

2008

# Jennifer Hawks v. Jeff Hawks : Brief of Appellee

Utah Court of Appeals

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Robert A. Echard; Attorney for Defendant/Appellant.

Keith M. Backman; Helgesen, Waterfall & Jones; Attorney for Appellee.

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IN THE UTAH COURT OF APPEALS

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JENIFER HAWKS,

Petitioner / Appellee,

vs.

JEFF HAWKS

Respondent / Appellant.

---

Case No. 20080649-CA

**BRIEF OF APPELLEE**

---

THIS IS AN APPEAL FROM A JUDGMENT IN THE  
SECOND JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY,  
STATE OF UTAH  
THE MICHAEL G. ALLPHIN

---

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## ISSUES PRESENTED

In his appeal from the trial court's decree of divorce, Respondent / Appellant Jeff Hawks ("Jeff") presents two issues:

He claims that the trial court erred in awarding Petitioner / Appellee Jenifer Hawks ("Jenifer") alimony without making a determination of her earning capacity; and

He claims that the court erred in removing an expense which he had claimed in his budget. The expense was for \$400 per month for travel expenses.

## DETERMINATIVE LAW

Utah Code Ann. §30-3-5

Hoagland v. Hoagland, 852 P.2d 1025, 1027 (Utah App. 1993)

Newman v. White Water Whirlpool, 2008 UT 79, ¶14, \_\_\_ P.3d \_\_\_

## STATEMENT OF THE CASE

This is a divorce case which ended a 35-year marriage. Jeff had worked throughout the marriage and earned over \$70,000 per year. Jenifer had been a housewife throughout the marriage. Except for a brief part-time job caring for a nephew about ten years before the end of the marriage, she had not worked outside the home since the 1970s.

Although the parties agreed on many of the issues, they could not agree on the amount of alimony which Jeff should pay to Jenifer.

A trial was held in this matter on May 15, 2008. At the close of the trial, the court took the matter under advisement. The next day the trial court made a decision on the matter in a video-recorded ruling. Copies of the ruling were sent to the attorneys for the parties. As part of the court's ruling, it ordered Jeff to pay alimony of \$1,900 per month. The court also excluded an expense which Jeff had claimed of \$400 for travel expenses.

Following the trial court's ruling, Jeff's attorney prepared Findings of Fact and Conclusions of Law and a Decree of Divorce. The judge signed those on July 2, 2008 and they were entered the same day.

### SUMMARY OF THE ARGUMENT

Although the trial court did not make a finding regarding the exact amount that Jenifer could earn, its findings on her ability to earn a living and her needs are sufficient to meet the abuse of discretion standard. Furthermore, the trial court's decision to give minimal weight to Jeff's expert testimony regarding Jenifer's earning potential was reasonable given the expert's admission that she did not have an interview with Jenifer or follow her usual practice in making an evaluation of Jenifer's earning potential.

The trial court's explained its decision to reduce Jeff's expenses by \$400 in its ruling of May 16, 2008. The fact that this was not included in the Findings of Fact and the Conclusions of Law and the Decree is attributable to Jeff because his attorney was assigned to prepare those documents. Under the invited error doctrine, the court should refuse to consider an assignment of error when the party who is complaining of the error contributed to the alleged error.

## **ARGUMENT**

In this appeal, Jeff raises two issues: 1) that the trial court erred by entering an alimony order without making a determination of the amount that Jenifer could earn, and 2) that the trial court erred in removing one of Jeff's claimed expenses from his budget. Neither of these claimed errors amounts to much and this court should affirm the order of the trial court.

### **I. THE TRIAL COURT MADE A SUFFICIENT FINDING OF JENIFER'S EARNING CAPACITY.**

Throughout the cases dealing with alimony, the appellate courts have stressed that the determination of an alimony award is a fact-sensitive decision. See, e.g., Hoagland v. Hoagland, 852 P.2d 1025, 1027 (Utah App. 1993) ("because the issue [of alimony] is 'fact-sensitive' and because the court must consider 'all relevant facts and equitable principles,' we defer to the court's sound discretion in determining the parties' standard of living.") (citing Howell v. Howell, 806 P.2d 1209 (Utah App.), cert. denied, 817 P.2d 327 (Utah 1991)).

In making an alimony determination, the court must examine the factors listed in Utah Code Ann. §30-3-5(8), which are:

- (i) the financial condition and needs of the recipient spouse;
- (ii) the recipient's earning capacity or ability to produce income;
- (iii) the ability of the payor spouse to provide support;
- (iv) the length of the marriage;
- (v) whether the recipient spouse has custody of minor children requiring support;
- (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and



(vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

Utah Code Ann. §30-3-5(8)(a).

In addition, “the court shall consider all relevant facts and equitable principles” in making an alimony determination (Utah Code Ann. §30-3-5(8)(c)), and “The court may, under appropriate circumstances, attempt to equalize the parties’ respective standards of living” (Utah Code Ann. §30-3-5(8)(d)).

In making his arguments, Jeff focuses exclusively on paragraph (ii) of subsection (a), which requires the trial court to consider the earning capacity of the recipient spouse. Jeff takes the position that a court’s findings on this matter are insufficient unless the court makes a finding of the specific dollar amount which the recipient spouse could earn. This position is unsupported by the text of the statute or either of the cases which he cites in support of his argument on this issue. This position also discounts the importance of the other factors which the court must consider in making an alimony determination and the balancing of all of these factors in the intensely fact-specific determination of the amount of alimony.

The facts show that in this matter the court did consider Jenifer’s earning capacity in making its alimony determination. In this matter, the best indication of the court’s consideration of the elements involved in its alimony determination is the video-recorded ruling it made on May 16, the day following the trial. A transcript of this ruling is

attached as Exhibit "A." In the ruling the court stated the following in making its determination of alimony:

The only other issue before the Court is the issue of alimony.

The defendant makes approximately \$82,000 per year, and the Respondent -- excuse me. The Petitioner makes, at this point zero. The Respondent makes approximately \$82,055. Petitioner argued that the -- his -- that the Respondent's income ought to be split, and Petitioner -- or Respondent argued that there ought to be some imputed income to her.

The court, as it looks at the budget, finds that the Respondent -- excuse me, the Petitioner has the ability to work and to earn some income, and if the Respondent -- or if the Court were to split the Respondent's income right down the middle, that there would -- he would not have sufficient income to satisfy his needs. It's like killing the goose that laid the golden egg, and it wouldn't make sense to the Court to -- to divide income equally.

She's still relatively young, and even though it's a 30-year marriage, she has the ability to work, as was testified to by an expert. And the Court will find that she's going to have to do that in order to make ends meet.

The Court will find that he makes \$82,055, and I'm going to use a figure of 75 percent that he would see after taxes, divided by 12 would be \$5, 128.43. If you take from that the alimony, the \$1,300 that leaves him with \$3, 828.43.

I'm going to find that he has reasonable expenses of \$3,207. I -- it looked to me like he has counted travel twice. He's got \$400 for travel, and then he has a whole lot of expenses for a vehicle and other such circumstances. And so I'll find that he has the ability to pay an additional \$600 in alimony.

She has needs of \$2,238. She's currently received alimony in the amount of \$1,300, which leaves a need of \$938. If I give her an additional \$600 a month in alimony, that will leave her with -- short about \$338, and *the Court will find that she has sufficient ability to even get a part-time job to supplement that income.* That would make her whole.

The Court finds that this is a compromise between the -- the actual splitting of income and the -- only giving her exactly -- well, it's -- it's -- giving her what was previously ordered of \$1,300.

The Court finds that she has more needs than that, even though she has the ability to work, and so it's somewhat of a compromise. This is a 30-year marriage, and the Court needs to take into consideration that.

And so the Court will order a total of \$1,900 per month, to be paid beginning with the month of may and thereafter for the term of the marriage; 30 years.

And I believe that's all that I was asked to determine.

Exhibit “A” at 4:25 - 7:5 (emphasis added).

From this excerpt from the court’s ruling, it is clear that, although the court did not make a finding regarding the specific dollar amount that Jenifer could earn, it did consider her earning capacity. The court specifically found that Jenifer’s needs were \$2,238. In spite of this fact, the court awarded her alimony of only \$1,900. The court found that she had the capacity to earn a sufficient amount to make up the difference.

In the court’s ruling in this matter, it is also clear that the court is trying to incorporate some of the other factors in Utah Code Ann. §30-3-5(8) into its ruling. The court specifically mentions the need to equalize the parties’ standard of living and the need to take into account the length of the parties’ marriage.

Furthermore, it appears that Jeff simply expects the court to accept his expert’s testimony regarding Jenifer’s ability to earn a living. In taking this position, Jeff expects the court to ignore obvious problems with the expert’s testimony. The expert admitted that the only conversation she had with Jenifer was a five- to ten-minute telephone conversation with Jenifer on the phone. The expert also admitted that she had completed none of the vocational testing which she usually completes with people she is examining in order to make a vocational evaluation. See Transcript at 163. Given these admitted failings, it is obvious that the expert’s opinion had no substantial basis—although the expert

may have had some expertise the area of vocational assessments, she had not taken the steps which even she acknowledged were necessary to adequately apply that expertise. Under those circumstances, the court would have been entirely justified in ignoring the expert's opinion. The court did not choose to do this—the court relied on the expert to conclude that Jenifer could work, but placed an appropriately minimal emphasis on the expert's conclusions about Jenifer's earning potential.

Because the trial court adequately considered Jenifer's earning potential, there was no error and the trial court's determination of alimony.

## **II. THE COURT JUSTIFIED ITS EXCLUSION OF JEFF'S TRAVEL EXPENSE.**

Jeff's second issue on this appeal is that the trial court excluded an expense which he claimed for \$400 per month in travel expenses. Jeff claims that the court provided no justification for its action and that the exclusion of this expense therefore represents reversible error.

A review of the court's ruling in this matter, however, indicates that the trial court did justify its exclusion of the travel expense. The trial court specifically stated

I—it looked to me like he had counted travel twice. He's got \$400 for travel, and then he has a whole lot of expenses for vehicle and other such circumstances.

Exhibit "A" at 6:5-7.

Based on the court's conclusion that Jeff had double-counted his travel expenses, the exclusion of the \$400 in travel expenses was justified and there was no abuse of the trial court's discretion in determining Jeff's expenses.

Although the court's justification for excluding the travel expense was not included in the court's Findings of Fact, this omission must be laid at Jeff's feet. Jeff's attorney was given the responsibility for preparing the Findings of Fact and Conclusions of Law. See Exhibit "A" at 7:8-10. It would be unjust to allow Jeff to leave out one of the court's findings in preparing the documents and then claim the omission as an error which would justify the reversal of the court's decision. See Newman v. White Water Whirlpool, 2008 UT 79, ¶14, \_\_\_ P.3d \_\_\_ ("The invited error doctrine prohibits parties from 'taking advantage of an error committed at trial when that party led the trial court into committing the error'") (citing Tschaggeny v. Milbank Ins. Co., 2007 UT 37, ¶12, 163 P.3d 615).

In this matter, Jeff led the trial court into omitting its finding on his travel expenses by failing to include that finding in the Findings of Fact and Conclusions of Law he prepared for the court's signature. He cannot take advantage of that error to win a reversal of the court's decision on that matter. The court should therefore disregard Jeff's claim of error in the matter of the exclusion of his travel expenses.

### **CONCLUSION**

The trial court did not commit reversible error. Although the trial court did not make a finding of the exact dollar amount that Jenifer could have earned, it is clear that

the court adequately considered her earning capacity along with the other factors described in Utah Code Ann. §30-3-5(8) in making its alimony determination. Under the invited error doctrine, Jeff cannot rely on the exclusion of the justification for the court's decision to exclude his travel expenses when he prepared the document in which he claims the error was made. For these reasons, the court should affirm the trial court's alimony and expense determinations in this matter.

DATED this 19 day of February, 2009.



Keith M. Backman  
Attorney for Petitioner / Appellee

Certificate of Service

I hereby certify that on this 19 day of February, 2009, I mailed two true and correct copies of the foregoing brief to Robert A. Echard, attorney for respondent / appellant, at 2491 Washington Boulevard #200, Ogden, Utah 84401.





Exhibit

“A”



IN THE SECOND JUDICIAL DISTRICT COURT  
IN AND FOR OGDEN COUNTY, STATE OF UTAH

\* \* \*

---

JENIFER HAWKS,	)	
	)	
Petitioner,	)	Civil No. 07470043
	)	
vs.	)	
	)	
JEFF HAWKS,	)	
	)	
Respondent.	)	
	)	

---

\* \* \* \* \*

**REPORTER'S TRANSCRIPT OF PREVIOUSLY-RECORDED PROCEEDINGS**

**RULING**  
**16 May 2008**

\* \* \* \* \*

*BE IT NOTED, that the above-captioned cause came on to be heard on this, the 16th day of May, 2008, before the Honorable Michael G. Allphin, judge presiding, at which time the following was heard, to wit:*

\* \* \*



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**I N D E X**

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Ruling of the Court:

4

REPORTERS CERTIFICATE:

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10

P R O C E E D I N G S

THE COURT: This is the time set for ruling in the matter of Jennifer Hawks versus Jeff Hawks, case No. 07470043.

This matter was heard at trial on May 15th. The Petitioner was present represented by Mr. Keith Bachman. The Respondent was present represented by Mr. Robert Echard.

The issues that the parties have not yet agreed to -- I might indicate that they have agreed to the splitting of the personal property and the vehicles, each keeping what they have.

The retirement would be according to Woodward formula, with a Quadra, except for the fact that they each own -- or that -- together, the marital assets -- in the marital assets, there are two homes, and each is occupying one. And they've agreed that each would keep the one that they are occupying.

It appears, from the appraisals, that the home in Lay -- that the Petitioner is occupying is worth approximately -- let's see. -- it must be 60 -- 69,000, I believe.

Of which she would owe to the -- to the Petitioner half of that amount, of \$34,500.

The parties propose that the difference in

18:29:07

18:29:07

13:42:16

13:43:04

13:43:08

13:43:13

13:43:17

13:43:20

13:43:23

13:43:27

13:43:30

13:45:10

13:45:10

13:45:10

13:45:10

13:45:10

13:45:10

13:45:10

13:45:10

13:45:10

13:45:20

13:45:26

13:45:27

13:45:38

13:46:44

1 value of the real property be offset in the retirement 13:46:48  
2 accounts. 13:46:52

3 The Petitioner wants just \$34,000 to be 13:46:54  
4 offset. 13:47:01

5 The Respondent has argued and brought an 13:47:03  
6 expert to indicate that Mr. Hawks would suffer a tax 13:47:07  
7 penalty of -- or a -- would suffer taxes as a result of 13:47:13  
8 drawing out the retirement, and it would make the 13:47:19  
9 \$34,500 equivalent to \$53,077. 13:47:25

10 The accountant also pointed out that she may 13:47:38  
11 sell the home without any tax consequences, so it seems 13:47:41  
12 only fair to the Court that the tax impact ought to be 13:47:44  
13 considered, and that the amount of retirement account 13:47:49  
14 to be -- that would offset the \$34,500 difference would 13:47:58  
15 be \$53,077, and the Court will order that. 13:48:05

16 Let me go back to the beginning and indicate 13:48:17  
17 that the parties both testified that they met the 13:48:22  
18 jurisdictional grounds; they were residents of Davis 13:48:27  
19 county and had been for the requisite period prior to 13:48:34  
20 filing the divorce. 13:48:41

21 That there were irreconcilable differences. 13:48:42  
22 The Court will find that there were irreconcilable 13:48:49  
23 differences and will award each a decree of divorce 13:48:57  
24 based upon those differences. 13:49:01

25 The only other issue before the Court is the 13:49:06

issue of alimony.

The defendant makes approximately \$82,000 per year, and the Respondent -- excuse me. The Petitioner makes, at this point, zero. The Respondent makes approximately \$82,055. Petitioner argued that the -- his -- that the Respondent's income ought to be split, and Petitioner -- or Respondent argued that there ought to be some imputed income to her.

The Court, as it looks at the budget, finds that the Respondent -- excuse me, the Petitioner has the ability to work and to earn some income, and if the Respondent -- or if the Court were to split the Respondent's income right down the middle, that there would -- he would not have sufficient income to satisfy his needs. It's like killing the goose that laid the golden egg, and it wouldn't make sense to the Court to -- to divide income equally.

She's still relatively young, and even though it's a 30-year marriage, she has the ability to work, as was testified to by an expert. And the Court will find that she's going to have to do that in order to make ends meet.

The Court will find that he makes \$82,055, and I'm going to use a figure of 75 percent that he would see after taxes, divided by 12 would be

1 \$5,128.43. If you take from that the alimony, the 13:53:04  
2 \$1,300, that leaves him with \$3,828.43. 13:53:10

3 I'm going to find that he has reasonable 13:53:14  
4 expenses of \$3,207. I -- it looked to me like he had 13:53:27  
5 counted travel twice. He's got \$400 for travel, and 13:53:37  
6 then he has a whole lot of expenses for a vehicle and 13:53:41  
7 other such circumstances. And so I'll find that he has 13:54:22  
8 the ability to pay an additional \$600 in alimony. 13:54:25

9 She has needs of \$2,238. She's currently 13:54:32  
10 received alimony in the amount of \$1,300, which leaves 13:54:39  
11 a need of \$938. If I give her an additional \$600 a 13:54:51  
12 month in alimony, that will leave her with -- short 13:54:57  
13 about \$338, and the Court will find that she has 13:55:02  
14 sufficient ability to even get a part-time job to 13:55:09  
15 supplement that income. That would make her whole. 13:55:13

16 The Court finds that this is a compromise 13:55:17  
17 between the -- the actual splitting of income and 13:55:22  
18 the -- only giving her exactly -- well, it's -- it's -- 13:55:27  
19 giving her what was previously ordered of \$1,300. 13:55:39

20 The Court finds that she has more needs than 13:55:42  
21 that, even though she has the ability to work, and so 13:55:45  
22 it's somewhat of a compromise. This is a 30-year 13:55:48  
23 marriage, and the Court needs to take into 13:55:52  
24 consideration that. 13:55:54

25 And so the Court will order a total of 13:55:54

1 \$1,900 per month, to be paid beginning with the month 13:55:56  
2 of May and thereafter for the term of the marriage; 13:56:05  
3 30 years. 13:56:11

4 And I believe that's all that I was asked to 13:56:16  
5 determine. 13:56:26

6 Each party will pay their own attorneys' 13:56:27  
7 fees. They have sufficient assets in their retirement 13:56:30  
8 accounts if they need to take those. And they -- I'll 13:56:33  
9 ask Mr. Echard if he'll prepare a findings of fact, 13:56:44  
10 conclusions of law, and decree of divorce. 13:56:51

11 And also, the two attorneys are ordered to 13:56:54  
12 get together and to make a final determination as to 13:57:01  
13 what retirement accounts there are, both hers and his, 13:57:03  
14 and they're each to be split according to the Woodward 13:57:08  
15 formula. 13:57:11

16 And I'll ask Mr. Backman if he won't prepare 13:57:12  
17 a Quadra that would satisfy the -- the requirements of 13:57:21  
18 the law. 13:57:27

19 I believe that that's all I have, and so 13:57:30  
20 this concludes the ruling for this matter. 13:57:33

21 Thank you very much, counsel. 13:57:39

22 (Whereupon, the recording 13:57:40  
23 was concluded.)

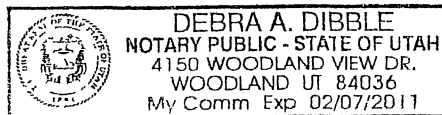
24 \* \* \*  
25

REPORTER'S CERTIFICATE

STATE OF UTAH                                 )  
  )   ss.  
COUNTY OF SALT LAKE                     )

I, Debra A. Dibble, Registered Professional  
Reporter for the State of Utah, do hereby certify that  
the foregoing transcript was taken down by me  
stenographically from electronically recorded tapes  
and thereafter transcribed under my direction.

That the foregoing pages contain a true and  
accurate transcript of the electronically recorded  
proceedings, or requested portions thereof, and was  
transcribed by me to the best of my ability from the  
tapes given me.



A handwritten signature in dark ink, appearing to read "Debra A. Dibble", written over a horizontal line.

Debra A. Dibble, CSR, RPR