

1997

Mary Ann Moon v. Stanley W. Moon : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 970542-CA

IN THE UTAH COURT OF APPEALS

MARY ANN MOON,

Petitioner/Appellee,

vs.

STANLEY W. MOON,

Respondent/Appellant.

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Appeals Ct. No. 970542-CA

BRIEF OF APPELLANT

AN APPEAL FROM THE THIRD DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE HOMER F. WILKINSON, PRESIDING

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CONSTITUTIONAL PROVISIONS

None

OTHER CITED AUTHORITIES

None

IN THE UTAH COURT OF APPEALS

MARY ANN MOON,

Petitioner/Appellee,

vs.

STANLEY W. MOON,

Respondent/Appellant.

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Appeals Ct. No. 970542CA

BRIEF OF APPELLANT

I. APPELLATE JURISDICTION

Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78-2a-3(2)(h) and pursuant to Utah R. App. P. 3.

II. ISSUES PRESENTED ON APPEAL

A. Did the trial court have the authority to rule that the Order to Show Cause, which had been dismissed, was in fact the pleading on which the case should be based rather than upon petitioner's Petition for Modification.

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1. **Standard of Review**

Correction of error standard. See Bailey v. Call, 767 P.2d 138 (Utah App. 1989), cert. denied, 773 P.2d 45 (Utah 1989). Whether the finding is clearly erroneous. Ashton v. Ashton, 732 P.2d 147 (Utah 1987).

B. Was there a sufficient basis pursuant to the petitioner's Petition for Modification to modify the Decree of Divorce.

1. **Standard of Review**

Abuse of discretion. Asper v. Asper, 752 P.2d 978 (Ut.Ct.App. 1988). "Conclusions of law [are] accord(ed) no particular deference, but [are] review(ed) for correctness." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985) (citing Automotive Manufacturers Warehouse, Inc. v. Service Auto Parts, Inc., 596 P.2d 1033, 1036 (Utah 1979) and Betenseon v. Call Auto & Equipment Sales, Inc., 645 P.2d 684, 686 (Utah 1982)).

C. If the court should award the payment of alimony on funds which are not received by an individual based upon K-1 distributions.

1. **Standard of Review**

Abuse of discretion. Asper v. Asper, 752 P.2d 978 (Ut.Ct.App. 1988). "Conclusions of law [are] accord(ed) no particular deference, but [are] review(ed) for correctness." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985) (citing Automotive Manufacturers Warehouse, Inc. v. Service

Auto Parts, Inc., 596 P.2d 1033, 1036 (Utah 1979) and Betenseon v. Call Auto & Equipment Sales, Inc., 645 P.2d 684, 686 (Utah 1982)).

D. Was there sufficient evidence presented for the awarding of attorneys fees.

1. Standard of Review

Abuse of discretion. Asper v. Asper, 752 P.2d 978 (Ut.Ct.App. 1988). "Conclusions of law [are] accord[ed] no particular deference, but [are] review[ed] for correctness." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985) (citing Automotive Manufacturers Warehouse, Inc. v. Service Auto Parts, Inc., 596 P.2d 1033, 1036 (Utah 1979) and Betenseon v. Call Auto & Equipment Sales, Inc., 645 P.2d 684, 686 (Utah 1982)). Savage v. Savage, 658 P.2d 1201 (Utah 1988).

III. CONSTITUTIONAL PROVISIONS

There are no constitutional provisions at issue in this case.

IV. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from the Findings of Fact, Conclusions of Law on petitioner's Order to Show Cause and Petition to Modify, and on respondent's Objection to Findings of Fact, Conclusions of Law and Order before the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, presiding, which trial occurred on May 29, 1997 wherein the trial court awarded to the petitioner additional sums of alimony and attorneys fees.

B. STATEMENT OF FACTS

On June 30, 1992 the parties had reached a stipulation at a pre-trial. Pursuant to the stipulation of the parties the court had entered the Decree of Divorce on August 26, 1992.

Paragraph 8 of the Decree of Divorce provides in part as follows:

"The defendant shall pay to the plaintiff the sum of \$2,400 per month as alimony plus thirty percent (30%) of the gross income of any bonus he may receive each calendar year..."(R 505)

Paragraph 6 of the Findings of Fact which was for the determination of child support, provides in part as follows:

"The parties have agreed and the court finds that the plaintiff has been employed as a school teacher and earning \$1,750 gross monthly income. Further, her income will be reduced effective July 1, 1992 to part-time income of approximately \$900 per month. The defendant's income is \$250,000 per year which is paid \$150,000 as annual salary and bonus of approximately \$100,000. The monthly income of the defendant when it is annualized is \$20,833.00 per month. The parties have agreed that the Uniform Child Support Guidelines will not apply in this case..." (R 494-495)

Paragraph 10 of the Findings of Fact which deals with alimony provides in part as follows:

"Based upon the incomes of the parties the defendant has agreed to pay to the plaintiff the sum of \$2,400 per month as alimony. The defendant will also pay to the plaintiff, as additional alimony thirty percent (30%) of the gross amount of any bonuses he receives as additional income above his annual base salary which is currently \$150,000 without bonuses... Accordingly, after deductions for state and federal taxes, social security, health care premiums, child support and alimony, the defendant will be left with approximately \$2,500 net income to meet his own monthly financial needs. Payment of alimony and the total amounts required when considering defendant's annual income can only be made after the defendant has received his bonus."(R 496-497)

At the time that the parties entered into the stipulation it was acknowledged and the court was informed by petitioner's counsel, that the business in which the respondent is a twenty percent (20%) shareholder was undergoing a tax audit and that the structure of the compensation would be modified and changed. (R 1165 at p.8; R 1167 at p.6-8; R 1166 at p.23-24) It was further recognized that the respondent would most likely have to pay to the IRS taxes because of the audit and the changing of the tax structure. Mr. Peterson, petitioner's attorney, represented to the court as follows:

"There is a tax liability being assessed to either MST Trucking or MST Financial or Mr. Moon individually, and Mr. Moon will be responsible for that. Without any question, any tax effect as to his own income as a result of that, and whatever the result of that audit is that is taking place with MST Trucking." (R 1165 at p.8; R 1166 at p.24)

The respondent has not received any bonuses after the restructuring of the corporation when MST Trucking became a Sub-Chapter "S" Corporation and was no longer a "C" Corporation. The respondent continued however, to pay to the petitioner one-third (1/3) of all "cash" distributions which he received from MST Trucking. The distributions were returns on his investment and were not bonuses. (R 1167 at p.12, 47 and 49)

In July 1995, the petitioner filed an Order to Show Cause against the respondent claiming that he had not paid to the petitioner the "bonus" money. (R 832-834)

The Order to Show Cause was heard in front of the Honorable Lisa A. Jones, Domestic Relations Commissioner, and she thereafter entered her order pursuant to Minute Entry dated February 12, 1996. (R at p.959-961) Pursuant to her determination it was determined that the

petitioner's request was in fact a "Petition for Modification" and was not an Order to Show Cause and that the changing of the structure of the company did not entitle the petitioner to thirty percent (30%) of the monies above the \$150,000 income which were received by the respondent. The trial court affirmed that order pursuant to Order dated March 27, 1996. (R at p.967-968) No appeal was taken by the petitioner to modify that ruling.

The petitioner filed a Petition for Modification on March 3, 1996. (R at p.962-966) The petitioner's Petition alleged that the respondent had diverted income to salary rather than bonuses and was working and planned to constructively prohibit and limit payments of alimony to the petitioner.

The trial court held, at the trial on May 29, 1997, over the objections of the respondent, that the matter was before the court on an Order to Show Cause and/or that the petitioner's attorney should have objected to the Commissioner's recommendation and submitted the matter on the Order to Show Cause (R 1166 at p.2) but in any event even if this ruling is wrong that there has been a substantial and material change of circumstances in order to grant the Petition for Modification and to modify the Decree of Divorce. The trial court stated:

“Counsel, let me first indicate to you, as I stated this morning, I indicated to you that this comes before the court not only on a Petition to Modify but on the Order to Show Cause. Mr. Ludlow has taken issue with that, which he has the right to do. And the court took the position – and I still take the position – that, at pretrial, this matter was discussed and expressed to both counsels as far as the Order to Show Cause or Petition to Modify, and the court would be looking at both of them.

This court is of the opinion that this should be before the court on the Order to Show Cause and not on the Petition to Modify. I think counsel, Mr. Hunt, was wrong in not bringing an objection to the recommendation of the Commissioner. I

am sure I signed for a recommendation when it came before me. Unless there is an objection made to those, then they're automatically signed.

But I think, either way, about the only difference it makes as far as the Order to Show Cause or the Petition to Modify would be the question as far as retro-activity of any amounts which the court may award.

So, I am looking at this, at both of those, and I am going to make a ruling on both and if the failure to file an objection is controlling in it, as far Mr. Hunt's position is concerned, then of course somebody else will have to tell us that." (See Appendix B at p.2)

Pursuant to the trial court's ruling, it has invited an appeal in this matter. The ruling of the trial court is that it was going to make a determination increasing the alimony and rule in a fashion to "bootstrap" its decisions in any form or fashion whether it was procedurally correct or whether there was sufficient evidence before the court.

The trial court further granted attorneys fees to the petitioner even though there was no itemization of the work performed, documentation as to what was accomplished for the time periods nor any other basis to show that the work was reasonable in light of the services performed.

SUMMARY OF ARGUMENTS

It was inappropriate to have the matter adjudicated as an Order to Show Cause. The Order to Show Cause had been dismissed and the matter was before the court on a Petition for Modification. The allegations in the Petition for Modification were that the respondent had manipulated the corporation and his income so as to defeat the "bonus" alimony payments to the petitioner. There was no finding of any manipulation and there was now showing of any inappropriate acts by the respondent to defeat the petitioner's alimony on bonuses. The court should

not have modified the Decree because there is no basis to modify the Decree. There was no showing of any substantial change in circumstance nor was there any showing of unforeseen circumstances which were not contemplated at the time that the Decree was initially entered. The petitioner had not met her burden of proof to allow for the Decree to be modified.

The Decree has been modified by the trial court. The only time to which the Decree could be modified would have been from April 1996 forward. Retro-active application to August 26, 1992 is not appropriate.

K-1 income as received by the respondent should not be included as a basis for the payment of alimony.

Attorneys fees awarded by the trial court was improper. There was no compliance with Rule 4-505 of the Code of Judicial Administration nor any other evidence to show that the attorneys fees as awarded herein were appropriate or correct.

ARGUMENT

POINT I

THE TRIAL COURT INAPPROPRIATELY TURNED THE PETITION FOR MODIFICATION INTO AN ORDER TO SHOW CAUSE TO ARRIVE AT AN IMPROPER RULING

The petitioner had wanted to receive more money from the respondent and so she had filed an Order to Show Cause in July 1995. (R 822-834) Thereafter the Order to Show Cause was presented for adjudication before the Honorable Lisa A. Jones, Domestic Relations Commissioner,

who entered her ruling on February 12, 1996. A copy of that entry is attached hereto and made a part hereof and marked "Addendum A". (See also R at p.959-961) As a result of the Minute Entry an order was submitted and entered by the court on March 27, 1996. (R at p.967-969) That order was signed by the Honorable Homer F. Wilkinson and incorporated the findings of the Commissioner pursuant to her Minute Entry of February 12, 1996. Pursuant to the findings it was determined that the matter that was before the court was a request to modify the Decree of Divorce. The specific language was that "the court finds that this is a modification issue to be dealt with under a Petition to Modify". (See Addendum A.) Accordingly the Order to Show Cause was dismissed and no appeal was taken from the Order to Show Cause.

Based upon this ruling the petitioner filed her Petition to Modify in order to seek additional alimony from the respondent. (R at p.962-966)

At the pre-trial held prior to the trial the court had informed counsel that he was going to review the matter as if it were still being presented on the basis of an Order to Show Cause. This was objected to by the respondent's attorney. At the commencement of the trial the court thereafter again affirmed that it was going to review the matter as if the action were presented under the Order to Show Cause even though the same was objected to by respondent's attorney and the court again noted this objection when it made its ruling. (R 1166 at p.2 and 1163 at p.2)

The trial court held that an Order to Show Cause and the Petition to Modify are one and the same. The trial court thinks that the only difference between the two of those being the retro-active

application. (R 1137 at ¶ 1, 1143 at ¶ 1 and 1150 at ¶ 1) The matter had previously been adjudicated on the basis of whether or not it was an Order to Show Cause. The issue of the form of the hearing being an Order to Show Cause should have therefore been moot. To have the trial court re-litigate this case as an Order to Show Cause is a violation of the doctrine of res judicata. The trial court would not accept that there are differences between an Order to Show Cause and a Petition for Modification and it used them interchangeably. There are different standards for each of these particular legal doctrines. An Order to Show Cause is based upon the enforcement of the Decree (See Wiles v. Wiles, 871 P.2d 1026 (Ut.App. 1994) and Dent v. Dent, 870 P.2d 280 (Ut.App. 1994)). A Petition for Modification is to modify the terms or language in a Decree upon which there must be a showing of a substantial change of circumstance subsequent to the Decree that was not originally contemplated within the Decree itself before the same can be modified. See Jense v. Jense, 784 P.2d 1249 (Ut.App. 1989) and Grover v. Grover, 839 P.2d 871 (Ut.App. 1992) The petitioner had stated at trial that she did not wish to modify the Decree but only to enforce it. (R 1166 at p.13)

The Petition as filed by the petitioner alleges that funds had been diverted by the respondent so that he is no longer paid bonuses and that the diversion is so as to preclude payment of any additional funds of bonus money to the petitioner. (R 964 ¶'s 7, 8 and 10) At trial the only evidence presented by the petitioner was that there had been an increase in income to respondent as reported in his tax returns. (R 1166 at p.6, 9, and 10) There was no evidence from the petitioner as to how or why respondent's income had changed. There was absolutely no evidence presented by the

petitioner that she had not received all of the bonus monies as required pursuant to the Decree of Divorce. (R 1166 at p. 19-20)

At the time that the original stipulation upon which the original Decree is based had been presented to the court, the corporation, of which the respondent is a twenty percent (20%) share holder, was involved in a tax audit and the structure of the corporation was going to be changed. There was a great likelihood that because of the audit and the way that the monies had been paid in the past that the respondent would have substantial tax consequences which the respondent would be solely required to bear without contribution from the petitioner. Mr. Peterson, petitioner's then attorney, represented to the court at the time of the stipulation which was the basis for the Decree of Divorce the following:

There is a tax liability being assessed to either MST Trucking or MST Financial or Mr. Moon individually, and Mr. Moon will be responsible for that. Without any question, any tax effect as to his own income as a result of that, and whatever the result audit is that is taking place with MST Trucking." (R 1165 at p.8; R 1166 at p.24)

According to the trial court's Findings of Fact number 7, the court found that

"In regards to the question of whether or not the plaintiff's Petition to Modify meets the statutory rule, the court finds that there was a material change in circumstances in that the change in the structure of the payment of the defendant's income was not foreseeable. The resulting change in the structure of the income of the defendant constitutes a material change of circumstances. Accordingly, the plaintiff's enforcement of the Findings of Fact, Conclusions of Law and Decree of Divorce of August 26, 1992 is the same either by the use of the plaintiff's Order to Show Cause or by bringing a Petition to Modify." (R at 1140-1141)

This finding is just contrary to the evidence and contrary to the law.

A. Lack of Evidence.

The petitioner knew that the company was undergoing an audit and that there would be tax problems relating to that audit for the respondent. (R 1166 at p.23 & 24; R 1167 at p. 6-8; R 1165 at p.8) Mr. Larry Kirkham, respondent's then attorney had informed Mr. Peterson, petitioner's then attorney, that there was going to be a change in the corporate structure and that tax liability would most likely occur to respondent and that future bonuses were speculative at best. (R 1167 at p. 6-8) This information was discussed prior to the 1992 pre-trial and during the time when the business valuation was being made by the petitioner's evaluator. The corporate structure in fact was changed at approximately the end of the company's fiscal year, March 31, 1992 which would have been prior to the settlement conference of May 29, 1992. (R 1167 at p.7) The petitioner has always known of the financial condition of the company, the company structure changed and she did her own investigation and evaluation of the company. What was happening to the company was definitely foreseeable and known.

The Findings of Fact, Conclusions of Law and Decree of Divorce were prepared by petitioner's counsel and thus any ambiguity in and to the documents should be construed against the petitioner. Respondent does not believe that any ambiguity exists. Pursuant to the Decree of Divorce the petitioner was to receive thirty percent (30%) of the bonuses which the respondent received. She was not to receive thirty percent (30%) of all of his salary over and above \$150,000. (R 505 at ¶ 8

of the Decree of Divorce; (R 1167 at p.17-18; R 1166 at p.18) No bonus monies were received by the respondent and none were paid in 1993 or thereafter.

After the change in the corporate structure of MST Trucking bonuses were no longer available. Mr. Moon received a four percent (4%) increase in his salary in 1993, approximately one percent (1%) increase in his salary in 1994 and a seven percent (7%) increase in his salary in 1995. (R 1167 at p.12) Respondent began to receive K-1 distributions commencing 1992. Even though the respondent's tax returns show substantial income, actual "cash" was not received by him. Pursuant to the K-1 distributions the respondent was required to pay taxes on income that he did not receive. (R 1167 at p.12) When there was a "cash" distribution which he received, which would have been a return on capital which is not a bonus, the respondent paid one-third (1/3) of that distribution to the petitioner. (R 1167 at p.12) The Decree of Divorce does not provide that the petitioner receive one-third (1/3) of the monies over and above \$150,000 that the respondent receives from his salary at MST Trucking but solely that she receives thirty percent (30%) of his bonuses. (Emphasis added) (R 1167 at p.28) Petitioner received one-third (1/3) of the monies when there has been a "cash" distribution to respondent. These were monies that he did not have to pay to her and which there was no obligation to pay to her. Respondent, acting in good faith, paid her one-third (1/3) of the funds that he did in fact receive. Petitioner was not paid on the K-1 "pass through" or the K-1 income when he did not receive any "cash" distributions. It was noted by both Mr. Kirkham and Craig Willet that Mr. Moon has been paying taxes on monies that he never actually received

because of the nature of K-1 distributions. (R 1167 at p.13 and 38, 39, 40, 41 and 43-44) The change in the corporate structure and the loss of the bonuses was foreseeable and was known at the time that the original stipulation and decree had been entered. The court in its Findings ¶ 7 is totally mistaken and is contrary to all of the information that had been presented at the original hearing in June 1992 and at trial on May 29, 1997. There was no rebuttal in regards to the testimony of Mr. Kirkham and the statements as made by Mr. Kirkham at trial as it related to disseminations of information on the audit, corporate structure change, the corresponding documentation and the business evaluations which had taken place prior to the Decree being entered. Mr. Peterson knew of the problems and tax consequences and tax issues and other related problems going on with MST Trucking. The petitioner chose to use the term “bonuses” as a determination upon which her alimony would be based. There have only been slight increases in the salary that has been received by the respondent and all that has occurred is that he has been receiving, for income reporting purposes, K-1 pass throughs wherein he must pay taxes on monies that he does not receive. These K-1's and the additional incomes have been mostly because of the other companies in which respondent is involved, those being MST Financial and Santa Anna and Elm. (R 1167 at p.28, 30, 37, 39, 40) The respondent has never received any wages or salaries other than from MST Trucking. (R 1164 at p. 36, 50) He has never received any bonuses from any company other than MST Trucking. (R 1167 at p.36) The petitioner admitted under cross examination that the Decree does not provide that she is to receive thirty percent (30%) of income over and above \$150,000 that is received by the

respondent. (R 1166 at p.18) This was also testified to by Mr. Kirkham who informed the court that the petitioner was only to receive thirty percent (30%) of the bonuses and not thirty percent (30%) over and above the respondent's salary of \$150,000. (R 1167 at p.27) The trial court however in its Order at paragraph number 4 requires the respondent to pay to the petitioner thirty percent (30%) of all income he receives over \$150,000 annually whether it consists of salary, bonuses or distributions. (R at P.1151)

B. Applications of Law.

The trial court is clearly modifying the Decree of Divorce and changing the Decree from the stipulation and previous Order entered in 1992. The now modified order requires that respondent pay to petitioner one-third (1/3) of all of his salary over and above \$150,000 plus one-third (1/3) of any and all K-1 distributions whether or not he receives any monies as a result of these particular distributions. This was not contemplated in the Decree of Divorce and is not set forth in the Decree of Divorce. This clearly requires a Petition for Modification with a showing of a substantial change of circumstance to occur rather the enforcement of a Decree as would happen pursuant to an Order to Show Cause. The Decree is not being enforced but it is being changed from what was ordered on August 26, 1992.

The trial court held that the "unforeseen circumstances" was the change in the corporate structure. This has been shown to be incorrect. The trial court merely wished to ignore the transcripts from the settlement conference and Mr. Kirkham's un rebutted testimony and use this

“change in circumstance” in its attempt to “bootstrap” its decision to make the respondent pay more money to the petitioner. The requirements of Utah Code Ann. §30-3-5(7)(g)(i) and (ii) as well as the requirement that there must be a substantial change of circumstance that was not originally contemplated within the Decree itself have not been met. See Woodward v. Woodward, 709 P.2d 393 (Utah 1985) and Jense v. Jense, 784 P.2d 1249 (Ut.App. 1989) In Jense, Id. the trial court attempted to modify the Decree of Divorce based upon the fact that the husband in that case had not received a bonus. This court held

“...the plaintiff’s loss of his job in 1987 is not a change in circumstances upon which the original award or the money judgement of April 1, 1987 was based. The loss of employment occurred subsequent to both events. The loss of a job, like the failure to receive a bonus, (emphasis added) may go to plaintiff’s ability to pay the judgement but is not a proper basis upon which to change the amount of the original award.” Id. at 1252.

In this case there has been the loss of a bonus because of the change of the structure of the corporation which was contemplated and known by the petitioner and her then attorney. This is not a change in circumstance between these parties. The trial court’s finding that there was an “unforeseen change in circumstance” is just contrary to the evidence presented at trial. Petitioners only evidence was that she was not receiving any alimony over \$2,400 per month and the respondents income had increased. Respondent’s un rebutted evidence was that he had done nothing to change the corporate structure or modify the bonuses. (R 1167 at p.50) Respondent hasn’t received any bonuses. His salary has had modest increases. (4% in 1993; 1% in 1994; 7% in 1995: R 1167 at p.2) The rest of his taxable income is pursuant to K-1 distributions. (R 1167 at p.37)

The trial court in holding that the matter was before it on an Order to Show Cause did not require petitioner to meet the allegations in her petition. There was no evidence of any manipulation or diversion by the respondent of the corporation as claimed and which was the basis of the Petition for Modification. There was no finding of any manipulation or diversion by the respondent of the corporation as claimed and which was the basis of the Petition for Modification. There was no finding of any manipulation or diversion of income by the respondent. The trial court inappropriately modified the Decree without requiring the petitioner to 1) meet her burden of proof of her allegations in her petition, 2) showing or proving a substantial material change in circumstances not foreseeable at the time of the divorce (UCA §30-3-5(7)(g)(i) or 3) issued a new order without addressing the needs of the petitioner that did not exist at the time the decree was entered (UCA §30-3-5(7)(g)(ii).

The trial court has just ignored the Decree of Divorce, the statutes, the case law and the evidence and entered an order modifying the Decree to what the trial court believes should now be paid by respondent to petitioner. This court should reverse the trial court and dismiss the Petition for Modification. This court should also hold that it was improper to hold that an Order to Show Cause and Petition to Modify are one and the same and that it was improper to adjudicate them jointly, especially when the Order to Show Cause has been dismissed.

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POINT II

K-1 INCOME SHOULD NOT BE INCLUDED FOR DISTRIBUTION.

The trial court now requires that the respondent pay to the petitioner thirty percent (30%) of any funds reported on his income tax returns as a result of his employment with MST Trucking. Under the Decree the respondent is only required to pay thirty percent (30%) of bonuses. The respondent is not required to pay thirty percent (30%) of any distributions pursuant to a K-1 or thirty percent (30%) of any dividends.

Paragraph 6 of the Findings of Fact of August 1992 sets forth that the defendant's income is \$250,000 per year which is paid \$150,000 of annual salary and bonuses of approximately \$100,000. (R 494) This paragraph was to deal with child support issues solely and not to deal with the alimony. (R 1167 at p.29) Paragraph 10 of the August 1992 Findings of Fact and Conclusions of Law (R 497) and paragraph 8 of the Decree (R 505) determines the award of alimony and how the same is based. The trial court was informed as to the differences between bonuses and dividends. A dividend is paid with respect to ownership of stock while bonuses are paid with respect to services or performance. (R 1167 at p.44) The trial court was also informed as to the nature of K-1 distributions. (R 1167 at p.12-13 also 43-44) In this particular case Mr. Moon, in fact, has had to pay taxes on income he did not receive because of the K-1's which were given to him by the company. (R 1167 at p.12) The respondent has had to pay taxes on income that he has never received "in his pocket" based upon the K-1 distribution As was noted on the Santa Anna and Elm properties he had

to pay tax on K-1 distributions of approximately \$70,000 to \$80,000 though he had not received any monies as a result of those K-1 distributions. (R 1167 at p.39, see also R 1167 at pp.28, 30)

Pursuant to Jones v. Jones, 700 P.2d 1072 (Utah 1985) there has to be shown the petitioner's financial condition and needs, her ability to produce income and the respondent's ability to provide support. K-1 income is a distribution that is made to which the person may never receive any "cash". Taxes are paid based on accounting methods. Monies may be retained by the corporation and used to enhance a capital asset. If respondent doesn't receive the income in his pocket in the form of cash, then how is he supposed to make an alimony payment to the petitioner? The ruling by the trial court that respondent pay petitioner one-third (1/3) of all funds reported on his tax returns as taxable income, including K-1 income is inappropriate. This means that Mr. Moon would have to pay to petitioner alimony on monies that he never received. It is conceivable that because of accounting methods used that the K-1 distribution could be so great that respondent could be required to pay out more monies in alimony than he ever earned in salary thus putting him in a negative position. The trial court's ruling gives the petitioner all benefits but it has not ordered that she participate in any losses. The trial court's ruling that respondent pay support to petitioner when he does not receive income which is tangible monies which can be transferred to petitioner is inappropriate.

The respondent is a twenty percent (20%) share holder of the corporation. He has no ability to control the structure of the corporation, the determination of whether or not bonuses are paid, what the distribution will be pursuant to a K-1 distribution, whether dividends will be paid or any

other of these items. He can't control the corporation because of his lack of ownership. There was no evidence presented at trial that he has ever been able to change or control the corporation. The Petition to Modify as filed in this matter is based on allegations that the respondent is manipulating the corporation so as to defeat alimony payments. No facts nor evidence were presented which supported this allegation.

The trial court has determined that K-1 distribution is identical to a bonus. This is an incorrect assumption by the trial court. Craig Willett, a certified public accountant, also testified how a K-1 works and attempted to explain the same to the court. (R 1167 at p.43-44) The corporation no longer pays taxes. The shareholders pay taxes on the income. They get the benefits of any loss that the corporation may generate in calculating net income to the corporation. In the typical situation the company either retains money to allow it to grow or has more in accounts receivable that have not translated into cash or they have depreciated assets or other items all of which generate taxable income for the person who receives the K-1 distribution even though the individual is not receiving any spendable money. The person literally has to pay taxes even though they have not received a "cash" distribution to pay the taxes.

By analogy, in the calculation of child support amounts, when a person is self employed or as in this case, is a member of a Sub-chapter "S" Corporation, they are allowed to have taken out of the gross income appropriate deductions and expenses before the calculation of "gross income" is determined. See Utah Code Ann. §78-45-7.5(4)(a) and (b). In this case the trial court has included

all income, whether or not received without regards to deductions and expenses or accounting method (cash or accrual) in ordering the modified alimony.

A bonus, which was the term that was used by the Decree of Divorce as prepared by the petitioner is when an individual is paid with respect to services or performance. It is not the same as a K-1 distribution nor is it the same as a dividend which is paid with respect to ownership of stock or a return on an investment. Petitioner is entitled to receive thirty percent (30%) of all bonuses not K-1 distributions or dividends. Because there is a substantial difference between a K-1 distribution and a bonuses the trial court should not have ordered that petitioner receive those monies.

The Decree of Divorce solely allows the petitioner receive thirty percent (30%) of any bonuses. It is inappropriate for her to be awarded thirty percent (30%) of all income over \$150,000 annually received by the respondent that consists of salary or distributions from MST Trucking including the K-1 income.

POINT III

THE COURT WRONGFULLY APPLIED A RETRO-ACTIVE MODIFICATION.

If this case was appropriate to be heard as an Order to Show Cause then the respondent would not dispute that there could be retro-active enforcement back to the time since the entry of the Decree of Divorce. However, this action is in reality a Petition to Modify. The trial court has modified the Decree of Divorce. A Petition to Modify can only be modified from the time when notice is given of the Petition for Modification. Utah Code Ann. §30-3-10.6(2). See also, Whitehead

v. Whitehead, 836 P.2d 814 (Ut.App. 1992). This would mean that any modification in this case would occur from April 4, 1996 when the acceptance of service of the Petition for Modification occurred (R-970). The trial court's order of retroactive application to the date of the Decree of Divorce of August 26, 1992 is improper. (R 1152 at ¶ 6) If this court allows the Decree to be modified then the same should only occur from April 4, 1996 forward.

POINT IV

ATTORNEYS FEES AWARDED BY THE COURT ARE IMPROPER.

The petitioner had requested attorneys fees for the bringing of this action. The court awarded to her the sum of \$4,324 for the services provided by Mr. Hollis Hunt, her present attorney, and the sum of \$1,700 which is the amount she had paid to Mr. E.H. Fankhauser for a total of attorneys fees of \$6,024. The court did not award all of Mr. Hunt's attorneys fees as the court had ruled that he was at fault for failing to object to the Commissioner's recommendation with the court further stating that had Mr. Hunt appealed the Commissioner's ruling it would have alleviated the necessity of the pleadings and the attorneys fees used in the filing of the Petition to Modify. (R 1141 at ¶ 9) The only evidence presented at the time of the trial as it relates to the \$1,700 award was that this is the amount that the petitioner had paid to Mr. E.H. Fankhauser. (R 1166 at p.36 and 37) Mr. Hunt testified as to a gross amount of billings without itemization or detail. (R 1166 at p.31, 32 and 33) Pursuant to Rule 4-505 of the Code of Judicial Administration the petitioner was required to provide to the court an affidavit that would set forth the hours, the time spent, the hourly rate, the nature of

the work performed and thereafter the reasonableness of the work performed. In this particular case all that was submitted was a gross billing amount without any itemization as to what work and services were actually performed, the time spent in regards to performing the various work in this matter, the reasonableness of the time spent and there was no showing that the time spent was within the community standard for like work and services. In addition to this the respondent had objected to the presentation of any attorneys fees or the calling of Mr. Hunt based upon the fact that Mr. Hunt had not disclosed in discovery that he would testify nor was there any disclosure in the discovery as to the work, services and amounts that had been incurred or billed. (R 1166 at p.27) Nonetheless the court allowed Mr. Hunt to testify and to present his Exhibit #5 which was the basis of his attorneys fees as awarded by the court. The evidence of fees should not have been allowed based on failure to comply with the discovery.

It is acknowledged that an award of attorneys fees is within the sound discretion of the trial court however, the same must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees. Whitehead v. Whitehead, 836 P.2d 814 (Ut.App. 1992) In this case the trial court abused its discretion in awarding attorneys fees. Not only was there a failure to comply with Rule 4-505 of the Code of Judicial Administration which prohibited a determination as to whether or not the fees were reasonable, within the community standard and that the work performed was reasonable and necessary, but there was absolutely no evidence presented of the financial need of the receiving spouse, the ability of the

respondent to pay those fees and the reasonableness of the requested fees. The only evidence presented to the trial court was that these are the fees that are requested based upon the gross billing of Mr. Hollis Hunt and the amount that the petitioner had paid to Mr. Fankhauser.

Additionally, the attorney for the petitioner had stated to the court that he was requesting attorneys fees pursuant to Utah Code Ann. §30-3-3. (R 1166 at p.28) Pursuant to that statute it provides in part

“...in an action to enforce an order of custody, visitation, child support, alimony or division of property in a domestic case, the court may award costs and attorneys fees upon determining that the party substantially prevailed upon a claim or defense...”

Nowhere in Utah Code Ann. §30-3-3(2) does it provide for attorneys fees being awarded in a Petition for Modification. That statute specifically applies to Orders to Show Cause where it is seeking the enforcement of a Decree. The specific language of the statute is in terms of “enforcement” not for “modification”. The trial court stated in its ruling:

“...Now, as far as attorneys fees, the court is going to award Mr. Hunt’s attorneys fees of \$4,324 and award to the plaintiff \$1,700 for the amount she paid to Mr. Fankhauser.

And the reason the court had decreased Mr. Hunt’s attorneys fees is because I think Mr. Hunt was at fault for not bringing this matter immediately to the court on an objection to the recommendation of the Commissioner, and it has caused unnecessary pleadings and attorneys fees to be used in the filing of the Petition to Modify.” (See Appendix B at p.8)

The trial court was not able to make any findings as to reasonableness, need and/or ability to pay because the record is devoid of any evidence on those issues. When this is taken into consideration

with the failure to comply with Rule 4-505 of the Code of Judicial Administration plus respondent's objection to even the presentation of attorneys fees because there had never been any disclosure pursuant to discovery requests for the same and the court's overruling of that particular objection it is readily apparent that the award of attorneys fees in this matter is an abuse of discretion and should be reversed by this court.

CONCLUSIONS

The Honorable Lisa A. Jones, Domestic Relations Commissioner, was correct when she had determined that the appropriate proceeding needed to be a Petition for Modification and not an Order to Show Cause. The requested relief as sought by the petitioner requires that the Decree be modified in order to give the relief requested. The trial court has in fact modified the Decree of Divorce and has used interchangeably the Order to Show Cause and Petition for Modification. The trial court has not applied the standards as required by statute and case law. The trial court has solely sought to increase the alimony that the petitioner receives without 1) having the petitioner meet her burden of proof, 2) meeting the allegations in her petition, 3) failing to establish that there was a substantial change of circumstance subsequent to the Decree that was not originally contemplated within a Decree itself, or 4) there was not any addressing of the needs of the petitioner that did not exist at the time that the Decree was entered. All of these items point to the fact that the trial court improperly modified the Decree of Divorce.

K-1 income should not have been included for distribution. Because of the nature of K-1 income and distributions the respondent is not receiving monies which will allow him to pay out alimony. The Decree requires that he only pay on bonuses. K-1 income and distribution is not the same as a bonus. They are substantially different. Income has been generated for the corporation pursuant to accounting methods though the respondent is not receiving spendable money. It is inappropriate to have him required to pay monies on K-1 distributions when the same was not contemplated nor part of the original Decree.

If this court allows the Decree to be modified pursuant to the trial court's ruling then the same can only occur after April 4, 1996. Retroactive modification of the Decree is inappropriate and should not have been ordered by the trial court.

There was no compliance with Rule 4-505 of the Code of Judicial Administration, no itemization of the work and services which were performed, the time spent in regards to performing the work in this matter, the reasonableness of the time spent nor that the work that was performed was within the community standard for like work and services, no award of attorneys fees should have been granted. Additionally, there was absolutely no evidence presented of the financial need of the receiving spouse, the ability of the respondent to pay those fees and the reasonableness of the requested fees. The only items dealing with attorneys fees were that the amounts that were requested was based upon the gross billings of Mr. Hunt and the amount that the petitioner had paid to Mr. Fankhauser. The petitioner had failed to give evidence in her discovery of the attorneys fees and then

failed to identify either Mr. Hunt or Mr. Fankhauser as possible witnesses. Attorneys fees should not have been granted or allowed.

The respondent would request that the court reverse the rulings of the trial court and dismiss the petition to modify the Decree of Divorce. This court should not allow any attorney's fees to the petitioner. It would be appropriate for this court to hold that the trial court inappropriately adjudicated the matter as an Order to Show Cause, that there was no basis for allowing a modification of the Decree under the Petition to Modify as filed by the petitioner and that the award of attorneys fees was inappropriate.

RESPECTFULLY SUBMITTED this _____ day of April, 1998.

RANDY S. LUDLOW
Attorney for Respondent/Appellant

MAILING CERTIFICATE

I hereby certify that I caused to be mailed a true and correct copy of the foregoing BRIEF OF APPELLANT, by placing the same in the United States Mail, in a postage prepaid sealed envelope, this _____ day of April, 1998

HOLLIS B HUNT
392 EAST 12300 SOUTH, SUITE A
DRAPER, UTAH 84020

Leslie Christofferson
Secretary

ADDENDUM A

In The Third Judicial District Court Of Salt Lake County
State of Utah

MARY ANN MOON

Plaintiff,

vs.

STANLEY W MOON

Defendant.

MINUTE ENTRY

Case No. 904901685

Commissioner LISA A. JONES

Under Advisement Recommendation

Court Clerk: GLN

Date: FEBRUARY 12, 1996

Type of hearing: ORDER TO SHOW CAUSE

Plaintiff's Attorney: HOLLIS S. HUNT
DEFENDANT'S ATTORNEY: RANDY S LUDLOW

THE COMMISSIONER HAVING RECEIVED THE PROFFERS OF TESTIMONY AND ARGUMENT ON CERTAIN CONTESTED ISSUES AND HAVING TAKEN THOSE CONTESTED ISSUES UNDER ADVISEMENT, THE COMMISSIONER NOW MAKES THE FOLLOWING FINDINGS AND RECOMMENDATIONS:

1. DEFENDANT'S INCOME: DEFENDANT WAS ORDERED IN THE 1992 DECREE OF DIVORCE TO PAY ALIMONY IN THE AMOUNT OF \$2,400.00 PER MONTH BASED ON HIS SALARY OF \$150,000.00 AT THAT TIME, AND, IN ADDITION, TO PAY 30% OF HIS BONUSES.

FOLLOWING THE ENTRY OF THE DECREE, DEFENDANT AS A SHAREHOLDER AND OFFICER OF MST TRUCKING VOTED, WITH OTHERS, TO CHANGE THE CORPORATE STRUCTURE OF THE COMPANY. UNDER THE NEW CORPORATE STRUCTURE, DEFENDANT DOES NOT RECEIVE "BONUSES", BUT NOW RECEIVES THE VAST AMOUNT OF HIS INCOME FROM SALARY AND SMALLER "DISTRIBUTIONS". HE HAS PAID PLAINTIFF 30% OF THE DISTRIBUTIONS.

PLAINTIFF ARGUES DISTRIBUTIONS PLUS INCOME SHOULD BE USED

AND A BONUS SHOULD BE CALCULATED BY USING ANY INCOME IN EXCESS OF \$150,000.00 FIGURE STATED IN THE DECREE.

DEFENDANT ARGUES THAT THE DECREE IS CLEAR AND SINCE HE DID NOT RECEIVE BONUSES, PLAINTIFF IS NOT ENTITLED TO ANY ADDITIONAL ALIMONY FROM HIS BASE SOURCE OF INCOME. DEFENDANT ARGUES HE DID NOT ACT ALONE IN CHANGING THE CORPORATE STRUCTURE, IT WAS BROUGHT ABOUT BY AN IRS AUDIT. DEFENDANT ASSERTS THIS IS A MODIFICATION ISSUE, NOT ONE OF ENFORCEMENT.

THE COURT FINDS THAT THIS IS A MODIFICATION ISSUE TO BE DEALT WITH UNDER A PETITION TO MODIFY. UNDER RULE 6-404 OF THE UTAH CODE OF JUDICIAL ADMINISTRATION, THE COMMISSIONER CANNOT MODIFY A DECREE ON A MOTION CALENDAR UNDER THESE FACTUAL CIRCUMSTANCES.

2. FEES: PLAINTIFF'S REQUEST FOR FEES IS DENIED.

3. ORDER: PLAINTIFF'S COUNSEL IS TO PREPARE THE ORDER.

DATED THIS 12TH DAY OF FEBRUARY 1996.



COMMISSIONER LISA A. JONES

Case No: 904901685 DA

Certificate of Mailing

I certify that on the 12th day of February, 1996,
I sent by first class mail a true and correct copy of the
attached document to the following:

MARY ANN MOON
Plaintiff

STANLEY W MOON
Defendant

HOLLIS S. HUNT
Atty for Plaintiff
243 EAST 400 SOUTH
SUITE 200
SALT LAKE CITY UT 84111

RANDY S. LUDLOW
Atty for Defendant
311 SOUTH STATE STREET
SUITE 280
SALT LAKE CITY UT 84111

District Court Clerk

By: 
Deputy Clerk

ADDENDUM B

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

<p>MARY ANN MOON,</p> <p style="text-align: right; padding-right: 40px;">Plaintiff,</p> <p>vs.</p> <p>STANLEY W. MOON,</p> <p style="text-align: right; padding-right: 40px;">Defendant.</p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p><u>Reporter's Partial Transcript</u></p> <p><u>of Trial Proceedings; Order</u></p> <p><u>to Show Cause/Modification:</u></p> <p><u>Court's Ruling</u></p> <p>Case No. 904901685 DA</p> <p>Hon. Homer F. Wilkinson</p>
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BE IT REMEMBERED, that on the 29th day of May, 1997, the above-entitled matter continued in trial session in Courtroom No. 502 of the Courts Building, Metropolitan Hall of Justice, 240 East 400 South, Salt Lake City, Utah before the Honorable Homer F. Wilkinson, Judge in the Third Judicial District, State of Utah.

APPEARANCES

HOLLIS S. HUNT, Attorney-at-Law, 243 East 400 South, Suite 200, Salt Lake City, UT 84111 Telephone 531-0099 Fax 531-7928 appearing with and on behalf of the Plaintiff.

RANDY S. LUDLOW, Attorney-at-Law, 336 South 300 East, Suite 200, Salt Lake City, UT 84111 Telephone 531-1300 Fax 539-8236 appearing with and on behalf of the Defendant.

COPY

(Whereupon, the following proceedings continued in open court:)

THE COURT: Counsel, let me first indicate to you, as I started this morning, I indicated to you that this comes before the court not only on a petition to modify, but on the order to show cause. Mr. Ludlow has taken issue with that, which he has the right to do.

And the court took the position -- and I still take the position -- that , at the pretrial, this matter was discussed and expressed to both counsel as far as the order to show cause or petition to modify, and that the court would be looking at both of them.

This court is of the opinion that this should be before the court on the order to show cause and not on the petition to modify. I think counsel, Mr. Hunt, was wrong in not bringing an objection to the recommendation of the commissioner. I'm sure I signed her recommendation when it came before me. Unless there's an objection made to those, then they're automatically signed.

But I think, either way, about the only difference it makes as far as the order to show cause or a petition to modify would be the question as far as retroactivity of any amounts which the court may award.

So, I'm looking at this, at both of those, and I'm going to make a ruling on both. And if the failure to file an objection is controlling in it, as far as Mr. Hunt's position is concerned, then of course somebody else will have to tell us that.

First of all, I took considerable time in going over the pleadings in this case, and to me they're quite clear. I think they were drafted well and there's not a dispute as to the pleadings, which Mr. Hunt took that position and wanted to invoke the parol evidence rule, which I disallowed because of the fact that I knew there was some question as to whether it was clear to both parties.

I'm looking at the Findings of Fact first, which have been read here many times today, and Paragraph 6:

The defendant's income is
\$250,000.00 per year --

That's what is income is. It doesn't say anything about "bonuses," it doesn't say anything about "salary," that's what his income is.

-- which is based on \$150,000.00
as annual salary and bonus of
approximately \$100,000.00.

That still does not change what his income is: His income was \$250,000. And now look at Paragraph 10:

Based upon the incomes of
the parties --

the income being \$250,000

-- the Defendant has agreed to pay to the Plaintiff the sum of \$2,400.00 per month as alimony. The Defendant will also pay to the Plaintiff, as additional alimony thirty percent (30%) of the gross amount of any bonuses he receives as additional income above his annual base salary

which is currently \$150,000.00 without bonuses.

Also it states:

The Defendant will provide independent verification to the Plaintiff of any and all bonuses received.

Now, the next part -- and nobody's referred to that -- is the most important part to me in the whole pleading:

The parties agree that this form of payment of alimony is being adopted and agreed upon because the Defendant receives a monthly gross income of \$12,500.00 per month. Accordingly, after deductions for state and federal taxes, social security, health care premiums, child support and alimony, the Defendant will be left with approximately \$2,500.00 net income to meet his own monthly financial needs. The payment of alimony in the total amounts required when considering Defendant's annual income can only be made after Defendant has received his bonus. The Defendant will make distribution to the Plaintiff of thirty percent (30%) of his gross bonus immediately upon his receipt thereof,

and the parties recognize that this will qualify as payment of alimony in addition to \$2,400.00 per month paid from Defendant's base salary.

Then it goes on and says:

Based upon the Defendant's current bonus of \$100,000.00 per year, the amount of alimony paid from the Defendant's bonuses would be \$30,000.00 additional annual payment of alimony.

The decree of divorce merely states:

The Defendant shall pay to the Plaintiff the sum of \$2,400.00 as alimony plus thirty percent (30%) of the gross income of any bonus he may receive each calendar year.

And then, of course, it also provides that:

The Defendant shall also provide independent verification to the Plaintiff of all bonuses Defendant receives.

Now, to me, that was very clear. The defendant had a salary of \$250,000 per year. Because of the fact that, if he were to pay -- because of the fact that he was receiving part of that salary as a bonus annually and not monthly, it would work a considerable

hardship on the defendant, and it was done for the benefit of the defendant.

I'm sure both attorneys must have recognized it, that he would not have sufficient income to care for and support himself if he had to pay alimony each month on \$250,000.

So it was worked out that he would pay that on an annual basis when he received the bonus. But regardless of how you look at it, he was going to be paying alimony on \$250,000 a year.

Since that has taken place, there has been a change as far as the salary, as far as his bonuses, as far as the structure is concerned. But that does not change the meaning of the divorce decree and the findings of fact and conclusions of law.

The court rules that the defendant is responsible for the payment of alimony of \$2400 per month on the first \$150,000 he receives; and he's to pay 30 percent of all amounts he receives over that, whether that's income or bonuses or distributions or anything else as far as that goes.

Now, a lot's been said as far as K-1 distributions. The court is familiar and aware of this type of situation, but in many corporations, money has to be plowed back into the corporation for it to continue in existence. That still does not say that it is not income.

The fact that it's put back into the corporation, and the defendant does not receive that, does not mean it's not income to him, and that he would have a responsibility to pay to the plaintiff 30 percent as far as the increase which he has had; that being an income or increase to him.

Whether he takes it out or not, that's up to him. And the other partners may put all theirs back in, but he still has the responsibility to pay 30 percent of his increase.

Now, the question as far as the petition to modify, I think this does meet the statutory rule. It was not foreseeable, as far as the change of structure of the company, and certainly there has been a substantial and material change of circumstances from alimony on \$150,000 to 30 percent on the next -- well over that, and bonuses over that, and now receiving alimony at only \$2400 per month.

So the court, either way, feels that the plaintiff is entitled to enforcement of the order to show cause or enforcement of the petition to modify. Now, the question as far as the retroactivity, the court does take the position that this should be retroactive.

Certainly, when this matter was first brought to the attention of the court, being sent out to her, verification, that he had some knowledge to know of this fact, and the matter would be retroactive.

MR. LUDLOW: To what date, your Honor?

THE COURT: To the date of the divorce decree.

MR. LUDLOW: The order to show cause says it was served in 1995.

THE COURT: It doesn't go back until after the order to show cause. When you file an order to show cause, it goes back to the decree itself.

MR. LUDLOW: I understand.

THE COURT: Now, as far as attorneys fees, the court is going to award to Mr. Hunt attorneys fees of \$4,324 and award to the plaintiff \$1700 for the amount she paid to Mr. Fankhauser.

And the reason the court has decreased Mr. Hunt's attorneys fees is because I think Mr. Hunt was at fault in not bringing this matter immediately to the court on an objection to the recommendation of the commissioner, and has caused unnecessary pleadings and attorneys fees to be used in the filing of the petition to modify.

Now, I'm not going to go through each year; you have that material. If you can't work it out, then of course I have my notes here. But the plaintiff is first entitled --

MR. LUDLOW: Excuse me, your Honor, I couldn't hear what you said.

THE COURT: I didn't finish saying it, counsel. Let me finish for just a minute. This decree was signed in August of 1992, so he's entitled -- or, she's entitled to a verification for '93, '94, '95, '96, and of course we're into '97. Any questions?

MR. LUDLOW: Yes. I'm confused with regard to what this court is saying with regard to what Mr. Moon owes. Are you saying if she gets -- if she's bought out of those other years, and he has the K-1, with monies he doesn't receive, you're saying he owes money on that; or are you saying he owes money on the interest he received?

THE COURT: I'm saying he received -- he pays money on 30 percent of all increase he has over \$150,000.

MR. LUDLOW: Of salary.

THE COURT: No, increase -- listen to me, counsel: Increase. On the K-1 distribution, that's an increase. That becomes income to him. He can take that money out. If he wants to put that money back into the corporation, that's his choice. Otherwise, a person could never take money out, just enough to live on, and "I don't have any increase or any income."

MR. LUDLOW: Sir, is the court aware that on a K-1, if there is a pass-through to the IRS -- because the corporation is no longer paying tax, it's now paid by the individual. So when they pay those, they receive the monies, the K-1 is a pass-through or directly to the IRS. The individual never receives that.

It's the same when they never receive any income as a result of the additional valuation of an asset. There's no money his pocket.

THE COURT: That's what I said, counsel. It's an increase to him.

MR. HUNT: Your Honor, you didn't deal with the issue of interest.

THE COURT: There would be interest awarded on all past-due amounts. That's by statute.

MR. HUNT: Thank you, your Honor. Who do you want to prepare the pleadings?

THE COURT: I'll ask you, Mr. Hunt, to prepare the pleadings.

MR. HUNT: Thank you.

THE COURT: Court will be in recess.

MR. LUDLOW: Before the court leaves, I would ask for a stay with regard to execution with regard to those matters. We plan to appeal this.

THE COURT: Well, I won't grant any stay at this point. You do what you have to do as far as filing a motion to stay. That's up to you.

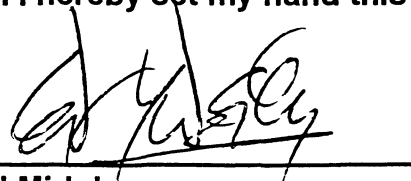
MR. LUDLOW: All right, judge.

(Whereupon, at the hour of 12:30 p.m., the instant proceedings came to a close.)

REPORTER'S CERTIFICATE

I, Ed Midgley, Official Court Reporter in the Third Judicial District, State of Utah, do hereby certify that the above and foregoing proceedings were, by me, stenographically reported at the times and places herein set forth; that said report was, by me, subsequently reduced to printed form, consisting of the enumerated pages herein appearing; and that said report so transcribed constitutes a true and correct transcription of testimony given, evidence adduced and/or proceedings had as in the foregoing annexed transcription herein set out, portion only of entire proceedings being herein transcribed pursuant to requested transcript content.

To which certification I hereby set my hand this 3rd day of June, 1997, at Salt Lake City.

A handwritten signature in black ink, appearing to read 'Ed Midgley', is written over a horizontal line.

Ed Midgley
Official Court Reporter

Utah CSR No. 22-104249-7801

ADDENDUM C

FILED DISTRICT COURT
Third Judicial District

AUG 11 1997

HOLLIS S. HUNT - #1587
Attorney for Plaintiff
243 East 400 South, Suite 200
Salt Lake City, UT 84111
Telephone: (801) 531-0099

By [Signature] SALT LAKE COUNTY
Deputy Clerk

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

MARY ANN MOON,)	
)	
Plaintiff,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW ON
vs.	)	PLAINTIFF'S ORDER TO SHOW
	)	CAUSE AND PETITION TO MODIFY
)	
STANLEY W. MOON,	)	Case No. 904901685 DA
)	
Defendant.	)	Judge Homer F. Wilkinson

The Plaintiff's Order to Show Cause and Petition to Modify the Decree of Divorce of August 26, 1992, came on regularly for trial before the Honorable Homer F. Wilkinson, judge of the above-entitled Court, on May 29, 1997. The Plaintiff was present and represented by and through her counsel, Hollis S. Hunt, and the Defendant was present and represented by his counsel, Randy S. Ludlow. The Court heard the testimony of the respective parties to this matter, their witnesses, reviewed pleadings, exhibits and heard arguments from the respective counsel. The Court having been fully advised in the premises now makes the following:

FINDINGS OF FACT

1. The matter before the Court comes to the Court not only on the Plaintiff's Petition to Modify of March 22, 1996, but also on the Plaintiff's Order to Show Cause previously filed in this matter on August 22, 1995. The Court indicated to the parties at the Pretrial Conference on May 23, 1997, that the Court would review both pleadings at the trial. There is no difference between the allegations of the Order to Show Cause and the allegations of the Petition to Modify. The only question would be the retroactivity of any amounts which the Court may award. The Court finds that the Plaintiff's matter should be before the Court on its Order to Show Cause and not the Petition to Modify.

2. The Court has taken considerable time reviewing the Findings of Fact, Conclusions of Law and Divorce Decree of August 26, 1992, and finds that they were well drafted and there is not a dispute as to the pleadings and that the meaning of the pleadings is quite clear. Plaintiff's counsel requested the Court to invoke the Parol Evidence Rule which the Court disallowed as there was some question as to the meaning of the pleadings as between the parties. The Court finds that the Findings of Fact and the Divorce Decree of August 26, 1992, were well drafted, not disputed, and are quite clear to the Court.

3. In the Findings of Fact of August 26, 1992, in Paragraph 6, state that the Defendant's income is stated at \$250,000.00 per year. In this paragraph, there is no reference to "bonuses" nor "salary" but only to the Defendant's "income" which in turn consists of \$150,000.00 of annual salary and additional bonuses of approximately \$100,000.00 a year. Despite the allocation of income between salary and bonuses, the Defendant's income was \$250,000.00 a year at the time of divorce.

4. In Paragraph 10 of the Findings of Fact of August 26, 1992, which is based upon the income of the Defendant being \$250,000.00, states as follows:

" . . The Defendant has agreed to pay to the Plaintiff the sum of \$2,400.00 per month as alimony. The Defendant will also pay to the Plaintiff as additional alimony thirty percent (30%) of the gross amount of any bonuses he receives as additional income above his annual base salary which is currently \$150,000.00 without bonuses. . . The Defendant will provide independent verification to the Plaintiff of any and all bonuses received."

The next part of the paragraph is the most important part of the whole pleading:

"The parties agree that this form of payment of alimony is being adopted and agreed upon because the Defendant receives a monthly gross income of \$12,500.00 per month. Accordingly, after deductions for state and federal taxes, social security, health care premiums, child support and alimony, the Defendant will be left with approximately \$2,500.00 net income to meet his own monthly financial needs. The payment of alimony in the total amounts required when considering Defendant's annual income can only be made after Defendant has

received his bonus. The Defendant will make distribution to the Plaintiff of thirty percent (30%) of his gross bonus immediately upon his receipt thereof and the parties recognize that this will qualify as payment of alimony in addition to \$2,400.00 per month paid from Defendant's base salary. . . Based upon the Defendant's current bonus of \$100,000.00 a year, the amount of alimony paid from the Defendant's bonus would be \$30,000.00 additional annual payment of alimony."

5. The Decree of Divorce of August 26, 1992, merely states as follows:

"The Defendant shall pay to the Plaintiff the sum of \$2,400.00 as alimony plus thirty percent (30%) of the gross income of any bonus he may receive each calendar year. . . The Defendant shall also provide independent verification to the Plaintiff of all bonuses Defendant receives."

6. To the Court, the text of above quoted portions of the Findings of Fact and Decree of Divorce are very clear. The Defendant had an income of \$250,000.00 per year. If he was receiving part of that income as bonus annually and not monthly, it would work a considerable hardship on the Defendant. The separation between salary and bonuses and the annualized payment was done for the benefit of the Defendant. He would not have sufficient income to care for and support himself if he had to pay alimony each month on his total annual income of \$250,000.00. Payment of alimony was structured so that the Defendant would pay on an annual basis when he received that part of his income as a bonus. Regardless of how you look at payment of his income, the

Defendant was going to be paying alimony on his total income of \$250,000.00 a year.

Since that initial alimony payment structure was set up in the Findings of Fact and Conclusions of Law and Decree of August 26, 1992, the allocation of Defendant's income has been restructured as to the allocation between the Defendant's salary and his bonuses. The Defendant now receives little or no bonuses and his salary has been substantially increased. Despite the change in the structure of how the Defendant's income is paid to the Defendant, the meaning of the Divorce Decree and the Findings of Fact and Conclusions of Law have not changed. The Court finds that the Defendant is ordered to pay alimony of \$2,400.00 per month on the first \$150,000.00 he receives as income. The Defendant is ordered to pay (30%) of all annual income he receives over \$150,000.00 regardless if that income is referred to as salary, bonuses, or distributions that he receives as income for that year as additional alimony to the Plaintiff.

7. In regard to the question whether or not the Plaintiff's Petition to Modify meets the statutory rule, the Court finds that there was a material change of circumstances in that the change in the structure of the payment of the Defendant's income was not foreseeable. The resulting change in the structure of the income of the Defendant constitutes a

material change of circumstances. Accordingly, the Plaintiff's enforcement of the Findings of Fact, Conclusions of Law and Decree of Divorce of August 26, 1992, is the same either by the use of the Plaintiff's Order to Show Cause or by bringing a Petition to Modify.

8. As the Plaintiff's claims for relief in both the Order to Show Cause and in the Petition to Modify are requesting enforcement of the Findings of Fact and Conclusions of Law and Decree of Divorce of August 26, 1992, any ruling by this Court should be retroactive to the date of the Divorce Decree for the years 1993, 1994, 1995, 1996, and 1997. The Court finds that this matter was first brought to the attention of the Defendant and that he had knowledge of the Plaintiff's claim to enforce the Decree and that the claim was to be retroactive to the date of the divorce. The Court finds on the question of retroactivity that the claims of the Plaintiff shall be retroactive to the date of the Decree, August 26, 1992.

9. The Court awards attorney's fees to the Plaintiff in the sum of \$4,324.00 for the services provided by her attorney, Hollis S. Hunt, and the additional sum of \$1,700.00 for the amount she paid to Mr. E. H. Fankhauser for a total award of attorney's fees of \$6,024.00. The Court has not awarded payment of the full amount of Mr. Hunt's attorney's fees as the Court

believes that an objection to the ruling by Commissioner Jones should have been filed immediately before this Court which would have alleviated the necessity of the pleadings and attorney's fees being used in the filing of a Petition to Modify.

10. The Defendant is ordered to provide verification of the Defendant's income to the Plaintiff for the years 1993, 1994, 1995, 1996, and 1997. The verification of income shall include salary, bonuses, K-1 income and all other income the Defendant received during each annual period.

11. The Court finds that the definition of income shall include salary and bonuses received from MST Trucking Company, and any annual increase that the Defendant receives over \$150,000.00 shall be subject to the (30%) distribution to the Plaintiff as alimony regardless of whether or not the Defendant chooses to actually receive the money or to leave it in the corporation. Any sums allocated to the Defendant as income shall still be calculated as part of the Defendant's alimony obligation to the Plaintiff. The Plaintiff shall be entitled to (30%) of that income if the Defendant's income is over \$150,000.00 for any annual period.

12. Plaintiff shall be entitled to interest at the statutory rate as found in Section 15-1-4, U.C.A. (1953, as amended), at the rate of (7.45%) per annum on all past due

amounts for the years 1993, 1994, 1995, 1996, and 1997 to the date of this judgment. Plaintiff shall be further entitled to post-judgment rate of interest at the rate of (7.45%) on all past due amounts until paid.

13. Defendant's request for a stay of execution on the judgment is denied at this time and the Defendant is instructed to do whatever is necessary to do in filing a motion to obtain a stay.

HAVING MADE its Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The cause of action brought by the Plaintiff before this Court is upon the Order to Show Cause of the Plaintiff to enforce the terms of the Decree of Divorce of August 26, 1992, and not on the Plaintiff's Petition to Modify to modify this Decree of Divorce of August 26, 1992. The relief requested by the Plaintiff in either pleading is the same and requests only the enforcement of the Findings of Fact and Conclusions of Law and the Decree of Divorce of August 26, 1992. The only difference between the Order to Show Cause or the Petition to Modify would be the question as to the retroactivity of any amounts which the Court may award.

2. The Findings of Fact and Conclusions of Law and the Decree of Divorce of August 26, 1992, between the Plaintiff and the Defendant are well drafted, without dispute and to the Court are quite clear in their meaning.

3. Pursuant to the Findings of Fact of August 26, 1992, in Paragraph 6, the income of the Defendant for 1992 is clearly stated as \$250,000.00 a year regardless of whether the income is structured as bonuses or salary.

4. Paragraph 10 of the Findings of Fact of August 26, 1992, establishes a structure which will allow the Defendant to receive his monthly salary of \$150,000.00 a month upon which he must pay to the Plaintiff the sum of \$2,400.00 per month and that the Defendant was then to pay (30%) of any additional income he received over and above the \$150,000.00 on an annual basis as additional alimony to the Plaintiff. This structure was for the benefit of the Defendant so that he would not have to pay alimony on a monthly basis based on a total annual income of \$250,000.00 a year. This was due to the fact that some of the income he received was at the end of the year and it would create an undue hardship to the Defendant were he to have to pay it on a monthly basis rather than an annual basis. The Court orders that the Defendant is responsible for the payment of alimony of \$2,400.00 per month on the first \$150,000.00 of income he receives

annually. The Defendant is ordered to pay (30%) of all amounts of income he receives over \$150,000.00 annually as additional alimony to the Plaintiff. The requirement to pay (30%) of all income he receives over \$150,000.00 annually applies to all income whether that income consists of salary, bonuses, or distributions received from MST Trucking Company.

5. Plaintiff's Petition to Modify meets the statutory rule in that there was a material change of circumstances which was not foreseeable in the change of the income structure by the company resulting in a change in the allocation of income to the Defendant between bonuses and salary. Plaintiff is entitled to enforcement of the Order to Show Cause or the enforcement of the Petition to Modify as both require compliance by the Defendant to the Findings of Fact, Conclusions of Law and Decree of Divorce of August 26, 1992.

6. The relief requested by the Plaintiff in its original Order to Show Cause filed with this Court and the subsequent Petition to Modify are retroactive to the date of the Decree of Divorce of August 26, 1992.

7. Plaintiff is awarded a judgment for attorney's fees against the Defendant in the sum of \$6,024.00.

8. Defendant is ordered to provide verification of all of his income as defined in this Order for the years 1993,

1994, 1995, 1996, and 1997. The order requiring verification of income by the Defendant to the Plaintiff shall be ongoing so long as the parties are bound by the Findings of Fact, Conclusions of Law and Decree of Divorce of August 26, 1992.

9. Defendant is ordered to pay the Plaintiff alimony payments in the amount of \$2,400.00 per month on the first \$150,000.00 of income that the Defendant receives on an annual basis. The Defendant is ordered to pay additional alimony in the amount of (30%) of all income attributable to the Defendant over and above \$150,000.00 annually for the years of 1993, 1994, 1995, 1996 and 1997. Defendant's income shall include salary and bonuses received from MST Trucking Company, and any increase over \$150,000.00 annually attributable to the Defendant whether the Defendant actually receipts or receives the income or increase during that annual period.

10. All past due amounts of alimony not paid by the Defendant to the Plaintiff for the years 1993, 1994, 1995, 1996, and that portion of 1997 to the date of this judgment shall bear interest at the statutory rate as is set out in Section 15-1-4 U.C.A. (1953, as amended) at the rate of (7.45%) per annum to the date of judgment. All amounts due owing that are post-judgment arrearages shall bear interest at the annual rate of (7.45%) until paid.

11. Defendant's Motion for a Stay of Execution upon
the judgment is denied.

DATED this 11 day of Aug, 1997.

BY THE COURT:

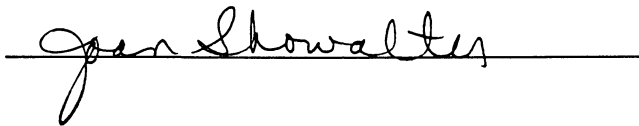


HOMER F. WILKINSON
Third District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of July, 1997,
I caused to be mailed, postage prepaid, a true and correct copy
of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW ON
PLAINTIFF'S ORDER TO SHOW CAUSE AND PETITION TO MODIFY to:

Randy S. Ludlow
Attorney for Defendant
336 South 300 East, Suite 200
Salt Lake City, Utah 84111

A handwritten signature in cursive script, reading "Jon Showalter", is written over a horizontal line.

wp51\pldg\moon.osc

330-0099

FILED DISTRICT COURT
Third Judicial District

AUG 11 1997

By [Signature] SALT LAKE COUNTY
Deputy Clerk

HOLLIS S. HUNT - #1587
Attorney for Plaintiff
243 East 400 South, Suite 200
Salt Lake City, UT 84111
Telephone: (801) 531-0099

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

MARY ANN MOON,)		
)		
Plaintiff,	)	ORDER ON PLAINTIFF'S	2217081
	)	ORDER TO SHOW CAUSE AND	8-13-97
vs.	)	PETITION TO MODIFY	8:30 AM
	)	2176790	
STANLEY W. MOON,	)	Case No. 904901685 DA	
)		
Defendant.	)	Judge Homer F. Wilkinson	

Plaintiff's Order to Show Cause and Petition to Modify the Decree of Divorce of August 26, 1992, came on regularly for trial on May 29, 1997, before the Honorable Homer F. Wilkinson, judge of the above-entitled Court. The Plaintiff was present and represented by and through her counsel, Hollis S. Hunt, and the Defendant was present and represented by his counsel, Randy S. Ludlow. The Court heard the testimony of the respective parties, witnesses, and reviewed the exhibits and pleadings submitted. The Court having already entered its Findings of Fact and Conclusions of Law now enters the following;

IT IS HEREBY ORDERED:

1. The cause of action brought by the Plaintiff before this Court is upon the Order to Show Cause of the Plaintiff to enforce the terms of the Decree of Divorce of August 26, 1992, and not on the Plaintiff's Petition to Modify to modify this Decree of Divorce of August 26, 1992. The relief requested by the Plaintiff in either pleading is the same and requests only the enforcement of the Findings of Fact and Conclusions of Law and the Decree of Divorce of August 26, 1992. The only difference between the Order to Show Cause or the Petition to Modify would be the question as to the retroactivity of any amounts which the Court may award.

2. The Findings of Fact and Conclusions of Law and the Decree of Divorce of August 26, 1992, between the Plaintiff and the Defendant are well drafted, without dispute and to the Court are quite clear in their meaning.

3. Pursuant to the Findings of Fact of August 26, 1992, in Paragraph 6, the income of the Defendant for 1992 is clearly stated as \$250,000.00 a year regardless of whether the income is structured as bonuses or salary.

4. Paragraph 10 of the Findings of Fact of August 26, 1992, establishes a structure which will allow the Defendant to receive his monthly salary of \$150,000.00 a month upon which he

must pay to the Plaintiff the sum of \$2,400.00 per month and that the Defendant was then to pay (30%) of any additional income he received over and above the \$150,000.00 on an annual basis as additional alimony to the Plaintiff. This structure was for the benefit of the Defendant so that he would not have to pay alimony on a monthly basis based on a total annual income of \$250,000.00 a year. This was due to the fact that some of the income he received was at the end of the year and it would create an undue hardship to the Defendant were he to have to pay it on a monthly basis rather than an annual basis. The Court orders that the Defendant is responsible for the payment of alimony of \$2,400.00 per month on the first \$150,000.00 of income he receives annually. The Defendant is ordered to pay (30%) of all amounts of income he receives over \$150,000.00 annually as additional alimony to the Plaintiff. The requirement to pay (30%) of all income he receives over \$150,000.00 annually applies to all income whether that income consists of salary, bonuses or distributions received from MST Trucking Company.

5. Plaintiff's Petition to Modify meets the statutory rule in that there was a material change of circumstances which was not foreseeable in the change of the income structure by the company resulting in a change in the allocation of income to the Defendant between bonuses and salary. Plaintiff is entitled to

enforcement of the Order to Show Cause or the enforcement of the Petition to Modify as both require compliance by the Defendant to the Findings of Fact, Conclusions of Law and Decree of Divorce of August 26, 1992.

6. The relief requested by the Plaintiff in its original Order to Show Cause filed with this Court and the subsequent Petition to Modify are retroactive to the date of the Decree of Divorce of August 26, 1992.

7. Plaintiff is awarded a judgment for attorney's fees against the Defendant in the sum of \$6,024.00.

8. Defendant is ordered to provide verification of all of his income as defined in this Order for the years 1993, 1994, 1995, 1996, and 1997. The order requiring verification of income by the Defendant to the Plaintiff shall be ongoing so long as the parties are bound by the Findings of Fact, Conclusions of Law and Decree of Divorce of August 26, 1992.

9. Defendant is ordered to pay the Plaintiff alimony payments in the amount of \$2,400.00 per month on the first \$150,000.00 of income that the Defendant receives on an annual basis. The Defendant is ordered to pay additional alimony in the amount of (30%) of all income attributable to the Defendant over and above \$150,000.00 annually for the years of 1993, 1994, 1995, 1996 and 1997. Defendant's income shall include salary and

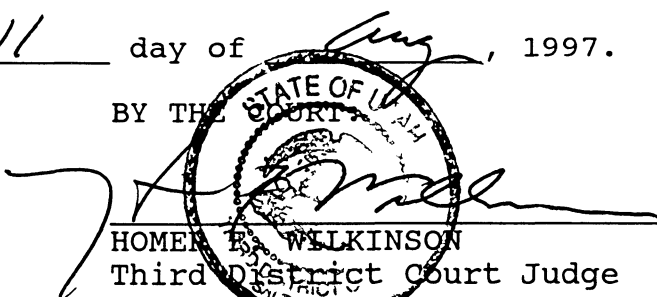
bonuses, and any increase over \$150,000.00 annually attributable to the Defendant whether the Defendant actually receipts or receives the income or increase during that annual period.

10. All past due amounts of alimony not paid by the Defendant to the Plaintiff for the years 1993, 1994, 1995, 1996, and that portion of 1997 to the date of this judgment shall bear interest at the statutory rate as is set out in Section 15-1-4 U.C.A. (1953, as amended) at the rate of (7.45%) per annum to the date of judgment. All amounts due owing that are post-judgment arrearages shall bear interest at the annual rate of (7.45%) until paid.

11. Defendant's Motion for a Stay of Execution upon the judgment is denied.

DATED this 11 day of Aug, 1997.

BY THE COURT


HOMER B. WILKINSON
Third District Court Judge

ADDENDUM D

30-3-3. Award of costs, attorney and witness fees — Temporary alimony.

(1) In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

(2) In any action to enforce an order of custody, visitation, child support, alimony, or division of property in a domestic case, the court may award costs and attorney fees upon determining that the party substantially prevailed upon the claim or defense. The court, in its discretion, may award no fees or limited fees against a party if the court finds the party is impecunious or enters in the record the reason for not awarding fees.

(3) In any action listed in Subsection (1), the court may order a party to provide money, during the pendency of the action, for the separate support and maintenance of the other party and of any children in the custody of the other party.

(4) Orders entered under this section prior to entry of the final order or judgment may be amended during the course of the action or in the final order or judgment.

Utah Code Ann. §30-3-5(7)(g)(i) and (ii)

(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.

30-3-10.6. Payment under child support order — Judgment.

(1) Each payment or installment of child or spousal support under any child support order, as defined by Subsection 62A-11-401(3), is, on and after the date it is due:

(a) a judgment with the same attributes and effect of any judgment of a district court, except as provided in Subsection (2);

(b) entitled, as a judgment, to full faith and credit in this and in any other jurisdiction; and

(c) not subject to retroactive modification by this or any other jurisdiction, except as provided in Subsection (2).

(2) A child or spousal support payment under a child support order may be modified with respect to any period during which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is the petitioner, or to the obligor, if the obligee is the petitioner.

(3) For purposes of this section, "jurisdiction" means a state or political subdivision, a territory or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(4) The judgment provided for in Subsection (1)(a), to be effective and enforceable as a lien against the real property interest of any third party relying on the public record, shall be docketed in the district court in accordance with Sections 78-22-1 and 62A-11-311.

78-45-7.5. Determination of gross income — Imputed income.

(4) (a) Gross income from self-employment or operation of a business shall be calculated by subtracting necessary expenses required for self-employment or business operation from gross receipts. The income and expenses from self-employment or operation of a business shall be reviewed to

determine an appropriate level of gross income available to the parent to satisfy a child support award. Only those expenses necessary to allow the business to operate at a reasonable level may be deducted from gross receipts.

(b) Gross income determined under this subsection may differ from the amount of business income determined for tax purposes.

Rule 4-505. Attorney fees affidavits.

Intent:

To establish uniform criteria and a uniform format for affidavits in support of attorney fees.

Applicability:

This rule shall govern the award of attorney fees in the trial courts.

Statement of the Rule:

(1) Affidavits in support of an award of attorney fees must be filed with the court and set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorney fees are claimed, and affirm the reasonableness of the fees for comparable legal services.

(2) The affidavit must also separately state hours by persons other than attorneys, for time spent, work completed and hourly rate billed.

(3) If the affidavit is in support of attorney fees for services rendered to a person or entity who has been assigned an interest in a claim for the purpose of collection or hired by the obligee to collect a debt, the affidavit shall also state that the attorney is not sharing the fee or any portion thereof in violation of Rule of Professional Conduct 5.4.

(4) If judgment is being taken by default for a principal sum which it is expected will require considerable additional work to collect, the following phrase may be included in the judgment after an award consistent with the time spent to the point of default judgment, to cover additional fees incurred in pursuit of collection:

“AND IT IS FURTHER ORDERED THAT THIS JUDGMENT SHALL BE AUGMENTED IN THE AMOUNT OF REASONABLE COSTS AND ATTORNEY’S FEES EXPENDED IN COLLECTING SAID JUDGMENT BY EXECUTION OR OTHERWISE AS SHALL BE ESTABLISHED BY AFFIDAVIT.”

(5) Attorney fees may be awarded pursuant to this rule or pursuant to Rule 4-505.1.

(Amended effective January 15, 1990; May 1, 1993; November 15, 1995.)