

2007

Eloff v. Eloff : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Eloff v. Eloff*, No. 20070904 (Utah Court of Appeals, 2007).
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IN THE UTAH COURT OF APPEALS

SHERRIE C ELOFF,

Petitioner/Appellee,

vs

BRUCE C ELOFF,

Respondent/Appellant,

.....
APPEAL

Appellate Case No 20070904 CA
Third District Case No 054905322 DA

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FILED
UTAH APPELLATE COURT
MAY 16 2008

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TABLE OF CONTENTS

JURISDICTION 1

ISSUES PRESENTED AND STANDARD OF REVIEW 1

PRESERVATION OF THE ISSUES 2

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE, PROCEEDINGS, AND FACTUAL BACKGROUND
..... 2,3

Nature of the Case 2

Course of Proceedings 3

Disposition in the Court Below 3

Statement of Facts 3

SUMMARY OF THE ARGUMENTS 5

ARGUMENT 7

 I. The Trial Court Abused Its Discretion In Determining Alimony Because The
 Trial Court Failed to Adequately Evaluate The Needs And Financial Condition
 Of The Petitioner 7

 II. The Trial Court Abused Its Discretion In Determining Alimony Because The
 Trial Court Failed To Enter Specific Findings On The Needs And Financial
 Condition Of The Petitioner 11

CONCLUSION 13

ADDENDUM

 A. Ruling Transcript

TABLE OF AUTHORITIES

CASES:

Andrus v. Andrus, 169 P.3d 754, 759 (Utah Ct. App. 2007) 6

Baker v. Baker, 866 P.2d 540, 546 (Utah Ct. App. 1993) 10

Bakanowski v. Bakanowski, 80 P.3d 153, 155 (Utah Ct. App. 2003) 7,10,11,12

Bingham v. Bingham, 872 P.2d 1065 (Utah Ct. App. 1994) 7,8,9

Friedeli v. Friedeli, 238 P.647 648 (Utah 1925) 7

Georgedes v. Georgedes, 627 P.2d 44, 46 (Utah 1981) 7

Griffith v. Griffith, 985 P.2d 255 (Utah 1999) 1

Haumont v. Haumont, 793 P.2d 421, 423 (Utah Ct. App.1990) 7

Howell v. Howell, 806 P.2d 1209, 1211 (Utah Ct. App. 1991) 1

Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985) 7,8

Kelley v. Kelley, 9 P.3d 171 (Utah Ct. App. 2000) 1

Lee v. Lee, 6744 P.2d 1378 (Utah Ct. App. 1987) 5

Medley v. Medley, 93 P.3d 847 at 848, n.4 (Utah Ct. App. 2004) 7

Montoya v. Montoya, 696 P.2d 1193, 1194 (Utah 1985) 1

Munns v. Munns, 790 P.2d 116, 121 (Utah Ct.App.1990) 7

Noble v. Noble, 761 P.2d 1369, 1372 (Utah 1988) 7

Stevens v. Stevens, 754 P.2D 952, 959 (Utah Ct. App. 1988) 10

STATUTES:

Utah Code Ann. § 30-3-5(8) 2,5,6,

Utah Code Ann. § 78-2a-3(h) 1

RULES:

Rule 52(b) 2,3,5

Utah Rules of Civil Procedure ,3,5

JURISDICTION

Utah Code Ann. § 78-2a-3(h) confers original jurisdiction over this appeal, which is an appeal from an order entered in a domestic relations case.

ISSUES PRESENTED AND STANDARD OF REVIEW

Issue: Whether the Trial Court abused its discretion in awarding alimony to Petitioner where the Trial Court, in determining Petitioner's need for alimony, included child-related expenses as part of Petitioner's monthly expenses, yet failed to adequately consider the monthly Child Support payments receive from Respondent as part of Petitioner's ability to meet her monthly expenses?

Standards of Review: Alimony determinations are reviewed for an abuse of discretion. *Griffith v. Griffith*, 985 P.2d 255, 260 (Utah 1999); *Kelley v. Kelley*, 9 P.3d 171, 179 (Utah Ct. App. 2000). Trial courts have considerable discretion in determining alimony and property distribution in divorce cases, and will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated. *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991). In exercising its discretion, however, the trial court must make explicit findings of fact in support of its legal conclusions. *Montoya v. Montoya*, 696 P.2d 1193, 1194 (Utah 1985).

PRESERVATION OF THE ISSUES

The issue, regarding the Trial Court's calculation of Petitioner's need for alimony, was preserved during the trial ruling (*see* R. at 498; Ruling transcript at 12, 13-25), in a timely post-trial Rule 52(b) *Motion for Clarification of Findings of Fact* (*see* R. at 315), and in a timely post-trial *Notice of Appeal* (*see* R. at 454).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

UTAH CODE ANN. § 30-3-5(8)(a):

- (8)(a) The court shall consider at least the following factors in determining alimony;
- (i) the financial condition and needs of the recipient spouse;
 - (ii) the recipient's earning capacity or ability to produce income;
 - (iii) the ability of the payor spouse to provide support;
 - (iv) the length of the marriage;
 - (v) whether the recipient spouse has custody of minor children requiring support;
 - (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and
 - (vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

STATEMENT OF THE CASE

Nature of the Case: This appeal resulted from a domestic relations case heard in the Third Judicial District Court for Salt Lake County. The issue on appeal arises out of the determination of alimony support made by the Trial Court. Respondent argues that the Trial Court erred in its determination of alimony and that said error amounts to an addressable abuse of discretion.

Course of Proceedings: On or about September 23, 2005, SHERRIE C ELOFF (Petitioner / Appellee) petitioned for a divorce from her husband, BRUCE C ELOFF (Respondent / Appellant). *See R.* at 1. As part of said Petition, Petitioner requested alimony *See R.* at 5. The issue of alimony came before the Trial Court by way of a Bench Trial on June 12, 2007. *See R.* at 262. The Trial Court, after hearing arguments, entered its Ruling and resulting determination of alimony on June 13, 2007 *See R.* at 264.

Disposition in the Court Below: On July 19, 2007, the Trial Court entered a *Decree of Divorce* (*see R.* at 288) and *Findings of Fact and Conclusions of Law* (*see R.* at 269) On July 26, 2007, Respondent filed a timely *Motion for Clarification of Findings of Fact* pursuant to Rule 52(b) of the Utah Rules of Civil Procedure *See R.* at 315. On September 19, 2007, in a Minute Entry entitle *Minute Entry and Order Denying Respondent's Objection to Findings of Fact, Conclusions of Law, Decree, and Motion for Clarification*, the Trial Court denied Respondent's *Motion for Clarification of Findings of Fact* (*see R.* at 404) and declared, "This signed Minute Entry shall constitute the Order of the Court resolving the matters referenced herein, no further Order is required" (*see R.* at 405) Respondent then filed a timely *Notice of Appeal* on October 19, 2007 *See R.* at 454.

Statement of Facts: At trial the Parties agreed that, for child support purposes, Petitioner would be deemed to have income of \$3,137 per month. *See R.* at 498 (Trial transcript at 5, 20-24). The Parties also agreed that, for child support purposes, Respondent would be deemed to have income of \$6,760 per month *See R.* at 498 (Trial transcript at 6, 2-

3). Additionally, the Parties agreed that Child Support would be paid by Respondent to Petitioner (*see* R. at 498 (Trial transcript at 6; 21-23)) and that the agreed upon income amounts would be used to calculate the base child support amount. *See* R. at 498 (Trial transcript at 23; 13-23). The resulting *Finding of Fact and Conclusions of Law*, entered on July 19, 2007, indicate that Petitioner would receive from Respondent an adjusted child support amount of \$818.26 per month (adjusted from a base child support amount of \$941.12). *See* R. at 274.

At trial, the Trial Court heard arguments regarding Petitioner's gross income and Petitioner's reasonable and necessary expenses. *See* R. at 498 (Ruling transcript at 5; 7-15). Petitioner claimed total monthly expenses of \$4,198.99. *See* R. at 251. This expense amount included expenses for the Children as well as for the Petitioner. *Id.* Based on the evidence presented and after having made adjustments, the Trial Court found, for alimony purposes, Petitioner's gross income to be \$3,137 and Petitioner's reasonable and necessary monthly expenses to be \$3,461. *See* R. at 498 (Ruling transcript at 5; 7-15). The Trial Court concluded that Petitioner suffered a shortfall in the amount of \$324. *Id.*

Also at trial, the Trial Court heard arguments regarding Respondent's gross income and Respondent's reasonable and necessary expenses. *See* R. at 498 (Ruling transcript at 5; 16-25). Based on the evidence presented, the Trial Court found, for alimony purposes, Respondent's gross income to be \$6,760 and Respondent's reasonable and necessary monthly expenses to be \$4,372. *Id.* The Trial Court then concluded that Respondent had the ability to pay alimony, and consequently, the Trial Court ordered that Respondent pay Petitioner alimony support in the amount of \$324 per month. *Id.*

In making the alimony determination ruling, the Trial Court held the following conversation (*see* R. at 498 (Ruling transcript at 12, 13-25).

Mr. Reading: Yeah. Okay. And your Honor, at this point, a clarification Back to the alimony issue, you mentioned that the Petitioner had \$3,137, that included, I guess, the child support?

Mr. McPhie: No.

The Court. No. I did not include that child support in the calculation and I cited it as a gross amount of her income.

Mr. Reading: And – and so that was not taken into account to help pay those expenses?

The Court It was taken into account, but it was not included by me as income for alimony purposes.

On July 7, 2007, Respondent filed a *Motion for Clarification of Finding of Fact* pursuant to Rule 52(b) of the Utah Rules of Civil Procedure wherein Respondent requested that the Trial Court articulate its basis in fact and law as to not including the child support award of \$818.26 per month when determining Petitioner's ability to meet her monthly needs for the purposes of alimony. *See* R. at 315 Respondent's request was denied on September 19, 2007, in a Minute Entry from the Trial Court

SUMMARY OF THE ARGUMENTS

In determining alimony, courts are required to consider the financial condition and needs of the recipient spouse; the earning capacity of the recipient spouse or ability of recipient spouse to produce income, and the ability of the obligor spouse to provide support Utah Code Ann. § 30-3-5(8)(a) It is an abuse of discretion to fail to adequately consider the aforementioned factors in determining alimony. *Lee v. Lee*, 744 P.2d 1378 (Utah Ct. App.

1987) Trial courts are required to make findings on each of these factors and said findings must follow logically from, and be supported by, the evidence *Andrus v Andrus*, 169 P 3d 754, 759 (Utah Ct App 2007) Failure to do so is reversible error *Id*

In the case at hand, in determining alimony, the Trial Court erred in its analysis of the Petitioner's financial condition and thereby overstated the financial needs of the Petitioner In determining Petitioner's financial condition and ability to produce income, the Trial Court did not include the \$818.26 monthly child support payments Petitioner receives from Respondent At the same time, in determining Petitioner's needs for alimony support, the Trial Court did include the monthly child-related expenses This calculation method had the effect of increasing Petitioner's monthly expenses (by including the Children's monthly expenses), while simultaneously decreasing Petitioner's monthly income (by not including the child support payments) As a result, the Trial Court mis-characterized Petitioner's financial condition and artificially inflated Petitioner's financial needs

Therefore, the Trial Court's failure to adequately consider the financial conditions and need of Petitioner was an addressable abuse of discretion, and the Trial Court's failure to adequately consider the ability of Petitioner to produce sufficient income for herself was an addressable abuse of discretion The resulting alimony determination was in error because it failed to meet the requirements under Utah Code Ann § 30-3-5(8)(a) and was not supported by the findings Moreover, the alimony determination did not follow logically from, nor was it supported by, the evidence Thus, Trial Court abused its discretion in determining alimony and the resulting alimony support award should be reversed

ARGUMENT

I. The Trial Court Abused its Discretion in Determining Alimony Because the Trial Court Failed to Adequately Evaluate the Needs and Financial Condition of the Petitioner

The purpose of alimony is to provide support for the wife *Medley v. Medley*, 93 P 3d 847, 849 (Utah Ct. App 2004) (relying on *Georgedes v Georgedes*, 627 P 2d 44, 46 (Utah 1981)) An alimony award should enable the receiving spouse to maintain, as nearly as possible, the standard of living enjoyed during the marriage *Munns v. Munns*, 790 P 2d 116, 121 (Utah Ct App 1990) While the awarding of alimony and the fixing of the amount thereof are within the sound discretion of the trial court, such discretion is not arbitrary, and the award or refusal to award is subject to correction on appeal if it is erroneous on its face or unjust to either party *Friedli v. Friedli*, 238 P 647, 648 (Utah 1925)

In determining alimony, a trial court must consider three factors (1) the financial condition and need of the receiving spouse; (2) the ability of the receiving spouse to produce sufficient income for himself or herself; and (3) the ability of the responding spouse to provide support *Munns v. Munns*, 790 P 2d 116, 121 (Utah Ct App.1990) (Also see *Noble v Noble*, 761 P 2d 1369, 1372 (Utah 1988), *Jones v. Jones*, 700 P 2d 1072, 1075 (Utah 1985), and *Haumont v Haumont*, 793 P 2d 421, 423 (Utah Ct App 1990)) These factors are commonly referred to as the “Jones Factors.” *Bakanowski v. Bakanowski*, 80 P.3d 153, 155 (Utah Ct. App 2003). Failure to adequately consider the three factors is an abuse of discretion *Id.*

In *Bingham*, the court reversed and remanded the judgement of the trial court because the trial court failed to adequately consider the financial needs and condition of Ms. Bingham

(Wife). *Bingham v. Bingham*, 872 P.2d 1065 (Utah Ct. App. 1994). There, Mr. Bingham (Husband) argued that the trial court abused its discretion in awarding Wife more alimony than her expenses necessitated. The trial court awarded Wife \$1,431.76 in child support and \$1,750.00 in alimony for a total monthly support payment of \$3,181.76. At trial, Wife estimated her overall monthly expenses at \$3,080. After further evaluation, the trial court reduced Wife's overall monthly expenses by \$600 and thereby assessed Wife's overall monthly expenses at \$2,480. Therefore, as the reviewing court noted, the trial court awarded Wife an excess of \$701.76 per month over Wife's established financial need requirement. In holding that the trial court abused its discretion, the reviewing court stated; "Where the trial court has offered no explanation for such a discrepancy, we agree with [Husband] that the court should not have awarded [Wife] more than her established need required, regardless of [Husband's] ability to pay this excess amount. Accordingly, we remand the case for a reassessment of the alimony award in accordance with the precept that the spouse's demonstrated need must, under *Jones*, constitute the maximum permissible alimony award." *Bingham v. Bingham*, 872 P.2d 1065, 1068 (Utah Ct. App. 1994).

The facts in case at hand are similar to those in *Bingham*. By not including child support payments as part of Petitioner's financial condition and needs, the Trial Court also abused its discretion in awarding Plaintiff more alimony than her expenses necessitated. The Trial Court, in the case at hand, awarded Petitioner \$818.26 in child support (*see* R. at 274) and \$324 in alimony (*see* R. at 498(Ruling transcript at 5; 7-15)) for a total monthly support payment of \$1,142.26. At trial, Petitioner estimated her overall monthly expenses, including

child-related expenses, at \$4,198.99. *See* R. at 251. Just as in *Bingham*, the Trial Court, upon further evaluation, reduced Petitioner's overall monthly expenses by the amount of \$737.99 and thereby assessed Petitioner's overall monthly expenses at \$3,461. *See* R. at 498 (Ruling transcript at 5; 7-15). The Trial Court held that Petitioner's gross income is \$3,137 and therefore, Petitioner's resulting need for alimony was \$324. *Id.* In giving its Ruling, the Trial Court stated that it did not include child support in the calculation. *Id.* This is in error and the Trial Court did not adequately evaluate Petitioner's financial condition and needs. Further, the Court gave no explanation as to its reasoning for excluding the child support payments from its financial condition and needs analysis. *Id.*

Here, Petitioner receives \$818.26 in monthly child support payments. *See* R. at 498 (Ruling transcript at 5; 7-15). If this is added to the \$3,137 monthly income of Petitioner, as is required in an adequate evaluation of Petitioner's financial condition and needs, it can be seen that Petitioner has \$3,955.26 per month to address her \$3,461 overall monthly expenses; or a \$494.26 monthly surplus. Therefore, the Trial Court awarded Petitioner an excess over her established financial need requirement. Thus, the \$324 alimony award is not necessary and said award does not reflect Petitioner's true financial condition or needs as the courts require.

As in *Bingham*, Petitioner was awarded an excess over her established financial need requirement; therefore, just as in *Bingham*, this Court of Review should hold that the Trial Court should not have awarded Petitioner alimony in excess of her established need, regardless of Respondent's ability to pay this excess amount. This Court should hold that the Trial Court abused its discretion in its alimony determination by not establishing Petitioner's true financial condition or needs as required by the Jones Factors.

II. The Trial Court Abused its Discretion in Determining Alimony Because the Trial Court Failed to Enter Specific Findings on the Needs and Financial Condition of the Petitioner

In considering the Jones Factors, the trial court is required to make adequate factual findings on all material issues unless the facts in the record are clear, un-controverted, and capable of supporting only a finding in favor of the judgment. *Baker v. Baker*, 866 P.2d 540, 546 (Utah Ct. App. 1993). If the trial court considers these factors in setting an award of alimony, the reviewing court will not disturb its award absent a showing that such a serious inequity has resulted as to manifest a clear abuse of discretion. However, where a trial court fails to enter specific findings on the needs and condition of the recipient spouse, making effective review of the alimony award impossible, that omission is an abuse of discretion. *Bakanowski v. Bakanowski*, 80 P.3d 153, 155 (Utah Ct. App. 2003). Detailed findings of fact and conclusions of law are necessary for the reviewing court to ensure that the trial court's discretionary determination of the alimony award was rationally based. *Stevens v. Stevens*, 754 P.2d 952, 959 (Utah Ct. App. 1988).

In *Bakanowski*, the Court of Appeals held that the trial court abused its discretion by failing to enter specific findings on Ms. Bakanowski's (Wife) needs and financial condition. *Bakanowski v. Bakanowski*, 80 P.3d 153 (Utah Ct. App. 2003). In so doing, the Court of Appeals noted that the pertinent facts in the record were not clear, un-controverted, and capable of supporting only a finding in favor of the judgment. *Id.* At trial, the court found Wife's monthly living expenses of \$5,259 to be inflated. Rather than evaluating Wife's monthly budget, the trial court ruled that Wife could not enjoy a similar standard of living as

Husband without a \$1,000 monthly award. The trial court then concluded that Wife demonstrated a need for alimony in the amount of \$1,000 per month and ordered Mr. Bakanowski (Husband) to pay said alimony.

In holding that the trial court abused its discretion in determining alimony, the reviewing court paid particular attention to the trial court's failure to adequately determine Wife's financial condition and needs. The court of appeals noted that the trial court, upon finding that Wife's monthly living expenses to be inflated, explicitly avoided evaluating her monthly needs and her ability to meet those needs. The court of review also noted that in attempting to equalize the parties income, the trial court, neglected to employ the traditional needs analysis and as such the trial court abused its discretion. In finding an abuse of discretion, the court of review stated; "The absence of findings of fact is a fundamental defect that makes it impossible to review the issues that were briefed without invading the trial court's fact-finding domain. The findings of fact must show that the court's judgment or decree follows logically from, and is supported by the evidence." *Bakanowski v. Bakanowski*, 80 P.3d 153, 156 (Utah Ct. App. 2003).

Here, we suffer from the same abuse of discretion as the reviewing court found in *Bakanowski*. In the case at hand, we cannot say that the Trial Court's decree follows logically from, and is supported by the evidence as is required under *Bakanowski*. This is because, here, the Trial Court also avoided evaluating Petitioner's monthly need and her ability to meet those needs. In its findings, the Trial Court simply stated the Parties gross income in the amounts the Parties agreed upon for the purposes of a child support determination. *See* R. at 498 (Ruling transcript at 5; 7-15). In this regard, the Court failed to enter specific findings on the

financial needs and condition of Petitioner. This is in error and said omission not only amounts to an abuse of discretion, but the omission makes effective review of the alimony award impossible. The Trial Court refused to include the child support Petitioner receives from Respondent. *See* R. at 498 (Ruling transcript at 13; 12-25). Like in *Bakanowski*, this falls short of an adequate evaluation of Petitioner’s monthly needs and her ability to meet those needs. Additionally, the Trial Court in the case at hand “made some adjustments” to Petitioner’s claimed expenses by reducing Petitioner’s monthly expenses to \$3,461. *See* R. at 498 (Ruling transcript at 5; 7-15). There are no findings as to which expenses were adjusted or how the court arrived at the reduced monthly expense amount. *Id.* Again, in this regard, the Court failed to enter specific findings on the financial needs and condition of Petitioner. This is in error and said omission not only amounts to an abuse of discretion, but the omission makes effective review of the alimony award impossible.

Therefore in the case at hand, like in *Bakanowski*, the Trial Court did not make sufficient findings concerning Petitioner’s true financial condition and needs. The Trial Court neglected to employ the traditional needs analysis and as such the trial court abused its discretion. Thus, the absence of findings of fact is a fundamental defect that makes it impossible to review the issues without invading the trial court’s fact-finding domain, and the findings of fact in the instant case do not show that the court’s judgment or decree follows logically from, and is supported by the evidence as required.

CONCLUSION

Trial Court abused its discretion in determining alimony because the Trial Court failed to adequately consider the financial condition and needs of the Petitioner. The Petitioner was awarded an excess over her established financial need requirement; therefore, this Court of Review should hold that the Trial Court should not have awarded Petitioner alimony, regardless of Respondent's ability to pay this excess amount. This Court should hold that the Trial Court abused its discretion in its alimony determination by not establishing Petitioner's true financial condition or needs as required by the Jones Factors.

Additionally, the Trial Court neglected to enter specific finding on the needs and financial condition of the Petitioner. The Trial Court neglected to adequately employ the traditional needs analysis and as such the Trial Court abused its discretion. The absence of findings of fact is a fundamental defect that makes it impossible to review the issues without invading the Trial Court's fact-finding domain, and the findings of fact in the instant case do not show that the Court's judgment or decree follows logically from, and is supported by the evidence as required. For the forgoing reasons, the Trial Court abused its discretion in determining alimony award and said alimony award should be reversed.

RESPECTFULLY SUBMITTED this 16 day of May, 2008.

SCALLEY READING BATES
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J. Bruce Reading
Mitchell T. Brooks
Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that I mailed, postage prepaid, a true and exact copy of the foregoing
BRIEF OF APPELLANT to the following party on the 16 day of May 2008:

David A. McPhie
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Holladay, Utah 84117



ADDENDUM

EXHIBIT “A”

CERTIFIED COPY

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

	-o0o-	
SHERRIE C. ELOFF,)	
)	
Petitioner,)	Case No. 054905322 DA
)	
vs.)	RULING
)	
BRUCE C. ELOFF,)	
)	
Respondent.)	
	-o0o-	

BE IT REMEMBERED that on the 13th day of June, 2007, commencing at the hour of 4:04 p.m., the above-entitled matter came on for hearing before the HONORABLE TYRONE E. MEDLEY, sitting as Judge in the above-named Court for the purpose of this cause, and that the following proceedings were had.

-o0o-



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* * *

1 P R O C E E D I N G S

2
3 (Transcriber's Note: Speaker identification
4
5 may not be accurate with audio recordings.)
6

7 THE COURT: Yes. And--and by the way, I have--I'm
8 going to do something just slightly different on that T.R.O.,
9 not--not very different, but just slightly different.

10 Exactly.

11 And I'll explain that to you--

12 I won't need you to do that, but I'll explain that
13 after we get through this matter. So, can I hang up now? Are
14 you going to send them in? Okay. Yeah, I'm sure--

15 I'm--yes. All right.

16 Are both of you there? Okay. I need to put you on
17 hold so that I can get you on my speaker phone, okay? So,
18 hold on.

19 Okay. Are both of you still there?

20 MR. READING: We are.

21 MR. McPHIE: I am.

22 THE COURT: Okay. And Mr. McPhie, your voice
23 sounded just slightly distant. Can you speak--

24 MR. McPHIE: Okay. Is this better now?

25 THE COURT: Yes. Yes. That is better.

1 MR. McPHIE: Okay.

2 THE COURT: And by the way, this is case numbered
3 054905322 and we are on the record at this time and since we
4 are on the record, let's start with counsel for the petitioner
5 and just for the record purposes, identify yourself, please.

6 MR. McPHIE: Yes. David McPhie for the petitioner,
7 Sherrrie Eloff.

8 MR. READING: Bruce Reading on behalf of Bruce
9 Eloff.

10 THE COURT: Okay. Counsel, as you are aware, this
11 is the time I set for ruling on the issues that were submitted
12 to me for resolution. Yesterday we had a trial in this
13 particular divorce case. The majority of the issues were
14 resolved by way of stipulation and only a few issues remain.

15 Initially, because I don't think I made this
16 pronouncement yesterday, I should state that based upon the
17 testimony presented, the Court is satisfied that jurisdiction
18 is in fact proper in this case and that grounds of
19 irreconcilable differences have been established, warranting
20 a--a--the granting of a divorce between these parties. I
21 don't think I made that pronouncement yesterday. So, I do so
22 now.

23 I'm going to go immediately to the issue of alimony
24 and this is how I have resolved that particular issue. First
25 of all, I'd like to state for the record that I have

1 considered all of the required Jones factors. I've obviously
2 also taken into consideration how these parties are
3 respectively employed. Additionally, I've taken into
4 consideration the age of these parties and I--I've also taken
5 into consideration and this Court has in fact found that this
6 is in fact, a long term marriage.

7 Based upon the evidence presented, Counsel, I have
8 found, for alimony purposes, the petitioner's gross income to
9 be in the approximate amount of \$3,137. Additionally, based
10 upon the evidence presented, I have also found, and obviously,
11 I have made some adjustments, but I have found that the
12 petitioner's reasonable and necessary expenses are in the
13 approximate total amount of \$3,461; consequently, I am finding
14 that petitioner does have a shortfall in the amount of \$324.
15 So, she does have that amount of unmet need.

16 Additionally, for alimony purposes, I am finding
17 that the respondent has gross income in the approximate amount
18 of \$6,760 and that he has reasonable monthly expenses in the
19 approximate amount of \$4,372. So, I am finding that the
20 respondent has the ability to pay alimony; consequently, I'm
21 awarding the petitioner alimony in this case in the amount of
22 \$324, consistent with the standard limitations and
23 restrictions and by that, I simply mean subject to remarriage,
24 cohabitation, for the duration of the term of the parties'
25 marriage.

1 I'm going to go next to the issue of personal
2 property.

3 Excuse me. I needed to take a sip of water.

4 Regarding the issue of personal property, I have
5 resolved that issue as follows:

6 Can both of you still hear me?

7 MR. McPHIE: I can.

8 MR. READING: Yes, your Honor.

9 THE COURT: Okay. Good.

10 I'm resolving this issue as follows: I am going to
11 find that it is equitable to affirm the division of the
12 personal property as the parties--as exists between the
13 parties as of the date of trial, as the parties have divided
14 that personal property. So, I am affirming that distribution
15 and division as equitable, with the following exceptions, and
16 those exceptions are these:

17 The 1997 Blazer is kind of a little difficult for me
18 to characterize and what I mean by that, it has some
19 characteristics of being separate property, since I am finding
20 that it came to the respondent by way of the death of his
21 father. The vehicle has always been titled in his name, yet,
22 at the same time, for a fairly lengthy period of time, it
23 appears as if that--the petitioner had the substantial, full
24 use of that vehicle. And I am finding, obviously, that
25 marital assets were used for the maintenance and upkeep on

1 that vehicle, even if it is a 1997 Chevy Blazer.

2 But because of that mixed type of character, I am
3 going to award the 1997 Blazer to the respondent, free and
4 clear from any claim or interest in the vehicle by the
5 petitioner, in part, because of its, what I'm describing to be
6 it's, in part, it's non-marital asset character because of the
7 manner in which this property was held by way of title and the
8 manner in which it has come to the respondent.

9 Additionally, I'm making this award of the Blazer to
10 the respondent, in part, as an equitable set-off against the
11 personal property distribution that the Court has affirmed
12 here just a moment ago.

13 The other exception regarding this personal property
14 distribution will be as to the piano, which accordingly--
15 according to the evidence presented, has a value of
16 approximately \$7,000. And how I'm going to deal with that
17 piece of property is as follows. Unless the parties agree
18 otherwise in writing, the piano is awarded to both parties
19 equally. The petitioner will have the right and opportunity
20 to the possession and control of the piano. The parties will
21 be required to share equally in any costs of repair or
22 maintaining the piano.

23 Additionally, the parties will share equally in any
24 appreciation or increased value in the piano. And then I'm
25 going to order that the piano be sold--ordered to be sold upon

1 the last minor child reaching the age of majority.

2 Those are the only exceptions to the personal
3 property distribution.

4 The next issue I'm going to address deals with the
5 issue of pick up and delivery of the children and I'm going to
6 resolve this issue in this manner. I'm of the opinion that
7 the most equitable thing for me to do is to resolve this issue
8 by maintaining the status quo, which results in the respondent
9 being responsible for pick up and delivery of the minor
10 children when exercising his visitation.

11 The reason why I'm persuaded that that is the--
12 maintaining the status quo is the most appropriate way to
13 resolve this issue, because it's readily apparent from the
14 evidence presented, that these minor children are engaged in
15 various extracurricular activities and it is the petitioner,
16 for the most part, is responsible for the transportation for
17 those extracurricular activities and in an attempt to resolve
18 this issue equitably, I'm going to maintain the status quo

19 I'm not sure this is--this still remains to be an
20 issue for me to resolve. I--I think this next issue was
21 resolved by way of stipulation and this deals with the issue
22 of the petitioner's request to pick up the minor children from
23 the respondent, to have them attend church and then return the
24 children.

25 MR McPHIE: We've agreed to that.

1 THE COURT: Okay. I thought that that was resolved
2 by way of stipulation, so that--it's not--

3 MR. READING: That is true, your Honor. The only
4 caveat would be is if he--if he happened to have another
5 activity planned for that day or was going to be out of town
6 with the kids, I mean--

7 MR. McPHIE: That was also agreed.

8 THE COURT: Okay. And since that--

9 MR. McPHIE: If he's going out of town, then she
10 can't say, you can't take them 'cause it's Sunday, but if he's
11 in town--

12 MR. READING: And not fishing--

13 MR. McPHIE: Yeah.

14 MR. READING: --they--they need to go.

15 THE COURT: Well, are you sure you--if you're sure
16 you have a stipulation as to that issue, I won't say anymore.

17 MR. READING: I think that's on the record that way.

18 THE COURT: Okay. Now, let me go next to the issue
19 that deals with the respondent's request for the equal sharing
20 of taxes incurred for the 2005-2006 tax year. I think this is
21 based upon an increase in the Scott Trade accounts. It was
22 alleged that that sum to be, I think in the approximate amount
23 of two--total amount of \$2,137.

24 Listen, I'm going to require that the petitioner
25 share equally one-half of that debt, but that needs to be

1 documented.

2 MR. McPHIE: Not a problem, your Honor

3 THE COURT: I'm also going to require the petitioner
4 to share in one-half of the cell phone bill, the cell phone
5 bill was \$74.57, one-half of the medical expense bill, which
6 is--was in the total of \$31.94. I'm denying the respondent's
7 request that the petitioner share in the--any expense for the
8 air conditioning bill.

9 Going next to what I think will be the last issue,
10 is the respondent's request that he receive four percent
11 interest on his equitable lien. I struggled with this request
12 for some time, until I located some Utah case law that appears
13 to clearly hold that awarding interest on an equitable lien is
14 not appropriate.

15 And you should know that I am relying on two cases,
16 the first case is a domestic relations case and I probably
17 will mispronounce the name of the case, I think is Osguthorpe
18 vs. Osguthorpe and the case is found at 804 P.2d 530. It's a
19 1990 Utah Court of Appeals case.

20 Also, that Osguthorpe case is upheld in a subsequent
21 case of Lovato vs. Lovato, which is a 2002 Utah Court of
22 Appeals case, the cite on that case is 2002 Utah Appeals 162.

23 And the general holdings of those two opinions is as
24 follows: That an equitable lien is unlike a judgment and only
25 gives the lienholder a right to collect the debt out of the

1 charged property. In those cases, the court held that
2 interest could not accrue until the equitable lien was reduced
3 to judgment, after the happening of one of the contingencies
4 that will result in reducing the equitable lien to a judgment.
5 Until that occurs, interest on equitable lien is not
6 appropriate and in the--in both cases that I cited to you, the
7 trial court was reversed for awarding interest on an equitable
8 lien. So, I'm going to follow that direction and deny the
9 respondent's request.

10 MR. McPHIE: Okay.

11 THE COURT: I think that that resolves all the
12 issues with the exception of maybe one and that would be the
13 issue of attorney's fees. And do you wish me to resolve that
14 now?

15 MR. READING: If you're in a position that you can
16 do that, sure.

17 MR. McPHIE: If you're in a position to do it, sure.

18 THE COURT: From my vantage point, based upon the
19 evidence presented, although I recognize that there is a
20 disparity in the incomes of--of these parties, I would
21 conclude and find that it is most equitable for this Court to
22 order that the parties be responsible for their own attorney's
23 fees in this particular case. Consequently, I would not find
24 any necessity to require either side to submit affidavits in
25 support.

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MR. McPHIE: Okay.

THE COURT: I think that that's it.

MR. McPHIE: I think that is.

Do you want me to prepare this? This is David McPhie talking. Sorry.

THE COURT: That's fine. But I would like to see the documents come to me--

MR. McPHIE: I'll submit them to opposing counsel--

THE COURT: Yeah. They need to be signed off at least as to form and definitely as to form and content as to the matters that were stipulated to. Do you see what I'm saying?

MR. READING: Yeah. Okay. And your Honor, at this point, a clarification. Back to the alimony issue, you mentioned that the petitioner had \$3,137, that included, I guess, the child support?

MR. McPHIE: No.

THE COURT: No. I did not include that child support in the calculation and I cited it as a gross amount of her income.

MR. READING: And--and so that was not taken into account to help pay those expenses?

THE COURT: It was taken into account, but it was not included by me as income for alimony purposes.

MR. READING: Okay.

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THE COURT: Any other points of clarification?

MR. McPHIE: We'll submit this to you pre-approved.

THE COURT: Mr. Reading?

MR. READING: That--I think that was the only question I had, your Honor.

THE COURT: Okay. All right. Hey, listen, thank you very much.

MR. READING: Thank you.

THE COURT: Okay. Bye.

MR. READING: Bye, now.

(Whereupon, this hearing was concluded.)

* * *

TRANSCRIBER'S CERTIFICATE

STATE OF UTAH *
 * ss.
County of Salt Lake *

I, Toni Frye, do hereby certify:

That I am a Certified Court Transcriber of Tape Recorded Court Proceedings; that I received electronically recorded files of the within matter and have transcribed the same into typewriting, and the foregoing pages, to the best of my ability constitute a full, true and correct transcription, except where it is indicated the Electronically Recorded Court Proceedings were inaudible.

Dated this 5th day of May, 2008.

Toni Frye
Toni Frye, Transcriber

I, RENEE L. STACY, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public for the State of Utah, do hereby certify that the foregoing transcript prepared by Toni Frye was transcribed under my supervision and direction.

Renee L. Stacy
Renee L. Stacy, CSR, RPR

My commission expires:

