

1997

J. Lynn Wilde v. Sherrie D. Wilde : Reply Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 970318-CA

IN THE UTAH COURT OF APPEALS

J. LYNN WILDE,

Plaintiff/Respondent,

vs.

SHERRIE D. WILDE,

Defendant/Appellant.

REPLY BRIEF
OF APPELLANT
SHERRIE D. WILDE

Case No. 970318-CA

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FILED

Utah Court of Appeals

AUG 10 1998

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

J. LYNN WILDE,

Plaintiff/Respondent,

vs.

SHERRIE D. WILDE,

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**REPLY BRIEF
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RULES

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UCA § 30-3-5(7)(g)(ii) (1995);

CASE AUTHORITIES

Cole v. Cole, 239 P.2d 615, (Utah 1952);

OTHER

Websters Seventh New Collegiate Dictionary

INTRODUCTION

This reply brief seeks to fortify Sherrie's position on the following eight issues raised by the parties' briefs:

1. What version of Section 30-3-5 applies to Sherrie's alimony claim?
2. Under that statute, must Sherrie show "extenuating circumstances" in order to recover "new" alimony?
3. Assuming this Court rejects Sherrie's answer to Question No. 1:
 - A. Do the circumstances in this case constitute "extenuating circumstances" within the meaning of the new statute?
 - B. Did the trial court commit reversible error in precluding Sherrie from presenting additional evidence of "extenuating circumstances" sufficient to justify imposition of continuing alimony obligations on Lynn?
4. Had Lynn's obligation to pay alimony under a prior order expired before Sherrie sought additional alimony? i.e. Is Sherrie's a "new" alimony claim?
5. Under the law applicable to Sherrie's claim, may alimony be awarded to a deserving former spouse even when it is sought after the obligation to pay alimony under a prior order has ceased?
6. Should Lynn be ordered to pay alimony to Sherrie?
7. Should Lynn be ordered to pay Sherrie's reasonable costs and attorney's fees incurred in establishing her entitlement to continuing alimony?
8. On remand, should Sherrie be allowed to present evidence supporting her claim to a share of Lynn's wealth based on her contention that it was generated through a fraudulent, secretive wealth-building plan commenced during the marriage?

I.

**WHAT VERSION OF SECTION 30-3-5 APPLIES TO
SHERRIE'S ALIMONY CLAIM?**

The version in effect on August 23, 1994.

Sherrie's claim for continuing alimony based on her having contracted debilitating arthritis is contained in the petition to modify she filed on August 23, 1994. Although she later sought and was granted leave to amend that petition, the matters added by amendment did not concern her alimony claim. (R. 465-471) Even if the amendments did concern alimony, the alimony claim would still be governed by the law in effect at the time the original petition to modify was filed on August 23, 1994. The relation back doctrine of URCP Rule 15(c) is explicit. Whenever a claim asserted in an amended pleading arose out of the matters set forth in the original pleading, the amendment relates back to the date of the original pleading. Rule 15(c), URCP.

Therefore, the version of UCA § 30-3-5 that applies to Sherrie's alimony claim is the version in effect as of August 23, 1994.

II.

UNDER THAT APPLICABLE STATUTE, MUST SHERRIE SHOW “EXTENUATING CIRCUMSTANCES” IN ORDER TO RECOVER “NEW” ALIMONY?

No. The version of Section 30-3-5 in effect when Sherrie filed her petition to modify in August of 1994 contains no requirement for a showing of “extenuating circumstances”. On the contrary, it provides in clear, unmistakable terms:

(3) The court has continuing jurisdiction to make subsequent changes **or new orders** for the support and maintenance of the parties . . . as is reasonable and necessary.

UCA § 30-3-5(3) (1994) (See History: 1993, Ch. 261, Section 1, 1994, Ch. 284, Sect. 1).

Under this statute, the divorce court unquestionably has continuing jurisdiction to make new orders for alimony when appropriate. There was and still is no case law to the contrary.

III.

ASSUMING THIS COURT REJECTS SHERRIE'S ANSWER TO QUESTION NO. 1 (AND FINDS THAT THE NEW VERSION OF SECTION 30-3-5 APPLIES):

A. Do the Circumstances in This Case Constitute “Extenuating Circumstances” Within the Meaning of the New Statute?

Yes. On May 1, 1995, a new version of Section 30-3-5 went into effect.

Subparagraph 7 (g) of that statute contains the following two subdivisions:

- (g) (i) The Court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.
- (ii) The Court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

UCA §30-3-5(7)(g)(i, ii) (1995) (see history of laws 1995, Ch. 330, Sect. 1; 1997, Ch. 232, Sect. 4).

The trial court found the circumstances of this case to meet the requirements of subsection (i). It expressly found that Sherrie's "rheumatoid arthritis condition constitutes a material and substantial change in circumstances that were [sic] not foreseeable at the time of the entry of the decree of divorce". (R. 658, para. 16.) It also expressly found that Sherrie has need and Lynn has an ability to pay alimony. (R. 658, Para. 18). The trial court nevertheless concluded as a matter of law that this case

presented no “extenuating circumstances” within the meaning of the statute. That conclusion, Sherrie submits, is erroneous.

Our legislature has given no clue as to the meaning it intended for “extenuating circumstances”. In the absence of legislative guidance, the words should be given their plain meaning. Webster’s Seventh New Collegiate Dictionary includes these definitions for the word “extenuate”: to make thin or emaciated; to lessen the strength or effect of.” Extenuating circumstances, therefore, would include circumstances of hardship which have rendered a party’s resources “thin” or have weakened or emaciated a party.

The sudden onset of rheumatoid arthritis in the spring of 1994 seriously compromised Sherrie’s health. Her condition deteriorated dramatically to the point that in March of 1996, she was no longer able to work. (R. 671; 694; Tr. Trans. p. 166, pp. 39-40). Her condition also rendered her unable to qualify for medical insurance. (R. 696; Tr. Trans. p. 45; R. 501). At the time of trial, her monthly expenses far exceeded the \$800.00 per month temporary alimony Judge Rigrup had earlier ordered Lynn to pay. (See R. 424-425; 441-442; Defendant’s Trial Exhibits 2 and 3). She was totally dependent upon welfare assistance from the LDS Church to maintain herself. (R. 647). During the 14 month period immediately preceding the trial, Sherrie received \$9,906.98 in cash assistance from the LDS Church, in addition to food from the Bishop’s Storehouse of the Church’s Welfare System. (See Defendant’s Trial Exhibit 1; R. 690-691; Tr. Trans. pp. 23-25). Both oral and documentary evidence was presented

at trial that Sherrie's monthly expenses totaled \$3,270.35. (See Defendant's Trial Exhibits 2 and 3; Tr. Trans. pp. 46-49).

Taken as a whole, Sherrie's circumstances could hardly be any more extenuated than they are at present. Lynn's circumstances contribute to the inequity of denying Sherrie alimony. When he divorced Sherrie, he left her destitute. He then immediately began to amass wealth and soon enjoyed prosperity even greater than that he and Sherrie enjoyed during the first two decades of their marriage. Though it refused to receive evidence of the extent of Lynn's wealth, the trial court did find that he currently earns "at least \$120,000 per year". (R. 644; 658, para. 13).

On pages 9 and 10 of his brief, Lynn claims that "pursuant to all prior Court orders of payment, [he] was current in all his obligations to pay alimony to Sherrie" and has done nothing to contribute to Sherrie's financial difficulties. This is simply not true. For example, Lynn contumaciously refused to pay the temporary alimony he was ordered to pay in the May 1, 1995 Minute Entry of Commissioner Arnett. His refusal to pay resulted in serious financial difficulties for Sherrie. At length, she was required to employ counsel to bring an Order to Show Cause against Lynn. That Order to Show Cause resulted in an express finding that Lynn had not paid alimony as ordered by the Court. (See October 5, 1995 Minute Entry of Commissioner Arnett; See also Sherrie's July 3, 1995 Affidavit in Support of Order to Show Cause).

If the circumstances in this case are not “extenuating” within the legislature’s intent, it is difficult to imagine a set of circumstances which could qualify as “extenuating”.

B. Did The Trial Court Commit Reversible Error in Precluding Sherrie From Presenting Additional Evidence of “Extenuating Circumstances” Sufficient to Justify Imposition of Continuing Alimony Obligations on Lynn?

Yes. Immediately prior to the commencement of trial, the district court granted Lynn’s motion in limine to prevent Sherrie from offering any evidence at trial supporting her contention that Lynn had orchestrated his divorce and personal bankruptcy in a manner to deny Sherrie a share in the substantial wealth he thereafter acquired as a result of his secretive wealth-building activities during the marriage. (R. 688; Tr. Trans. p. 16). During the trial, the district court also refused to receive or consider evidence concerning the extent of Lynn’s prosperity and accumulated wealth. The district court ruled that only the amount of Lynn’s current income could be admitted. It repeatedly found irrelevant, and refused to receive any evidence pertaining to, Lynn’s wealth and accumulation of assets. (See, e.g. Trial Trans. pp. 110-116; 117, 118, 123; 146-148).

The evidence Sherrie was precluded from offering at trial concerning the extent of Lynn’s wealth and concerning his pre and post divorce wealth-building strategy may well have qualified as “extenuating circumstances” under even the trial court’s interpretation of the phrase.

If her alimony claim is to be governed by the new statute (which went into effect several months after she first asserted it), she should be given full opportunity to present all evidence available to her which could support a finding of “extenuating circumstances”. She was not given that opportunity.

IV.

HAD LYNN’S OBLIGATION TO PAY ALIMONY UNDER A PRIOR ORDER EXPIRED BEFORE SHERRIE SOUGHT ADDITIONAL ALIMONY? I.E. IS SHERRIE’S A “NEW” ALIMONY CLAIM?

No. The June 24, 1992 Order Modifying Decree of Divorce expressly ordered Lynn to continue paying alimony through October of 1994. (R. 237-241; See especially paragraph 5 at R. 239). Sherrie’s petition seeking permanent alimony was filed before October of 1994. It was filed on August 23, 1994. At that time, Lynn was still under court order to continue paying alimony through the fall of 1994.

The district court’s finding that Sherrie was a “stranger” to Lynn at the time she filed her request for more alimony was erroneous. Careful scrutiny of the record (especially the June 24, 1992 order) reveals that Sherrie’s claim was not a claim for “new” alimony.

V.

**UNDER THE LAW APPLICABLE TO SHERRIE'S CLAIM,
MAY ALIMONY BE AWARDED TO A DESERVING
FORMER SPOUSE EVEN WHEN IT IS SOUGHT AFTER
THE OBLIGATION TO PAY ALIMONY UNDER A PRIOR
ORDER HAS CEASED?**

Yes. Sherrie's alimony claim should be governed by the law in effect at the time she asserted it - August 23, 1994. There was no statute then in effect requiring a court to find extenuating circumstances before issuing a new order for alimony addressing new needs of the recipient. The only Utah case in which the issue had been addressed was the 1952 case of Cole v. Cole, 239 P.2d 615 (Utah 1952). In that case, this court expressly declined to decide whether alimony may *ever* be awarded when it is sought after the obligation to pay it under a prior order has ceased. 239 P.2d at 616. It simply ruled that a new alimony award was not appropriate in that case. The facts before this court are far different from those presented in Cole v. Cole. There, a woman who had deserted her husband sought alimony 12 years after his alimony obligation had ceased. Here, Sherrie and Lynn had been married for 25 years, during which Sherrie bore 5 children. Sherrie did not desert Lynn, but Lynn basically deserted her. He allowed her home to be foreclosed upon while both divorcing her and discharging his own debts in bankruptcy. (R. 693). After leaving her, he amassed great wealth. As he did so, Sherrie grew both impoverished and unhealthy to the point that she is now dependent on Church welfare and government disability for subsistence.

There are strong societal reasons why Sherrie should be granted continuing alimony from Lynn even if his obligation to pay alimony under a prior order *had* ceased.

VI.

SHOULD LYNN BE ORDERED TO PAY ALIMONY TO SHERRIE?

Yes. As the trial court expressly found, Lynn has the ability to pay alimony. (R. 644, 658). Lynn earns a salary in excess of \$120,000 per year (R. 644). In addition, he is provided a vehicle (Mercedes) and his transportation and car insurance expenses are paid by his company. (R. 711; Tr. Trans. pp. 107-108). He also enjoys full health insurance benefits through his company. (R. 711; Tr. Trans. p. 107; R. 714; Tr. Trans. p. 120). He owns and lives in a condominium in Bountiful having an appraised value, as of 1996, of \$236,000 (R. 868). His condo contains a hot tub, sauna, pool table, big screen TV, two other TV's and 2 VCR's. (R. 868, 869, 881). In June of 1995, he purchased a lot in North Salt Lake for \$97,000 in cash, with the intent to build a home on it. (R. 869-870). At Christmas in 1996, he took 8 people to Hawaii for a week vacation. (R. 898). He has access to season tickets to Utah Jazz Basketball games (on the 19th row from the floor) and often purchases and uses Jazz playoff tickets. (R. 866-868).

As the trial court found, Sherrie unquestionably has a need for alimony. (R. 658, paras. 16, 17 and 18). Since March of 1996, Sherrie has been completely unable to

work due to the progression of her debilitating rheumatoid arthritis illness. (R. 694; Tr. Trans. pp. 39-40, 166; R. 664-666; 669-673). Overwhelming cumulative evidence of Sherrie's condition of destitution appears in the record in the form of uncontroverted testimony of Sherrie herself, her relief society president, her prior work supervisor and a board certified rheumatologist. The Social Security Administration's formal findings of total disability also indicates Sherrie's need. In addition, the trial court's Findings of Fact Nos. 1, 3, 4, 5, 6, 7, 8 and 9 all support the conclusion that Sherrie desperately needs alimony.

In short, Sherrie unquestionably needs alimony and Lynn unquestionably has the ability to pay it. These parties were married to each other for 25 years and raised 5 children together. They are hardly "strangers" to one another. Under the district court's ruling, Sherrie's church and the federal government have greater obligation to contribute to her support than the man to whom she was married for 25 years. In a civilized society whose basic unit is the family, that is a shameful travesty of justice.

VII.

SHOULD LYNN BE ORDERED TO PAY SHERRIE'S REASONABLE COSTS AND ATTORNEY'S FEES INCURRED IN SEEKING THE ALIMONY SHE NEEDS?

Yes. At trial, uncontroverted evidence was presented that Sherrie had paid attorney's fees to her own counsel in the amount of \$2,450.00 and that she owed her

counsel an additional \$14,534.56 for legal work done on her behalf through the time of trial. (Def's Trial Exhibit 8). In paragraph 6 of its April 17, 1997 order, the trial court ordered Sherrie "to pay her attorney fees and costs, the balance of which is \$14,534.56". (R. 654). Entry of that order reflects the trial court's finding that Sherrie's costs and attorney's fees were reasonably and necessarily incurred. No objection was made to the proffer of testimony concerning Sherrie's attorney's fees and costs or to the detailed time itemizations supporting it. (R. 102-104).

Only two questions remain: Who should be required to pay the costs and attorney's fees Sherrie incurred through trial (\$16,984.56) and who should be required to pay her fees and costs incurred in this appeal? Respectfully, Sherrie submits that both sums should be paid by Lynn. She requests this court to so order.

VIII.

ON REMAND, SHOULD SHERRIE BE ALLOWED TO PRESENT EVIDENCE SUPPORTING HER CLAIM TO A SHARE OF LYNN'S WEALTH BASED ON HER CONTENTION THAT IT WAS GENERATED THROUGH A FRAUDULENT, SECRETIVE WEALTH-BUILDING PLAN COMMENCED DURING THE MARRIAGE?

Yes. In November of 1995, Sherrie sought leave of court to amend her petition to modify the divorce decree to include entirely new allegations supporting her claim to an equitable share of Lynn's present wealth due to its having originated in efforts

expended by him during the marriage. This petition was based on Sherrie's learning of the rapid and somewhat incredible growth and prosperity of Lynn's Beneficial International "empire". Lynn's interest in Beneficial International had been represented to be essentially valueless at the time of the parties' divorce. Lynn had become an officer and director of the company 3 years before the divorce and held a substantial block of stock in it. The marital financial hardships began about the time Lynn became involved with this business.

In 1995, Sherrie caused her counsel to conduct investigation which led her to believe that Lynn had orchestrated both his divorce and his personal bankruptcy in a manner to deprive her of a share of his interest in Beneficial International and other related business entities controlled by him. (R. 446). Sherrie was granted leave to amend her petition to modify. Her amended verified petition to modify was filed on January 24, 1996. (R. 465-471). (See also Addendum No. 3 to Sherrie's Appeal Brief).

On May 1, 1995, the following law went into effect:

When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

UCA § 30-3-5(e) (1995). Although this law was in effect at the time Sherrie first asserted her claim to a share of Lynn's current wealth, the district court found that it did not apply to Sherrie's property distribution claim. In this, the district court clearly erred as a matter of law.

Being applicable, the statute provides basis for receipt of the evidence Sherrie sought but was not allowed to introduce at trial.

The Wilde marriage was a marriage of long duration - 25 years. It dissolved on the threshold of a major change in Lynn's income. During the last years of the marriage, the parties endured great financial hardship while Lynn undertook to build the business which later brought him great prosperity. His present wealth, Sherrie contends, is a result of the groundwork he laid during the last several years of his marriage. During those years, the Wilde family experienced financial difficulties they never had previously known. Lynn's personal bankruptcy discharge simultaneous with the dissolution of his marriage gave him a fresh financial start. The prosperity that followed was, Sherrie contends, a result of efforts expended during the marriage.

Full revelation of the facts surrounding Lynn's divorce and personal bankruptcy may well reveal facts constituting a fraud upon the divorce and/or bankruptcy court(s). Under Rule 60(b), URCP, a party may at any time seek relief from a judgment, order or proceeding "for fraud upon the court".

Sherrie should be allowed to present evidence supporting the property distribution claim set forth in her January 24, 1996 amended verified petition to modify.

CONCLUSION AND REQUESTED RELIEF

Sherrie's alimony claim was asserted while Lynn was still paying alimony under the district court's June 24, 1992 order and before the new alimony statute went into effect. As such, it is neither a claim for "new alimony" nor governed by the 1995 version of Section 30-3-5.

If the new version of the statute did govern Sherrie's alimony claim, the claim should nevertheless be granted because Sherrie's case presents circumstances which are "extenuating" within the legislature's intended meaning.

The district court erred in applying the new statute, in misconstruing its intent and in refusing to allow evidence which may have satisfied even its own definition of "extenuating circumstances."

Sherrie requests alimony in the amount of \$3,270.35 per month consistent with her actual needs as reflected in her trial exhibits 2 and 3. She requests that it be made retroactive to the date of her becoming totally disabled - March 11, 1996. Sherrie also asks that she be awarded her costs and reasonable attorney's fees incurred in the district court (in the total sum of \$16,984.56) and her reasonable costs and fees incurred in this appeal, as established in accordance with this court's direction.

On remand, Sherrie should be allowed to present evidence supporting her property distribution claim.

RESPECTFULLY SUBMITTED this 10 day of August, 1998.

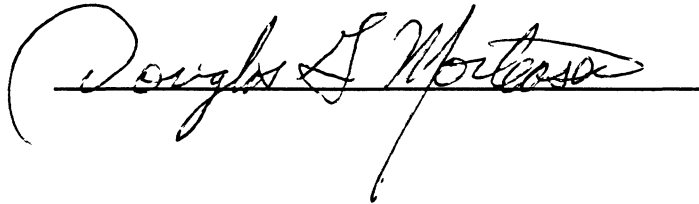


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CERTIFICATE OF SERVICE

I certify that on the 11 day of August, 1998 I caused to be mailed ^{2 copies} ~~a copy~~ of the foregoing to the following:

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