. Richardson respectfully asks that this Court affirm the trial court's award of alimony, and that the

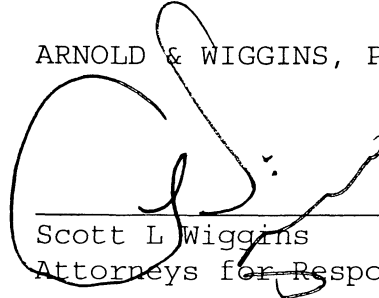
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<sup>6</sup>The trial court, in its Memorandum Decision, noted that "[t]here was no evidence of the effect of alimony payments on [Mr. Richardson's] tax liability or alimony receipt on [Ms. Richardson's], but the court does not believe that tax considerations related to alimony would substantially alter the conclusions reached here." See R. 53 n.2, Memorandum Decision.

Court grant her any other relief the Court deems just or appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 28th day of January, 2008.

ARNOLD & WIGGINS, P.C.



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Scott L Wiggins  
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First-Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **BRIEF OF RESPONDENT** to the following on this 31st day of January, 2008:

Mr. J. Bruce Reading  
Mr. Jonathan H. Rupp  
Scalley, Reading, Bates, Hansen  
& Rasmussen, P.C.  
15 West South Temple, Suite 600  
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*Counsel for Petitioner*



\_\_\_\_\_  
Scott L Wiggins

## **ADDENDA**

Addendum A: Memorandum Decision, dated June 2, 2005  
Addendum B: Motion and Memorandum for Reconsideration of Court's Ruling  
Addendum C: Memorandum in Opposition to the Motion for Reconsideration of Court's Ruling  
Addendum D: Memorandum Decision, dated December 23, 2005  
Addendum E: Findings of Fact and Conclusions of Law and the Decree of Divorce  
Addendum F: *Richardson v. Richardson*, 2007 UT App 222U  
Addendum G: Order granting Petition for Writ of Certiorari, dated October 23, 2007

Tab A

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THIRD DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

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KYNDA KAY RICHARDSON,

Petitioner,

vs.

KENNETH ANDREW RICHARDSON,

Respondent.

**MEMORANDUM DECISION**

(Issues presented at trial)

Case No. 034905249

Judge Stephen L. Roth

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The bench trial in this matter took place on February 8, 2005, with Joseph L. Nemelka, Joseph Lee Nemelka, P.C., representing petitioner Kynda Kay Richardson ("Kynda") and J. Bruce Reading, Scalley & Reading, P.C., representing respondent Kenneth Andrew Richardson ("Kenneth"). Having considered the evidence presented at trial and the arguments of counsel, the court makes the following decision.

**DECISION**

**A. JURISDICTION and GROUNDS.**

As a threshold matter, the court notes that Kynda has lived in Salt Lake County since January 2003, soon after the separation of the parties in about mid-2002, and therefore concludes that it has jurisdiction over the parties and the subject matter of this case. Further, the parties have come to disagree deeply over crucial aspects of their life together, perhaps most importantly over the approach to raising and disciplining their children. While Kenneth states that he does not desire a divorce, the parties had the benefit of counseling before the filing of the Petition, have been separated for over two years and have established separate lives. The court concludes that there are

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grounds for entering a decree of divorce based on the existence of irreconcilable differences that prevent the marriage from continuing.

**B. CHILD CUSTODY and SUPPORT**

There were six children born to this marriage, of whom four are still minors: Dana May Richardson, born May 17, 1987, Kyle Allen Richardson, born July 19, 1988, Avery Keen Richardson, born August 21, 1990, and Justin Wallace Richardson, born March 25, 1993. The parties do not contest child custody and appear to be in agreement that Kynda should have sole physical and legal custody. Kynda was the primary caretaker for the children prior to the parties' separation and the children continue to live with her at their present home in West Valley City, while Kenneth has remained in Alaska, where the parties lived since their marriage in Anchorage on August 20, 1980. Kynda appears to strongly desire custody, and she has been and continues to be a fit parent. There is no indication that the children have any different custody preference. The court concludes that Kynda is and has been a fit and proper parent, that there is no reason to disturb the parties' own agreement with respect to custody, and that it is in the best interests of the children that she be awarded sole physical and legal custody. Parent time issues will be addressed below.

For purposes of the child support calculation, gross income includes income from almost any source, other than those specifically excluded by the statute. *See* U.C.A. § 78-45-7.7(1). At the time of trial Kenneth was working full time for Aurora Electric in Anchorage as a project manager/estimator, earning a salary of \$1,188.47 per week according to a January 28, 2005 employer earnings statement about \$61,800 per year. Apparently some time in 2003, after the parties' separation, Kenneth was promoted to this supervisory position from the journeyman electrician position that he had formerly held at Aurora Electric. He received a lower salary in the prior position, but normally and consistently worked substantial overtime (more than 40 hours per week)



during the marriage and thus earned about \$5,000 (2001 W-2) to \$6,000 (2002 W-2) more each year than he does now, because, as a supervisor, overtime is no longer available to him. Kenneth testified that he took the promotion because it was a job change that he wanted and because his boss urged him to take the new position for the benefit of the company. While there is no indication other than timing that Kenneth took the promotion in order to deliberately reduce his income for purposes of this proceeding, this was in significant part a voluntary decision on his part that reduced his income. For this reason, the court believes that it is fair to consider his previous scrapping activities (in which he made up to \$1,000 per year from time to time) as a source of income still open to him and to consider his historical overtime. In all, the court believes that it is reasonable to impute \$1,700 per year as a reasonable assessment of Kenneth's additional earning capacity for purposes of child support and alimony calculations, giving him some latitude to make changes in his work position to accommodate reasonable work-related goals, while recognizing that those changes are largely voluntary, as well as taking into account his ability to make additional income, as he has in the past, from scrapping or other work.

In addition, Kenneth receives an annual distribution made to all citizens of the State of Alaska. The most recent such distribution was \$1,984, and Kenneth testified that it was sometimes less and sometimes more. This annual payment falls within the broad scope of gross income under the statute, and the court concludes that the \$1,984 figure is a reasonable estimate of ongoing income from this source for purposes of calculating gross income (for child support and alimony). Kenneth's gross income for child support purposes is therefore \$61,800 plus \$1,700 plus \$1,984: a total of \$65,484 per year or \$5,457 per month.

Kynda is employed by the State of Utah, working full time. Her last pay stub for 2004 showed her annual salary to be \$21,927 or \$1,827 per month. Kynda's work experience is relatively

minimal because of the parties' decisions regarding how their family would function during the marriage. After about a year of employment, Kynda cared for the children at home during the marriage, with only short periods of part time employment, and she does not appear to have developed any specialized job skills. There was no evidence that she had either the opportunity or the capacity to earn more than what she is making now; and the court concludes that she is fully employed in her present position at her present rate of pay, which is her gross income.

There was no evidence that either party was obligated to any other person for alimony or child support outside the bounds of this case, and therefore gross income and adjusted gross income are the same for each party. These figures are therefore to be used for calculating the share of child support attributable to each party, with Kenneth to be the obligated party.

The parties propose that they should each be allocated tax deductions for two children, but disagree on which. No real basis for allocation was presented other than the representation that Kynda needed at least one child deduction to be eligible for a tax benefit. It therefore appears to the court that it is fair to allocate the tax deductions as follows: Dana and Justin to Kynda and Kyle and Avery to Kenneth. When Dana reaches eighteen, the exemptions should alternate to equalize the benefits as much as possible, with Kenneth having the deductions for two children and Kynda for one the first year in which there are only three deductions available, Kynda having two and Kenneth one in the second year, and so on. When the deductions for children reduce to two, each parent may claim one deduction; when there is only one deduction left, that deduction goes to Kynda. In the alternative, for any tax year the party for whom the exemption(s) is most valuable may elect to purchase the option(s) from the other party for the amount the other party would lose if the exemption were not available.

Child support should be paid retroactive from date of separation (which the court believes was sometime around January 2003), with Kenneth to be credited for amounts paid since that time against his obligations for child support and alimony.

C. PERSONAL PROPERTY

The evidence at trial indicated disagreement over the value and division of the certain personal property acquired during the marriage. This involved essentially a savings account containing about \$1,000, a certificate of deposit in the amount of approximately \$6,000, a set of firearms collected by Kenneth, tools, certain items of apparel made of animal fur, a Bobcat tractor, and three vehicles: a van in Kynda's possession and two trucks (a 1981 Dodge Dakota and a 2003 Ford Ranger) in Kenneth's possession. The parties agreed at the end of trial that Kynda receive the savings account, the certificate of deposit and the van and that Kenneth be awarded the two trucks, the tools, the firearm collection, the Bobcat tractor, and the fur items. The court has no reason to believe that this division is not fair and equitable and therefore concludes that it is.

There is also a New York Life insurance policy on Kenneth's life with a \$50,000 face amount and a cash value of about \$6,300. Kenneth proposed that the policy be cashed out and the proceeds be shared equally between him and Kynda. It was not clear to the court what Kynda wanted in this regard. It appears to the court that it would be of some value to the parties and in the children's interest to keep the insurance policy in place, with Kenneth to pay the premiums, having the minor children irrevocably designated as the beneficiaries and Kynda as the trustee for the minor children. Once the last child is emancipated, the policy is to be cashed in, with Kynda to receive within 60 days thereafter one-half of the cash value of the policy, valued as of the time of trial. The parties have the option, if they both agree to do so, of cashing the policy in now, with the amount received in payment to be divided equally between them.

D. REAL PROPERTY

There are two parcels of real property at issue, the marital home in Eagle River, Alaska, near Anchorage, and an unimproved, .92 acre lot located in subdivision in Willow, Alaska. Neither property is encumbered by a mortgage or other significant lien. The parties appear to agree that the equity in each property should be divided between them, but they disagree about the value of each property.

Kynda believed the Willow lot to be worth about \$10,000, based on unspecified calls to real estate agents in the area. Kenneth estimated the lot to be worth \$3,000 to \$4,000 and said that it had an assessment value on the tax notice of \$4,200. The court believes that an estimated value of \$5,000 is reasonable approximation of the value of the lot, given the sparse information presented. Kynda is to receive \$2,500 as her share of the Willow lot's value.

The Eagle River home was purchased about 20 years ago for about \$50,000. It was appraised in early 2004 at \$60,000. Kenneth says the appraisal is incorrect because it indicates that the house, a modular house, has sanitary sewer, asphalt street and curb and gutter, which it does not have. He believes it is worth \$47,000 based on a tax assessment and on his estimate that it will take about \$13,000 to connect the house to municipal sewer, a step he says is necessary to make the house saleable. Kynda says she believes the appraisal is correct, even without a sewer hook-up, and that the house cannot have depreciated in value since it was purchased. The appraisal indicates that property values in the area are increasing, and no evidence was presented on how property tax assessments were made. Kenneth has presented no reliable evidence of the effect on property value of the lack of a sewer hook-up, much less that the value would be directly related to the cost of providing such an improvement. Nor has he presented any evidence of how property tax

assessments are made in the area or how reliable an indication of actual value they are or that property values have decreased since the purchase of the property for \$50,000 over twenty years ago.

The court believes that the appraisal is the most reliable indication of value under the circumstances and finds that the house is worth \$60,000 at the time of trial and the equity should be divided equally, with the house to be sold and the net proceeds split equally between the parties. In the alternative, if Kenneth wants to keep the house, he must pay \$30,000 to Kynda.

#### E. ALIMONY

“[T]he purpose of alimony is to prevent the receiving spouse from becoming a public charge and to maintain the standard of living enjoyed during the marriage to the extent possible.” *Howell v. Howell*, 806 P.2d 1209, 1212 (Ut.Ct.App. 1991), citing *Fletcher v. Fletcher*, 615 P.2d 1218, 1223 (Utah 1980). The Supreme Court, in *Jones v. Jones*, 700 P.2d 1072 (Utah 1985), set out “three factors that must be considered in fixing a reasonable alimony award: [1] the financial conditions and needs of the wife; [2] the ability of the wife to produce a sufficient income for herself; and [3] the ability of the husband to provide support.” *Id.* at 1075 (edits by the court; citations omitted); U.C.A. § 30-3-5(8) (which expands the number of factors to be considered, while retaining the *Jones* factors as the essence of the inquiry). After the determination of the needs and resources of both parties using the *Jones* factors, “the court should set alimony as permitted by those parameters, to approximate the parties’ standard of living during the marriage as closely as possible.” *Howell*, 806 P.2d at 1212. In the case of a long-term marriage, the alimony award “should, ‘to the extent possible, equalize the parties’ respective standards of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage.’” *Id.*, quoting *Gardner v. Gardner*, 748 P.2d 1076, 1081 (Utah 1988); *cf. Howell*, 806 P.2d at 1216 n.4 (“The alimony award, however, need not be large enough to maintain the receiving spouse at the standard of living enjoyed during

the marriage if that amount of alimony would lower the standard of living of the paying spouse below that of the receiving spouse.”). Having considered “all relevant facts and equitable principles,” the court “may, in its discretion, base alimony on the standard of living that existed at the time of trial.” U.C.A. § 30-3-5(8)(c).

Kynda’s income, as discussed above, is \$1,827 per month. Accepting the annual deductions from her salary as set out in her 2004 year-end pay stub, they are Federal Tax (\$465.10), Social Security Tax (\$1,286.53), Medicare Tax (\$300.88), State tax (\$551.73), and health dental and vision insurance (together \$1,176.52), for a total monthly deduction of about \$315.00. Her net income for alimony purposes is therefore \$1,512. (The court is not considering deductions for life insurance for either party because essentially voluntary (on the part of Kynda) or building cash value from this point forward (on the part of Kenneth)). Child support payments will be approximately \$1,375 per month. Total net income, without consideration of alimony tax consequences, is therefore about \$2,897.

As to general expense deductions, the court believes that Kynda’s monthly expenses, as set forth in Exhibit 7, are reasonable, especially considering that she is caring for four children.<sup>1</sup> While she filed a financial declaration earlier that stated lower expenses, the court found credible her explanation that she had been keeping expenses deliberately low during that period because of the financial uncertainties of the unresolved divorce and had increased her expenses to a more normal level during 2004, the subject period for Exhibit 7. Those deductions are supported by detailed monthly expense reports. Nevertheless, Exhibit 7 contains some expenses that the court considers

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<sup>1</sup> Neither party presented much evidence of their standard of living at the time of separation, so the court is relying primarily on evidence regarding their expenses as a fair substitute or approximation.

as either one-time costs or not allowable for purposes of alimony determination. Those include attorneys fees and mediation costs related to the divorce in the amount of \$1,331. They also include \$1,779 in what appear to be one-time costs for the purchase of appliances (\$906.10 to Maytag on January 26 and \$873.05 to Maytag on February 7), although the court believes that one-half that amount (about \$890) is a reasonable annual budget for general maintenance of a home and its contents over the long term, given the number of children in her care and the need to furnish a separate house, and ought to be included as an expense. Because the testimony indicated that the parties historically have made donations to their church at about 10% of income and continue to do so, each listing such donations as part of their expenses, the court considers these donations as a continuing part of their previous and present standards of living and will include them as reasonable expenses for both parties. Deducting \$185 per month for one-time expenses, her reasonable expenses are \$3,306 per month.

The deficit between her income, including initial child support, and her reasonable expenses is therefore about \$409 per month.

Kenneth's income, as discussed above, is \$5,457 per month. This amounts to salary of \$61,800 per year, plus \$1,984 state payment and \$1,700 additional attributed income, per the analysis set forth above. Deductions, per his weekly Direct Deposit Earnings Statement, include Medicaid (\$16.94), social security (\$72.45), federal tax (\$117.85), local tax (\$5.40) and health insurance (\$10.25). The court is not considering deductions for 401(k) contributions, a medical flex plan and a 401(k) loan repayment. The loan repayment deduction (amounting to about \$193 per month) is to pay off a \$10,000 loan Kenneth took out of his retirement plan in 2003, after the separation, to pay attorney's fees (\$5,000), a down payment on a new truck (\$3,000), and a deposit in a savings account (\$2,000). The court does not believe the repayments on this loan, given its timing and the use of the

proceeds, ought to be counted as a deduction from salary for alimony purposes. Other deductions appear reasonable. Similarly, the medical flex plan is a voluntary contribution (about \$10 per week) that can be used to pay medical expenses as they arise (apparently deductibles and other expenses not covered by insurance). Because this is essentially a medical savings plan for the benefit of the respondent, it should not be counted as a true deduction for alimony purposes.

The total weekly deductions from salary are therefore about \$223 or about \$966 per month. Including an additional \$26 per month to account for a proportional amount of deductions for the imputed \$1700 per year (there was no evidence that the state payment of \$1982 per year was taxed), the total deductions are about \$992 per month, leaving a net income, before any alimony tax benefit,<sup>2</sup> of \$4,465.

The expenses Kenneth listed in Exhibit 15, appeared to be generally reasonable, and the court is using that exhibit as a base for determining Kenneth's reasonable expenses, with certain exceptions, as discussed below. Kenneth claims total monthly expenses of \$3,911.47. In addition, if Kenneth takes out a mortgage on the Eagle River house to pay off the equity, he will have to make payments on that loan. Because of his age, a 15-year amortization is reasonable, requiring a monthly payment of about \$250 at an interest rate of about 6%. This is a reasonable additional expense, as Kenneth does not have any rent or mortgage payment now and intends to remain in the house and not sell it. Further, Kenneth has allocated about \$1,350 for child support payments, when the total is closer to \$1,375, based on the parties' combined incomes of about \$7,284 per month, allocated about 25% to Kynda and 75% to Kenneth. These amounts should be added as expenses.

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<sup>2</sup> There was no evidence of the effect of alimony payments on Kenneth's tax liability or alimony receipt on Kynda's, but the court does not believe that tax considerations related to alimony would substantially alter the conclusions reached here.



Some expenses the court believes should not be included. As discussed above, the court does not believe that the expenses for repayment of the 401(k) loan (about \$193 per month) and life insurance (which the court estimates at \$65 per month based on the absence of any other evidence other than respondent's claim to have \$165 in monthly expenses for all insurance other than deducted health insurance premiums) should be included for purposes of alimony determination, as they are not necessities, and neither party urged their inclusion. In addition, Kenneth claims a total of \$350 per month in medical and dental expenses. There was no evidence of a need for health care that would support expenses at that level, especially since he apparently has employer-provided health insurance for which amounts are deducted from his salary; and absent any evidence of particular health conditions requiring treatment, the court believes that \$50 per month is reasonable. Kenneth's reasonable expenses are therefore about \$3,628.

Kenneth therefore has a surplus of net income over expenses of about \$837 per month.<sup>3</sup>

Other than the equity in the marital home, the parties have accumulated little in the way of resources to supplement their incomes. Considering Kynda's financial condition and needs and her inability to provide sufficient income to meet those needs, together with Kenneth's ability to provide support and the significant income differential between them even taking into account the payment and receipt of child support, the court concludes that Kenneth should pay alimony to Kynda. In addition, the court believes it is significant that this is a long term marriage in which Kynda gave up her ability to improve her work skills and earning capacity to care for a large family, so that should play a part in the determination of alimony amount, as well. *See Howell*, 806 P.2d at 1213. The

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<sup>3</sup> The court notes that, while both the parties and the court have used figures for income and expenses that appear quite specific, these figures in reality are approximations, especially as they are meant to ultimately represent amounts received and spent in the future. In determining alimony, the court recognizes and takes into account the imprecision of the amounts involved.

court believes that alimony in the amount of \$420 is a fair and reasonable award. This sum approximates the petitioner's need, before consideration of the alimony tax consequences, and falls within respondent's capacity to pay, as determined by the court.

While a significant amount of her expenses can now be attributed to minor children in the home, a good part of the income needed by Kynda to maintain the appropriate standard of living is also attributable to child support payments from Kenneth. As children reach the age of eighteen, which will be a regular occurrence over the next few years, the court believes that Kynda's income will be reduced disproportionately to the reduction of expenses both because the reasonable expenses associated for a time even with older children will not necessarily diminish to zero as they reach 18 years old and because some expenses, such as mortgage, utilities and so on will not necessarily be significantly or proportionately reduced even when children do leave the home. For that reason, the court concludes that it is reasonable to increase alimony to some extent as Kynda's income from child support payments goes down and as Kenneth's expenses from such payments also diminish. This also contributes to the goal of maintaining a rough equivalence in the parties' standard of living after this long-term marriage. *Id.* (considering the effects of diminishing child support obligations as children reach 18 on the relative disparity of income between spouses). The alimony payments due to Kynda should therefore increase by \$100 per month, beginning the first day of the month after which each child turns eighteen. On this basis, when the last child turns eighteen, Kenneth's income will have increased by about \$1,375 per month, while commensurate alimony increases to Kynda will amount to \$400 per month, leaving him with some cushion that takes into account the purported increased cost of living in Alaska and not reducing his standard of living below Kynda's.

Alimony should continue for a period equal to the length of the marriage. Changes in income due to retirement at a reasonable age are not taken into account here and may be considered

as changes of circumstances in the future, if otherwise appropriate. Alimony should be paid retroactive to the time of separation.

F. PARENT TIME

While it is apparent that Kenneth loves his children, during the marriage he took a decidedly harsher approach to their discipline than did Kynda, going to the extreme of punishing them by the use of a belt on occasion and threatening to do so more regularly. The court believes that this goes beyond acceptable limits on discipline of children and it apparently played a part in the break up of the marriage. The children remain somewhat intimidated by their father, and their distance from him, both emotional and geographical at this point, has been exacerbated by his decision that it would be best under the circumstances of the separation to contact them infrequently. While his telephone contacts have recently increased, he has seen the children only a few times since the separation. Some or all of the children have been in counseling to deal in part with issues involving their father.

The court believes that it is in the best interests of the children to reestablish their relationship with their father as soon as possible and that his access to them be as liberal as the distances involved allow, at a minimum in accordance with the applicable guidelines for parent time. Under the circumstances, there should be a gradual increase in parent time up to guideline standards, beginning with visits here to Salt Lake City, where Kenneth should attend counseling sessions with the children's therapist and any further individual counseling reasonably recommended to facilitate the transition to regular parent time. During the course of this process, the parties should formulate a reasonable parenting plan with the input of the children's therapist, which should be in place by the time regular visitation is ready to begin. By saying this, the court believes that the parties should

seek the therapist's input on the nature and timing of this process and that the goal should be to make this transitional period as short as possible.

G. ATTORNEY FEES

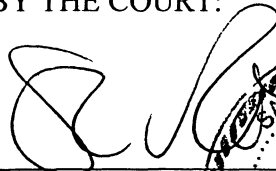
Based on the court's assessment that Kynda's expenses are beyond her income and other resources at this point and on its conclusion that Kenneth's resources provide him with a surplus over his expenses (as discussed in connection with alimony, above), the court concludes that Kenneth should be responsible to pay Kynda's reasonable attorney fees incurred in this matter. Kynda has insufficient income to meet her needs, and alimony payments will bring her income up to the point where her needs are met, not including attorney fees. Kenneth will have a level of surplus and is more able to pay fees. Kynda should provide evidence of the amount and reasonableness of the fees she claims to the court.

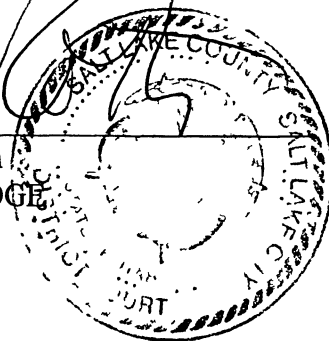
CONCLUSION

The court has set out a number of findings and conclusions in its analysis. Counsel for petitioner is to prepare findings of fact and conclusions of law that take into account other matters that ought to be included but were resolved before trial and should include additional findings and conclusions from the evidence presented reasonably necessary to support the court's ruling.

DATED this 22 day of June, 2005.

BY THE COURT:

  
Stephen L. Roth  
DISTRICT JUDGE



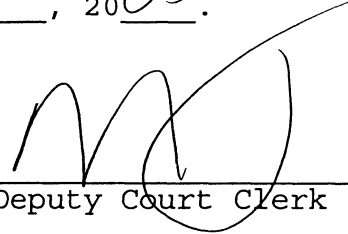
CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 034905249 by the method and on the date specified.

METHOD NAME

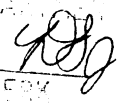
Mail JOSEPH L NEMELKA  
ATTORNEY PET  
6806 S 1300 E  
SALT LAKE CITY, UT 84121  
Mail J. BRUCE READING  
ATTORNEY RES  
50 SOUTH MAIN  
SUITE 950  
SALT LAKE CITY UT  
84147-0429

Dated this 3<sup>rd</sup> day of June, 2005.

  
\_\_\_\_\_  
Deputy Court Clerk

Tab B

J. Bruce Reading (2700)  
**SCALLEY & READING, P.C.**  
Attorneys for Respondent  
50 South Main, Suite 950  
P.O. Box 11429  
Salt Lake City, Utah 84147-0429  
Telephone: (801) 531-7870  
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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

KYNDAL KAY RICHARDSON,

Petitioner

vs.

KENNETH ANDREW RICHARDSON,

Respondent.

**MOTION FOR RECONSIDERATION OF COURT'S  
RULING**

Civil No. 034905249 DA  
Judge Stephen L. Roth  
Commissioner Susan Bradford

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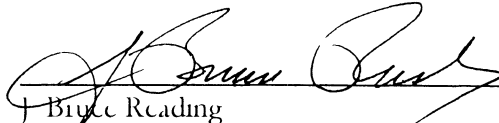
Respondent, Kenneth Andrew Richardson, by and through his attorneys, moves the Court to reconsider the findings and conclusions contained in its Memorandum Decision of June 2, 2005 (hereinafter, "Court's Ruling"). In summary, Respondent requests that the Court reconsider the following:

1. Reconsideration of the alimony award, based upon (a) inaccurate income and deduction figures; (b) prospective changes in the amount and retroactive application; and (c) improper consideration of tithing payments.
2. Petitioner's ability to pay attorney fees as a result of the retroactive alimony award.
3. The Court's failure to give adequate guidance regarding the implementation of a parent-time plan.
4. The Court's failure to address the division of the parties' retirement accounts.

This Motion for Reconsideration is supported by a memorandum

DATED this 7 day of July, 2005

SCALLEY & READING, P.C.

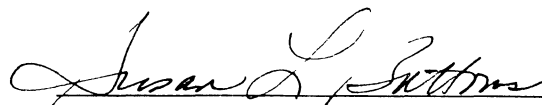
  
J. Bruce Reading  
Attorney for Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that I mailed, postage prepaid, and faxed a true and exact copy of the foregoing document to the following party on the 7th day of July, 2005

Joseph Lee Nemelka  
Attorney at Law  
6806 South 1300 East  
Salt Lake City, Utah 84121

Fax No 537 7661

  
Susan L. Bottoms  
Legal Assistant to J. Bruce Reading



J. Bruce Reading (2700)  
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CLERK  
DEPUTY CLERK

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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---

KYNDA KAY RICHARDSON,

Petitioner

vs.

KENNETH ANDREW RICHARDSON,

Respondent.

MEMORANDUM IN SUPPORT OF MOTION FOR  
RECONSIDERATION

Civil No. 034905249 DA  
Judge Stephen L. Roth  
Commissioner Susan Bradford

Respondent, Kenneth Andrew Richardson, by and through his attorneys, submits this Memorandum in support of his Motion to Reconsider the ruling contained in the Memorandum Decision of June 2, 2005 (hereinafter, "Court's Ruling"):

ARGUMENT

- I. The Alimony Award is Improper Because: (a) the Court's Ruling Regarding Respondent's Income Are Inaccurate; (b) Future Changes in Alimony Are Available Only Through a Petition to Modify; and (c) Tithing Payments Were Improperly Considered as a Component of Petitioner's Needs

Because the alimony award of \$420.00 per month is based upon an artificially inflated estimate of Respondent's available income, the award should be reduced. Furthermore, under Utah law, changes in alimony can only be made pursuant to a petition to modify. This requirement cannot be avoided by building changes into the Findings of Fact and Conclusions of Law (hereinafter, "Findings"), based upon

speculation about future events. Finally, tithing is not a proper component of Petitioner's needs for purposes of determining alimony.

**A. The Ruling Overestimate Respondent's Ability to Pay Alimony**

The Court's Ruling overestimates Respondent's ability to pay alimony because it overstates Respondent's available income. Page 3 of the Ruling paragraph 4 of the Findings of states, incorrectly, that Respondent recently received a distribution from the state of Alaska in the amount of \$1,984.00. Instead, Petitioner actually received a distribution in the amount of \$919.00, as shown at trial.

The Court should therefore impute ongoing payments from the state of Alaska based upon imputed annual payments of \$919.00, thus reducing Respondent's annual income by \$1,065.00. Respondent's annual income, before deductions, should therefore be \$62,719.00 (or \$5,226.58 per month). After deductions of \$992.00 per month, as stated in paragraph 20 of the Findings, Respondent's monthly available income is \$4,234.58 per month.

In addition, the Court has imputed income from Respondent's scrapping activity. Testimony at trial was this scrapping was done while he was in the field working at his full-time job. He is now in administration and does not have scrapping available to him anymore.

**B. Neither Prospective Changes in Alimony, Nor Retroactive Alimony, Can Be Built Into a Decree of Divorce**

The Court's ruling improperly implements retroactive alimony, and prospective increases in alimony as Respondent's child support payments decrease. Utah Code Ann. § 30-3-5(g)(ii) provides, however, that courts may not modify alimony to address the needs of a recipient that did not exist at the time of entry of the decree of divorce. Furthermore, the Utah Court of Appeals has unequivocally stated that "*any future changes in alimony* are limited to instances where a material change of circumstances has occurred." *See*

*Howell v. Howell*, 806 P.2d 1209 (Utah Ct. App. 1991) (emphasis added). *Howell* also mandates that the “the standard of living existing at or near the time of trial” is the appropriate benchmark for determining an alimony award. *See id.* at 1212.

The Court’s Ruling directly contravenes both the *Howell* decision and Utah Code Ann. § 30-3-5(g)(ii). Petitioner’s future needs and Respondent’s future ability to pay should not be pre-judged by the Court. *See also Nelson v. Nelson*, 97 P.3d 722, 723-24 (Utah Ct. App. 2004) (explaining that a motion to terminate alimony, based upon the petitioner’s prospective reduction in income upon retirement, was not ripe for decision because petitioner had not yet retired; as such there was not a justiciable “‘imminent clash of legal rights and obligations’”). If the Court prospectively increases alimony payments at specifically scheduled future times, its decision will be based primarily upon speculation rather than upon any actual change the circumstances of the parties.

Based upon *Howell*, *Nelson*, and Utah Code Ann. § 30-3-5(g)(ii), the Court’s Ruling should specify what alimony should currently be, based upon Respondent’s needs at the time of the entry of the divorce decree. No future times or contingencies should be considered because there is no way of determining in advance the future needs and abilities of the parties.

Likewise, the award of alimony, retroactive to the time of separation is improper. *See Findings at ¶ 25.* As the court pointed out in *Osen v. Osen*, (Unreported Memorandum Decision), April 6, 2000, WL 33249404 (Utah Ct. App.), retroactive awards are

contrary to the intent of the statute, which allows a party to move for interim alimony to meet the party's needs between separation and divorce. *See Utah Code Ann. § 30-3-3(3)* (1998) (stating “the court may order a party to provide money, during the pendency of the action”) (emphasis added). It was not intended to be awarded as an afterthought in the final decree--especially when not requested by the benefitting party. *See id.* §

30-3-3(4) (allowing amendment to interim alimony entered "prior to entry of the final order") (emphasis added).

By failing to move for interim alimony, Petitioner waived any claim for it. Retroactive alimony should therefore not be awarded.

**C. The Court's Ruling Improperly Consider Tithing Payments as a "Need" of Petitioner**

Because tithing payments, or other charitable giving, have nothing to do with a person's standard of living, they should not have been considered by the Court in determining the alimony award. In determining an alimony award, the trial court must consider, among other things, the following factors: (1) the financial condition and needs of the recipient spouse; (2) the earning capacity of the recipient spouse; (3) the ability of the obligor spouse to pay alimony; and (4) the length of the marriage. *See Rehn v. Rehn*, 974 P.2d 306, 310 (Utah Ct. App. 1999); *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985); *see also* Utah Code Ann. § 30-3-5(8)(a)(i)-(iv).

The purpose of alimony is to "equalize the parties' respective post-divorce living standards . . ." to the extent possible. *See Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991), *cert. denied*, 817 P.2d 327 (Utah 1991) (quoting *Rasband v. Rasband*, 752 P.2d 1331, 1333 (Utah Ct.App.1980)).

As far as Respondent can determine, there is no Utah case or statute that authorizes the consideration of tithing as a factor in determining an alimony award. The Utah Court of Appeals has defined "standard of living" as "a minimum of necessities, comforts, or luxuries that is essential to maintaining a person in customary or proper status or circumstances." *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991), *cert. denied*, 817 P.2d 327 (Utah 1991) (*citing* Webster's Third New International

Dictionary 2223 (1986)). Charitable donations and tithing are unrelated to a party's own necessities, comforts, and luxuries, and should therefore not be considered in determining an alimony award.

**II. If Retroactive Alimony is Permitted, then Petitioner Will Have Sufficient Income to Pay Her Attorney Fees, Making the Award of Attorney Fees to Petitioner Improper**

The award of retroactive alimony, if it stands, will be a windfall for Petitioner. There was no evidence that Petitioner incurred debts in order to survive from the time of separation to the time of trial. Apparently, Petitioner was able to reduce her expenses during this period and to manage her financial affairs adequately. The award of retroactive alimony therefore amounts to \$10,500.00 windfall (twenty five months from the parties' separation to the time of trial, multiplied by \$420.00). This is more than enough to enable Petitioner to pay her attorney fees of \$5,280.00, as claimed in the Affidavit of Attorney Fees filed by her counsel in this matter.

Even if the Court believes the award of attorney fees to Petitioner is proper, Respondent object to the Affidavit of Attorney Fees, submitted by Petitioner's counsel, because it fails to meet the requirements of Rule 73 of the Utah Rules of Civil Procedure. Under the rule, all such affidavits must set forth "a reasonably detailed description of the time spent *and work performed* . . ." *See* Utah R. Civ. P. 73(b)(2).

Petitioner's counsel merely states his hours, but fails to detail the work performed. As such, his request fails to comply with Rule 73 and should be denied.

**III. The Findings Improperly Delegate the Responsibility to Determine Parent-Time to the Parties**

Section 30-3-35 of the Utah Code establishes the minimum parent time to which a noncustodial parent is entitled "unless a parent can establish otherwise by a preponderance of the evidence that more or less parent-time should be awarded . . ." *See* Utah Code Ann. § 30-3-34(2). No such proof was provided by

the preponderance of the evidence. But that being said, the Court has suggested a "gradual increase in parent time" with such transition beginning with visits in Salt Lake City with Respondent attending counseling with the children's therapist. In addition, Respondent should attend any individual counseling recommended.

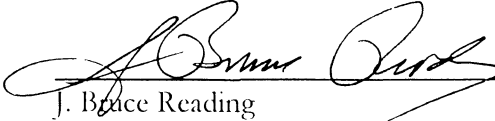
The problem with this procedure is the children are not in therapy, so there is no counseling to attend. Further, many child therapists will not give therapy to adults. There is nothing in the order to indicate what should happen in that circumstance. Who is the individual to recommend individual counseling and how does the individual counselor give input to the visitation schedule? More guidance is needed.

Finally, the Court has ordered the parties to formulate a reasonable parenting plan. The Respondent has requested visitation on at least 20 occasions since separation to the present and has only been allowed visitation six occasions. Again, there is no child therapist in existence to assist in the parenting plan. The parties cannot agree -- that is why trial was necessary.

There is a need for further guidance from the Court.

DATED this 7 day of July, 2005.

SCALLEY & READING, P.C.


  
J. Bruce Reading  
Attorney for Respondent

### CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid, and faxed a true and exact copy of the foregoing document to the following party on the 7<sup>th</sup> day of July, 2005:

Joseph Lee Nemelka  
Attorney at Law  
6806 South 1300 East  
Salt Lake City, Utah 84121

Fax No. 537-7661

A handwritten signature in cursive script, reading "Susan L. Bottoms", written over a horizontal line.

Susan L. Bottoms  
Legal Assistant to J. Bruce Reading

Tab C



Joseph Lee Nemelka - No 6620  
Attorney at Law  
JOSEPH LEE NEMELKA, P C  
6806 South 1300 East  
Salt Lake City, Utah 84121  
Telephone (801) 568-0654  
Facsimile (801) 568-9196

Attorney for Petitioner

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

---

KYNDA KAY RICHARDSON,	)	
	)	
Petitioner,	)	
	)	
vs	)	Case No 034905249 DA
	)	
KENNETH ANDREW RICHARDSON,	)	
	)	Judge Stephen L Roth
Respondent	)	Commissioner Susan Bradford
	)	

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**PETITIONER'S MEMORANDUM IN OPPOSITION TO  
RESPONDENT'S *MOTION FOR RECONSIDERATION OF COURT'S RULING***

---

Petitioner, Kynda Kay Richardson, by and through her counsel, Joseph Lee Nemelka,  
hereby submits this memorandum in opposition to Respondent's *Motion for Reconsideration of  
Court's Ruling*, and Respondent's *Memorandum in Support of Motion for Reconsideration*, as  
follows

## ARGUMENT

### **I. The Alimony Award is Appropriate**

#### **A. The Ruling does not overestimate Respondent's Ability to Pay**

##### **Alimony**

In his *Memorandum* Respondent argues that the Court erred by overestimating his ability to pay alimony by “overstating [his] available income ” Respondent asserts that the Court erred in finding that he received a distribution from the State of Alaska of \$1,984 per year instead of \$919 per year The Court did not err in this regard Testimony at trial showed that the yearly Alaska distribution varied anywhere from \$500 to \$2,000 per year Even assuming *arguendo* that the Court erred in overstating this amount by \$1,000, the error is harmless The monthly increase to Respondent's income would be only \$89 per month. This is not a substantial enough amount to alter the Court's ruling

Respondent also argues that the Court should not have imputed him income from his scrapping activity The Court did not err in this regard Testimony at trial showed that Respondent did additional scrapping work while he was working in the field However, the evidence also showed that Respondent has access to every job site and can still do the scrapping work it from wherever he is regardless of his other administrative duties Moreover, the Court considered Respondent's reduction in income to be voluntary and that his scrapping work was something that he had done historically during the marriage For this reason, the Court thought it

was fair to consider his previous scrapping activities which the Court specified as a previous source of income. The Court did exactly what is allowable pursuant to Utah Case Law and that is, when there is a reduction of income, just prior to or during a divorce action being filed, then it is perfectly reasonable to use historical and other income for purposes of establishing income for child support and alimony calculations. The Court specifically states its findings

While there is no indication other than timing that Respondent took the promotion in order to deliberately reduce his income for purposes of this proceeding, this was in significant part a voluntary decision on his part that reduced his income. For this reason, the court believes that it is fair to consider his previous scrapping activities (in which he made up to \$1,000 per year from time to time) as a source of income still open to him and to consider his historical overtime. In all, the court believes that it is reasonable to impute \$1,700.00 per year a reasonable assessment of Kenneth's additional earning capacity for purposes of child support and alimony calculations, giving him some latitude to make changes in his work position to accommodate reasonable work-related goals, while recognizing that those changes are largely voluntary, as well as taking into account his ability to make additional income, as he has in the past, from scrapping or other work.

Furthermore, Respondent is trying to introduce evidence that was not introduced at trial. Respondent is trying to "boot strap" additional argument into his *Motion* and *Memorandum*, and such should be stricken.

**B. The Court did not err in awarding Prospective Increases in Alimony,  
nor did it err in Awarding Retroactive Alimony**

Respondent argues that the Court improperly implemented retroactive alimony and prospective increases of alimony as the child support payments decrease. Respondent points to §30-3-5g(ii) of the Utah Code in arguing that the Court may not modify alimony to address needs that did not exist at the entry of the Decree of Divorce. This argument is misplaced. At the time of trial, Petitioner specifically testified, in open court and by exhibit, what her expenses were. The Court found her expenses in the sum of \$3,306.00 per month to be reasonable. The Court found that Petitioner could only meet those expenses with both the alimony and child support being paid to her. The Court found that with child support of \$1,374, and with a net income of \$1,512, Petitioner would need alimony of \$409 to meet her expenses. The Court found that as the child support decreased, so would Petitioner's ability to pay her expenses, while Respondent's ability to pay his expenses and alimony would increase. Petitioner's expenses would remain the same and, therefore, any increase in prospective alimony is based upon "the needs of [Petitioner]" that exist at the "time of entry of decree of divorce," or trial. The Court did not find that Petitioner's expenses would be greater in the future and that she would therefore need more alimony. The Court simply awarded alimony based upon the information before it as to Petitioner's needs. This is a fact known and taken into consideration at trial.

The Court made further specific findings for its reasoning to increase the alimony once the child support payments went down. This was a very long-term marriage and as Respondent's child support obligation went down as the children reached the age of eighteen (18), this would not necessarily mean a change in the expenses for the children in Petitioner's custody. Further, the Court wanted to maintain a rough equivalence of the parties standard of living after a long-term marriage. The Court recognized that as the children grow older the Respondent's income will increase automatically, while Petitioner's expenses will not necessarily decrease.

Respondent's reliance on the *Howell* case is misplaced. The Court in *Howell* did state that any future changes in alimony are limited to situations where a material change of circumstances has occurred. The *Howell* Court did not elaborate on that statement and the facts of the *Howell* case do not assist Respondent in this case. However, simply stating that the alimony will increase incrementally, does not mean that this is a "future change" as contemplated by *Howell*. This Court has ruled what the alimony award would be now and as the minor children reach the age of majority. Therefore, there will be no "future" changes in alimony. Of course, the Court's current award of alimony would be changed but only if there is a substantial material change of circumstances.

Respondent also argues that *Howell* mandates that the standard of living existing at or near the time of trial is the appropriate bench mark. This is correct. The Court looked at the standard of living of the parties and found Petitioner's expenses to be reasonable and her income,

including child support, left a shortfall. The Court also found that Respondent had discretionary income of \$837 each and every month. Thus, the Court did consider the standard of living existing at the time of trial and, therefore, did not err. The Court is not looking at the standard of living that may occur in the future because the Court is assuming that the expenses and income of the parties will remain the same. The Court is calculating and allowing an increase in the alimony award as child support is decreased. It is fact that is known now, a fact that is foreseeable and a fact that is contemplated.

Contrary to Respondent's argument, future needs and future ability to pay are not being prejudged by the Court. The Court's decision is not based upon speculation or conjecture. The decision is based upon what the Court knows now in terms of the parties' incomes and expenses, and the fact that the Court knows now that the child support will go down.

The Court could have very well found that alimony should be awarded in the sum of \$820.00. This is roughly what is available for alimony from Respondent's surplus. The Court could very well say that the alimony award is \$820.00 to be paid \$420.00 now with an additional \$100.00 at each time. Regardless, the outcome is still the same. All of the issues are known. All of the amounts are known and, therefore, there is nothing hindering the Court's order in making the appropriate findings in that regard. Nothing of the Court's ruling violates the *Howell* nor Utah Code § 30-3-5g(ii).

Respondent repeats several times that the concept that future contingencies should not be considered because there is no way of determining in advance the future needs and abilities of the parties. Again, the Court is awarding alimony based upon the *current* ability to pay of the parties. It is not relying on any determination of future income nor future expenses.

Respondent also argues that the award of alimony retroactive at the time of separation is improper. This argument is also misplaced. During the separation of the parties, Respondent was paying support each and every month to Petitioner. Such funds were not designated as child support or alimony. Respondent argues that in order for any retroactive alimony to be awarded, Petitioner had to bring a motion beforehand. However, when one party, such as Respondent in this case, is already paying some amount of money for support, there is simply no need to file a motion for an interim order. The Court in this matter is simply indicating that the \$420.00 current alimony award would be retroactive back to the date of the parties separation and any amounts paid by Respondent during that time would be applied toward this obligation. Petitioner could not, therefore, have waived her ability to interim alimony as it was already being paid, albeit in an imprecise amount. Moreover, during this time the parties were negotiating to resolve the support issues and all other issues of the divorce. Requiring the parties to litigate matters over which they are trying to negotiate a resolution would be contrary to the sense of equity, justice and judicial economy.

**C. The Court Properly Considered Tithing as a Need of Petitioner**

Respondent argues that the Court cannot consider tithing as an expense of the parties. Respondent argues that tithing payments have nothing to do with a person's standard of living and should not have been considered in the alimony award. This argument is incorrect and somewhat disingenuous. The Court in its findings specifically indicates that the evidence that the parties

historically made donations to the Church at about ten percent (10%) of income and continue to do so, each listing such donations as part of their expenses and the Court considers these donations as a continuing part of their previous and present standards of living and will include them as reasonable expenses for both parties.

Thus, the Court allowed both parties to claim tithing as an expense and part of their standards of living. Both parties were treated equally in this regard, although allowing Respondent to claim his alimony as an expense provides him an even greater monthly amount of discretionary income—an additional \$495. Respondent points to a number of cases that he asserts support his position that the Court cannot consider tithing as part of a standard of living. Respondent states that none of these cases authorizes a Court to consider alimony as an expense. However, Respondent ignores the fact that no case law or statutory authority prohibits the Court from considering tithing as a factor in determining an alimony award. In fact, the Court is supposed to consider the “financial condition” of the parties. In *Howell*, the Utah Court of Appeals did define the standard of living as a “minimum of necessities, comforts or luxuries that is



essential to maintaining a person in customary or proper status or circumstances” *Howell* does not, however, further delineate what is meant by the foregoing language. Common sense dictates that “customary” means what the parties were use to or the *status quo*. “Luxuries” would include expenses that are not necessary for minimal survival, but for things such as vacations, golf lessons, tanning, etc. Luxuries could also very easily include tithing or donations. If Respondent did not believe that the Court should consider tithing or donations, why did he expect the Court to consider his donations as an expense?

As *Howell* indicates, trial courts have considerable discretion in determining alimony in divorce cases and such decisions will be held upon appeal unless a clear and prejudicial use of discretion is demonstrated. No such abuse of discretion has been shown.

**II. Petitioner will not have sufficient income to pay her attorney’s fees even if retroactive alimony is permitted.**

Respondent claims that retroactive alimony would be a windfall for Petitioner. This is not accurate. During the time of the parties separation, Respondent has been living very frugally as found by the Court. However, Respondent has been able to enjoy a greater standard of living having the greater income of the parties. Furthermore, the retroactive alimony may or may not amount to \$10,500, given the fact that during the parties separation Respondent voluntarily paid support for the minor children and for Petitioner. The only fact that remains is what amounts are

still due and owing for retroactive child support and alimony. There are offsets which need to be taken into consideration which can be included in any findings.

Respondent argues that the Affidavit of Attorneys Fees fails to meet the requirements for Rule 73 of Utah Rules of Civil Procedure. However, Respondent fails to recall that at trial that as part of his exhibits, Petitioner included a detailed copy of each his attorneys fees which was provided as an exhibit to the Court. Furthermore, Petitioner's counsel indicated to the Court the amount of the hourly fee, the complexity of the case, and that he was requesting fees. This was all made a part of record and placed with the Court as evidence. Besides, the purported *Affidavit as to Attorney's Fees* has not even been filed with the Court. Petitioner's counsel will submit a sufficiently detailed and formal affidavit with the final documents.

### **III. The Findings do not Improperly Delegate Responsibility of Parent-time to the Parties.**

§ 30-3-35 of the Utah Code specifically indicates that any visitation or parent-time established by the parties is preferred to a Court mandated award. Respondent requests that he be awarded the minimum parent-time pursuant to § 30-3-35 of the Utah Code. However, that statute contemplated both parents living within a reasonably close proximity. Respondent lives in Alaska and Petitioner lives in Utah. Therefore, it is certainly impractical that Respondent have parent-time one night a week and every other weekend.

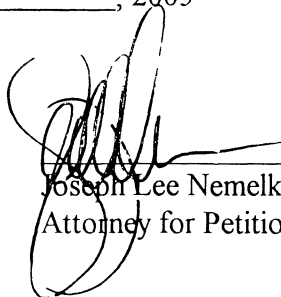
Respondent's argument that no proof was provided to show that less parent-time should be awarded is inaccurate. The evidence showed, as the Court found, the level of abuse by Respondent. The fact that some of the minor children are now in counseling and the fact of Respondent's inability and unwillingness to visit the children for substantial periods of time, all contribute to the reasoning and the findings of the Court in that regard. Evidence was placed on the record that the children are still intimidated by their father. Furthermore, the Court did in fact order that the applicable guidelines--§ 30-3-36 of the Utah Code--would be appropriate at some point in the future after a gradual increase occurred. The Court ordered that the parties formulate a reasonable parenting plan with the children's therapist, which should be in place before standard parent-time occurs. It is hard to see how this can be an inappropriate award or an inappropriate procedure for establishing Respondent's parent-time. The Court has given specific guidance to the parties on how to deal with the issue. If the parties are unable to resolve any parenting issues, they should be ordered to go to mediation to assist them in resolving those issues. This should not, however, suspend the entry of the *Decree of Divorce* in this matter.

Respondent's statements that Petitioner has denied him parent-time since the trial is false, and, once again, additional evidence he is trying to "boot strap" onto his *Motion*

### CONCLUSION

Accordingly, pursuant to the foregoing, Petitioner requests that Respondent's *Motion for Reconsideration of Court's Ruling* be denied and that Respondent be responsible for Petitioner's attorney's fees incurred in responding to the *Motion*

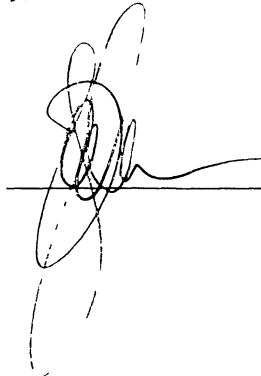
DATED this 19<sup>th</sup> day of July, 2005

  
\_\_\_\_\_  
Joseph Lee Nemelka  
Attorney for Petitioner

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Memorandum was mailed, U S First Class Mail, postage prepaid, this 19<sup>th</sup> day of July, 2005, to

J Bruce Reading  
SCALLEY & READING, P C  
50 South Main, Suite 950  
P O Box 11429  
Salt Lake City, Utah 84147-0429

  
\_\_\_\_\_

Tab D

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THIRD DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

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KYNDA KAY RICHARDSON,

Petitioner,

vs.

KENNETH ANDREW RICHARDSON,

Respondent.

**MEMORANDUM DECISION**

(Respondent's Motion for  
Reconsideration and Objection to  
Proposed Findings and Conclusions)

Case No. 034905249

Judge Stephen L. Roth

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Respondent has filed a Motion for Reconsideration of Court's Ruling (the "Reconsideration Motion"), supported by his Memorandum in Support of Motion for Reconsideration ("Respondent's Memorandum"), asking the court to reconsider certain aspects of its ruling, set out in a Memorandum Decision. after trial in this matter. Respondent also filed an Objection to Proposed Findings and Decree, supported by the same Respondent's Memorandum. Petitioner filed a Memorandum in Opposition to Respondent's Motion for Reconsideration of Court's Ruling ("Petitioner's Opposition"). Respondent filed a Reply Memorandum in Support of Motion for Reconsideration and filed a Notice to Submit the matter for decision on October 5, 2005. Having considered the parties' memoranda and reconsidered the evidence and arguments presented at trial, the court makes the following decision.

**DECISION**

**A THE ALIMONY AWARD.**

Respondent asserts that the court's alimony award is improper because the court's assessment of respondent's income overestimated his ability to pay, the provisions for increases in alimony based on future reductions in child support and for retroactive alimony are contrary to law, and

tithing payments should not have been considered as a component of petitioner's needs. Each issue is addressed below.

1. Overestimate of Respondent's Income.

Respondent states that the court used an erroneous figure of \$1984 as his 2004 annual distribution from the State of Alaska, when his testimony was that the 2004 amount was \$919, but varied yearly. Respondent did not specify the level of variation, and the court believes that he would have done so if it was to his advantage. The court recalls that petitioner testified that the distribution was \$1984 in 2004, that it had been about \$2,000 in past years, but varied yearly. Apparently the court misheard petitioner's testimony about the amount of the 2004 distribution, but generally found petitioner's testimony to be credible. Accepting that the correct figure for 2004 was \$919, however, and taking into account petitioner's testimony about the level of distributions in past years of about \$2,000 but with annual variations, perhaps as low as \$500, the court finds that a reasonable estimate of respondent's income from state distributions is between \$500 and \$2000, with the average bearing significantly toward the higher figure, or about \$1,500. Taking into account this change, the court's conclusion regarding respondent's income (as set out on page 3 of the Memorandum Decision), is decreased by \$484, from \$65,484 per year to \$65,000 per year, and consequently from \$5,457 per month to \$5,417, a difference of \$40 per month. This change is not significant, and does not affect the court's conclusion in the Memorandum Decision about respondent's ability to pay alimony.

Respondent also states that the "scrapping" activity is no longer available to respondent, because he did this while working in the field and he does not work in the field in his new management job. In attributing \$1,700 in additional income to respondent (Memorandum Decision at 3), the court considered the fact that after the separation, respondent had voluntarily reduced his income by taking a management job that did not allow him to benefit from the overtime that he had

historically worked.<sup>1</sup> The court does not believe that the testimony requires a conclusion that respondent's previous scrapping activities are now foreclosed to him because of his new position. In addition, the court considered these activities, undertaken during the marriage along with overtime at work, as part of respondent's historical earning capacity that was appropriately taken into account in light of his voluntary reduction in income.

The court therefore concludes that its ruling did not overestimate respondent's ability to pay alimony.

2. Future Increases in Alimony as Child Support Ends.

Respondent argues that the provision for future increases in alimony as the parties' children turn eighteen and child support diminishes is contrary to law, because it is based on speculation about the future needs and circumstances of the parties.

In *Howell*, the court noted that "Utah's appellate courts have considered the appropriateness of alimony after a long term marriage, where the wife (usually) has worked primarily in the home, has limited job skills, and is in her late forties or fifties." *Howell*, 806 P.2d at 1213 (citations omitted). This is just such a case. The parties were married for over twenty years and had six children. Petitioner gave up her ability to acquire significant work skills and earning capacity to care for a large family, and continued to care for the remaining four minor children at the time of trial. She is in her forties or fifties and is not likely to significantly increase her earning capacity to a point where she can support herself at a standard the parties enjoyed during marriage. See *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985), quoted in *Howell*, 806 P.2d at 1213. While an alimony award of

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<sup>1</sup> While the court has concluded that respondent did not do this for the purpose of reducing his income, the court believes that he did accept this position, which he had declined before, in part because the parties' separation and pending divorce decreased his incentive to continue working in a position that provided more income but was perhaps less attractive to him as a job.



\$420 per month at this point is appropriate to address petitioner's needs, it is based on petitioner's present sources of income, including about \$1,375 in child support, which will decrease incrementally as each of the four minor children turns eighteen. The first of those turned eighteen in May 2005 and the second will reach majority in 2006, with the other two following.

In holding that an alimony award of \$1,800 was "clearly erroneous" (i.e., too low) the *Howell* court took note of the problem that occurs in situations where predictable decreases in child support are not taken into account in setting alimony awards:

Child support set pursuant to child support guidelines at \$1363, plus alimony of \$1800, plus defendant's potential salary as determined by the court of \$645, yields gross monthly income of \$3808 for defendant and her son. Plaintiff, after deducting child support and alimony, has gross monthly income of \$6,837. When his child support obligation ceases, approximately fifteen months after the decree, he will have gross monthly income of \$8200 in comparison to defendant's \$2445. Defendant fits the profile described in *Jones* and other cases: she is approximately fifty years old, has minimal marketable job skills, and has spent most of the thirty plus years of the parties' marriage raising and caring for their five children and their home, presumably with the concurrence of plaintiff. Her likelihood of achieving significant salary levels in the future is slim. The alimony set by the court does not come close to equalizing the parties' standard of living as of the time of the divorce, but allows plaintiff a two to four times advantage.

*Howell*, 806 P.2d at 1213 (footnotes omitted). In a footnote at the end of the sentence describing the disparity in the parties' income after child support ceases, the court quoted the statement of the Utah Task Force on Gender and Justice Report to the Utah Judicial Council: "If courts award child support in lieu of permanent alimony, they may fail to anticipate the financial impact on the remaining family as each child reached age 18 and his or her award terminates." *Id* at 1213 n.2 (citation omitted).

——— While not as dramatically as in *Howell*, when the Richardsons' remaining minor children turn eighteen, the relative disparity in the parties' incomes will increase significantly. Petitioner has gross monthly income of about \$3,622, including salary at \$1,827, child support of \$1,375 and \$420 in

alimony, from which she must provide for herself and four children. Respondent's gross monthly income of \$5,417, after deducting an equivalent amount of child support and alimony, is also coincidentally about \$3,622,<sup>2</sup> from which he must provide for only himself. As his child support obligation decreases, respondent's income will increase proportionately as petitioner's decreases. At the end of his child support obligation, less than seven years from now, with no incremental increases in alimony respondent will have gross monthly income of about \$5,000 (\$5,417 less \$420) in comparison to petitioner's \$2,250 (\$1,827 plus \$420). With the addition to alimony of increments totaling \$400 at the end of child support, petitioner's income will be about \$2,650 in comparison to respondent's \$4,600. The court believes that incremental increases in alimony as child support decreases reflects the reality that petitioner will continue to incur expenses that will not be reduced dollar-for-dollar as the children reach eighteen and, perhaps more importantly, roughly meets the goal of "better equaliz[ing] the parties' ability to go forward with their respective lives" after this long-term marriage. *See Howell*, 806 P.2d at 1213.

The court therefore concludes that the incremental increases in alimony "anticipate the financial impact on the remaining family as each child reach[es] age 18 and his or her award terminates" and serve to equalize the parties' abilities to go on with their lives in a rough approximation to the standard of living during the marriage, and therefore are not based on speculation, but on circumstances "foreseeable at the time of the divorce" (*see* U.C.A. § 30-3-5(8)(g)(i)) and fall within the compass of Utah law.

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<sup>2</sup> In its earlier Memorandum Decision, the court used net figures; these gross figures are used simply for a rough comparison, similar to that made by the Court of Appeals in *Howell*.

3. Retroactive Award of Alimony.

Respondent argues, in effect, that the court's ruling that the alimony award should be retroactive to the date of separation is contrary to the statutory scheme set out in U.C.A. § 30-3-3. In support of this position, respondent cites an unpublished Court of Appeals decision, *Osen v Osen*, 2000 UT App 90, which reasoned that an award of alimony meant to compensate for the appellant's not having had to pay temporary support prior to trial, to the extent it purported to be "an award of retroactive interim alimony," was "contrary to the intent of the statute," which allows a party to move for interim alimony to meet the party's needs between separation and divorce," *Id.* at n.1, citing U.C.A. § 30-3-3(3). The court noted that temporary support "was not intended to be awarded as an afterthought in the final decree—especially when not requested by the benefitting party." *Id.*, citing U.C.A. § 30-3-3(4).

Petitioner counters that no temporary support award was sought or entered because respondent was voluntarily paying some amount of support during the pendency of the suit that was not denominated as either child support or maintenance and that, under the circumstances, she should not be required to have sought a temporary support order as a prerequisite to obtaining a support award that is retroactive. She argues that this would require the parties "to litigate matters over which they are trying to negotiate a resolution" and would not be equitable or support judicial economy.

*Osen*, as an unpublished decision, does not have the force of precedent, and its analysis of the statute is cursory and amounts to *dicta*, because it was simply an aside contained in a footnote that was not necessary to the result reached. The court believes that section 30-3-3 does not impose the constraint on retroactive support awards that respondent asserts. "The precept is well recognized that the trial court is vested with broad equitable powers in divorce matters." *Curry v Curry*, 321

P.2d 939, 942 (Utah 1958). For example, in a related area these equitable powers have been found by the Utah Court of Appeals, under applicable statutes and “Utah common law,” to include “the discretion to award modified alimony retroactively to the date a modification petition is served.” *Wilde v Wilde*, 2001 UT App 318, ¶ 23. There is no evident reason why a court with statutory authority to award temporary alimony during pending litigation and discretion to retroactively award modified alimony would not also have discretion to make a retroactive award of temporary alimony under its broad equitable powers. Spouses have common law and statutory duties to provide support for dependent children and a dependent spouse. The statutory provision for temporary support orders therefore appears to be a codification of a recognized obligation rather than the creation of a new one. Recognizing this, it is not uncommon in this district for initial temporary support awards under section 30-3-3 to be made retroactive to the date of filing of the petition or even to the date of separation.

In addition, because of the inherently equitable nature of divorce proceedings, Utah courts encourage non-litigative resolution of divorce issues through voluntary and mandatory mediation. If retroactive temporary support was precluded by law where an order is not already in place to be modified, parties who delayed formal litigation for temporary orders in order to reach resolution on support issues through negotiation or mediation would be put at a significant disadvantage, and the value and appeal of these less costly and less confrontational approaches would be reduced.

The issue then is whether in this context, the provisions of section 30-3-3 preclude the retroactive award of support that does not amount to the modification of an existing order. Section 30-3-3 provides for an order of temporary support “during the pendency of the action” and for amendment of “[o]rders entered under this section . . . during the course of the action or in the final order or judgment.” U.C.A. § 30-3-3(3) & (4) There is nothing in this language that plainly states

that the temporary award authorized here cannot be made retroactive. It simply provides that awards already made can be modified. That the legislature knew how to restrict retroactive support awards is clear from the language of U.C.A. § 78-45-9.3(3) & (4) (formerly part of U.C.A. § 30-3-10.6), which provides clear limitations on the retroactive effect of modifications to existing awards. The legislature apparently chose not to include such restrictions in section 30-3-3; rather, the language of that section provides only that existing temporary orders are subject to modification. The court concludes that it has discretion to award spousal support retroactively, particularly where the petition requests such support, which is the case here. *See* Petition for Divorce, filed on August 26, 2003, at ¶ 21.

Nevertheless, based on reconsideration of the evidence relating to the parties' pre-trial circumstances, the court believes that the retroactive award of alimony should be modified to some extent. The court finds from the evidence presented at trial that after the separation and petitioner's move to Salt Lake City, respondent paid to her for some significant period of time up to \$600 a week in undifferentiated "support," apparently meant to include child support and spousal support. This amount is substantially higher than the combined alimony and child support ordered by the court. Once petitioner was served with the Petition for Divorce in September 2003, however, respondent reduced his support payments to about \$1,350, which he believed was the amount of child support he would be required to pay, and which is very close to the amount required under Utah law. Petitioner testified that her needs increased in May 2004, when her expenses increased, largely due to taking on the costs of paying the mortgage on a house, compared with a lower monthly rental cost before that, and associated increased utility expenses. But she also testified that she had been significantly curtailing spending generally during that period because of her reduced circumstances after respondent had substantially reduced his support payments after the Petition was filed, while

respondent's circumstances did not require him to similarly economize. In setting the amount of alimony, the court relied primarily on evidence about petitioner's financial condition and needs, and her ability to meet those needs on her own, that appeared to be roughly similar from May 2004 forward, because that period seemed to more accurately reflect the standard of living before separation.

Taking all this into consideration, together with the broader context of the parties' marriage, the court believes it is equitable to make alimony retroactive to and including May 2004. The court has considered the respondent's ability to pay support before trial, based on the court's analysis in the original Memorandum Decision, which appears to be as pertinent to the period going back to time of separation as to the time of trial. In addition, the court has considered the petitioner's needs, as discussed above and in the Memorandum Decision, as well as the fact that respondent's pre-filing support contributions were considerably larger than the court's combined child support and alimony award, which acts to roughly offset any deficit petitioner may have experienced during the period from filing up to May 2004.

The court further concludes that the higher amounts paid by respondent before filing are sufficient to offset any slight deficiency in child support that may have accrued before trial. Therefore child support need not be made retroactive.

The court's ruling set out in the Memorandum Decision is therefore modified to provide that alimony is to be retroactive to and including May 2004 and child support is not to be retroactive, the child support obligation having been complied with. Any overpayment of support obligations that respondent may have made before filing was voluntary and has been taken into account in this decision. Therefore, the court's ruling in the Memorandum Decision (at 5) that the respondent is "to

be credited for amounts paid since [the date of separation] against his obligations for child support and alimony” is stricken.

4. Consideration of Church Donations (Tithing).

Respondent argues that the court should not have considered the parties’ contributions to their church (“tithing”) in determining the award of alimony “[b]ecause tithing payments, or other charitable giving, have nothing to do with a person’s standard of living . . . .” Respondent’s Memorandum at 4.

Utah courts have ruled that “the court should set alimony . . . to approximate the parties’ standard of living during the marriage as closely as possible. It follows that if the payor spouse’s resources are adequate, alimony need not be limited to provide for only basic needs, but should also consider the recipient spouse’s ‘station in life.’” *Howell v. Howell*, 806 P.2d 1209, 1212 (Ut.Ct.App. 1991) (citations omitted). In this regard “[s]tandard of living is defined as ‘a minimum of necessities, comforts, or luxuries that is essential to maintaining a person in customary or proper status or circumstances.’”<sup>3</sup> *Id.* at 1211 (dictionary citation omitted).

As the court noted in the Memorandum Decision (at 9), during the marriage the parties historically paid a contribution to their church of 10% of income. A regular tithing payment was thus one of the “necessities, comforts, or luxuries” that was customary in their married life and a component of their standard of living. It is appropriately considered as part of “the financial condition and needs of the recipient spouse” in this case. *See id.* at 1212. In addition, both parties indicated that they continued to pay tithing after separation. Given the disparity in the parties’

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<sup>3</sup> Because a purpose of alimony is “to approximate the standard of living enjoyed during the marriage, to the extent possible”, the “needs of the recipient spouse” are not limited to “only basic needs” or the minimum necessary for subsistence, but also include “necessities, comforts, and luxuries” enjoyed during the marriage. *See Howell*, 806 P.2d at 1212..

income and petitioner's other established needs, if no allowance were made in the alimony determination, she would likely be unable to pay tithing without sacrificing other legitimate needs. Petitioner, on the other hand could afford to continue tithing payments without such sacrifice, and is able to continue such payments at the level of alimony set by the court. If the court failed to consider the parties' tithing payments as part of their standard of living, the alimony award would fail to meet the goal of "equaliz[ing] the parties' respective post-divorce living standards . . . ." *Id* at 1211 (citation omitted; modification added).

The court therefore concludes that the parties' respective church contributions were appropriately considered in determining alimony.

**B. RETROACTIVE ALIMONY and the AWARD OF ATTORNEY'S FEES.**

Respondent argues that if the retroactive alimony award stands, petitioner will receive a windfall from which she should be required to pay her own attorney's fees. Alimony is an award of spousal support based on need and is not a windfall to the recipient spouse. In this case, the court has modified the alimony award to make it retroactive to May 2004, which appears to reduce the amount of retroactive alimony to be paid by petitioner. Further, the court deducted attorney's fee payments from petitioner's expenses in determining her needs for purposes of alimony, so there is no overlap of retroactive alimony and payment for attorney's fees. Respondent's objection to the award of attorney's fees on this basis is therefore not well taken.

Respondent also criticizes the completeness of the Affidavit of Attorney Fees submitted by counsel for petitioner. While the Affidavit has not yet been filed, the court agrees that the Affidavit should provide sufficient detail about the actual work performed for the court to determine whether the fees requested were reasonable and necessary. Counsel should submit an appropriate affidavit.



incorporating the documentation submitted at trial, so the information regarding fees is readily reviewable.

C. PARENT TIME ISSUES.

Respondent criticizes the court's ruling regarding parent time, in particular the provision for a gradual increase of respondent's parent time up to the level of statutory guidelines, while requiring that he attend counseling. The court agrees that its parent-time ruling may not be workable. The children are apparently not in therapy at this point, as the court believed; and other aspects of the parent-time provisions are perhaps too open-ended.

The court believes its concerns, stated in the Memorandum Decision, can more realistically be addressed by providing for parent-time per the applicable statutory guidelines, with respondent required to successfully complete a parenting class that is functionally equivalent to the multi-week parenting class provided by Valley Mental Health on court referral. Once respondent has done this, parent-time should begin under the applicable statutory guidelines (probably section 30-3-37 because of the respondent's residence in Alaska). The court's primary concern is that respondent complete the course before the children are required to go to Alaska for parent-time. If respondent comes to Utah to visit in the interim, he may have parent-time here without having first completed the class, so long as he gives reasonable notice. Such parent-time should be at a minimum equivalent to that provided for in U.C.A. § 30-3-35, i.e., one weekend, to begin with the weekend just after he arrives or the weekend on which he arrives, and at least one weeknight, unless the parties otherwise agree. Respondent should also be given liberal access to the children for telephone communication, at least three times per week at a minimum, and for email, if available..

The parties should contact Valley Mental Health (attn. Kathy Reimherr (cell: 556-6037)) to determine the nature of its parenting class, and respondent can complete that program or one in

Alaska that is roughly equivalent (for example a multi-week parenting class approved by the Alaska counterpart of DCFS). No later than 30 days from the date of this Memorandum Decision, respondent's counsel should provide petitioner's counsel with a description of the class he intends to take. If the parties are in agreement that the proposed class meets the requirements of this decision, respondent should complete the class as soon as reasonably possible; if in disagreement they should approach the court for resolution, prepared to offer specific alternatives. As soon as respondent has provided written verification that he has successfully completed the appropriate parenting class, visitation under the statutory guidelines can begin, including travel to Alaska. Before completion of the course, visitation will be limited to local visits in Utah, as explained above. The Advisory Guidelines contained in U.C.A. § 30-3-33 shall apply, as appropriate to the parties' circumstances.

The court therefore modifies its parent-time ruling to provide for parent-time as set forth above.

#### ORDER

Based on the foregoing, it is hereby

ORDERED, as follows

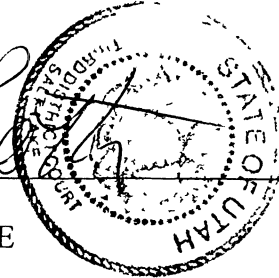
1. Respondent's Motion for Reconsideration and Objections to Proposed Findings and Decree is granted in part and denied in part, as set forth above.
2. The court's Memorandum Decision, dated June 2, 2005, is accordingly supplemented and modified as set forth above.
3. Counsel for petitioner is to make appropriate modifications to the proposed findings of fact and conclusions of law and the decree that take into account the court's ruling as set forth herein.

DATED this 23<sup>rd</sup> day of December, 2005.

BY THE COURT:



Stephen L. Roth  
DISTRICT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 034905249 by the method and on the date specified.

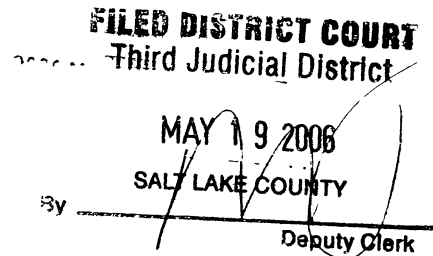
METHOD NAME

Mail	JOSEPH L NEMELKA ATTORNEY PET 6806 S 1300 E SALT LAKE CITY, UT 84121
Mail	J. BRUCE READING ATTORNEY RES 50 SOUTH MAIN SUITE 950 SALT LAKE CITY UT 84147-0429

Dated this 23 day of December, 2005.

  
\_\_\_\_\_  
Deputy Court Clerk

Tab E



Joseph Lee Nemelka - No. 6620  
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Facsimile: (801) 568-9196

Attorney for Petitioner

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

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KYNDA KAY RICHARDSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 034905249 DA
	)	
KENNETH ANDREW RICHARDSON,	)	
	)	Judge Stephen L. Roth
Respondent.	)	Commissioner Susan Bradford
	)	

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**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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The above-entitled matter came before the Honorable Stephen L. Roth of the above-entitled Court on the 8<sup>th</sup> day of February, 2005. Petitioner appeared in person and was represented by her counsel, Joseph Lee Nemelka. Respondent appeared in person and was represented by his counsel, J. Bruce Reading. The Court, having heard argument of counsel and testimony of the parties and witnesses, having reviewed the file in this matter, having taken the

matter under advisement, and being otherwise fully advised in the premises, hereby finds as follows

1. **JURISDICTION AND GROUNDS:** As a threshold matter, the court notes that Petitioner has lived in Salt Lake County since January, 2003, after the separation of the parties in about mid-2002, and therefore concludes that it has jurisdiction over the parties and the subject matter of this case. Further, the parties have come to disagree deeply over crucial aspects of their life together, perhaps most importantly over the approach to raising and disciplining their children. While Respondent states that he does not desire a divorce, the parties had the benefit of counseling before the filing of the Petition, have been separated for over two (2) years and have established separate lives. The court concludes that there are grounds for entering a decree of divorce based on the existence of irreconcilable differences that prevent the marriage from continuing.

2. **CHILD CUSTODY AND SUPPORT:** There were six children born to this marriage, of whom four are still minors: Dana May Richardson, born May 17, 1987, Kyle Allen Richardson, born July 19, 1988, Avery Keen Richardson, born August 21, 1990, and Justin Wallace Richardson, born March 25, 1993. The parties do not contest child custody and appear to be in agreement with Petitioner should have sole physical and legal custody. Petitioner was the primary caretaker for the children prior to the parties' separation and the children continue to live with her at their present home in West Valley City, Utah, while Kenneth has remained in Alaska,

where the parties lived since their marriage in Anchorage on August 20, 1980. Petitioner appears to strongly desire custody, and she has been and continues to be a fit parent. There is no indication that the children have any different custody preference. The court concludes that Petitioner is and has been a fit and proper parent, that there is not reason to disturb the parties' own agreement with respect to custody.

3. For purposes of the child support calculation, gross income includes income from almost any source, other than those specifically excluded by the statute. See U.C.A., Section 78-45-7.7(1). At the time of trial Respondent was working full time for Aurora Electric in Anchorage as a project manager/estimator, earning a salary of \$1,188.47 per week according to a January 28, 2005, Employer Earnings Statement showing about \$61,800.00 per year. Apparently some time in 2003, after the parties' separation, Respondent was promoted to this supervisory position from the journeyman electrician position that he had formerly held at Aurora Electric. He received a lower salary in the prior position, but normally and consistently worked substantial overtime (more than 40 hours per week) during the marriage and thus earned about \$5,000.00 (2001 W-2) to \$6,000.00 (2002 W-2) more each year than he does now, because as a supervisor, overtime is no longer available to him. Respondent testified that he took the promotion because it was a job change that he wanted and because his boss urged him to take the new position for the benefit of the company. While there is no indication other than timing that Respondent took the promotion in order to deliberately reduce his income for purposes of this proceeding, this was in



significant part a voluntary decision on his part that reduced his income. For this reason, the court believes that it is fair to consider his previous scrapping activities (in which he made up to \$1,000 per year from time to time) as a source of income still open to him and to consider his historical overtime. In all, the court believes that it is reasonable to impute \$1,700.00 per year a reasonable assessment of Kenneth's additional earning capacity for purposes of child support and alimony calculations, giving him some latitude to make changes in his work position to accommodate reasonable work-related goals, while recognizing that those changes are largely voluntary, as well as taking into account his ability to make additional income, as he has in the past, from scrapping or other work.

4. In addition, Respondent receives an annual distribution made to all citizens of the State of Alaska. The most recent such distribution was \$919, and Respondent testified that it was sometimes less and sometimes more. The court finds that a reasonable estimate of Respondent's income from state distributions is between \$500 and \$2,000, with the average bearing significantly toward the higher figure, or about \$1,500. This annual payment falls within the broad scope of gross income under the statute, and the court concludes that the \$1,500.00 figure is a reasonable estimate of ongoing income from this source for purposes of calculating gross income (for child support and alimony). Respondent's gross income for child support purposes is therefore \$61,800.00 plus \$1,700.00 plus \$1,500, a total of \$65,000 per year, or \$5,417.00 per month.

5. Petitioner is employed by the State of Utah, working full time. Her last pay stub

for 2004 showed her annual salary to be \$21,927 00 or \$1,827 00 per month. Petitioner's work experience is relatively minimal because of the parties' decisions regarding how their family would function during the marriage. After about a year of employment, Petitioner cared for the children at home during the marriage, with only short periods of part time employment, and she does not appear to have developed any specialized job skills. There was no evidence that she had either the opportunity or the capacity to earn more than what she is making now; and the court concludes that she is fully employed in her present position at the present rate of pay, which is her gross income.

6. There is no evidence that either party was obligated to any other person for alimony or child support outside the bounds of this case, and therefore gross income and adjusted gross income are the same for each party. These figures are therefore to be used for calculating the share of child support attributable to each party, with Respondent to be the obligated party.

7. Based upon the foregoing, Respondent shall pay child support to Petitioner in the sum of \$1,374 per month commencing as of the date of trial herein.

8. Respondent's obligation to pay child support shall continue as to each minor child until that minor child reaches the age of eighteen (18) or graduates from high school, whichever later occurs.

9. Pursuant to Utah Code §62A-11-401 *et seq* and -501, withholding of child support from Respondent's wages as a means of collecting child support shall be authorized.

10. **INCOME TAX EXEMPTIONS:** The parties propose that they should each be allocated tax deductions for two children, but disagree on which. No real basis for allocation was presented other than the representation that Petitioner needed at least one child deduction as follows. Dana and Justin to Petitioner and Kyle and Avery to Respondent. When Dana reaches eighteen (18), the exemptions should alternate to equalize the benefits as much as possible, with Respondent having the deductions for two children and Petitioner for one the first year in which there are only three deductions available, Petitioner having two and Respondent one in the second year, and so on. When the deductions for children reduce to two, each parent may claim one deduction, when there is only one deduction left, that deduction goes to Petitioner. In the alternative, for any tax year the party for whom the exemption(s) is most valuable may elect to purchase the option(s) from the other party for the amount the other party would lost if the exemption were not available.

11. **MEDICAL INSURANCE & EXPENSES:** Each party shall provide medical insurance for the minor children as long as it remains available at a reasonable cost through his or her employment. If Respondent secures insurance, Respondent shall provide evidence of said coverage and that such coverage is effective in Utah.

a. Each parent shall share equally the out-of-pocket costs of the premium actually paid by a parent for the children's portion of insurance. The children's portion of the premium is a per capita share of the premium actually paid. The premium expense for the children

shall be calculated by dividing the premium amount by the number of persons covered under the policy and multiplying the result by the number of children in the instant case

b. Each parent shall pay one-half ( $\frac{1}{2}$ ) of all reasonable and necessary uninsured medical expenses, including deductibles and co-payments, incurred for the dependent children.

c. The parent ordered to maintain insurance shall provide verification of coverage to the other parent, or to the Office of Recovery Services under Title IV of the Social Security Act, 42 U.S.C. Section 601 et seq., upon initial enrollment of the dependent children, and thereafter on or before January 2 of each calendar year. The parent shall notify the other parent, or the Office of Recovery Services of any change of insurance carrier, premium, or benefits within 30 calendar days of the date he/she knew or should have known of the change

d. The parent who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within thirty (30) days of payment

e. In addition to any other sanctions provided by the Court, a parent incurring medical expenses may be denied the right to receive credit for the expenses or to recover the other parent's share of the expenses if that parent fails to comply with above.

12. **PERSONAL PROPERTY:** The evidence at trial indicated disagreement over the

value and division of the certain personal property acquired during the marriage. This involved essentially a savings account containing about \$1,000.00, a certificate of deposit in the amount of approximately \$6,000.00, a set of firearms collected by Respondent, tools, certain items of apparel made of animal fur, a Bobcat tractor, and three vehicles: a van in Petitioner's possession and two trucks (a 1981 Dodge Dakota and a 2003 Ford Ranger) in Respondent's possession. The parties agreed at the end of the trial that Petitioner receive the savings account, the certificate of deposit and the van and that Respondent be awarded the two trucks, the tools, the firearm collection, the Bobcat tractor, and the fur items. The court has no reason to believe that this division is not fair and equitable and therefore concludes that it is

13 There is also a New York Life Insurance Policy on Respondent's life with a \$50,000.00 face amount and a cash value of about \$6,300.00. Respondent proposed that the policy be cashed out and the proceeds be shared equally between the parties. It was not clear to the court what Petitioner wanted in this regard. It appears to the court that it would be of some value to the parties and in the children's interest to keep the insurance policy in place, with Respondent to pay the premiums, having the minor children irrevocably designated as the beneficiaries and Petitioner as Trustee for the minor children. Once the last child is emancipated, the policy is to be cashed in, with Petitioner to receive within sixty (60) days thereafter one-half (1/2) of the cash value of the policy, valued as of the time of trial. The parties have the option, if they

both agree to do so, of cashing the policy in now, with the amount received in payment to be divided equally between them

14. Further, Respondent has a 401(k) that shall be divided equally and a Qualified Domestic Relations Order shall be prepared, if necessary. Any loans taken out by Respondent since the parties separation shall be added to the balance of the 401(k) prior to division. Respondent shall provide a copy of his most recent statement showing the current balance and loan balance of the 401(k).

15. **REAL PROPERTY:** There are two (2) parcels of real property at issue, the marital home in Eagle River, Alaska, near Anchorage, and an unimproved, .92 acre lot located in a subdivision in Willow, Alaska. Neither property is encumbered by a mortgage or other significant lien. The parties agree that the equity of each property should be divided between them, but they disagree about the value of each property. Petitioner believed the Willow lot to be worth about \$10,000.00, based on unspecified calls to real estate agents in the area. Respondent estimated the lot to be worth \$3,000.00 to \$4,000.00 and said that it had an assessment value on the tax notice of \$4,200.00. The court believes that an estimated value of \$5,000.00 is reasonable approximation of the value of the lot, given the sparse information presented. Petitioner is to receive \$2,500.00 as her share of the Willow lot's value.

16. The Eagle River home was purchased about twenty (20) years ago for about

\$50,000 00 It was appraised in early 2004 at \$60,000 00 Respondent says the appraisal is incorrect because it indicates that the house, a modular house, has sanitary sewer, asphalt street, curb and gutter, which it does not have He believes it is worth \$47,000 00 based on a tax assessment and on his estimate that it will take about \$13,000 00 to connect the house to municipal sewer, a step he says is necessary to make the house saleable Petitioner says she believes the appraisal is correct, even without a sewer hook-up, and that the house cannot have depreciated in value since it was purchased The appraisal indicates that property values in the area are increasing, and no evidence was presented on how property tax assessments were made. Respondent has presented no reliable evidence of the effect on property value of the lack of sewer hook-up, much less that the value would be directly related to the cost of providing such an improvement Nor has he presented any evidence of how property tax assessments are made in the area or how reliable an indication of actual value they are or that property values have decreased since the purchase of the property for \$50,000 00 over twenty (20) years ago The court believes that the appraisal is the most reliable indication of value under the circumstances and finds that the house is worth \$60,000 00 at the time of trial and the equity should be divided equally, with the house to be sold and the net proceeds split equally between the parties In the alternative, if Respondent wants to keep the house, he must pay \$30,000 00 to Petitioner

17. **ALIMONY:** “[T]he purpose of alimony is to prevent the receiving spouse from

becoming a public charge and to maintain the standard of living enjoyed during the marriage to the extent possible ” *Howell v. Howell*, 806 P 2d 1209 (Ut Ct App 1991), citing *Fletcher v Fletcher*, 615 P 2nd 1218, 1223 (Utah 1980) The Supreme Court, in *Jones v. Jones*, 700 P 2d 1072 (Utah 1985), set out “three factors that must be considered in fixing a reasonable alimony award [1] the financial conditions and needs of the wife, [2] the ability of the wife to produce a sufficient income for herself, and [3] the ability of the husband to provide support ” *Id.* At 1075 (edits by the court, citations omitted), U C A , Sect. 30-3-5(8) (which expands the number of factors to be considered, while retaining the *Jones* factors as an essence of the inquiry ) After the determination of the needs and resources of both parties using the *Jones* factors, “the court should set alimony as permitted by those parameters, to approximate the parties’ standard of living during the marriage as closely as possible ” *Howell*, 806 P 2d at 1212 In the case of a long-term marriage, the alimony award “should, ‘to the extent possible, equalize the parties’ respective standards of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage ”” *Id.*, quoting *Gardner v Gardner*, 748 P 2d 1076, 1081 (Utah 1988) *cf.* *Howell*, 806 P 2nd at 1216 n 4 (“The alimony award, however, need not be large enough to maintain the receiving spouse at the standard of living enjoyed during the marriage if that amount of alimony would lower the standard of living of the paying spouse below that of the receiving spouse ”) Having considered “all relevant facts and equitable principles,” the court



“may, in its discretion, base alimony on the standard of living that existed at the time of trial.”

U.C.A., Section 30-3-5(8)(c)

18. Petitioner’s income, as discussed above, is \$1,827.00 per month. Accepting the annual deductions from her salary as set out in her 2004 year-end pay stub, they are Federal Tax (\$465.10), Social Security Tax (\$1,286.53), Medicare Tax (\$300.88), State Tax \$551.73), and health, dental and vision insurance (together \$1,176.52), for a total monthly deduction of about \$315.00. Her net income for alimony purposes is therefore \$1,512.00. (The court is not considering deductions for life insurance for either party because essentially voluntary (on the part of Petitioner) or building cash value from this point forward (on the part of Respondent)). Child support payments will be approximately \$1,375.00 per month. Total net income, without consideration of alimony tax consequences, is therefore about \$2,897.00.

19. As to general expense deductions, the court believes that Petitioner’s monthly expenses, as set forth in Exhibit 7, are reasonable, especially considering that she is caring for four (4) children. Neither party presented much evidence of their standard of living at the time of separation, so the court is relying primarily on evidence regarding their expenses as a fair substitute or approximation. While she filed a financial declaration earlier that stated lower expenses, the court found credible her explanation that she had been keeping expenses deliberately low during that period because of the financial uncertainties of the unresolved divorce and had increased her expenses to a more normal level during 2004, the subject period for Exhibit

7 Those deductions are supported by detailed monthly expense reports. Nevertheless, Exhibit 7 contains more expenses that the court considers as either one-time costs or not allowable for purposes of alimony determination. Those include attorneys fees and mediation costs related to the divorce in the amount of \$1,331.00. They also include \$1,779.00 in what appears to be a one-time cost for the purchase of appliances (\$906.10 to Maytag on January 26 and \$873.05 to Maytag on February 7), although the court believes that one-half that amount (about (\$890.00) is a reasonable annual budget for general maintenance of a home and its contents over a the long term, given the number of children in her care and the need to furnish a separate house, and ought to be included as an expense. Because the testimony indicated that the parties historically have made donations to their church at about ten percent (10%) of income and continue to do so, each listing such donations as part of their expenses, the court considers these donations as a continuing part of their previous and present standard of living and will include them as reasonable expenses for both parties. Deducting \$185.00 per month for one-time expenses, Petitioner's reasonable expenses are \$3,306.00 per month. The deficit between her income, including initial child support, and her reasonable expenses is therefore about \$409.00 per month.

20. Respondent's income, as discussed above, is \$5,417.00 per month. This amounts to salary of \$61,800.00 per year, plus \$1,500.00 state payment and \$1,700.00 additional attributed income, per the analysis set forth above. Deductions, per Respondent's weekly Direct Deposit Earnings Statement, including Medicaid (\$16.94), Social Security (\$72.45), Federal Tax

\$117.85), local tax \$5.40) and health insurance \$10.25). The court is not considering deductions for 401k contributions, a medical flex plan and a 401k loan repayment. The loan payment deduction (amounting to about \$193.00 per month) is to pay off a \$10,000.00 loan Respondent took out of his retirement plan in 2003, after the separation, to pay attorneys fees \$5,000.00, a down payment on a new truck (\$3,000.00), and a deposit in a savings account \$2,000.00). The court does not believe the repayment on this loan, given its timing and the use of the proceeds, ought to be counted as a deduction from salary for alimony purposes. Other deductions appear reasonable. Similarly, the medical flex plan is a voluntary contribution (about \$10.00 per week) that can be used to pay medical expenses as they arise (apparently deductibles and other expenses not covered by insurance). Because this is essentially a medical savings plan for the benefit of the Respondent, it should not be counted as a true deduction for alimony purposes.

21. The total weekly deductions from salary are therefore about \$223.00 or about \$966.00 per month. Including an additional \$26.00 per month to account for a proportional amount of deductions for the imputed \$1,700.00 per year (there was no evidence that the state payment of \$1,982.00 per year was taxed), the total deductions are about \$992.00 per month, leaving a net income, before any alimony tax benefits of \$4,465.00. There was no evidence of the effect of alimony payments on Respondent's tax liability or alimony receipt on Petitioner's, but the court does not believe that tax considerations related to alimony would substantially alter the conclusions reached herein.

22. Some expenses the court believes should not be included. As discussed above, the court does not believe that the expenses for repayment of the 401k loan (about \$193.00 per month) and life insurance (which the court estimates at \$65.00 per moth based on the absence of any other evidence other than Respondent's claim to have \$165.00 in monthly expenses for all insurance other than deducted health insurance premiums) should be included for purposes of alimony determination, as they are not necessities, and neither party urged their inclusion. In addition, Respondent claims a total of \$350.00 per month in medical and dental expenses. There was no evidence of a need for health care that would support expenses at that level, especially since he apparently has employer-provided health insurance for which amounts are deducted from his salary; and absent any evidence of particular health conditions requiring treatment, the court believes that \$50.00 per month is reasonable. Respondent's reasonable expenses are therefore about \$3,628.00.

23. Respondent therefore has a surplus of net income over expenses of about \$837.00 per month. The court notes that, while both the parties and the court have used figures for income and expenses that appear quite specific, these figures in reality are approximations, especially as they are meant to ultimately represent amounts received and spent in the future. In determining alimony, the court recognizes and takes into account the imprecision of the amounts involved.

24. Other than the equity in the marital home, the parties have accumulated little in the

way of resources to supplement their incomes. Considering Petitioner's financial condition and needs and her inability to provide sufficient income to meet those needs, together with Respondent's ability to provide support and the significant income differential between them even taking into account the payment and receipt of child support, the court concludes that Respondent shall pay alimony to Petitioner. In addition, the court believes it is significant that this is a long term marriage in which Petitioner gave up her ability to improve her skills and earning capacity to care for a large family, so that should play a part in the determination of alimony amounts, as well. See *Howell*, 806 P.2d at 1213. The court believes that alimony in the amount of \$420.00 is a fair and reasonable award. This sum approximates the Petitioner's need, before consideration of the alimony tax consequences, and falls within Respondent's capacity to pay, as determined by the court.

25 While a significant amount of her expenses can now be attributed to minor children in the home, a good part of the income needed by Petitioner to maintain the appropriate standard of living is also attributable to child support payments from Respondent. As children reach the age of eighteen (18), which will be a regular occurrence over the next few years, the court believes that Petitioner's income will be reduced disproportionately to the reduction of expenses both because the reasonable expenses associated for a time even with older children will not necessarily diminish to zero as they reach eighteen (18) years old and because expenses, such as mortgage, utilities and so on will not necessarily be significantly or proportionately reduce even

when children do leave the home. For that reason, the court concludes that it is reasonable to increase alimony to some extent as Petitioner's income from child support payments goes down and as Respondent's expenses from such payments also diminish. This also contributes to the goal of maintaining a rough equivalence in the parties' standard of living after a long-term marriage. *Id.* (considering the effects of diminishing child support obligations as children reach eighteen (18) on the relative disparity of income between spouses). The alimony payments due to Petitioner should therefore increase by \$100.00 per month, beginning the first day of the month after which each child turns eighteen (18). On this basis, when the last child turns eighteen (18), Respondent's income will have increased by about \$1,375.00 per month, while commensurate alimony increases to Petitioner will amount to \$400.00 per month, leaving him with some cushion that takes into account the purported increased costs of living in Alaska and not reducing his standard of living below Petitioner's.

26. Alimony should continue for a period equal to the length of the marriage. Changes in income due to retirement at a reasonable age are not taken into account here and may be considered as changes of circumstances in the future, if otherwise appropriate. Alimony should be paid retroactive to and including May, 2004.

27. **PARENT-TIME:** While it is apparent that Respondent loves his children, during the marriage he took a decidedly harsher approach to their discipline than did Petitioner, going to the extreme of punishing them by the use of a belt on occasion and threatening to do so more

regularly. The court believes that this goes beyond acceptable limits on discipline of children and it apparently played a part in the break up of the marriage. The children remain somewhat intimidated by their father, and their distance from him, both emotional and geographical at this point, has been exacerbated by his decision that it would be best under the circumstances of the separation to contact them infrequently. While his telephone contacts have recently increased, he has seen the children only a few times since the separation. Some or all of the children have been in counseling to deal in part with issues involving their father.

28. It is in the best interest of the children to reestablish their relationship with their father as soon as possible and that his access to them be as liberal as the distances involved allow, at a minimum in accordance with the applicable guidelines for parent time. Under the circumstances, Respondent shall successfully complete a parenting class that is functionally equivalent to the multi-week parenting class provided by Valley Mental Health on court referral. Further, such course shall be administered by an agency approved by the State of Alaska, such as the Men & Women's Center or the Recovery Connection. Once Respondent has done this, parent-time should begin pursuant to §30-3-37 of the Utah Code. The court's primary concern is that Respondent complete the parenting course before the children are required to go to Alaska for parent-time. If Respondent travels to Utah in the interim, even without first having completed the class, and upon reasonable notice, he should be allowed minimum parent-time pursuant to §30-3-35 of the Utah Code or as the parties may agree. Respondent should also be given liberal

telephone access to the children at a minimum three (3) times per week, plus e-mail communication if available. The parties should contact Valley Mental Health (Kathy Reimherr-556-6037) to determine the nature of its parenting class, and Respondent can complete that program or one in Alaska that is roughly equivalent (for example, a multi-week parenting class approved by the Alaska counterpart to Division of Child and Family Services). No later than thirty (30) days from December 23, 2005, Respondent's counsel shall provide Petitioner's counsel with a description of the class he intends to take. If the parties are in agreement that the proposed class meets the requirements of the court, Respondent should complete the class as soon as reasonably possible. If the parties are in disagreement, they should approach the court for a resolution, but prepare to offer specific alternatives. As soon as Respondent has provided written verification that he has successfully completed the appropriate parenting class, his parent-time as set forth above can begin, including travel to Alaska. All applicable provisions of the advisory guidelines set forth in §303-33 of the Utah Code shall be adopted herein.

29. Petitioner is ordered to pay the transportation costs of one (1) visit per year, provided that (a) there is not only one (1) visit, and (b) arrangements are made at least thirty (30) days in advance. If there is only one (1) visit per year, Petitioner shall be responsible for only one-half (½) of the transportation costs for that visit.

30. ATTORNEY'S FEES: Based on the Court's assessment that Petitioner's



expenses are beyond her income and other resources at this point and on its conclusions that Respondent's resources provide him with a surplus over his expenses (as discussed in connection with alimony, above), the court concludes that Respondent should be responsible to pay Petitioner's reasonable attorney's fees incurred in this matter. Petitioner has insufficient income to meet her needs, and alimony payments will bring her income up to the point where her needs are met, not including attorney's fees. Respondent will have a level of surplus and is more able to pay fees. Petitioner should provide evidence of the amount and reasonableness of the fees she claims to the Court.

31. **NAME CHANGE:** Petitioner shall be restored to her maiden name if desired.

From the foregoing findings of facts, the Court now makes and enters its

#### **CONCLUSIONS OF LAW**

1. That the bonds of matrimony hereto and now existing between Petitioner and Respondent shall be dissolved and Petitioner shall be granted decree of divorce from Respondent, the same to become absolute and final upon the signing of the Findings of Fact and Conclusions of Law and the Decree of Divorce and the filing of the same with the Clerk of the above-entitled Court.

2. That all matters and issues including, but not limited to, child custody, parent-time, child support, alimony, division of property and debts, and attorney fees shall be ordered pursuant

to the foregoing Findings of Fact

DATED this 10<sup>th</sup> day of May, 2006

BY THE COURT

  
HONORABLE STEPHEN L. ROTH  
THIRD DISTRICT COURT JUDGE





matter under advisement, and being otherwise fully advised in the premises, and having heretofore entered its *Findings of Fact and Conclusions of Law*, and good cause appearing therefor,

**IT IS HEREBY ORDERED, ADJUDGED AND DECREE AS FOLLOWS:**

1       Petitioner is awarded a divorce from Respondent based on the existence of irreconcilable differences that prevent the marriage from continuing.

2       **CHILD CUSTODY AND SUPPORT:** There were six children born to this marriage, of whom four are still minors: Dana May Richardson, born May 17, 1987, Kyle Allen Richardson, born July 19, 1988, Avery Keen Richardson, born August 21, 1990, and Justin Wallace Richardson, born March 25, 1993. Petitioner is awarded sole physical and legal custody of the minor children.

3       Respondent shall pay child support to Petitioner in the sum of \$1,374 per month commencing as of the date of trial herein.

4       Respondent's obligation to pay child support shall continue as to each minor child until that minor child reaches the age of eighteen (18) or graduates from high school, whichever later occurs.

5       Pursuant to Utah Code §62A-11-401 *et seq* and -501, withholding of child support from Respondent's wages as a means of collecting child support shall be authorized.

6       **INCOME TAX EXEMPTIONS:** Petitioner shall be awarded the minor children

Dana and Justin as dependants for tax exemption purposes and Respondent shall be awarded the minor children Kyle and Avery. When Dana reaches eighteen (18), the exemptions should alternate to equalize the benefits as much as possible, with Respondent having the deductions for two children and Petitioner for one the first year in which there are only three deductions available, Petitioner having two and Respondent one in the second year, and so on. When the deductions for children reduce to two, each parent may claim one deduction, when there is only one deduction left, that deduction goes to Petitioner. In the alternative, for any tax year the party for whom the exemption(s) is most valuable may elect to purchase the option(s) from the other party for the amount the other party would lost if the exemption were not available. The parties shall exchange tax information by March 1<sup>st</sup> of each year. In any event, Respondent's ability to claim any minor child(ren) is conditioned upon his being current in his child support and medical expense obligations.

7. **MEDICAL INSURANCE & EXPENSES:** Each party shall provide medical insurance for the minor children as long as it remains available at a reasonable cost through his or her employment. If Respondent secures insurance, Respondent shall provide evidence of said coverage and that such coverage is effective in Utah.

a. Each parent shall share equally the out-of-pocket costs of the premium actually paid by a parent for the children's portion of insurance. The children's portion of the premium is a per capita share of the premium actually paid. The premium expense for the children

shall be calculated by dividing the premium amount by the number of persons covered under the policy and multiplying the result by the number of children in the instant case.

b. Each parent shall pay one-half ( $\frac{1}{2}$ ) of all reasonable and necessary uninsured medical expenses, including deductibles and co-payments, incurred for the dependent children.

c. The parent ordered to maintain insurance shall provide verification of coverage to the other parent, or to the Office of Recovery Services under Title IV of the Social Security Act, 42 U.S.C. Section 601 et seq., upon initial enrollment of the dependent children, and thereafter on or before January 2 of each calendar year. The parent shall notify the other parent, or the Office of Recovery Services of any change of insurance carrier, premium, or benefits within 30 calendar days of the date he/she knew or should have known of the change.

d. The parent who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within thirty (30) days of payment.

e. In addition to any other sanctions provided by the Court, a parent incurring medical expenses may be denied the right to receive credit for the expenses or to recover the other parent's share of the expenses if that parent fails to comply with above.

8. **PERSONAL PROPERTY:** During the marriage the parties acquired certain

items of personal property including a savings account containing about \$1,000 00, a certificate of deposit in the amount of approximately \$6,000 00, a set of firearms collected by Respondent, tools, certain items of apparel made of animal fur, a Bobcat tractor, and three vehicles: a van in Petitioner's possession and two trucks (a 1981 Dodge Dakota and a 2003 Ford Ranger) in Respondent's possession. Petitioner shall be awarded the savings account, the certificate of deposit and the van and Respondent shall be awarded the two trucks, the tools, the firearm collection, the Bobcat tractor, and the fur items.

9. There is also a New York Life Insurance Policy on Respondent's life with a \$50,000.00 face amount and a cash value of about \$6,300.00. It is in minor children's interest to keep the insurance policy in place, with Respondent to pay the premiums, having the minor children irrevocably designated as the beneficiaries and Petitioner as Trustee for the minor children. Once the last child is emancipated, the policy is to be cashed in, with Petitioner to receive within sixty (60) days thereafter one-half ( $\frac{1}{2}$ ) of the cash value of the policy, valued as of the time of trial. The parties have the option, if they both agree to do so, of cashing the policy in now, with the amount received in payment to be divided equally between them

10. Further, Respondent has a 401(k) that shall be divided equally and a Qualified Domestic Relations Order shall be prepared, if necessary. Any loans taken out by Respondent since the parties separation shall be added to the balance of the 401(k) prior to division.

Respondent shall provide a copy of his most recent statement showing the current balance and loan balance of the 401(k).

11. **REAL PROPERTY:** During the marriage the parties acquired two (2) parcels of real property the marital home in Eagle River, Alaska, near Anchorage, and an unimproved, .92 acre lot located in a subdivision in Willow, Alaska. Neither property is encumbered by a mortgage or other significant lien. Respondent shall be awarded the Willow lot, but shall pay to Petitioner the sum of \$2,500.00 as her share of the Willow lot's value.

12. The Eagle River residence shall be sold and the proceeds shall be split equally between the parties. However, if Respondent wants to keep the house, he must pay \$30,000.00 to Petitioner.

13. **ALIMONY:** Petitioner is awarded the sum of \$420.00 per month in alimony from Respondent. The alimony payment due to Petitioner shall increase by \$100.00 per month, beginning the first day of the month after which each child turns eighteen (18). On this basis, when the last child turns eighteen (18), the alimony increases to Petitioner will amount to an additional \$400.00 per month.

14. Alimony shall continue for a period equal to the length of the marriage. Changes in income due to retirement at a reasonable age are not taken into account here and may be considered as changes of circumstances in the future, if otherwise appropriate. Alimony shall also



be paid retroactive to and including May, 2004. Said alimony obligation shall be automatically withheld by the Office of Recovery Services.

15     **PARENT-TIME:** Respondent shall successfully complete a parenting class that is functionally equivalent to the multi-week parenting class provided by Valley Mental Health on court referral. Further, such course shall be administered by an agency approved by the State of Alaska, such as the Men & Women's Center or the Recovery Connection. Once Respondent has done this, parent-time shall begin pursuant to §30-3-37 of the Utah Code. Respondent must complete the parenting course before the children are required to go to Alaska for parent-time. If Respondent travels to Utah in the interim, even without first having completed the class, and upon reasonable notice, he shall be allowed minimum parent-time pursuant to §30-3-35 of the Utah Code, or as the parties may agree. Respondent shall also be given liberal telephone access to the children at a minimum three (3) times per week, plus e-mail communication if available. The parties shall contact Valley Mental Health (Kathy Reimherr-556-6037) to determine the nature of its parenting class, and Respondent can complete that program or one in Alaska that is roughly equivalent (for example, a multi-week parenting class approved by the Alaska counterpart to Division of Child and Family Services). No later than thirty (30) days from December 23, 2005, Respondent's counsel shall provide Petitioner's counsel with a description of the class he intends to take. If the parties are in agreement that the proposed class meets the requirements of the court, Respondent shall complete the class as soon as reasonably possible. If the parties are in

disagreement, they shall approach the court for a resolution, but prepare to offer specific alternatives. As soon as Respondent has provided written verification that he has successfully completed the appropriate parenting class, his parent-time as set forth above can begin, including travel to Alaska. All applicable provisions of the advisory guidelines set forth in §303-33 of the Utah Code shall be adopted herein.

16. Petitioner is ordered to pay the transportation costs of one (1) visit per year, provided that (a) there is not only one (1) visit, and (b) arrangements are made at least thirty (30) days in advance. If there is only one (1) visit per year, Petitioner shall be responsible for only one-half ( $\frac{1}{2}$ ) of the transportation costs for that visit.

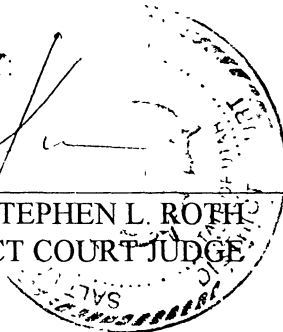
17. **ATTORNEY'S FEES:** Respondent shall be responsible to pay Petitioner's reasonable attorney's fees incurred in this matter in the sum of \$4,488.00.

18. **NAME CHANGE:** Petitioner shall be restored to her maiden name if desired.

DATED this 10<sup>th</sup> day of May, 2006.

BY THE COURT:

  
HONORABLE STEPHEN L. ROTH  
THIRD DISTRICT COURT JUDGE



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UTAH APPELLATE COURTS  
JUN 21 2007

IN THE UTAH COURT OF APPEALS

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Kynda Kay Richardson,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Petitioner and Appellee,	)	
	)	Case No. 20060575-CA
v.	)	
	)	F I L E D
Kenneth Andrew Richardson,	)	(June 21, 2007)
	)	
Respondent and Appellant.	)	2007 UT App 222

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Third District, Salt Lake Department, 034905249  
The Honorable Stephen L. Roth

Attorneys: J. Bruce Reading and William G. Wilson, Salt Lake  
City, for Appellant  
Scott L. Wiggins, Salt Lake City, for Appellee

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Before Judges Greenwood, Billings, and McHugh.

BILLINGS, Judge:

Respondent Kenneth Andrew Richardson appeals the trial court's alimony award, arguing that the trial court erred when it ordered him to pay incremental increases in alimony to his ex-wife, Petitioner Kynda Kay Richardson, upon the termination of child support. Mr. Richardson further asserts that the trial court erred when it awarded Ms. Richardson retroactive alimony, even though she failed to include a request for interim alimony in her petition for divorce. "We review a trial court's award of alimony for abuse of discretion. 'We will not disturb the trial court's alimony award so long as the trial court exercises its discretion within the standards set by the appellate courts.'" Bakanowski v. Bakanowski, 2003 UT App 357, ¶7, 80 P.3d 153 (citation omitted) (quoting Haumont v. Haumont, 793 P.2d 421, 423 (Utah Ct. App. 1990)). We affirm.

First, Mr. Richardson contends that the trial court erred by ordering that, as each of the parties' children turns eighteen years old and the amount of child support decreases, the amount of alimony Mr. Richardson pays Ms. Richardson increases. Specifically, Mr. Richardson argues that it was improper for the trial court to mandate future changes to Ms. Richardson's alimony award based on a speculative change in her circumstances. We

believe, however, that Mr. Richardson mischaracterizes the considerations upon which the trial court based the increases in alimony.

Under Utah law, "[t]he trial court has broad latitude" in determining alimony awards. Jones v. Jones, 700 P.2d 1072, 1074 (Utah 1985). In making such awards, "the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial." Utah Code Ann. § 30-3-5(8)(c) (Supp. 2006). Moreover, "[t]he court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living." Id. § 30-3-5(8)(d). As the supreme court stated, "the purpose of alimony . . . 'is to provide support for the wife as nearly as possible at the standard of living she enjoyed during marriage, and to prevent the wife from becoming a public charge.'" Jones, 700 P.2d at 1075 (quoting English v. English, 565 P.2d 409, 411 (Utah 1977)).

Based on the underlying purpose of alimony, the supreme court "articulated three factors that must be considered in fixing a reasonable alimony award: '[1] the financial conditions and needs of the wife; [2] the ability of the wife to produce a sufficient income for herself; and [3] the ability of the husband to provide support.'" Id. (quoting English, 565 P.2d at 411-12). After reviewing the record, we conclude that upon Mr. Richardson's motion to reconsider, the trial court properly "analyzed the circumstances of the parties in light of these three factors." Id.

It is clear that the trial court considered Ms. Richardson's financial needs as well as her ability to support herself. The trial court noted that

[t]he parties were married for over twenty years and had six children. [Ms. Richardson] gave up her ability to acquire significant work skills and earning capacity to care for a large family, and continued to care for the remaining four minor children at the time of trial. She is in her forties or fifties and is not likely to significantly increase her earning capacity to a point where she can support herself at a standard the parties enjoyed during the marriage.

This court has discussed the appropriateness of such alimony considerations "after a long-term marriage, where the wife (usually) has worked primarily in the home, has limited job

skills, and is in her late forties or fifties." Howell v. Howell, 806 P.2d 1209, 1213 (Utah Ct. App. 1991).

The trial court determined that Ms. Richardson's initial alimony award of \$420 per month was appropriate to address her needs, but only because that amount was "based on [Ms. Richardson's] present sources of income, including about \$1375 in child support, which will decrease incrementally as each of the four minor children turns eighteen." Thus, as child support payments decrease, so does that source of Ms. Richardson's income. Therefore, we conclude that the trial court order incrementally increasing Ms. Richardson's alimony award properly considered her financial needs as well as her ability to support herself.

The trial court also properly considered Mr. Richardson's "ability . . . to provide support." Jones, 700 P.2d at 1075. The trial court determined that while Mr. Richardson pays his child support obligations, the parties' respective incomes are equalized. However, as his child support obligations terminate over time, his ability to pay support to Ms. Richardson increases while her ability to meet her own needs decreases. Without the addition of incremental increases in alimony payments to Ms. Richardson upon termination of child support, the parties' gross monthly incomes would be significantly disproportionate, and she would not be able to enjoy the standard of living she enjoyed during the marriage.

After considering Mr. Richardson's ability to pay alimony once his child support obligations decrease, the trial court determined that upon the termination of his child support payments, Mr. Richardson has an increased ability to provide Ms. Richardson the support she needs to maintain the standard of living she enjoyed during the marriage. These incremental increases in alimony meet the goal of "better equaliz[ing] the parties' abilities to go forward with their respective lives" after their long-term marriage, Howell, 806 P.2d at 1213, and provide Ms. Richardson with "the [approximate] standard of living she enjoyed during marriage," Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985). Therefore, we conclude that the trial court did not abuse its discretion in awarding Ms. Richardson incremental increases in alimony as her child support payments terminate.

Second, Mr. Richardson argues that the trial court erred when it awarded Ms. Richardson retroactive alimony, even though she never petitioned the court for interim alimony during the divorce proceedings. Utah Code section 30-3-3 provides that the trial court "may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party." Utah Code Ann. § 30-3-3(3) (Supp. 2006).

Section 30-3-3 further indicates that interim alimony may be ordered "prior to the entry of the final order or judgment [and] may be amended during the course of the action or in the final order or judgment." Id. § 30-3-3(4). This section allows a trial court to award interim alimony and does not specifically state that a party must request that the trial court order interim alimony prior to entry of the final order. See id. § 30-3-3.


Here, Ms. Richardson did not separately request interim alimony in her petition for divorce, but instead simply requested alimony. However, she testified at trial that she was seeking interim alimony. Section 30-3-5(1) gives the trial court power to include "equitable orders" in divorce decrees, id. § 30-3-3(5), and the trial court has broad discretion in using this power. See Curry v. Curry, 7 Utah 2d 198, 321 P.2d 939, 942 (Utah 1958) (recognizing that "the trial court is vested with broad equitable powers in divorce matters and that its judgment will not be disturbed lightly, nor at all unless the evidence clearly preponderates against [its] findings, or there has been a plain abuse of discretion, or a manifest injustice or inequity is wrought"). Therefore, we conclude that the trial court properly exercised its broad equitable powers in awarding retroactive alimony to Ms. Richardson.

Accordingly, we affirm.

  
Judith M. Billings, Judge

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WE CONCUR:

  
Pamela T. Greenwood,  
Associate Presiding Judge

  
Carolyn B. McHugh, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

OCT 23 2007

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Kynda Kay Richardson,

Respondent,

v.

Case No. 20070578-SC  
20060575-CA

Kenneth Andrew Richardson,

Petitioner.

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ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on July 20, 2007.

IT IS HEREBY ORDERED, pursuant to Rule 45 of the Utah Rules of Appellate Procedure, that the Petition for Writ of Certiorari is granted as to the following issue:

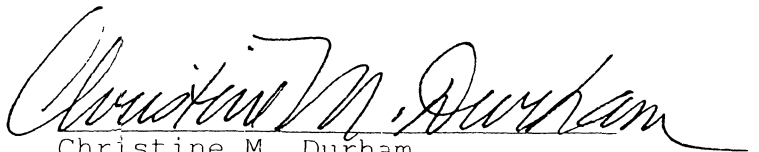
Whether the court of appeals erred in affirming the district court's award of an additional amount for alimony as each child of the Petitioner and Respondent reaches majority and Petitioner's obligation to pay support for each child terminates.

A briefing schedule will be established hereafter. Pursuant to rule 2, the court suspends the provision of rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

FOR THE COURT:

Date

October 23, 2007

  
Christine M. Durham,  
Chief Justice

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2007, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in the Interdepartmental mail service, or hand delivered to the parties listed below:

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Dated this October 24, 2007.

By   
Deputy Clerk

Case No. 20070578  
Court of Appeals Case No. 20060575  
THIRD DISTRICT, SALT LAKE Case No. 034905249