

1988

# Jude J. Nicholes v. James Lewis Nicholes : Brief of Respondent

Utah Court of Appeals

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## Recommended Citation

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IN COURT OF APPEALS  
BRIEF

MENT

ET NO. 880273 CA IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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JUDE J. NICHOLAS,	)	
	)	BRIEF OF RESPONDENT
Plaintiff/Appellant,	)	
	)	
vs.	)	CASE NO: 880273-CA
	)	
JAMES LEWIS NICHOLAS,	)	
	)	CATEGORY NO: 14 b
Defendant/Respondent.	)	

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BRIEF OF RESPONDENT

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Appeal from a Judgment of the  
Third District Court of  
Salt Lake County, State of Utah

HONORABLE KENNETH RIGTRUP, Presiding

---

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**FILED**

**OCT 3 1988**

**COURT OF APPEALS**

PARTIES TO THE PROCEEDINGS

Jude J. Nicholes, Plaintiff and Appellant. James Lewis  
Nicholes, Defendant and Respondent.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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JUDE J. NICHOLLES,	)	
	)	BRIEF OF RESPONDENT
Plaintiff/Appellant,	)	
	)	
vs.	)	CASE NO: 880273-CA
	)	
JAMES LEWIS NICHOLLES,	)	
	)	CATEGORY NO: 14 b
Defendant/Respondent.	)	

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Appeal from a Judgment of the  
Third District Court of  
Salt Lake County, State of Utah

HONORABLE KENNETH RIGTRUP, Presiding

---

STATEMENT OF THE CASE

Mr. and Mrs. Nicholes were married on June 30, 1964, and separated November 21, 1986. Mrs. Nicholes was 16 years old at the time and Mr. Nicholes was 18. (See trial record at pages 29, 143, and deposition of Dr. Gordon at page 28) Three children were born of the marriage (See trial record at page 28), one child was already emancipated due to age with two remaining minor children, Rebecca, born April 30, 1974, and Jason Emanuel, born December 15, 1969 (see trial record page 3) both minor children were eventually awarded to the Plaintiff subject to Defendant's reasonable visitation as is convenient and appropriate between the minor

children and the Defendant, Mr. Nicholes. (See trial record page 166).

Mrs. Nicholes has worked primarily as a housewife, raising the three children, although she has had training as a seamstress but is unable to work because of her present medical problems (see trial record at pages 81 through 84). Medical testimony does indicate that Mrs. Nicholes is capable of doing some work in her home as long as it is for short periods of time (see trial record at page 23). The Trial Court at Defendant's objection to the original proposed Findings of Fact and Conclusions of Law and Decree of Divorce stated in reference to the Plaintiff's present physical condition as follows:

The court feels, as well, that some of the ailments that your wife had were as a result of her own mental structure. (See trial record at page 215).

Mr. Nicholes, the Respondent, has worked two jobs during most of the marriage and was laid off from his daytime job at Western States Masonry and his night time job at Kennecott for a period in 1985 and 1986. (See trial record pages 171, 182 through 184). Mr. Nicholes became re-employed at Kennecott sometime after December of 1986 on the day shift rather than the evening shift. Due to lack of employment in the masonry business and certain physical and medical conditions Mr. Nicholes was unable to return to work



at Western States Masonry (see trial record page 167, 182, and the deposition of Dennis H. Gordon, M.D. page 10, 14, 16, 17, 19, 22, 23, 27, 28) Due to Mr. Nicholes' inability to work two jobs based on the present work circumstances and his present physical condition there was a loss of yearly income from \$43,600.00 in 1985 to \$22,655.00 in 1986, while the parties were still married, the separation not taking place until the 21st of November, 1986. (See trial record at page 37).

The appeal is from a divorce granted to the parties on August 7, 1987, with the actual Decree of Divorce to be final within 90 days after entry. On March 7, 1988, Defendant, by and through his counsel, objected to the Plaintiff's original proposed Findings of Fact and Conclusions of Law and the Decree of Divorce. At that time the Court modified its previous Order and ordered that the Decree would become final 60 days after entry, which entry was the 22nd day of March, 1988. (See trial record pages 166 and 171). The actual date of the divorce should have been May 20, 1988, and the Notice of Appeal was filed April 21, 1988. (See trial record page 188).

#### SUMMARY OF ARGUMENT

1. The Trial Court findings should not be disturbed or reversed in a divorce case in equity unless this Court

finds that there has been a clear abuse of discretion exercised by the Trial Court.

2. The Trial Court properly applied the three factors to be considered in awarding alimony in arriving at its final award to the Appellant and did not abuse its discretion in making that award.

3. The Trial Court properly applied the seven factors to be considered in awarding child support in arriving at its final award to the Appellant and did not abuse its discretion in making that award.

4. The Trial Court properly applied this Court's standards in regards to awarding State and Federal income tax exemptions in ordering the Appellant to sign waivers for the Respondent to claim those exemptions.

#### ARGUMENT

##### POINT I.

THE APPELLATE COURT WILL NOT DISTURB THE FINDINGS OF THE TRIAL COURT UNLESS THERE IS A CLEAR ABUSE OF DISCRETION IN A DIVORCE CASE.

The Appellate Court in reviewing matters in equity and more specifically, in a divorce action, will refrain from disturbing the Findings of the Trial Court unless a clear abuse of discretion by the Trial Court is shown.

The standard for reviewing matters in equity was recently considered by the Utah Supreme Court in J & M Construction, Inc., v. Southam, 722 P.2d 779 (Utah 1986), wherein the Court held as follows:

In reviewing matters in equity, this Court will reverse the Trial Court only when the evidence clearly preponderates against the findings below. Although we may review that evidence, we are particularly mindful of the advantage position of the Trial Court to hear, weigh, and evaluate the testimony of the parties. (cites omitted) Where the evidence may be in conflict, this Court will not upset the findings below unless the evidence so clearly preponderates against them that this Court is convinced that a manifest injustice has been done....

This court in the recent decision of Boyle v. Boyle, 735 P.2d 669 (Utah App. 1987) held as follows:

This Court will refrain from disturbing findings of the Trial Court in a divorce action unless a clear abuse of discretion is shown. (cite omitted) The Trial Court is clearly in the best position to weigh the evidence, determine credibility and arrive at factual conclusions.

Accordingly, pursuant to case law, unless this court finds a clear abuse of discretion in this equity or divorce matter, it should not disturb the findings of the Trial Court which stands in a better position to weigh the evidence, determine credibility and arrive at factual conclusions.

POINT II.

THE TRIAL COURT DID NOT ABUSE ITS  
DISCRETION IN ITS DETERMINATION OF THE  
ALIMONY AWARD.

The Appellant cites this Court to a decision of the Utah Supreme Court of Jones v. Jones, 700 P.2d 1072 (Utah 1985) which cites the earlier Utah Supreme Court case of English v. English, 565 P.2d 409 (Utah 1977) wherein it was held that the Trial Court must consider the following factors in awarding alimony: (1) The financial conditions and needs of the spouse claiming support, (2) The ability of that spouse to provide sufficient income for himself or herself, and (3) The ability of the responding spouse to provide the support. The failure of the Trial Court to analyze the parties' circumstances using these three factors does constitute an abuse of discretion. Paffel v. Paffel, 732 P.2d 96 (Utah 1986)

The underlying purpose of alimony is to "enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage and to prevent the spouse from becoming a public charge. In an action for divorce, the Trial Court has considerable discretion to provide for spousal support, and this Court will

not interfere with the trial court's award of such support in a divorce proceeding absent the showing of a clear and prejudicial abuse of discretion." Paffel v. Paffel, supra.

The Appellant cites this Honorable Court to the Utah Supreme Court Case of Olson v. Olson, 704 P.2d 564 (Utah 1985) wherein that court held "an alimony award should come as far as possible, to equalize the parties' respective standards of living and maintain them in a level as close as possible to the standard of living enjoyed during the marriage." But the court in that opinion went on further to state as follows:

While the alimony award was far below the total amount required to maintain the wife at the standard of living she enjoyed during the marriage, it is reasonable in light of the limited family resources available to fulfill her needs. Thus, we find no abuse of discretion. Should the relevant circumstances change in the future, the wife may petition the court for modification of the amount of alimony under the court's continuing jurisdiction. Id, 567.

In the immediate case at hand, "turning to the record in the absence of sufficient findings" Id, 567, the trial record would indicate beginning at page 189 through page 192 where the Trial Court is rendering its decision:

The problem is that there is just not enough to go around, and you both come out unhappy. The court had the benefit of financial data from both of you, both at the temporary level....

Kennecott, everyone in the world knows Kennecott's circumstances. And I hear about it more than most of you because most of our bailiff's are ex-Kennecott employees, and the Kennecott people that were fortunate to find work again go back at lower rates, they are not doing as well as they did formerly, and I don't know the circumstances and heard no evidence about the current circumstances about Western Masonry, though it's apparent that the construction industry is not robust by any measure certainly.

And so, the court really doesn't have the perception that Mr. Nicholes is sandbagging at this point, and I'm stuck with what he has got, and I'll certainly require that he produce periodic information about his finances, and I certainly would adjust to more appropriate levels if it's there.

He shouldn't be penalized for the fact that he's been a hard worker most of his life. He finds, like most of us do, that he's worn out a little bit and not as marketable as he used to be.

The Trial Court did not abuse its discretion, but did in fact analyze the parties' circumstances in the Nicholes case in light of the English and Jones factors. Firstly, in regards to the "financial conditions and needs of the spouse claiming support", or in this case the Appellant, evidence was presented and considered by the court regarding the Appellant's financial conditions and needs as indicated by exhibits demonstrating the Appellant's needs including the needs of the minor children living with her ranging between

\$1,984.75 to \$2,134.78 per month. The exhibits were not objected to but were subjected to cross-examination by Defendant/Respondent in regards to those expenses and are part of the record although not in the Findings (see Exhibit 5 and trial record at pages 66 through 67 and pages 108 through 111).

The Utah Supreme Court in a case cited by the Appellant, Paffel v. Paffel, supra in regards to the Appellant's appeal from a permanent award of alimony to his wife argued that the Trial Court had failed to make findings concerning his wife's income, expenses or need for support and that this constituted error held as follows:

The supplemental Findings of Fact and Conclusions of Law, as well as the Memorandum Decision of the Trial Court, did not specifically set forth the facts showing Respondent's needs or ability to provide support for herself. Instead they focused primarily upon the Appellant's ability to pay support. In Walker v. Walker, [707 P.2d 110] (Utah 1985) [Restated]:

The Trial Court did not enter any Findings of Fact or Conclusions of Law demonstrating the consideration of these factors or the weight assigned to each. Such an analysis by the Trial Court would assist this Court in determining the propriety of the ruling. However, our examination of the record suggests no basis for concluding either that the Trial Court did not consider these factors or that it abused its discretion.

As in Walker, the evidence in this case supports the lower court's order, and Appellant has made no showing to rebut the presumption that the Trial Court did not consider Respondent's income, expenses, and need for support.

Olson and Paffel have cited, and in light of the evidence on record and the opinion of the Court on the trial record from pages 189 through pages 192 adequately show that the evidence in the Nicholes case supports the lower court's order and that the Appellant has made no showing to rebut the presumption that the Trial Court had not considered the Appellant's financial conditions and needs as required in the first standard of the three standards enumerated in English, supra.

This Court held in Eames v. Eames, 735 P.2d 395 (Utah App. 1987), that the Trial Court had carefully and properly considered the three above factors and found that there was no abuse of discretion such that the award of alimony would not disturb. That case specifically dealt with a couple not unlike the parties in the immediate case with a similar number of years of marriage. In Eames the parties had had three children born into their marriage and at the time of their trial the youngest child was 18 years of age and resided with the wife in the family home, such as Rebecca was residing with the Appellant in the family home. In the Eames case the Plaintiff, who was the Respondent and the



wife, was awarded alimony in the amount of \$450.00 per month as long as the youngest child successfully pursued a full-time college education, lived in the home, remained single or reached the age of 21 years at which time the alimony would be reduced to \$300.00 per month and would remain so until the Plaintiff reached the age of 65 years at which time the alimony would terminate.

The Trial Court in Eames further found that the Plaintiff was employed as a department store manager and clerk for a large store and had a gross income of approximately \$10,000.00 per year, and that she had been employed during most of the marriage in unskilled or untrained type positions, while the Appellant/Defendant was a manufacturing engineer with a gross income of approximately \$34,000.00 per year, which represents a difference in income of approximately \$24,000.00 a year.

In the immediate case at hand, the Plaintiff, Mrs. Nicholes, has no income, the trial Judge did find the present income of the Defendant to be \$1,665.00 a month or close to \$20,000.00 a year (Findings of Fact and Conclusions of Law, page 2), and did award to the Plaintiff the sum of \$250.00 per month, not until age 65, not to decrease or be reduced when the minor child left the home, but a lifetime support of \$250.00 a month, with the opportunity to review

the Defendant's income on a continuing basis and increase that alimony amount should the Defendant's income increase. (See trial record at page 192, lines 4 through 7).

In regards to the second factor, "the ability of the wife to produce sufficient income for herself" the court did make a specific finding "that the Plaintiff is unemployed, and has physical problems that prevent her from employment" (see Findings of Fact and Conclusions of Law, page 2). There is no abuse of discretion here in that the Trial Court clearly found that the spouse claiming support did not have the ability to provide sufficient income for herself even in light of the testimony that she had training as a seamstress (see trial record at pages 81 through 84), medical testimony that she was capable of doing some work in her home as long as it was for short periods of time (see trial record at page 23), and the Court's finding that some of the ailments that the Plaintiff had were as a result of her own mental structure (see trial record at page 215).

In regards to the third factor, "the ability of the husband to produce support" the court specifically found that "the Defendant is currently employed at Kennecott and earning, approximately, \$1,665.00 gross, per month." (see Findings of Fact and Conclusions of Law, page 2). The Appellant refers this Court and attaches as an Exhibit to

its Addendum, a copy of proposed Findings of Fact and Conclusions of Law submitted by counsel for Mrs. Nicholes which included the recitation of Mr. Nicholes historical earnings for the years 1982 through 1986 which earnings were admittedly much greater than his earnings at the time the Decree of Divorce was entered.

Defendant by and through his counsel objected to Plaintiff's proposed Findings of Fact and Conclusions of Law and Decree of Divorce requesting the Trial Court to remove any reference to the parties' gross earnings from 1982 to 1985 as the Trial Court did not specifically find that these were the parties' gross wages. The court at the objection hearing on March 7, 1988, held or stated as follows:

The motion with respect to the earnings, I will strike the phrase as to past earnings. I clearly intended to make my findings on income based upon current circumstances; that is, that he's working for Kennecott Copper at a reduced salary from over and above what he formerly earned, and that was simply a condition of employment at Kennecott over which he had no control, and he has no means of going back and getting the former salary restored he got at Kennecott.

With respect to the masonry income, the economy appears to the court in terms of the construction business to be flat, which may be an understatement.

And so for that reason, the court doesn't feel that there was any bad faith on his part in terms of scheming to drop that employment.

The court further stated at the objection hearing in regards to Mr. Nicholes' employment and payment of alimony as follows:

The court only ordered \$100.00 per month per child, Mr. Nicholes. And although \$450.00 from \$1,600.00 gross earnings or thereabouts is a significant bite out of your hide, it was a marriage of long duration, and the court just simply chose to give her a higher alimony award than give it to the kids because of her ability to have that award over an indefinite period of time. (See trial record at pages 214 to 215).

The court further stated in regards to Mr. Nicholes present income and employment situation in the court's concluding statements at the trial of October 6 and 7, 1987, as follows:

Kennecott, everyone in the world knows Kennecott's circumstances. And I hear about it more than most of you because most of our bailiffs are ex Kennecott employees, and the Kennecott people that were fortunate to find work again go back at lower rates, and they are not doing as well as they did formerly, and I don't know the circumstances and heard no evidence about the current circumstances about Western Masonry, though it's apparent that the construction industry is not what robust by any measure currently. So, the court really doesn't have the perception that Mr. Nicholes is sandbagging at this point, and I'm stuck with what he has got and I'll certainly require that he produce periodic information about his finances, and I certainly would adjust to more appropriate levels if it's there.

He shouldn't be penalized for the fact that he's been a hard worker most of his life. He finds, like most of us do, that he's worn out a little bit and not as marketable as he used to be.

Accordingly, the Trial Court properly relied on Mr. Nicholes' income at the time of the Divorce Decree especially under the circumstances that the parties had lived together for almost one year under the reduced income before the parties had even separated.

The Appellant refers this Court to its decision of Canning v. Canning, 744 P.2d 325 (Utah Ct. App. 1987) wherein this Court reversed the amended judgment on the issue of alimony and remanded for additional findings and possible modification. In the Canning case the Trial Court found only that the Defendant or Mrs. Canning was unemployed at the time of the trial and that the Defendant should be awarded no alimony under the three factors previously described in Jones and English v. English, 565 P.2d 409 (Utah 1987). This Court found that "although this Court has the power to modify the Decree accordingly, a lack of necessary findings in the record prevents us from doing so" in regards to modifying the alimony.

As the Appellant has indicated in her brief, in Canning the wife's needs and her ability to earn were inadequately developed whereas in the immediate case at hand the trial

Judge did specifically find as indicated above that the Plaintiff was unemployed and had physical problems that prevented her employment and the Trial Court did award to the Appellant herein the sum of \$250.00 per month as and for alimony subject to increase or modification and an annual review should Mr. Nicholes' income increase from the present \$1,665.00 per month gross amount. In the Canning case, the husband was found to have had a gross monthly income of \$2,000.00 per month and Mrs. Canning was awarded no alimony such that "David Canning's standard of living will be much closer to what it was during the marriage than will be Appellant's". In this case Mrs. Nicholes was not only awarded \$250.00 a month for alimony for an indefinite period of time or throughout her life, but was awarded an addition \$200.00 per month as and for child support further reducing Mr. Nicholes' standard of living and bringing it closer to the Appellant's. The Trial Court fully realized as stated in the trial record and previously referred to that there were not sufficient monies to satisfy both parties. Mrs. Nicholes claimed monthly expenses of between \$1,900.00 to \$2,100.00 a month (with some discrepancies based on cross-examination) with Mr. Nicholes undisputed gross monthly income of \$1,665.00 had to be considered by the court to provide for both families in light of the fact that

Mr. Nicholes gross monthly income if given totally to the Appellant would not even begin to cover her expenses, let alone both of them. Therefore, the Trial Court considering the needs of the Appellant, her ability to produce income for herself and the ability of the husband to provide support to the requesting spouse even in light of his historical earnings, awarded to the Appellant the sum of \$450.00 per month.

Appellant further cites this Court to the Utah Supreme Court case of Gardner v. Gardner, 748 P.2d 1076 (Utah 1988) wherein the Utah Supreme Court reversed and remanded as insufficient the trial court's award of alimony of \$1,200.00 per month to be reduced to \$600.00 per month following Mr. Gardner's retirement. The remand was based on the fact that Mrs. Gardner is not employed and had little prospect of being re-employed and that Mr. Gardner had substantial retirement assets while Mrs. Gardner had no pension and would qualify for social security payments only as a "ex-wife married over twenty years" and that the likelihood of Mrs. Gardner providing for her own retirement was small. Mr. Gardner was a physician with earnings of \$6,000.00 per month. The court further found that explicit findings based on the factors in Jones were needed to support the alimony award and remanded for further proceedings in light of its

findings and the factors enumerated in Jones. In the immediate case at hand involving the Nicholes, as part of the property settlement, Mrs. Nicholes was awarded one-half of the equity of the marital residence which was sold almost immediately after the divorce with a net amount of approximately \$20,000.00 divided between the parties. (see trial record at page 191). Additionally the Plaintiff was awarded medical insurance under COBRA, substantial personal property, no debts, benefits under the United States Social Security Act as a wife of the Defendant in excess of twenty-three years, the Defendant provide annually to the Plaintiff a copy of his income tax return indicating present income and employment, and one-half of any retirement based on Woodward. There is no evidence in the Nicholes case as compared with the Gardner case that Mr. Nicholes would have substantial assets either before or after retirement to supplement his income and previous discussion indicates that the Trial Court did properly review the three factors discussed in English, Jones and Eames in arriving at its decision and award of alimony.

In Rasband v. Rasband, 752 P.2d 1331 (Utah Ct. App. 1988) this Court found that a decreasing rehabilitative alimony award of \$800.00 per month to \$1.00 over an eight year period failed to consider Mr. Rasband's clear ability



to provide support and Mrs. Rasband's severely limited ability to meet her own established financial needs. It further found that the Trial Court had failed to make detailed findings regarding Mrs. Rasband's earning capacity. The lower court found that \$45,000.00 of disposable income with Mr. Rasband needing \$18,000.00 annually, Mrs. Rasband needing \$16,800.00 annually for a total of \$34,800.00, left Mr. Rasband a \$10,000.00 annual discretionary income in addition to the advantage he enjoyed by being able to expense some personal living expenses through the business. This is not the situation with the Nicholes. The expenses of one party alone, those of Mrs. Nicholes, exceeds by \$300.00 to \$500.00 the gross monthly income of Mr. Nicholes, the only party producing income. Additionally, unlike the award in Rasband the Trial Court in this case awarded to Mrs. Nicholes rehabilitative alimony for an indefinite time period or the rest of her life subject to increase depending on Mr. Nicholes income, evidence of which will be provided annually pursuant to the Decree of Divorce so that there is not the disparity found in Rasband. Again, in Nicholes the lower court did consider the three factors of English in arriving at its award of alimony and there is no abuse of discretion such that the award of alimony should be affirmed.

In Martinez v. Martinez, 754 P.2d 69 (Utah App. 1988) this Court in considering Olson v. Olson, Jones v. Jones, and English v. English, reversed the decision of the Trial Court award of \$400.00 per month of terminable alimony after five years based on Mr. Martinez's annual income of \$100,000.00 per year and held that the Plaintiff was entitled to an award on a continuing basis in the sum of \$750.00 per month subject to the provisions of the Utah Code Annotated §30-3-5. In this case the Plaintiff was awarded permanent alimony of \$250.00 per month, one-third of the ultimate award of Martinez based on an income of Mr. Nicholes of approximately one-fifth of the income of Mr. Martinez. There is no abuse of discretion in this award and unlike Martinez, the Trial Court in this matter is not preserving the status of a limited income for one party and affluence for the other when one sacrificed to help the other achieve such affluence.

In regards to Mr. Nicholes' historical earnings, the Appellant cites this Court to the Utah Supreme Court case of Olson v. Olson, 704 P.2d 564 (Utah 1985) which held:

We have held that where the husband has experienced a temporary decrease in income, his historical earnings must be taken into account in determining the amount of alimony to be paid.

It is Respondent's contention that a great deal of attention should be paid to the term "temporary". In the

Olson case Mr. Olson had formed a consulting business and provided consulting services to governmental agencies on a contract basis with a fluctuating income depending on his current contract. His gross income was \$76,000.00 in 1980, \$62,000.00 in 1981, and \$57,000.00 for the first nine months in 1982. At the time of trial, the Defendant had no consulting contracts in force and no current income. He was negotiating a contract, which he expected to obtain, that would bring \$3,500.00 a month for the remainder of 1982. The Trial Court in Olson considered the historical earnings of Mr. Olson because at the time of the trial he did have a "temporary" decrease in his income but based on the fact that Mr. Olson was then negotiating a contract which he expected to obtain and would bring \$3,500.00 a month for the remainder of 1982, the Trial Court after considering those factors issued a Memorandum Decision providing the Defendant pay to the Plaintiff \$1,600.00 per month as alimony. The Supreme Court found that the Trial Court had considered Mr. Olson's historical earnings and properly did so under the facts of the case and found no abuse of discretion in the alimony award given with Mr. Olson's potential from the job he had been working in the past and was presently working despite a temporary decrease in earnings of between \$57,000.00 to \$76,000.00 a year.

The Appellant further cites this Court to Westenskow v. Westenshow, 562 P.2d 1256 (Utah 1977) with the position that "When the obligor has experienced a temporary decrease in income it is reasonable for the Court to impute the obligor's income based on his historical earning ability". Again, great deference should be paid to the term "temporary" decrease in income. In Westenshow the Plaintiff/husband was ordered to pay to the Defendant/wife, alimony in the sum of \$75.00 for a period of six months, with an increase to \$100.00 per month for a period of six months. Then a final sum of \$150.00 per month for a period of four years. The alimony would then terminate. In Westenskow the Plaintiff/husband was a college graduate that had been employed by a large corporation as a marketing representative, earning an annual salary of \$18,000.00. In August, 1975, he terminated his employment and organized his own company. The trial was held November 3, 1987, and Plaintiff's record of his compensation for his company was for the month of October only; the sum was \$600.00. Plaintiff testified he expected his income to improve.

The Court found at page 57:

...here Plaintiff has an established ability to earn \$18,000.00 annually. He presented a record of one month indicating a diminished income. It would be reasonable for the court to infer that either Plaintiff's income from his

business would increase or he would seek other employment with an adequate remuneration reflecting his historical earning ability. Under such circumstances the automatic increments in alimony and child support were not inequitable... Like Olson, the Plaintiff/husband has encountered a "temporary" decrease in his income fully expecting based on his own testimony, although not established by a potential contract of \$3,500.00 a month as in Olson, but by Mr. Westenskow's own testimony that his income would improve and Mr. Westenskow had the potential and capacity to again earn \$18,000.00 a year.

In Westenskow the diminished earnings were represented only a one month time period, whereas in this case the 1986 tax return showed a one year diminished income of approximately \$22,000.00 due to the fact that the Defendant/husband was working a full-time job. Again in the Nicholes case, unlike the Westenskow case, the Trial Court did specifically provide through the Decree that on an annual basis the Defendant would provide to the Plaintiff a statement of his income with the understanding that an increase in his monthly income would entitle the Plaintiff to move for additional alimony under the continuing jurisdiction of the Trial Court.

Numerous references have been made to rulings and statements made by the Trial Court in regards to Mr. Nicholes current income and why the Court considered current

income rather than the historical earnings. Appellant has indicated that the trial Judge refused to hear evidence concerning Mr. Nicholes' historical earnings and his ability to earn it in the future, when quite to the contrary the trial record at page 167 has an interjection to the Respondent's counsel questioning Mr. Nicholes as to his work history. The trial Judge indicated as follows:

The Court: I don't see the need for it, really.

Mr. Walpole: Okay.

The Court: I think I've heard enough about income, work.

The previous comments by the court as presented in argument in Point I. of this brief show more than sufficient evidence of the trial Judge's knowledge of the Respondent's income and work history and historical earnings such that the trial Judge specifically ruled on the present income of the Respondent as being \$1,665.00 and due to the present work conditions and circumstances found that to be the Respondent's current income.

The Appellant fails to make any reference to the deposition of Dennis H. Gordon, M.D., as reviewed by the trial Judge and as properly published in regards to the Defendant's employability (see trial record at pages 167, 190 and trial record page 197). At the deposition of Dennis H. Gordon, M.D. taken October 2, 1987, Dr. Gordon stated

that he first began seeing the Defendant for medical reasons on May 10, 1985, and that prior to that he had been treated by other physicians for recurrent dislocations of his shoulder and had had quite a long history of increasing deformity of the knee. (See deposition page 5). Dr. Gordon in the following pages further described the dislocation of the Defendant's right shoulder and unrelated right knee problems, with subsequent visits by Mr. Nicholes to Dr. Gordon on May 10th, May 31st, June 14th, July 19th, August 12th, September 13th and November of 1985, and then again in January of 1986, May of 1987 and September of 1987 (see deposition at page 10). Beginning on page 13 of the deposition, Dr. Gordon states that:

Any high impact on that knee simply increases the deterioration of it and he's got a fair amount of wear. He's got calcification in both menisci. He's got extensive changes in the knee, so if he stays away from high impacts to it, it will last longer.

In response to a question on what high impact would consist of, Dr Gordon responded "running, jumping, certainly any sports are going to cause impact to be eliminated. Anytime you are carrying heavy weights you're going to increase the stresses onto it, climbing, bending, squats, deep-knee bends, duck-walks, anything like that are very detrimental to a knee like that. So you need to stay away

from that. In answer to a question about any specific recommendations concerning Mr. Nicholes working one or two jobs, Dr. Gordon responded "it depends on what the jobs are. It is an impact type problem primarily that we are dealing with and two jobs of a heavy construction type position are quite unreasonable on the joint. He's going to have paid, and he's going to have more rapid breakdown if he keeps stressing it that way." Dr. Gordon further stated that his recommendation would be to stay away from labor, taking a desk job, but that he did not think that Mr. Nicholes had the training, but that his recommendation would be a non-manual or non-stressful type job. (See deposition pages 15, 16 and 17).

On his cross-examination concerning the working of two jobs, Dr. Gordon testified:

...my recollection is that from our previous evaluations on him, that he had been working two jobs, and I had been -- this issue came up, and I informed him that I did not feel that was really reasonable to be working two labor type situations.

When you are talking about two jobs, I guess it is -- are we talking about two part-time jobs? Two eight-hour jobs? I don't think that that's the significant thing. I think that the significant thing is the amount of impact that he's putting on the extremity, and that's really what I was stressing.... I know that we have discussed the fact and my recollection was that he had done a fair amount of



carrying, and I think that the part-time job required carrying, and for some reason I'm thinking of carrying hod or carrying construction-type equipment or something; fair amount of climbing and carrying of heavy objects.

I don't remember what the job at Kennecott involved. (See deposition pages 19 and 20).

On further cross-examination in regards to Mr. Nicholes' knee, Dr. Gordon stated:

Squatting, deep-knee bends, duck-walks are all going to be detrimental. Climbing is going to be detrimental, and this brings in stairs. That doesn't mean that you can't do them, but you ought not to do extensive amounts of them. If you want this knee to last as long as you can then you protect it, and you unweight it as much as you can....

I would try and preserve that knee as long as you could until you reach a point where pain limits you sufficiently enough to undergo the surgical intervention, which would be a replacement type arthroplasty (see deposition pages 23 and 24).

Lastly, on pages 27 through 28 in response to Plaintiff's counsel's cross-examination on retraining, Dr. Gordon stated:

I think it would be very wise if he could be retrained, yes. And then we run into a real problem with this on so many people.

Drywallers that come into us at age 35 with back problems, or 40 years old, and they have made high salaries or substantial salaries, and all of a

sudden they find themselves going back to a job that's going to be much less paying, and they don't want to do it, and I can understand, but the further they go the more difficult it becomes for them.

I don't think there is any question that somebody with this knee and right shoulder would be better off in a non-labor type situation.

Based on the foregoing case law and facts from the Nicholes case as applied to that case law, the Trial Court did properly consider the three factors spelled out in English, and also took into consideration the Defendant's historical earnings and applying the facts particular to the Nicholes case and within the Trial Court's discretion did properly award to the Plaintiff alimony of \$250.00 per month for an indefinite time period with an annual review of the Defendant's income for future potential modification if appropriate such that the Trial Court's Order should be affirmed.

### POINT III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS DETERMINATION OF THE CHILD SUPPORT AWARD.

Under Utah statutory law as spelled out in the Utah Code Annotated §78-45-7 you are entitled to a determination of amount of support states:

(2)...in determining the amount of perspective support, the court shall consider all relevant factors, including but not limited to: (a) the standard of living and the situation of the parties; (b) the relative wealth and income of the parties; (c) the ability of the obligor to earn; (d) the ability of the obligee to earn; (e) the need of the obligee; (f) the age of the parties; (g) the responsibility of the obligor for the support of others.

The Appellant makes reference to Astorga v. Julio, 564 P.2d 1385 (Utah 1977) to indicate that the underlying objective of child support is to reach an equitable proportion to each parent of a "reasonable and proper share of the child's expenses." Our review of that case shows that it is a proceeding under the Bastardy Act, which is civil in nature and whose purpose is to compel the father of a child to support it during its tender years. This proceeding is not a proceeding under the Bastardy Act, but is a divorce action in equity and therefore the case of Astorga v. Julio has no application.

In Savage v. Savage, 658 P.2d 1201 (Utah 1983) the Supreme Court held that "where a marriage is of long duration and the earning capacity of one spouse greatly outcedes that of the other... it is appropriate to order alimony and child support at a level which will insure that the supported spouse and children may maintain a standard of living not unduly disproportionate to that which they would have

enjoyed had the marriage continued. In Savage the Trial Court found the Defendant had a gross income annually in excess of \$133,000.00 and a net monthly income of \$7,362.00. The Defendant's evidence at trial showed his monthly expenses to be \$3,140.00 with the Court ultimately awarding to the Plaintiff \$2,000.00 in alimony and \$1,500.00 per month in child support or \$500.00 per month per child with the combined figures still leaving the Defendant with approximately \$800.00 in excess. The Plaintiff's evidence showed her monthly expenses were \$4,100.00. In the immediate case at hand, the Plaintiff's testimony was a need of between \$1,900.00 to \$2,200.00 per month (see trial record at page 71), while the Defendant's exhibit showed expenses of \$1,554.00 per month (see trial record at page 76), calculating expenses of both parties an income would be needed of \$3,700.00 or more per month to meet the needs testified to by both parties with an income of only \$1,665.00 per month. The Nicholes case can be distinguished from the Savage case in that in Savage there was plenty of income to meet the needs and expenses of the parties whereas in this case, neither of the parties if the monies are to be disbursed between them will be able to meet their financial obligations or to maintain the standard of living and situation of the parties. The money is simply not available to pay both

parties' expenses and although it might be appropriate to order alimony and child support at a level which will ensure that the supported spouse and children maintain a standard of living not unduly proportionate to that which they have enjoyed had the marriage continued, the monies were not and are not available for disbursement to meet the needs of both parties.

The Trial Court in determining the amount of child support must consider all relevant factors including those statutorily enumerated above or it will constitute an abuse of discretion. Jefferies v. Jefferies, 752 P.2d 909 (Utah App. 1988). The Appellant cites Stevens v. Stevens, 754 P.2d 952 (Utah App. 1988) wherein the Trial Court in considering child support made only two limited conclusionary findings regarding child support; (1) that a reasonable sum for the Plaintiff to pay to the Defendant for the support and maintenance of each child the sum of \$175.00 per child per month, (2) that although the income tax returns supplied by the Plaintiff on their face might not justify the award of support and alimony hereinabove provided, the Court has determined from the evidence submitted at the trial, that a substantial amount of tax-free income is generated by the Plaintiff's activities, and he can afford to pay the sums for support and alimony as hereinabove provided. In this

case the trial Judge made findings "that Mrs. Nicholes is unemployed and has physical problems that prevent her employment." (See Findings of Fact and Conclusions of Law at page 2) The record further indicates that Mrs. Nicholes is 40 years old (see trial record at pages 28 through 29). Mr. Nicholes age of 41 can be determined from the deposition of Dr. Gordon (see deposition at page \_\_\_\_). The Findings of Fact further indicate that Mr. Nicholes due to his present work circumstances and physical abilities is earning \$1,665.00 per month as the sole provider for the family and the testimony given shows that Mr. Nicholes is the father of the child or obligor and therefore has the responsibility for the support of the obligee. No testimony was offered as to the minor child, Rebecca, or the obligee working. The Plaintiff presented a Financial Declaration testimony on exhibits as to her expenses as acknowledged on the record of between \$1,900.00 to \$2,200.00 per month such that each of the seven statutory factors required to be reviewed by the Trial Court were reviewed and considered and an award made of \$100.00 per month per child and there was no abuse of discretion.

Although the Verified Complaint of the Plaintiff for divorce did plead for \$300.00 per month per child in child support to be increased to \$450.00 per month for the support

of the minor child, Rebecca, after the child support for Jason was terminated. At the time of trial, the Plaintiff responding to her counsel indicated that she felt necessary child support in order for her to care for their needs would be "probably around \$300.00 a child a month." (See trial record at page 66). Subsequent thereto, Plaintiff's Exhibit 5 detailing the income and expenses was submitted and in response to the question from Plaintiff's counsel "and would it be your testimony that that would be your monthly expenses and necessary to take care of yourself and your two children?", the Plaintiff answered "yes, it could be higher. That was last February" (see trial record at pages 66 to 67). No further requests were made by the Plaintiff of the Court and in particular the Plaintiff did not ask of the Court that child support be increased to a different amount once the minor child, Jason, became emancipated so that this issue is brought for the first time on appeal and should not be considered and the Trial Court is not under an obligation to sua sponte or on its own motion or grant a prospective child support award under the auspices that there will be a potential change in circumstances, otherwise every Trial Court considering any award of child support would be required to propose changes in child support on a prospective basis unknowing that eventually that passage of time each of the minor children will become emancipated.

Accordingly, based on the arguments rendered in Point I concerning the Court's review of the obligor's or Mr. Nicholes ability to earn, his income, his standard of living and the ages of the parties with the additional finding that the Defendant, Mr. Nicholes, is the father of the minor child and the needs of the obligee having been presented by the Plaintiff along with her expenses, and the Plaintiff having failed to provide any further or individual needs of the obligee or any proof or evidence as to the ability of the obligee to earn, essentially all factors were before the Court and considered by the Court in rendering its decision to award to the Plaintiff from the Defendant the sum of \$100.00 per month per child as and for child support to terminate upon reaching the age of 18 or graduation from high school in due course, whichever came later, and the Trial Court did not abuse its discretion and the judgment should be affirmed.

"The totality of the factual evidence in the record is clear, uncontroverted, and capable of supporting a finding in favor of the judgment of the need for child support" and should not be disturbed. Acton v. Deliran, 737 P.2d 996 (Utah 1987). The record is also replete with the financial needs of the children and the relative ability of Plaintiff and Defendant to meet those needs. See Martinez v. Martinez, 754 P.2d 69 (Utah App. 1988)



POINT IV.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING MR. NICHOLLES THE RIGHT TO CLAIM THE MINOR CHILDREN AS DEPENDENTS FOR INCOME TAX PURPOSES.

Martinez v. Martinez, supra, considers the provision of a separation agreement as being no longer effective and thereby allowing the Plaintiff who had previously through a separation agreement granted Defendant tax exemptions to request through her Amended Complaint the tax exemptions for all three children putting the distribution of tax exemptions at issue in the divorce proceeding.

In this case the Verified Complaint does not request that Plaintiff be awarded the tax exemptions of the minor children whereas the Defendant specifically requested in his Counterclaim that he be entitled to claim the minor children as dependents for income tax purposes (see trial record at page 23).

It is the Appellant's position that the only way that Mr. Nicholes can be given the children as tax exemptions is if Mrs. Nicholes signs the written declaration giving him the exemptions, and that the Internal Revenue Code contemplates a voluntarily written declaration by the custodial parent to allow those exemptions, and that it is beyond the jurisdiction of the Trial Court to order the

custodial parent to involuntarily execute the written declaration. In Martinez this Court specifically states as follows:

By amending her complaint, Plaintiff modified an affirmatively rejected the pre-divorce distribution. Plaintiff is entitled to the tax exemptions for all of the children in view of the award of custody to her and the failure of Defendant to establish any exception to the general rule stated above.

The Plaintiff has not requested that she be awarded the tax exemptions, neither in her Verified Complaint or upon review of the trial record, at the time of the trial.

The West Virginia Supreme Court of Appeals in Cross v. Cross, directly considered this issue and found that a court, as part of a child support award, may allocate the income tax child dependency exemption to the non-custodial parent by requiring the custodial parent to sign the waiver required by the 1984 Tax Reform Act. The Court further held that the 1984 amendment to §152(e) of the Internal Revenue Code was designed to simplify the handling of dependency exemptions by relieving the IRS of the administrative burden shouldered under prior law of resolving factual disputes between divorced parents over the issue of who actually provides more support for a child. Under the 1984 Act, the Court explains, the custodial parent always gets the exemption unless he or she assigns it to the other parent by

executing a written waiver. Because a Court Order standing alone, - without the necessary IRS waiver form - would be ineffectuated to transfer the exemption, and because nothing in the Act precludes the Court from requiring execution of the waiver, the Court concludes the Trial Courts have the power to order a custodial parent to sign the necessary waiver. This Court decision is in accord with recent rulings from Minnesota and Arizona and is "diametrically opposed" to a 1986 Texas case (Davis v. Fair, 707 S.W.2d 711 (Texas Ct. App. 1986)). It appears that only four other states have considered this issue since the 1984 amendments became effective and in no state has the issue reached the state's highest court. [See Scip v. Scip, 725 S.W.2d 134 (Mo. Ct. App. 1987) and Gleason v. Michlitsch, 728 P.2d 965 (Oregon Ct. App. 1986)] [See also Fudenberg v. Molstad, 390 N.W.2d 19 (Minnesota Ct. App. 1986) and Lincoln v. Lincoln, 13 F.L.R. 1535 (Arizona Ct. App. 1987)] Both of which assert that a custodial parent may be required to execute the necessary waiver of exemption in favor of the non-custodial parent who is paying child support in appropriate cases. The Court further held that under 1984 Act a State Court did not have the power to allocate the exemption simply by Court Order alone, but it does have the equitable power to require the custodial parent to sign the waiver. In that regard the Texas case missed the fact that there is no

prohibition expressed or implied on a State Court's requiring the execution of the waiver, and because the State Court allocation of dependency exemptions has been customary for decades, it is more reasonable than not to infer that if Congress intended to forbid State Courts from allocating the exemption by requiring the waiver to be signed, Congress would have said so.

In this connection, it is interesting to note that Texas was the only state that discouraged Court ordered allocation under the old law.

The Court further goes on to state that the IRS statute is entirely silent concerning whether a Domestic Court can require a custodial parent to execute a waiver, and this silence demonstrates Congress' surpassing indifference to have the exemption as allocated as long as the Internal Revenue Services doesn't have to do the allocating.

Additionally, it should be noted that in the final Decree of Divorce awarding the right to the Defendant to claim the minor children as dependents for purposes of the calculation of his State and Federal income tax dependent deductions, the Defendant is only entitled to do that if he is current in his child support obligations at the end of each year and that the Plaintiff has been ordered to execute the necessary waivers. There is the additional proviso that

should the Plaintiff earn in excess of \$7,500.00 per year that she would be awarded the right to claim the minor child, Rebecca Ann, as a dependent for purposes of the calculation of her Federal and State tax dependent deductions. For the Court to award otherwise when the medical testimony and the testimony of the Plaintiff irrefutably established the fact that Plaintiff is unemployable would be an abuse of discretion in equity.


According, the Trial Court did not abuse its discretion in awarding to the Defendant the minor child for income tax deduction purposes and the order should be affirmed.

#### CONCLUSION

Based on the above and foregoing facts, case law and statutes, the Trial Court did not abuse its discretion in awarding to the Plaintiff alimony of \$250.00 per month as it properly reviewed the three factors. The Trial Court also did not abuse its discretion in awarding to the Plaintiff child support of \$100.00 per month per child as it properly reviewed the seven factors. Finally, the Trial Court did not abuse its discretion in awarding to the Defendant the minor children of the parties for income tax purposes. Therefore, the decision of the Trial Court should be

affirmed and attorney's fees or costs awarded to the Defendant.

DATED this 30 day of September, 1988.

  
F. KIM WALPOLE  
Attorney for  
Defendant/Respondent

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30 day of September, 1988, I mailed four (4) true and correct copies of the above and foregoing BRIEF OF RESPONDENT by placing same in the U.S. Mail postage prepaid and addressed to the following:

Louisa L. Baker  
Attorney for Plaintiff/Appellant  
Utah Legal Services, Inc.  
124 South 400 East, Suite 400  
Salt Lake City, Utah 84111

