

2007

## Kim S. Black v. Jon Cornell Black : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KIM S. BLACK,  Petitioner/Appellant,  v.  JON CORNELL BLACK  Respondent/Appellee	BRIEF OF THE APPELLEE AND CROSS-APPELLANT JON CORNELL BLACK  Appellate Court Docket No. 20071014
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APPEAL FROM THE DECISION OF  
THE THIRD DISTRICT COURT, SALT LAKE COUNTY,  
THE HONORABLE L.A. DEVER

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JUN 24 2008

IN THE UTAH COURT OF APPEALS

<p>KIM S. BLACK,</p> <p>Petitioner/Appellant,</p> <p>v.</p> <p>JON CORNELL BLACK</p> <p>Respondent/Appellee</p>	<p>BRIEF OF THE APPELLEE AND CROSS-APPELLANT JON CORNELL BLACK</p> <p>Appellate Court Docket No. 20071014</p>
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### **RULES**

There are no rules involved in this matter.

## **STATEMENT OF JURISDICTION**

The Court of Appeals of Utah has jurisdiction to hear this appeal pursuant to U.C.A. § 78-4-103(2)(h).

## **STATEMENT OF THE ISSUE**

When alimony payments are retroactively terminated as a result of cohabitation under U.C.A. § 30-3-5(10), should the termination go back to the time that notice was given that a petition for modification of alimony was filed, or should the termination go back to the time that cohabitation began?

## **STANDARD OF REVIEW**

The Court of Appeals will review a trial court's statutory interpretation under a correction of error standard. *Brinkerhoff v. Brinkerhoff*, 945 P.2d 113, 115 (Utah App. 1997); *Ball v. Peterson*, 912 P.2d 1006, 1009 (Utah App. 1996).

Appellee preserved the issue for appeal by filing a Verified Petition to Modify Decree of Divorce (R. 76-80) and by filing an Amended Petition to Modify Decree of Divorce (328-338).

## **STATUTORY PROVISIONS**

U.C.A. § 30-3-5(3), (10) (West 2004), in relevant part:

Disposition of property – Maintenance and health care of parties and children – Division of debts – Court to have continuing jurisdiction – Custody and parent time – Determination of alimony – Nonmeritorious petition for modification.

....

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

....

(10) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

U.C.A. 1953 § 78-45-9.3(4) (West 2004) (now renumbered and amended as 78B-12-112 (2008)), in relevant part:

Payment under child support order – Judgment

....

(4) A child or spousal support payment under a child support order may be modified with respect to any period during which a modification is pending, but only from the date of service of the pleading on the obligee, if the obligor is the petitioner, or on the obligor, if the obligee is the petitioner.

### **RULES PROVISION**

There are no rules involved in this matter.

### **STATEMENT OF THE CASE**

Based on a modification of the statute limiting alimony to a period of time not longer than the length of the marriage, Respondent filed a petition to terminate alimony. Respondent later learned that the Petitioner had begun cohabitating even before the time



that the Respondent had filed the petition to terminate alimony. Respondent accordingly moved to amend his petition to include a claim of cohabitation and the trial court granted the motion. When the case went to trial, the trial court found that the Petitioner had begun cohabitating before the Respondent filed his initial petition to terminate alimony and terminated alimony back to the date of the service of the initial petition to terminate alimony, rather than when the Petitioner actually began cohabitating. It is the legal issue as to when the alimony termination date should have been made which is the basis of this appeal.

### **RELEVANT FACTS**

Jon Black (Respondent) and Kim Black (Petitioner) were divorced on July 3, 1989 (R. 31). The trial court held that Respondent was 100% disabled at the time of the divorce (R. 743). Petitioner was awarded alimony in the divorce decree in the amount of \$750.00 a month (R. 744). On June 7, 2001, Respondent served on Petitioner a Petition for Modification for the termination of alimony based on a change in the statute which limited alimony to a period of time to be no greater than the length of the marriage (R. 76-80). Four years later, after learning that the Petitioner had begun cohabitating with Mr. Ted Tomlin ("Tomlin") in the fall of 2000, Respondent accordingly filed an Amended Petition to Modify Decree of Divorce in June 2005, claiming cohabitation by Petitioner (R. 328-338).

Petitioner met Tomlin in September of 2000 and had sex with him the first night they met (R. 744). The pair then went on a trip to Wendover and Tomlin moved in with the Petitioner soon after the trip (R. 744), thus beginning the cohabitation period.

Although the Petitioner knew that her actions constituted cohabitation and that the alimony should be terminated, Petitioner continued to receive alimony payments and did not inform the Respondent that she was cohabitating. In fact, the Petitioner went to lengths to conceal her cohabitation from the Respondent and Respondent's representatives. Respondent's actions include, but are not limited to, (1) hurriedly moving Tomlin's belongings out of her house immediately before depositions were to be taken (R. 745-746); (2) instructing Tomlin's son's fiancé to say that Tomlin did not live at her house and to not talk to the attorney about the matter (R. 746); and (3) testifying during trial that they did not have sexual relations (R. 747). Tomlin's sister, Judy Ferguson, and her husband confronted the Petitioner about living with Tomlin, and told the Respondent how it was wrong to take alimony when she was cohabitating (R. 746-747). After this confrontation, Petitioner continued to receive alimony payments from the Respondent.

The matter went to trial on November 26 and 27, 2007, and the trial court held that the Petitioner began cohabitating in September 2000, so the court terminated the alimony award (R. 744, 748). The trial court held that the alimony order should be terminated retroactively, and used the date of the original service of the Petition for Modification, June 2001, rather than the actual beginning of the cohabitation in September 2000 (R. 748).

The proceedings lasted as long as they did both because of the disabled Respondent's inactivity and because of the Petitioner's refusal to comply with discovery requests, which required the Respondent to file a motion for Order to Show Cause.

## **SUMMARY OF THE ARGUMENTS**

The trial court erred when it held that the alimony award should be terminated retroactively to the date of notice of service of the Verified Petition to Modify Decree of Divorce. Based on (1) case law; (2) the language and intent of U.C.A. § 30-3-5(10) and U.C.A. § 78-45-9.3(4); and (3) principles of equity, the trial court should have terminated the alimony award retroactively to the date that the Respondent began cohabitating.

The trial court should have followed the precedent set by the Court of Appeals in *Sigg v. Sigg*, where the Court terminated the alimony award retroactively to the date that cohabitation began, which was before the date that the Petition to Modify Decree of Divorce had been filed. 905 P.2d 908, 911-912, (Utah App. 1995).

The trial court erred when it applied U.C.A. § 78-45-9.3(4) to the retroactive termination of the alimony award in the manner in which it did. This statute reads in pertinent part that “A child or spousal support payment under a child support order may be modified with respect to any period during which a modification is pending, but only from the date of service of the pleading on the obligee”. U.C.A § 30-3-5(10) reads in pertinent part that “Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person”, meaning that when alimony is terminated because of cohabitation, the alimony should be terminated retroactively to the date when cohabitation began. U.C.A. § 30-3-5(10) should control in this situation because it deals more specifically with the matter at hand.

Principles of equity require that U.C.A. § 30-3-5(10) be construed to mean that cohabitation-related termination of alimony should be retroactive to the date that the cohabitation began, not to the date that the party paying alimony demonstrates that cohabitation is indeed taking place. If courts were to choose the latter construction of the statute, receivers of alimony would be rewarded for concealing their cohabitation from the parties paying alimony. This would not only reward people for actions akin to theft, but it would also encourage behavior that the drafters of the statute in no way desired.

### **ARGUMENTS**

#### **I. THE TRIAL COURT ERRED WHEN IT HELD THAT RESPONDENT'S ALIMONY OBLIGATION SHOULD ONLY BE TERMINATED RETROACTIVELY BACK TO THE DATE THAT PETITIONER RECEIVED NOTICE OF RESPONDENT'S PETITION TO MODIFY THE DIVORCE DECREE**

##### ***A. THE TRIAL COURT ERRED BY NOT FOLLOWING THE PRECEDENT SET BY THE COURT OF APPEALS FOR RETROACTIVE TERMINATION OF ALIMONY IN THE CASE OF COHABITATION.***

In its holding, the trial court stated that the rule regarding retroactive modification of alimony awards only allows modification to be tied to the date that the petition for modification is filed (R. 748). Thus, the trial court retroactively terminated Petitioner's alimony award back to June of 2001 when Respondent first filed his petition for modification (R. 748). The trial court was correct in holding that an alimony award could be terminated retroactively, but erred in holding that the award could only be terminated retroactively to the date that notice was given that a petition for modification was filed.

The trial court failed to follow the precedent set in *Sigg v. Sigg*, where the Court of Appeals dealt with a nearly identical situation. 905 P.2d 908 (Utah App. 1995). In that case, the Court of Appeals held that where the party receiving alimony had cohabitated, the alimony award should be terminated retroactively to the date that cohabitation began, which, in that case, was prior to the date that the party paying alimony had filed the petition for modification. *Id.* at 911. A timeline of events will illustrate this point more effectively: In *Sigg*, Mr. and Ms. Sigg were divorced in 1990. Mr. Sigg was required to pay alimony in the amount of \$500 a month. In February of 1993, Ms. Sigg began cohabitating with another man. Nine months later, in November of 1993, Mr. Sigg filed a petition to modify the divorce decree. In June of 1994, the case went to trial, where the trial court held that alimony should be retroactively terminated back to February of 1993, when Ms. Sigg began cohabitating. *Id.* at 911-912. Ms. Sigg appealed the trial court's decision, but the Court of Appeals upheld the trial court's ruling that alimony should be retroactively terminated to February of 1993, when the cohabitation began. *Id.* at 912. Although only nine months passed between the date that Ms. Sigg began cohabitating (February 1993) and the date that Mr. Sigg filed his petition for modification of the divorce decree (November 1993), the Court of Appeals saw fit to terminate alimony retroactively to the date that cohabitation began. *Id.* at 918.

The facts in the present case are almost identical to *Sigg*. Petitioner was awarded and received alimony, but then began cohabitating in September of 2000 (R. 744, 748). Petitioner failed to notify the Respondent that she was cohabitating and continued to receive alimony. Nine months later, in June of 2001, Respondent filed to terminate

alimony (R. 748). When the matter went to trial in 2007, the trial court held that retroactive termination of the alimony award was proper, but only to the date that notice was given that the June 2001 petition was filed (R. 748). The trial court failed to follow the precedent set by *Sigg*, which clearly held that when an alimony award is terminated because of cohabitation, the award should be terminated retroactively to the date that cohabitation began, and not to the date that the notice was given that the petition to modify the divorce decree was filed. *Id.* at 918. The trial court's holding was clearly erroneous and should be corrected to hold, in accordance with the *Sigg* precedent, that when an alimony award is terminated because of cohabitation, the award should be terminated retroactively to the date that Petitioner began cohabitating, and not to the date that Respondent filed his petition for modification of the divorce decree. *Sigg* was ruled on in 1995 and has not been overruled. It should not be overruled now.

***B. THE TRIAL COURT ERRED BY APPLYING U.C.A. § 78-45-9.3(4) WHEN IT SHOULD HAVE APPLIED U.C.A. 30-3-5(10) TO THE RETROACTIVE TERMINATION OF ALIMONY IN THE CASE OF COHABITATION***

The trial court dealt with two different statutes that pertain to retroactive modification/termination of an alimony award: U.C.A. § 78-45-9.3(4) (now renumbered and amended at 78B-12-112 (2008)), which reads in pertinent part “A child or spousal support payment under a child support order may be modified with respect to any period during which a modification is pending, but only from the date of service of the pleading on the obligee”; and U.C.A. 30-3-5(10), which reads in pertinent part that “Any order of the court that a party pay alimony to a former spouse terminates upon establishment by

the party paying alimony that the former spouse is cohabitating with another person”.

The trial court held that “The general rule is that the date of the modification of support or alimony is tied to the date that the petition for modification is filed”, and accordingly terminated the alimony award retroactively to the date that Petitioner received notice that Respondent filed his petition to modify the divorce decree. This was an incorrect application of the language and intent of the two statutes. U.C.A. § 30-3-5(10) should control because it deals with the specific matter of termination of alimony due to cohabitation, whereas U.C.A. § 78-45-9.3(4) is the more general statute that deals with retroactive modification of alimony in general.

U.C.A. § 78-45-9.3(4) deals with retroactive modification of alimony in general cases where alimony is modified for various reasons, but mainly dealing with change in material circumstances. The statute only allows alimony to be modified retroactively to the date that the petition for modification is filed. The purpose of the statute is to ensure that a party receiving alimony is put on notice that the alimony award is being challenged, and that the alimony award may be terminated retroactively to the date that the petition was filed. This is good policy because it gives the party receiving alimony the opportunity to prepare for the eventuality that alimony may be terminated, and it protects that party from being required to pay back large amounts of past alimony unexpectedly. This policy is also sound because courts do not wish to harm an innocent party receiving alimony that has done no wrong, but has simply experienced a change in material circumstances. It would be inequitable for a party receiving alimony to suddenly

be required to restore several years worth of alimony payments simply because the party receiving alimony had experienced a material change in circumstances much earlier.

U.C.A. § 30-3-5(10), however, deals with a different matter. This statute deals with parties receiving alimony who cohabit and should not be receiving alimony. In *Knuteson v. Knuteson*, the court explained that this statute “is designed to prevent unconscionable servitude to an undeserving divorced spouse”, and that it “should be directed, to prevent injustice to a spouse who frequently pays through the nose, so to speak, to an undeserving ex-mate”. 619 P.2d 1387, 1389 (Utah 1980). A cohabitating ex-spouse does not deserve the notice that filing a petition for modification of a divorced decree gives. A cohabitating ex-spouse puts one’s self on notice that alimony may, and should, be terminated upon commencement of cohabitation. This statute is the controlling statute because it deals with the specific matter in this case of retroactive termination of alimony due to cohabitation.

The trial court incorrectly applied U.C.A. § 78-45-9.3(4) when it should have applied U.C.A. § 30-3-5(10). U.C.A. § 78-45-9.3(4) protects innocent parties receiving alimony who have done no wrong, whereas U.C.A. § 30-3-5(10) protects innocent parties paying alimony who have done no wrong, save failing to discover that their ex-spouses are cohabitating. A comparison of two cases will illustrate how the two statutes should be correctly applied. *Ball v. Peterson* held that modification of a support agreement may only be applied retroactively back to the date that the party receiving support received notice that a petition had been filed to modify the support award. 912 P.2d 1006, 1011 (Utah App. 1996). *Sigg v. Sigg*, however (as explained earlier), held that where the



spouse receiving alimony had cohabitated, the alimony award should be terminated retroactively to the date that cohabitation began, which was nine months earlier than the date on which the party receiving alimony received notice that a petition had been filed to amend the alimony award. 905 P.2d 908, 918 (Utah App. 1995). *Ball* and *Sigg* do not contradict each other. *Ball* applies the general rule of U.C.A. § 78-45-9.3(4), and *Sigg* applies the specific rule of U.C.A. § 30-3-5(10). Because the present case is almost identical to *Sigg*, the *Sigg* precedent should apply and not the *Ball* precedent.

Regarding U.C.A. § 30-3-5(10), however, the Respondent has argued that this statute does not subject an alimony order to retroactive termination; rather, the Petitioner has argued that this statute should only be construed to terminate an alimony award at the date on which the Respondent *proved* that the Petitioner was cohabitating and not at the date that the Petitioner *actually began* cohabitating. Such an interpretation violates both the *Sigg* precedent and policy considerations, which will be elaborated upon in the next section. In short, such an interpretation would encourage ex-spouses receiving alimony to conceal cohabitation as long as possible, without risking retroactive termination. Surely the drafters of the statute did not intend to encourage such behavior.

It is also important to note that these arguments do not intend to show that retroactive modification of an alimony award is mandatory, for it is not. The court held in *Wall v. Wall* that “The legislature's use of “may” clearly gives the court discretion to make child support modification orders retroactive”, meaning that a court may modify a support order retroactively, but it is not mandatory. UT App 61, ¶ 20, 157 P.3d 341. In the present case, the trial court correctly used its discretion to terminate alimony

retroactively. The trial court only erred in holding that the termination could only be applied retroactively to the date that notice was given of the petition to modify the divorce decree.

***C. PRINCIPLES OF EQUITY REQUIRE THAT U.C.A. § 30-3-5(10) BE CONSTRUED TO HOLD THAT COHABITATION-RELATED TERMINATION OF ALIMONY APPLY RETROACTIVELY TO THE DATE THAT COHABITATION BEGINS AND NOT TO THE DATE WHEN THE PARTY PAYING ALIMONY PROVES THAT COHABITATION IS INDEED TAKING PLACE***

Thus far, three separate dates have been suggested as the proper dates to which alimony should be retroactively terminated: (1) September of 2000, when the Petitioner began cohabitating – under the *Sigg* precedent and U.C.A. § 30-3-5(10); (2) June of 2001, when the Petitioner received notice that the Respondent had filed a petition to modify the alimony award – under U.C.A. § 78-45-9.3(4); and (3) November of 2007, when the Respondent demonstrated at trial that the Petitioner had been cohabitating – under the Petitioner’s interpretation of U.C.A. § 30-3-5(10). Of these three possible dates, September of 2000 is most in line with case law, statutory interpretation, and principles of equity.

Under U.C.A. § 30-3-5(10), it would be unjust and inequitable to hold that the Respondent could only receive retroactive termination of alimony back to the date on which he had demonstrated cohabitation, which was at trial in November of 2007. Such an interpretation would clearly violate policy considerations and principles of equity. A hypothetical scenario will help to illustrate this point: A and B stay married for 20 years, then get divorced. Under the alimony award, B must pay alimony to A for the next 20 years. B faithfully pays alimony every month as required. However, six months later, A

begins cohabitating with C. A conceals her cohabitation from B for the next ten years, while B continues to pay alimony every month. Ten and half years after the divorce, B discovers A's cohabitation and files a petition to terminate alimony. A, relying on the Petitioner's interpretation of U.C.A. § 30-3-5(10), then drags out the proceedings for as long as possible before the case finally goes to trial 12 years after the divorce. At trial, the court finds that A did indeed cohabit with C and that the cohabitation began six months after the divorce.

Under the Petitioner's interpretation of U.C.A. § 30-3-5(10), alimony would only be terminated at trial, 12 years after the divorce. Thus, A would be rewarded for concealing her cohabitation from B, as well as for dragging out the proceedings as long as possible in an effort to collect every month's worth of alimony possible. Under the trial court's interpretation of U.C.A. 78-45-9.3(4), alimony would be retroactively terminated back to the date on which A received notice that B had filed a petition to terminate that alimony award. This is a better situation, but it is still inequitable. A has not been rewarded for dragging out the proceedings, but A has been rewarded for concealing her cohabitation from B for ten years. Under both of these possible outcomes, A has been rewarded for behavior that is hardly different than theft.

In this case, the Petitioner has argued that retroactively terminating an alimony award is a harsh consequence. The Petitioner, however, should not receive any sympathy for her actions. In our society, we do not consider it harsh to require thieves to return stolen goods. The present case is hardly a different scenario. The Petitioner began cohabitating in September of 2000 (R. 748) and continued to accept alimony payments

from her disabled ex-husband whose entire income consisted of government assistance (due to his disability) and who barely had enough money to subsist at an assisted living facility (R. 329-330). Even after being confronted by Tomlin's sister about her actions, the Petitioner continued to receive alimony payments (R. 746-747). After receiving notice that the Respondent had filed a petition to modify the alimony award, the Petitioner dragged out the proceedings by refusing to comply with discovery requests, so much that the Respondent was forced to submit an Order to Show Cause for failure to comply with discovery. When the case finally went to trial in 2007, the Petitioner attempted to conceal her cohabitation from the Respondent and from the trial court, even testifying during trial that she had not had sexual relations with Tomlin (745-747). (The trial court pointedly noted that it found that the Petitioner's testimony was not credible (R. 747)).

The Respondent is the party who has received harsh treatment, so it is disingenuous to argue that the Petitioner would be treated harshly if the alimony were to be terminated retroactively back to the date that she began cohabitating. If the trial court's decision is left as it is, then future attorneys will be encouraged to counsel their cohabitating clients to conceal their cohabitation for as long as possible in order to receive as much alimony as possible. Surely the drafters of U.C.A. § 30-3-5(10) did not intend to encourage such unethical behavior. The only equitable possibility is to terminate alimony retroactively back to the date that the Petitioner began cohabitating in accordance with *Sigg* and principles of equity.

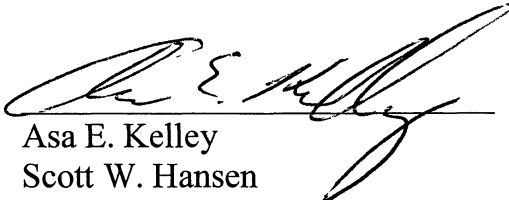
## CONCLUSION

The trial court's judgment is inconsistent with the current case law, statutory interpretation, and principles of equity regarding retroactive termination of an alimony award. If an alimony award is terminated because of cohabitation, the award should be terminated retroactively to the date that cohabitation began and not to the date that notice is given that a petition for modification of a divorce decree has been filed.

WHEREFORE, Jon C. Black prays that this Court reverse the judgment and order of the Trial Court herein and find that the alimony award should be terminated retroactively to the date that cohabitation began, or otherwise remand this for new trial or further proceedings before a new judge consistent with Utah Law. Jon C. Black also prays that this court award attorney fees for costs incurred related to the trial court proceedings and for the appellate proceedings.

DATED this 23 day of June, 2008.

TESCH LAW OFFICES, P.C.



Asa E. Kelley  
Scott W. Hansen  
Attorneys for Jon C. Black


**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing Brief of the Appellee and Cross-Appellant, Jon C. Black, to be sent by United States Mail, postage prepaid, on this 23<sup>rd</sup> day of June, 2008, as follows:

***Attorney for Appellant:***

*One (1) copy to:*

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Trudy Rutledge  
Legal Assistant

## **ADDENDUM**

- Exhibit A: Verified Petition to Modify Decree of Divorce
- Exhibit B: Amended Petition to Modify Decree of Divorce
- Exhibit C: Findings, Conclusions and Order

# **ADDENDUM A**



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**FILED DISTRICT COURT**  
Third Judicial District

JUN 04 2001

By KS SALT LAKE COUNTY  
Deputy Clerk

Attorney for Defendant

**THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH**

KIM S. BLACK,

Plaintiff,

vs.

JON C. BLACK,

Defendant.

**VERIFIED PETITION TO  
MODIFY DECREE OF DIVORCE**

Case No. 894900342DA

Judge: Leon A. Dever  
Comm'r: T. Patrick Casey

COMES NOW, Jon C. Black, Defendant, by and through counsel, and hereby requests and moves this Court to modify the Decree of Divorce previously entered in this matter. In support thereof, Defendant alleges as follows:

1. That Jon Cornell Black is the Defendant in the above-entitled matter, and is a resident of Salt Lake County, State of Utah.
2. Defendant, prior to the parties' entry of Decree of Divorce and continuing to date, suffered and suffers from paranoid schizophrenia.
3. That Kim S. Black is the Plaintiff in the above-entitled matter, and is a resident of Salt Lake County, State of Utah.

4. The parties were married on June 7, 1980, in Summit County, Utah.

5. The Plaintiff and Defendant were divorced from one another by Decree of Divorce made and entered by the Third Judicial District Court in and for Salt Lake County, State of Utah, on or about July 3, 1989.

6. The parties marriage, therefore, existed for approximately nine years, one month.

7. Pursuant to Paragraph 6 of the Decree of Divorce, Defendant was ordered to pay alimony in the amount of \$750.00 per month for an indeterminate period of time.

8. Since the entry of Decree of Divorce, the following substantial and material change in circumstances has occurred, which were not contemplated at the time of the parties' divorce, which in turn warrants a modification of the Decree of Divorce;

a. Defendant's income (supplemented entirely by government assistance due to his schizophrenia) has remained relatively static since the divorce--only increasing approximately \$41.00 per year since the entry of Decree of Divorce.

b. Upon information and belief, Plaintiff's income has increased appreciably since the entry of Decree of Divorce.

c. The parties' only child, in which Plaintiff obtained physical custody at the time of the entry of Decree of Divorce, has reached the age of majority and is able to provide for his own care and support.

d. Although the parties' marriage lasted nine years, one month, Defendant has been making alimony payments for approximately twelve years--35 months longer than the marriage existed and totaling additional alimony payments of \$24,750.00.

9. Based on the forgoing, it is reasonable, necessary, and proper that the Decree of Divorce be modified and the Defendant's alimony obligation be terminated.

10. It is fair and reasonable that each party should be ordered to pay his or her own attorney's fees and costs incurred in bringing this action if this matter is uncontested. However, should Plaintiff contest this action, it is fair and reasonable that the Plaintiff be ordered to pay Defendant's attorneys fees and cost incurred herein.

11. All other terms and provisions set for in the Decree of Divorce heretofore entered shall remain in full force and effect to the extent not inconsistent with the terms and provisions set forth herein.

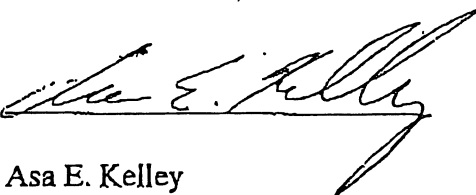
WHEREFORE, Defendant prays for the following relief:

1. For an order of modification as outlined above.
2. For an order of attorney fees and cost incurred herein if this matter is contested.
3. For such other and further relief as the court may see just and proper.

DATED this 4<sup>th</sup> day of June, 2001.

KELLEY & KELLEY, LLC

By:



Asa E. Kelley  
1000 Boston Building  
Nine Exchange Place  
Salt Lake City, UT 84111

Attorney for Defendant

This VERIFIED PETITION TO MODIFY  
DECREE OF DIVORCE is filed on behalf of :

Jon C. Black  
130 South 500 East, #308  
Salt Lake City, UT 84111

## VERIFICATION

Jon Black, being first duly sworn deposes and states: he has read the foregoing **Verified Petition to Modify Decree of Divorce** and understands its contents, and acknowledges and affirms that the information and facts contained in the document are true and correct to the own personal knowledge or belief where indicated, and that he is signing the document voluntarily for its stated purpose.

DATED this 7<sup>th</sup> day of June, 2001.

Jon C. Black  
Jon Black

SUBSCRIBED AND SWORN TO before me this 4 day of June, 2001.



Sara Marchant  
NOTARY PUBLIC

# **ADDENDUM B**

*[Handwritten signature]*

Respondent, Jon C. Black, pursuant to Rule 15 of the *Utah Rules of Civil Procedure*, and by and through counsel, hereby submits his Amended Petition to Modify Decree of Divorce. Respondent requests and moves this Court to modify the Decree of Divorce previously entered in this matter. In support thereof, Respondent alleges as follows:

**FIRST CAUSE FOR MODIFICATION OF ALIMONY**

**LENGTH OF THE MARRIAGE**

1. Jon Cornell Black is the Respondent in the above-entitled matter, and is a resident of Salt Lake County, State of Utah.

2. Respondent, prior to the parties' entry of Decree of Divorce and continuing, to date, suffered and suffers from paranoid schizophrenia.

3. Kim S. Black is the Petitioner in the above-entitled matter, and is a resident of Salt Lake County, State of Utah.

4. The parties were married on June 7, 1980, in Summit County, Utah.

5. The Petitioner and Respondent were divorced from one another by Decree of Divorce made and entered by the Third Judicial District Court in and for Salt Lake County, State of Utah, on or about July 3, 1989.

6. The parties' marriage, therefore, existed for approximately nine years, one month.

7. Pursuant to Paragraph 6 of the Decree of Divorce, Respondent was ordered to pay alimony in the amount of \$750.00 per month for an indeterminate period of time.

8. Since the entry of Decree of Divorce, the following substantial and material change in circumstances has occurred, which were not contemplated at the time of the parties' divorce, which in turn warrants a modification of the Decree of Divorce:

a. Respondent's income (consisting entirely by government assistance due to his paranoid-schizophrenia) has remained relatively static since the divorce—only increasing approximately \$41.00 per year since the entry of Decree of Divorce;



b. Upon information and belief, Petitioner's income has increased appreciably since the entry of Decree of Divorce;

c. The parties' only child, Jacob Black, of whom Petitioner obtained physical custody at the time of the entry of Decree of Divorce, has reached the age of majority and is able to provide for his own care and support;

d. Although the parties' marriage lasted nine years, one month, Respondent has been making alimony payments for approximately sixteen years, which yields the following facts:

i. Respondent has been paying alimony approximately 82 months longer than the marriage existed (Decree of Divorce, July 3, 1989 + 9 years and 1 month = July 30, 1998; Duration between July 30, 1998 and June 13, 2005 = 6 years, 10 months, and 15 days or ~ 82 months);

ii. Respondent has paid \$61,875.00 in alimony (82.5 months \* \$750.00/month) for the 82 months running past the length of the marriage.

9. As indicated above, Respondent's monthly income is relatively fixed. Respondent's monthly income minus his alimony payment to Petitioner leaves him just enough money to subsist at an assisted living facility. The amount of money Respondent contributes to alimony could be used to provide a modicum of additional comfort.

10. Based on the forgoing, it is reasonable, necessary, and proper that the Decree of Divorce be modified and the Respondent's alimony obligation be terminated.

**SECOND CAUSE FOR MODIFICATION OF ALIMONY**

**COHABITATION BY PETITIONER IN A SEXUAL AND/OR ROMANTIC RELATIONSHIP**

11. Respondent incorporates, by this reference, the allegations set forth in paragraphs 1 through 10 of this Petition.

12. Respondent alleges that a material and substantial change in circumstance has occurred, in that Petitioner has entered into and continues a sexual and/or romantic relationship with a man by the name of Teddy Tomlin.

13. Mr. Tomlin moved in and cohabited more or less continuously with Petitioner, but for a few periods of time where Mr. Tomlin lived out of the state of Utah, he resided full-time or nearly full-time with Petitioner beginning approximately October 2000.

14. Mr. Tomlin slept in the same bed with Petitioner and, had sexual relations with Petitioner.

15. Mr. Tomlin recently commented to his family and Petitioner's family that he was not receiving enough of, or the type of, sexual relations that he would like with Petitioner.

16. Petitioner and Mr. Tomlin took trips with one another.

17. Mr. Tomlin proposed marriage to Petitioner and, purportedly, bought a ring to evidence their engagement.

18. When Mr. Tomlin briefly took employment in Colorado, he and Petitioner contemplated moving there together.

19. Petitioner and Mr. Tomlin frequently attend family parties together.

20. Petitioner and Mr. Tomlin are referred to as "Grandma Kim" and "Grandpa" by Mr. Tomlin's step-grandchildren.

21. Petitioner and Mr. Tomlin have family photographs frequently taken with one another and with family.

22. Petitioner and Mr. Tomlin refer to each other with terms of endearment.

23. Petitioner and Mr. Tomlin continued to cohabit with one another until Petitioner was informed by Respondent's counsel that he knew of Petitioner's relationship with Mr. Tomlin. Mr. Tomlin, abruptly moved out of Petitioner's residence on or about May 10, 2005, at the direction of Petitioner. Petitioner and Petitioner's son and daughter-in-law moved Mr. Tomlin to the home of a friend where he had lived prior to the time when he moved in with Petitioner and where Mr. Tomlin's step-daughter once lived.

24. Petitioner and Mr. Tomlin were aware that, if their relationship was discovered, that the spousal support payments from Respondent to Petitioner would cease.

25. Upon information and belief, Petitioner and Mr. Tomlin discussed with family and friends, that Respondent's spousal support payments would cease if it was discovered that Petitioner and Mr. Tomlin were residing together.

26. Through deposition testimony, Respondent alleges that Petitioner contacted a number of the deponents before deposition for the purpose of convincing them not to reveal the residence and relationship status between Petitioner's and Mr. Tomlin's.

27. Respondent alleges that for large portions of time, Mr. Tomlin was unemployed while residing with Petitioner, and that Mr. Tomlin relied upon Petitioner for financial support.

28. Respondent alleges that, to a large extent, Petitioner's ability to financially support Mr. Tomlin and his family members can be traced to Respondent's ongoing spousal support during the time frame in which Respondent was paying spousal support.

29. Respondent alleges that while Mr. Tomlin cohabited with Petitioner, the following events occurred:

- a. Petitioner and Mr. Tomlin engaged in frequent sexual relations over the four year duration of their relationship;
- b. Petitioner and Mr. Tomlin acted as husband and wife;
- c. Petitioner and Mr. Tomlin interacted extensively with each other's families, attended family parties, appeared in family portraits, etc.;
- d. Petitioner purchased a vehicle for Mr. Tomlin;
- e. Mr. Tomlin stored most of his personal belongings in Petitioner's residence;
- f. Petitioner and Mr. Tomlin would outwardly show affection for one another, and referred to each other with terms of endearment;
- g. Petitioner helped Mr. Tomlin's family members purchase vehicles by acting as a co-signer or principal borrower;
- h. Petitioner lent money to Mr. Tomlin's family members.

30. Respondent alleges that he propounded discovery (through interrogatories) regarding any individuals residing with Petitioner. (Interrogatory 2.) Petitioner's response on this issue was received by Respondent on or about October 13, 2001.

31. With regards to Interrogatory 2 and who was residing with Petitioner, Petitioner answered that the parties' son, Jacob Black, was the only individual residing in Petitioner's residence.

32. Notwithstanding whether Mr. Tomlin was actually residing with Petitioner at the time she answered the above-referenced interrogatories, Petitioner was and is under a continual duty to supplement her answers if circumstances change.

33. Respondent alleges that Petitioner withheld information regarding her relationship and living arrangement with Mr. Tomlin from Respondent and his counsel.

34. Pursuant to *Utah Code Ann.* §30-3-5(10) (as amended), Respondent alleges that Petitioner cohabited with Mr. Tomlin for a significant period while Respondent continually paid spousal support, therefore, Respondent's spousal support should cease and all previous spousal support payments made by Respondent dating back to the filing of the original modification petition should be reimbursed.

#### **REQUEST FOR NUNC PRO TUNC ORDER**

35. Respondent incorporates, by this reference, the allegations set forth in paragraphs 11 through 34 of this Petition.

36. As alleged above, Petitioner has received spousal support from Respondent for a significant length of time continuing beyond the length of the parties' marriage.

37. However, as alleged above, Petitioner has cohabited with Mr. Tomlin in a sexual/romantic/spousal relationship beginning sometime in approximately October 2000.

38. The cohabitation ended after Petitioner's and Mr. Tomlin's relationship was discovered by Respondent.

39. While Petitioner and Mr. Tomlin appear to no longer be cohabiting, they continue to develop the relationship and to, otherwise, act as husband and wife.

40. As alleged above, Petitioner concealed her relationship with Mr. Tomlin from Respondent, despite her continual duty to update Respondent's discovery request on the issue.

41. Pursuant to *Utah Code Ann.* §30-4a-1 (as amended), Respondent alleges that the facts as presented herein show good cause as to why this Court should enter an order terminating spousal support back to the date that Petitioner began cohabiting with Mr. Tomlin, in October 2000.

42. Respondent alleges that Petitioner should be ordered to reimburse Respondent for all spousal support amounts paid, dating back to the original date of her cohabitation with Mr. Tomlin, until such time that this matter is adjudicated.

### CONTEMPT

43. Respondent incorporates, by this reference, the allegations set forth in paragraphs 35 through 42 of this Petition.

44. On or about June 7, 2001, Respondent caused to be served the original modification petition upon Petitioner through Summons and constable service.

45. The constable stamp affixed/imprinted to the top of the returned Summons indicates that Mr. Ted Tomlin accepted service at Petitioner's residence on June 7, 2001.

46. As alleged above, Respondent propounded discovery through interrogatories to Petitioner on or about August 13, 2001.

47. Respondent specifically asked who was residing in her residence, and Petitioner did not indicate that Teddy Tomlin was residing with her, notwithstanding the fact that Mr. Tomlin accepted service on the Summons that initiated this action. (Interrogatory #2.)

48. As alleged above, Respondent asserts that Petitioner has been cohabiting with Mr. Ted Tomlin in a sexual context since about October, 2000.

49. On or about May 24, 2005, Respondent deposed Petitioner, whereat Petitioner testified that Mr. Tomlin had not resided/cohabited with her in a sexual context, but did admit, despite her answer to Interrogatory #2, that Mr. Tomlin had spent nights at her residence and had slept in her bed with her.

50. Respondent alleges that Petitioner has committed deceit or abuse of process outside of the presence of the court or has otherwise unlawfully interfered with the process or proceedings of this court.

51. Respondent alleges that Petitioner committed her contemptuous acts by not forthrightly answering interrogatories as well as committing perjury through deposition testimony.

52. Respondent alleges that Petitioner has committed other contemptuous acts in these proceedings, to-wit: Petitioner contacted other deposition witnesses before the May 24, 2005 deposition and asked them to lie or conceal the truth regarding her sexual cohabitation with Mr. Ted Tomlin.

53. Respondent alleges that he has suffered an actual loss or injury due to Petitioner's contemptuous acts.

54. Respondent alleges that if Petitioner had forthrightly answered the interrogatories propounded on August 13, 2001, that this matter would have been concluded in summary form and he would not have continued to pay \$750.00 per month in spousal support that was and is not due to Petitioner.


55. Respondent alleges that Petitioner should be found in contempt and that all available damages pursuant to *Utah Code Ann.* §§78-32-10 & 78-32-11 (as amended) should be awarded to Respondent, including, but not limited to attorney's fees and costs.

WHEREFORE, Respondent, Jon C. Black, respectfully prays that the Court grant the following relief:

1. That all spousal support paid by Respondent to Petitioner be terminated.
2. That Petitioner be ordered to reimburse Respondent for all spousal support amounts paid, dating back to the original date of her cohabitation with Mr. Tomlin, and continuing until such time that this matter is adjudicated.
3. That Petitioner be found in contempt, and that the Court award Respondent all available damages under the law for his loss or injuries suffered pursuant to Petitioner's contemptuous acts.
4. That Petitioner pay Respondent's attorney fees and costs necessary to prosecute this matter.
5. That the Court award Respondent any further relief it deems just and equitable under the circumstances.

DATED this 26<sup>th</sup> day of June, 2005.

BUCKLAND ORTON, LLC

  
\_\_\_\_\_  
Scott W. Hansen  
Nine Exchange Place, Suite 801  
Salt Lake City, UT 84111  
Attorney for Respondent



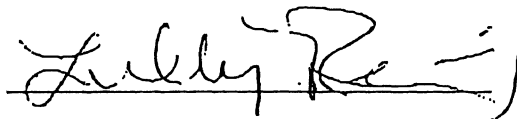
CERTIFICATE OF DELIVERY

I hereby certify, that on this 21<sup>st</sup> day of June, 2005, I delivered true and correct copy(s) of

the foregoing **Amended Petition to Modify Decree of Divorce** to the following party(s):

Mr. Randy S. Ludlow  
185 South State Street, Suite 208  
Salt Lake City, UT 84111

- ☒ First Class U.S. Mail, Postage Prepaid
- ☐ Facsimile Transmission
- ☐ Personal Delivery
- ☐ E-mail Transmission Attachment



# **ADDENDUM C**

NOV 30 2007

By DC SALT LAKE COUNTY  
Deputy Clerk

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

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KIM S. BLACK,	:	
Petitioner,	:	FINDINGS, CONCLUSIONS and
	:	ORDER
vs.	:	
JON C. BLACK,	:	Case No. 894900342
Respondent.	:	Judge L. A. Dever

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This matter came on for trial on November 26 and 27, 2007. Petitioner was present and represented by Randy S. Ludlow. The respondent was present and represented by Asa E. Kelley and Scott W. Hansen.

After considering the testimony, exhibits and arguments the Court finds the following:

FACTS

1. The parties were married June 7, 1980, and were divorced July 3, 1989.
2. The respondent, Jon Black, was 100% disabled at the time of the divorce.
3. The divorce was a default divorce.
4. The respondent was under a guardianship and conservator at the time of the

divorce.

5. The petitioner was the respondent's guardian and conservator at the time the default against him was entered.

6. The petitioner was awarded alimony in the divorce decree in the amount of \$750.00 a month.

7. The petitioner, Kim Black, by her admission, met Mr. Ted Tomlin in the fall of 2000.

8. Ted Tomlin testified he met Kim Black in September of 2000 and asked her son if she was single and would go to Wendover with him. The next day she went to Wendover with Ted.

9. Ted's mother, Shirlene Tomlin, testified that Ted told her that he and Kim had sex the first night they met. She also stated that Kim told her Ted lived in her house.

10. According to Jacob Black, Kim's son, Ted moved in with his mother soon after the Wendover trip and remained there almost continuously until the depositions in this case were noticed up. Jacob testified that Ted did go to Colorado to work on a temporary basis but came back to Kim's house after a couple of months.

11. Jacob stated that after Ted moved in he slept in Kim's bed and that Kim was there.

12. Jacob lived in the house until 2002. After that time he visited regularly and

there was no indications that the previous arrangements had changed.

13. Jacob testified that Ted him he was not getting enough oral sex and regular sex with Kim.

14. Jacob stated that Kim and Ted acted as girl friend and boy friend. They attended family functions as a couple. Ted bought Kim a promise or wedding ring. They used terms of endearment and squabbled like a married couple. Exhibit 3a is a family portrait of Ted, his step-daughters, grandchild, Kim and Jacob. Jacob stated his fiancé, Ashley, was not allowed in the picture because we were not married at the time.

15. Ashley Black is the niece of Ted Tomlin and the daughter-in-law of Kim Black. She testified that Ted lived with Kim. She stated that there were three bedrooms in Kim's house: Kim's, Jacob's and a basement bedroom that was used for storage. She stated that she saw Ted in Kim's bed. She also stated that she saw Ted and Kim in bed together and that often she would arrived at the house and Ted and Kim would be in their pajamas. Ashley stated that Kim told her that after her hysterectomy she didn't want to have sex anymore. The hysterectomy was after Ted moved in. Ashley testified that she saw the ring Ted bought for Kim, it was a wedding style ring, gold with diamonds.

16. Jacob and Ashley both testified that they were asked by Kim to move Ted's personal belongings out of the house on a rush basis, just before the depositions in this

case were to be taken.

17. Ashley stated that Kim stated that she called Ted at work and told him not to come home and left a note on his car saying he wasn't to come home. She also told Ashley, numerous times, to say that Ted did not live at her house and not to talk to the attorney about the matter.

18. Chrystal Nixon, Ted's step-daughter, stated that Kim and Ted appeared as a couple, Kim would attend family functions and her daughter calls her "Grandma" and she co-signed on a loan for her car.

19. Jackie Tomlin, Ted's ex-wife, testified that Kim and Ted appeared to be more than just "buddies" and that Ted would introduce Kim as his girl friend.

20. Ted Tomlin testified that Kim co-signed for his car, that he bought her a ring but it was only a joke. He also testified that Ex 3a was taken for his granddaughter's birthday and that Ashley was not included because she was not yet married to Jacob.

21. Judy Ferguson, Ted's sister, testified that Ted was living at Kim's house, she saw his clothes there, they attended family functions together, they acted as boy friend and girl friend, they lived together. Ted told her that Kim did not want to have sex after her operation. Judy told him she had the same problem and that Kim's desire would come back. She stated that he moved out of the house because he was caught living there. Judy also testified that she and her husband confronted Kim about living with

Ted and how it was wrong to take alimony since she was living with Ted.

22. Mark Fullerton, Ted's friend, first testified that Ted never stayed at Kim's, he then stated that he was a trucker and was gone 2 out of 3 days and did not know what Ted did when he was gone, then he testified that Ted slept at Kim's 50% of the time, at least until April of 2004.

23. Kim Black and Ted Tomlin testified that they did not have sexual relations. The Court finds that their testimony is not credible.

#### CONCLUSIONS OF LAW

1. Cohabitation involves a two pronged analysis: common residency and sexual contact evidencing conjugal association.

2. The evidence establishes that Kim Black and Ted Tomlin had a common residency. At least from the fall of 2000 until the scheduling of the depositions, they lived in the same house, shared a bedroom, shared food, participated in his family functions, had photos taken as a family unit, portrayed themselves as boy friend and girl friend and represented that fact to third parties. Ted Tomlin had access to the residence when Kim was not present. The summons served on Ted Tomlin noted that he was a resident of Kim's house. Kim supported Ted and co-signed on cars for him and his daughter. Ted bought Kim a wedding or promise ring.

3. There was testimony that Kim and Ted had sexual relations the evening they met and that Ted moved into the house soon after. There was testimony that Ted stated he was not having oral and regular sex as often as he would like and inquired from his sister how Kim's hysterectomy would effect her sexual desires.

4. These statements and inquiries establish that there was a sexual/conjugal relationship between the parties. There is no requirement that the sexual relationship be presently existing, only that it existed.

5. The respondent has met the burden to establish co-habitation and therefore alimony is terminated.

6. The respondent originally filed to terminate alimony in June of 2001, on the basis of a new statute. The respondent amended his petition to include co-habitation in June of 2005.

7. The general rule is that the date of the modification of support or alimony is tied to the date that the petition for modification is filed. The petition to modify was filed in June of 2001. The petitioner was on notice that the request for termination was before the Court. The fact that the grounds for termination was amended does not effect that date. The effective date for termination is June of 2001 and not June of 2005, the date the petition was amended

8. Judgment is entered for the respondent for all alimony paid since June of



2001, less the sums on deposit with the Court.

9. The sums on deposit with the Court are ordered released to the respondent,  
Jon Black.

DATED this 30<sup>th</sup> day of November, 2007, and read in open Court.

BY THE COURT

  
\_\_\_\_\_  
L. A. Dever  
District Judge

