

2007

Kim Black v. Jon Cornell Black : Brief of Appellant

Utah Court of Appeals

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Randy S. Ludlow; Attorney for Petitioner.

Asa E. Kelley; Tesch Law Offices; Scott W. Hansen; Lewis Hansen Waldo and Pleshe; Attorneys for Respndent.

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IN THE UTAH COURT OF APPEALS

KIM S. BLACK,

Appellant/Petitioner,

vs.

JON CORNELL BLACK,

Appellee/Respondent.

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Appellate Case No. 20071014

BRIEF OF APPELLANT

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FILED
UTAH APPELLATE COURTS

MAR 26 2008

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Appellant/Petitioner,

vs.

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STATUTES

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UTAH CODE ANN. § 30-3-5(3) (West 2004)	1,6,10
UTAH CODE ANN. § 78-45-9.3(4) (West 2004)	1,2,6-11
UTAH CODE ANN. § 78B-12-112 (2008)	2,6,11

RULES

There are no rules involved in this matter.

JURISDICTION

Court of Appeals has jurisdiction to hear this appeal pursuant to Section 78A-4-103(2)(h), UTAH CODE ANN. (2008).

STATEMENT OF THE ISSUE

1. Is it proper for a court to retroactively modify an order for spousal support under Utah Code section 78-45-9.3(4) to the date of notice of the petition to modify if that notice did not provide notice of the section 30-3-5(10) cohabitation claim on which the court based its determination?

1. 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).

Appellant preserved the issue for appeal by objecting to the Motion to Amend Petition (R.346-350) as well as moving to strike the Amended Petition to Modify Decree of Divorce, which added a cohabitation claim to the Petition to Modify Decree of Divorce. (R. 356-357.) The Motion to Strike was denied by the trial court. (R. 533.)

CONSTITUTIONAL PROVISIONS

There are no constitutional provisions at issue in this case.

STATUTORY PROVISIONS

UTAH CODE ANN. § 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.

UTAH CODE ANN. § 78-45-9.3(4) (West 2004) (now renumbered and amended as 78B-12-112 (2008)) provides in relevant part:

(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 Provision.

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, the Respondent sought termination of the alimony award. Four years later, Respondent, over Petitioner's objection, was allowed to amend his Petition for Modification to include a claim of cohabitation for termination of the alimony award. The Trial Court was only presented evidence of the cohabitation issue at trial and ruled for Respondent and terminated the alimony award but in doing this, terminated the alimony back to the date of the service of the original Petition for Modification. 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). On June 7, 2001, Jon Black served on Kim Black a Petition for Modification for the termination of the 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 parties' marriage. (R. 76-80). Four years later, in June 2005, Jon Black filed an Amended Petition to Modify Decree of Divorce, claiming cohabitation by Kim Black (R. 328-338), which Amended Petition was opposed (R. 346-350) and requested to be stricken (R. 356-357), which was denied by the trial court (R. 358-360 & 533). After trial in this matter, the court determined that Kim Black had in fact cohabitated and terminated the alimony. (R. 748) The court held that the alimony order should be modified retroactively, and used the date of the original

service of the Petition for Modification, June 2001, rather than either the date of the Amended Petition, June 2005 (when the cohabitation claim was added), (R. 748), or the date of establishing the cohabitation, which would have been the date of the order terminating alimony, November 30, 2007 (R. 749).

The original petition had been certified as ready for trial on April 1, 2003 (R. 232-233), but after the pretrial conference, respondent did nothing until February 15, 2005 to move the case along (R. 250-251). A bench trial was scheduled (R. 257-258) which was thereafter continued by respondent. It was after this scheduled trial that Jon Black filed his amended petition. Respondent certified the matter as ready for trial September 22, 2006 (R. 542-544) but thereafter again continued the case. Respondent again certified the case ready for trial August 3, 2007 (R. 703-705) with the case finally being tried November 26-27, 2007.

SUMMARY OF ARGUMENTS

Based on the language of Utah Code section 30-3-5(10), it would be inappropriate to retroactively modify an alimony order based on cohabitation. That section provides, “[a]ny order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.” *Id.* To retroactively modify an order for spousal support after it has been terminated by cohabitation, as occurred in this case, is not reasonable. Furthermore, the legislature surely could

not have intended the harsh results that would occur should alimony be altogether terminated retroactively.

Even if it is consistent with Utah Code section 30-3-5(10) to retroactively modify alimony orders based on cohabitation, such relation back should not extend further than when notice of the cohabitation claim was received by the alimony recipient. Attempting to amend a petition to modify a divorce decree by adding a cohabitation claim, as Respondent did here, is an end run around the plain language of 30-3-5(10), which provides for termination of the alimony upon establishment of cohabitation, and not modification of the alimony order.

ARGUMENT

I. THE PLAIN LANGUAGE OF UTAH CODE SECTION 30-3-5(10) DOES NOT ALLOW FOR RETROACTIVE MODIFICATION OF ALIMONY AWARDS BASED ON COHABITATION.

A. An Alimony Order Terminates upon the Establishment of Cohabitation.

Utah Code section 30-3-5(10) provides, “[a]ny order of the court that a party pay alimony to a former spouse terminates *upon establishment* by the party paying alimony that the former spouse is cohabitating with another person.” UTAH CODE ANN. § 30-3-5(10) (West 2004) (emphasis added). Therefore, until the party paying alimony establishes that the former spouse is cohabitating, the order to pay alimony continues in force. Termination of alimony is triggered not by cohabitation, but by the establishment of cohabitation.

Section 30-3-5(10) provides that the alimony order “terminates” upon establishment of cohabitation. The court below held that John Black “met the burden to establish [Kim Black’s] co-habitation and therefore alimony is terminated” (R. 748). After the judge ordered the alimony to be terminated, he then ordered the alimony to be retroactively modified to June of 2001, when the petition to modify was filed (R. 748). Utah Code section 30-3-5(10) clearly provides that the alimony order “*terminates* upon establishment” of cohabitation, and not that a court has discretion to *modify* an alimony order upon establishment of cohabitation (emphasis added). Although courts are given broad discretion in awarding alimony and in modifying such orders, *Diener v. Diener*, 2004 UT App 314, ¶ 4, 98 P.3d 1178, *see also* UTAH CODE ANN. § 30-3-5(3), the court should not have discretion to modify orders where the statute clearly provides for termination upon establishment of cohabitation. The alimony should have been terminated November 30, 2007 which is the date of establishment of cohabitation.

B. Utah Code section 78-45-9.3(4), which authorizes retroactive modification of child support and alimony orders, does not apply to alimony orders that have been terminated by establishing cohabitation under section 30-3-5(10).

At the time of the ruling of the lower court, Utah Code section 78-45-9.3(4) (West 2004) (now renumbered and amended at 78B-12-112 (2008)) was in effect, authorizing retroactive modification of child support and alimony orders “[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” It is unlikely that the legislature intended this section to apply to alimony orders that had already been terminated pursuant to section 30-3-5(10), as terminated orders cannot be modified.

Furthermore, it is unlikely that the legislature intended the harsh consequences that would prevail if 78-45-9.3(4) applied to cohabitants whose alimony had been terminated under 30-3-5(10). According to Utah Code section 78-45-9.3(4), “[o]nce the tribunal determines that a modification is appropriate, the tribunal shall order a judgment to be entered for any difference in the original order and the modified amount for the period from the service of the pleading until the final order of modification is entered.” Because the “modified amount” will always be zero if cohabitation is established, retroactive modification of alimony orders would create a significant financial hardship on alimony recipients, as recipients would have to reimburse the obligor for all payments since the date of the service of the modification pleading. The financial hardship is especially salient in cases where, as here, considerable time has passed since the date of the service of the modification pleading.¹ It is more likely that the legislature intended that alimony payments simply be terminated upon establishment of cohabitation, as section 30-3-5(10) provides, than that alimony recipients be liable for a large lump-sum payment of claims of when cohabitation allegedly

¹ Almost six and one-half years have passed between the date that notice of the modification pleading was given and the court’s retroactive modification order. (R. 748).

commenced. The respondent is the party who continually continued the matter and it should not be to petitioner's detriment the financial hardship that would occur to her under the court's ruling and the respondent's lack of moving the case forward.

Utah Code section 78-45-9.3(4) should not be interpreted broadly, to include the termination of alimony orders based on cohabitation under section 30-3-5(10). In *Wall v. Wall*, the court stated that it is "clear that as a general rule . . . support orders are 'not subject to retroactive modification.'" 2007 UT App 61, ¶ 20, 157 P.3d 341, (quoting Utah Code Ann. § 78-45-9.3(3)(c)).

II. EVEN IF RETROACTIVE MODIFICATION OF ALIMONY AWARDS TERMINATED PURSUANT TO SECTION 30-3-5(10) IS PROPER, THE MODIFICATION SHOULD NOT RELATE BACK TO A DATE PREVIOUS TO THE RECEIPT OF NOTICE OF THE COHABITATION CLAIM BY THE ALLEGED COHABITANT.

In June of 2001, Jon Black filed a Petition to Modify Decree of Divorce (R. 76-80). That petition was based on the allegation that a "substantial and material change in circumstances" had occurred (R. 77). In June 2005, Jon Black filed an Amended Petition of Modification, claiming cohabitation by Kim Black (R. 328-338), which Amended Petition was opposed and requested to be stricken, which was denied by the trial court (R. 358-360 & 533). After trial in this matter, the court determined that Kim Black had in fact cohabitated and terminated the alimony (R. 748). The court held that the alimony should be modified retroactively, and used the date of the original service of the Petition for Modification, June 2001, rather than either the date of the Amended Petition, June

2005 (when the cohabitation claim was added), (R. 748), or the date of establishing the cohabitation, which would have been the date of the order terminating alimony, November 30, 2007 (R. 749).

In *Wilde v. Wilde*, 2001 UT App 318, ¶ 19-20, 35 P.3d 341, the court held that Utah Code section 78-45-9.3(4) gave the court discretion to modify a spousal support payment under a child support order retroactively. The court in *Wilde* also noted that courts have broad discretion to retroactively modify alimony awards:

“[t]he only substantive limitation on that discretion was that the modification could run only from the date of notice of the petition.” *Id.* (citing *Ball v. Peterson*, 912 P.2d 1006, 1012 (Utah Ct. App. 1996); *Crockett v. Crockett*, 836 P.2d 818, 820 (Utah Ct. App. 1992)).

A. It was Inappropriate for Respondent to add a Cohabitation Claim to the Existing Petition to Modify Decree of Divorce

A petition to modify spousal support under Utah Code section 78-45-9.3(4) and a petition to terminate alimony under section 30-3-5(10) are distinct and separate statutes with different requires and purposes, and it is inappropriate to add a petition to terminate alimony to an existing petition to modify spousal support. First, to show that a modification of spousal support is in order, the claimant must prove entirely different facts from those required to prove cohabitation. To prevail on a petition to modify an order of spousal support, the claimant must meet the threshold requirement of proving that there has been a “substantial change in circumstances” which was not contemplated by the divorce decree. *Wall*, 2007

UT App 61, ¶ 11 To prevail on a petition to terminate alimony based on Utah Code section 30-3-5(10), the claimant must prove the elements of cohabitation (1) common residency and (2) sexual contact evidencing a conjugal association ” *Garcia v Garcia*, 2002 UT App 381, ¶ 5, 60 P 3d 1174 (quoting *Pendleton v Pendleton*, 918 P 2d 159, 160 n 1) Second, and more importantly, the remedies are distinct under the two claims If the court determines there has been a substantial change in circumstances, the court may *modify* the divorce decree under Utah Code section 30-3-5(3) If the court determines that the alimony recipient has been cohabitating with another, alimony is *terminated* 30-3-5(10)

In adding the June 2005 claim (cohabitation terminates alimony) to the June 2001 Petition to Modify Divorce Decree, Respondent attempts to make an end run around the plain language of section 30-3-5(10) which requires termination, and not modification Significantly, although there is a statute, (§ 78-45-9 3(4)), and case law that supports retroactive *modification* of alimony awards, *Wilde*, 2001 UT App 318, ¶ 19-20, Respondent, in his motion to the lower court, had not cited any prior law that provides for the retroactive termination or modification of alimony awards based on cohabitation Respondent’s attempt to piggyback his claim to terminate based on cohabitation on top of a petition to modify a spousal support order is clearly for the purpose of retroactively terminating alimony, and the plain language of section 30-3-5(10) does not permit that result

B. Retroactively Modifying the Alimony Order Back to the Date of the 2001 Petition to Modify the Divorce Decree Undercuts the Rationale for Requiring that a Modification Can Only Relate Back to the Date that Service of the Pleading was Given to the Obligee.

Former Utah Code section 78-45-9.3(4) (West 2004) (now renumbered and amended at 78B-12-112 (2008)) provided, “[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” The rationale for the limit on retroactive modification to the date the obligee receives notice is apparently to let the obligee know that the order may be modified, and that some portion of the money may have to be returned.

Jon Black’s 2001 Petition to Modify Decree of Divorce gave notice to Kim Black that alimony payments might be *modified*, based on the claims in that Petition. (R. 76-80.) In June of 2005, when the cohabitation claim was added, Kim Black was on notice that alimony payments could be *terminated* “upon establishment” of cohabitation. § 30-5-10(3). The 2001 notice of the petition to modify the divorce decree did not provide adequate notice of the 2005 claim that alimony should be terminated based on cohabitation. Therefore, if retroactive modification based on cohabitation is allowed, it should relate back to the time that notice of the cohabitation claim was given, and should not relate back to the 2001 petition. It is important to note that the court’s decision to retroactively modify alimony was based exclusively on the 2005 cohabitation claim, and the

court did not cite any of the allegations in the 2001 petition as bases for its decision (R. 748).

CONCLUSION

The plain language of Utah Code Section 30-3-5(10) provides for the termination of alimony upon the establishment of cohabitation, and does not allow for modification, retroactive or otherwise. Petitioner asks this court to hold that the termination of alimony should commence upon establishment of cohabitation, November 30, 2007, which was the date of the order terminating alimony, and should not be applied retroactively (R. 748-749). If this Court holds that retroactive modification based on cohabitation is consistent with section 30-3-5(10), retroactive modification should relate back to June 2005, when the cohabitation claim was made, and should not relate back to June 2001, when the Petition to Modify the Decree of Divorce was made.

Dated this 26th day of March, 2008.

157
RANDY S. LUDLOW

CERTIFICATE OF MAILING

I hereby certify that on this 26th day of March, 2008, I caused to be mailed, by deposit in the United States Mail, two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following:

Attorneys for Appellee/Respondent:

One (1) copy to:

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One (1) cop to:

Asa E. Kelley, # 7905
The Law Office of Asa E. Kelley, LLC
859 East 900 South, Ste 201
Salt Lake City, UT 84105

/s/

SHARLA J. WEAVER
Legal Assistant

ADDENDUM

Exhibit A	Verified Petition to Modify Decree of Divorce
Exhibit B	Amended Petition to Modify Decree of Divorce
Exhibit C	Response and Objection to Motion to Amend Petition
Exhibit D	Motion to Strike
Exhibit E	Ruling on Objection
Exhibit F	Findings, Conclusions and Order

EXHIBIT A

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FILED DISTRICT COURT
Third Judicial District

JUN 04 2001

SALT LAKE COUNTY

By KS

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.

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**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.

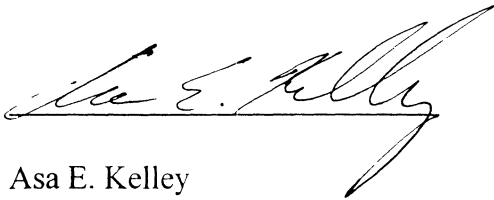
11. All other terms and provisions set for in the Decree of Divorce heretofore entered shall remain in full force and effect to the extent not inconsistent with the terms and provisions set forth herein.

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 4th 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 she own personal knowledge or belief where indicated, and that he is signing the document voluntarily for its stated purpose.

DATED this 7th 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

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

KIM S. BLACK,

Petitioner,

V.

JON C. BLACK,

Respondent.

[illegible]

AMENDED PETITION TO MODIFY DECREE OF DIVORCE

Case No. 894900342

Judge: L. A. Dever

Commissioner: T. Patrick Casey

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 26th 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 21st 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




EXHIBIT C

05 JUL -8 PM 4:55

FILED

Randy S. Ludlow #2011
Attorney for Petitioner
185 South State Street, Suite 208
Salt Lake City, Utah 84111
Telephone: (801) 531-1300
Fax: (801) 328-0173

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

KIM S. BLACK,

Petitioner,

vs.

JON CORNELL.BLACK,

Respondent.

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**RESPONSE AND OBJECTION
TO MOTION TO AMEND
PETITION**

Case No. 894900342 DA
Judge L A Dever
Comm. T. Patrick Casey

COMES NOW the petitioner, Kim S. Black, by and through her attorney of record, Randy S. Ludlow, who hereby objects to the Motion to Amend Petition as made by the respondent.

1. The respondent has requested relief of Court in order to file an amended petition alleging a new cause of action. In reviewing this matter it is inappropriate to request that the new cause of action be joined with the pending cause of action pursuant to Rule 15 of the Utah Rules of Civil Procedure. In this matter, the presently pending Petition for Modification is based upon a change in the statute which did not exist when the original Decree of Divorce was entered

in 1989. The original Decree of Divorce did not have a time limit nor any additional conditions in regards to the requirements to pay alimony or when alimony would terminate. The statute dealing with time limitation for the payment of alimony was enacted after the Decree of Divorce was entered. The respondent, in his pending petition now seeks that the alimony terminate based upon the statute that now limits alimony to a time period equal to the length of the marriage. It has previously been determined by the Commissioner that a change in the statute does not allow the Decree of Divorce to be modified pursuant to the request of the respondent which is consistent with Ball v. Peterson, 912 P.2d 1006 (Ut. Ct. App. 1996). The trial, which is presently scheduled for July 18, 2005, is based upon the relief requested pursuant to that statutory change.

2. The respondent now requests to terminate the alimony based upon an allegation that there is cohabitation by the petitioner. The petitioner denies the claim that there is cohabitation and her witnesses that she would call at time of trial would support her position. This claim is a new claim and it is not related to the prior claim. The ultimate end, termination of alimony, is consistent with each claim that is being made by respondent, but the request of the relief is a new cause of action and should not be joined in the pending cause of action. Pursuant to Tretheway v. Furstenau, 40 P.3d 649 (Ut. Ct. App. 2003), the Court looked at three (3) factors and to determine whether or not the Court would allow a Complaint or other pleading to be modified and joined in the presently pending cause of action. Those factors are: 1) timeliness of the motion, 2) Justification for the delay, and 3) Prejudice to the other party. In this matter there has not been timeliness of the motion. This action has been pending for in excess of four (4) years and is set to go to trial. There can be no claim that the motion is timely and it should be

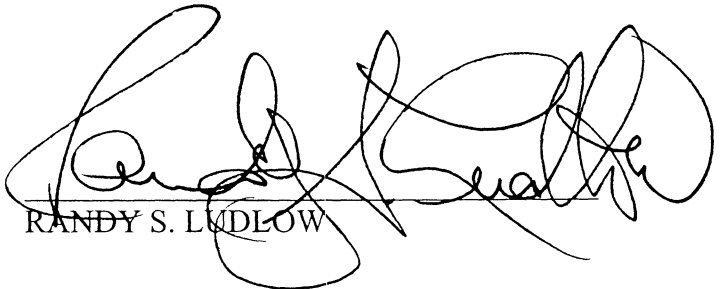
denied on that factor alone. The claim that there is justification for the delay as made by the respondent is that the alleged cohabitation has been hidden from the respondent. The petitioner denies that she has been cohabitating now or has in the past so there is not a proper claim that there is justification for delay. If the respondent believes that there is cohabitation then he had the right to bring it at any time rather than waiting until just before the trial on the presently pending matter. Because of the presently pending trial date it is inappropriate to allow the amendment to occur because the same would be prejudicial to the petitioner. Petitioner cannot defend the new allegation at this time without the Court allowing a delay and thereafter appropriate discovery.

3 Pursuant to Wells v. Wells, 272 P.2d 167 (Utah 1954), the Utah Supreme Court stated that the parties are usually granted leave to amend if the items are under the same general set of facts. In this particular matter the pending petition is based upon a change in the statute. The pending request to modify deals with allegations of cohabitation. These are different fact situations.

4 In this matter, if the Court allows the petition to be amended, there would have to be the necessary disclosures, pursuant to Rule 26 of the Utah Rules of Civil Procedure, Attorney Planning Meeting, and discovery completed by the petitioner, and other issues. Petitioner believes that it is more appropriate to require that the respondent file a new petition and if he desires at that time to thereafter make a motion to join the two (2) petitions for judicial economy for only one (1) trial rather than two (2) separate trials dealing with the attempt to terminate alimony. Given the present status of the case and the status of the law it is appropriate for the Court to deny the pending motion.

5. The respondent has further requested authority from the Court to enter the others *nunc pro tunc*. Such a request is inappropriate and is not authorized by statute. The only statute authorizing *nunc pro tunc*. orders is pursuant to U.C.A. §30-4a-1, and it can only relate to the marriage, the divorce, legal separation, or annulment of marriage. It does not give the Court authority to enter orders relating to modifications of orders. It is further prohibited pursuant to Case Law. See Crocket v. Crocket, 836 P.2d 818 (Ut. Ct. App. 1992). Further, pursuant to U.C.A. §78-45-9.3 (4) (which statute used to be U.C.A. §30-3-10.6), a child or spousal support payment can only be modified effective from the date of service of the pleading. This statute is codification of the case law that deals with support issues. The requested relief to have respondents new cause of action be entered *nunc pro tunc* is prohibited and may not be sought in this action.

DATED this 7 day of July, 2005.



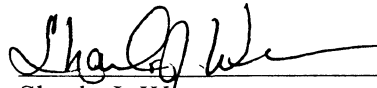
RANDY S. LUDLOW

CERTIFICATE OF SERVICE

I certify that on this 8th day of July, 2005, I caused to be mailed, by deposit in the United States Mail, postage pre-paid, a true and correct copy of the foregoing **RESPONSE AND OBJECTION TO MOTION TO AMEND PETITION** to the following:

Scott W. Hansen
BUCKLAND, ORTON, LLC
Nine Exchange Place, Suite 801
Salt Lake City, Utah 84111

Asa E. Kelly
KELLY & KELLY, LLC
859 East 900 South, Suite 201
Salt Lake City, Utah 84105



Sharla J. Weaver
Legal Assistant



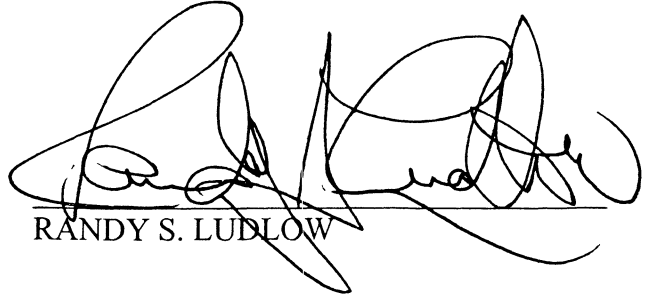
IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

Case No. 894900342 DA
Judge L A Dever
Comm. T. Patrick Casey

BLACK, K - Motion to Strike

any Court Order and as such it is inappropriately submitted to this Court.

DATED this 9 day of August, 2005.




RANDY S. LUDLOW

CERTIFICATE OF SERVICE

I certify that on this 9th day of August, 2005, I caused to be mailed, by deposit in the United States Mail, postage pre-paid, a true and correct copy of the foregoing **MOTION TO STRIKE** to the following:

Scott W. Hansen
BUCKLAND, ORTON, LLC
Nine Exchange Place, Suite 801
Salt Lake City, Utah 84111

Asa E. Kelly
KELLY & KELLY, LLC
859 East 900 South, Suite 201
Salt Lake City, Utah 84105



Sharla J. Weaver
Legal Assistant

EXHIBIT E

AUG 09 2005
SALT LAKE COUNTY
By _____ Deputy Clerk

Asa E. Kelley (7905)
KELLEY & KELLEY, LLC
 859 East 900 South, Ste 201
 Salt Lake City, UT 84105
 Telephone: (801) 746-3315
 Facsimile: (801) 359-3956

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

Commissioner: T. Patrick Casey


This matter came on for a regularly scheduled telephone conference on July 11, 2005, at or about the hour of 10:30 a.m., the Honorable L. A. Dever presiding. Present during the telephone conference, were Randy S. Ludlow, attorney for Petitioner; and Asa E. Kelley, attorney for Respondent. The Court heard argument by Mr. Kelley regarding Respondent's Motion to Amend Petition to Modify Decree of Divorce, and then heard argument by Mr. Ludlow regarding Petitioner's Response and Objection to Motion to Amend Petition.

The Court, after hearing argument by counsel, reviewing all motions and responses/objections properly before the Court, and being fully advised in the premises, hereby enters the following **ORDER**:


1. Respondent's Motion to Amend Petition to Modify Decree of Divorce is hereby granted.
2. Petitioner will have ninety (90) days from today's date (July 11, 2005) to conduct discovery regarding the issues raised in Respondent's Amended Petition.
3. Until trial in this matter is concluded or further Court order, Respondent shall deposit the monthly spousal support payments directly into a trust account established with the Court.
4. The Court strikes the bench trial set for July 18, 2005, without date.

DATED this 7 day of August, 2005.

BY THE COURT:



The Honorable Dever
Third District Court Judge



CERTIFICATE OF DELIVERY

I hereby certify, that on this 8 day of August, 2005, I delivered
true and correct copy(s) of the foregoing **Order Re: Teleconference Hearing** to the following party(s):

Randy Ludlow
185 S. State St., Ste 208
Salt Lake City, UT 84111

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

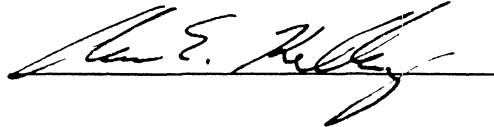


EXHIBIT F

NOV 30 2007

By SALT LAKE COUNTY
Deputy Clerk

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

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

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

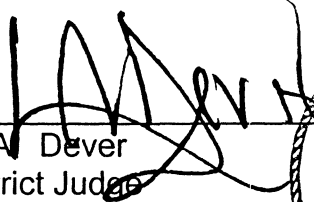
8. Judgment is entered for the respondent for all alimony paid since June of

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 30th day of November, 2007, and read in open Court.

BY THE COURT


L. A. Dever
District Judge

