

1986

Kathleen Clontz v. Harvey Clontz : Brief in Opposition to Certiorari

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KATHLEEN CLONTZ,

Plaintiff/Respondent,

vs.

HARVEY CLONTZ,

Defendant/Appellant/
Petitioner.

RESPONDENT'S BRIEF IN
OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

Case No. 860254

Priority No. 13

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S
PETITION FOR A WRIT OF CERTIORARI

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Clerk, Supreme Court, Utah

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
QUESTIONS PRESENTED FOR REVIEW	1
JURISDICTIONAL GROUNDS	2
STATEMENT OF THE CASE	2
ARGUMENT	3
Point 1 THE UTAH SUPREME COURT SHOULD DENY PETITIONER'S WRIT OF CERTIORARI AS LACKING PROPER CHARACTER OF REASONS UNDER RULE 43 OF THE RULES OF THE UTAH SUPREME COURT	3
Point 2 THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DECISION IN REGARDS TO OFFSETTING RETIREMENT ASSETS OF THE PARTIES, SUCH THAT CONSIDERATIONS UNDER RULE 43 OF THE RULES OF THE UTAH SUPREME COURT ARE NOT MET AND A WRIT OF CERTIORARI SHOULD BE DENIED AS TO RETIREMENT	6
Point 3 THE UTAH COURT OF APPEALS DECISION AFFIRMING THE LOWER COURT'S DECISION IN REGARDS TO ALIMONY HAS NOT BEEN SHOWN BY THE PETITIONER TO MEET ANY OF THE CONSIDERATIONS UNDER RULE 43 OF THE RULE OF THE UTAH SUPREME COURT AND THEREFORE THE WRIT OF CERTIORARI IN REGARDS TO ALIMONY SHOULD BE DENIED	13
CONCLUSION	21
CERTIFICATE OF SERVICE	23

TABLE OF AUTHORITIES

CASE CITATIONS

<u>Bailey vs. Bailey</u> , 70 U.A.R. 20 (Ct. App. 11-13-87)	8.
<u>Boyle vs. Boyle</u> , 55 UAR 51 (Utah Ct. 1987)	17
<u>Burnham vs. Burnham</u> , 716 P.2d 781 (Utah 1986)	6
<u>Canning vs. Canning</u> , 68 UAR 16 (Ut. App. 1987)	19
<u>Dogu vs. Douq</u> , 652 P.2d 1308 (Utah 1982)	7
<u>Eames vs. Eames</u> , 735 P.2d 395 (Utah App. 1987)	15
<u>Englert vs. Englert</u> , 576 P.2d 1274 (Utah 1978)	7
<u>Graff vs. Graff</u> , 699 P.2d 765 (Utah 1985)	13
<u>Higley vs. Higley</u> , 676 P.2d 379 (Utah 1983)	13
<u>Lee vs. Lee</u> , 69 UAR 51 (Utah App. 1987)	18
<u>Petersen vs. Petersen</u> , 58 UAR 28 (Ct. App. 1987)	14.
<u>Rayburn vs. Rayburn</u> , 738 P.2d 238 (Utah App. 1987)	10
<u>Talley vs. Talley</u> , 61 UAR 31	15
<u>Turner vs. Turner</u> , 649 P2d 6 (Utah 1982)	6

STATUTES CITED

Utah Code Annotated §30-35-5	
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RULES CITED

Rule 43 of the Rules of the Utah Supreme Court	
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IN THE SUPREME COURT FOR THE
STATE OF UTAH

KATHLEEN CLONTZ,	/	
Plaintiff/Respondent,	/	RESPONDENT'S BRIEF IN
vs.	/	OPPOSITION TO PETITION
		FOR A WRIT OF CERTIORARI
HARVEY JAMES CLONTZ,	/	Case No. <u>862054</u>
Defendant/Appellant/ Petitioner.	/	Priority No. 13
	/	

QUESTIONS PRESENTED FOR REVIEW

1. Has the Petitioner generally failed to show, Under Rule 43 of the Rules of the Utah Supreme Court, considerations 1, 2, 3 or 4 that the Petitioner is entitled to a Writ of Certiorari or review of the Utah Court of Appeals decision affirming the lower Court?

2. Has the Petitioner failed to show, under Rule 43 of the Rules of the Utah Supreme Court, that there is a conflict between the decision rendered by the Utah Court of Appeals in this case and other decisions made by the Utah Court of Appeals; that the decision by the Utah Court of Appeals interpreting a State statute is contrary to a decision by this Court; or that the Utah Court of Appeals decision in this case has strayed from prior decisions of this

Court, such that this Court should exercise its supervisory position concerning a retirement division?

3. Does this Court of Appeals decision conflict with other decisions of the Utah Court of Appeals or has it strayed so far from prior decisions of this Court as to require this Court to exercise its supervisory position in regards to an award of alimony?

JURISDICTIONAL GROUNDS

Petitioner has petitioned for a Writ of Certiorari as being sought pursuant to Rules 42 and 43 of the Utah Supreme Court.

STATEMENT OF THE CASE

Petitioner and Respondent were married on the 7th day of March, 1959, in Sunset, Davis County, State of Utah. There have been born five (5) children as issue of the marriage, all of which children are now emancipated. (TR. 106)

Respondent is employed at Hill Air Force Base and her gross income is approximately \$2,000.00 gross per month (TR. 103) and she has accumulated approximately \$15,856.83 in retirement. (TR. 106)

The Petitioner is medically disabled and receives civil service retirement disability in the amount of \$655.48 per

month. (TR. 106) That retirement which Petitioner is currently receiving is valued at approximately \$50,000.00. (TR. 106)

In 1960, a home was built by the parties upon property given to the Defendant, which property is currently unencumbered and the appraised value of the property is \$61,500.00. (TR. 96-108) The appraised value of the land itself is \$16,000.00. (TR. 117)

A Trial Court specifically found that the Petitioner is employable and in fact, that the Petitioner has been employed in the past and that he is presently looking for work. (Findings of Fact, page 4)

ARGUMENT

POINT 1

THE UTAH SUPREME COURT SHOULD DENY PETITIONER'S WRIT OF CERTIORARI AS LACKING PROPER CHARACTER OF REASONS UNDER RULE 43 OF THE RULES OF THE UTAH SUPREME COURT.

Rule 43 of the Rules of the Utah Supreme Court entitled "Considerations Governing Review of Certiorari" deals with jurisdiction of a Writ of Certiorari from the Court of Appeals to the Supreme Court. The Rule indicates that review by a Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there

are special and important reasons therefore. The Rule then goes on to indicate the character of reasons that will be considered in granting a Writ of Certiorari to review a Court of Appeals decision.

The first reason is as follows:

(1) When a panel of the Court of Appeals has rendered a decision in conflict with the decision of another panel of the Court of Appeals on the same issue of law....

In the instant case, after a review of the Respondent's subsequent points of argument, it should be evident to this Court that the Petitioner has failed to cite this Court to any conflict which this Court of Appeals affirmation has with the decision of another panel of the Court of Appeals on the same issues of law and therefore certiorari should not be allowed on this basis.

The second reason indicated is as follows:

(2) When a panel of the Court of Appeals has decided a question of State or Federal law in a way that is in conflict with the decision of this Court;....

In the instant case, although the Petitioner has referred the Court to a Utah State law, to-wit: Utah Code Annotated §30-35-5 in its Table of Authorities and initial paragraph to Point 2, the Petitioner does not further refer this Court to any interpretation by the Court of Appeals in

the instant case which would conflict with the decision of the Utah Supreme Court, therefore the Writ of Certiorari should be denied on this point.

The third reason indicated by Rule 43 is as follows:

(3) When a panel of the Court of Appeals has rendered a decision that is so far departed from the accepted and usual course of judicial proceedings as so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision; or....

In this case, the Court of Appeals has simply exercised its discretion based on other case law as the Respondent's further points of argument will demonstrate and this panel of the Court of Appeals has not rendered a decision that is departed from the accepted and usual course of judicial proceedings nor has it sanctioned such a departure by the lower Court, such as to call for an exercise of this Court's power of supervision, therefore the Writ of Certiorari should be denied as lacking foundation on the third basis of Rule 43.

The fourth consideration of Rule 43 has not been stated as a reason by this Petitioner for a Writ of Certiorari.

Wherefore, based on Rule 4 of the Rules of the Utah Supreme Court as cited above and after a careful review of the Respondent's other points of argument this Court should

deny Petitioner's Writ of Certiorari as lacking in the judicial grounds and allow the decision of the Court of Appeals to stand.

POINT 2

THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DECISION IN REGARDS TO OFFSETTING RETIREMENT ASSETS OF THE PARTIES, SUCH THAT CONSIDERATIONS UNDER RULE 43 OF THE RULES OF THE UTAH SUPREME COURT ARE NOT MET AND A WRIT OF CERTIORARI SHOULD BE DENIED AS TO RETIREMENT.

This Honorable Court held in Burnham vs. Burnham, 716 P.2d 781 (Utah 1986) that the Trial Court is permitted considerable discretion adjusting the financial and property interest of the parties through a divorce action and its determinations are entitled to a presumption of validity. Although the Appellant Courts may weigh the evidence and substitute their judgment for that of the Trial Court in divorce actions, this Court further stated in Turner vs. Turner, 649 P.2d 6 (Utah 1982) as follows:

This Court will not do so lightly and merely because its judgment may differ from that of the Trial Judge. The Trial Court's apportionment of property will not be disturbed unless it were to such manifest injustice or inequity as to indicate a clear abuse of discretion.

In the immediate case at hand, the Petitioner/Appellant

was denied any interest in the Respondent's retirement of approximately \$15,000.00, but in the same vein, Respondent was also denied any interest in the Petitioner/Appellant's retirement of approximately \$50,000.00. The Respondent's retirement is speculative, as she is not currently receiving any retirement income, whereas the retirement of the Petitioner/Appellant is currently being drawn.

The Petitioner cites this Court to Utah Supreme Court cases of Doqu vs. Doqu, 652 P.2d 1308 (Utah 1982) and Englert vs. Englert, 576 P.2d 1274 (Utah 1978) to inform this Court that the Trial Court has a duty to make an equitable division of all of the assets of every nature possessed by the parties whenever obtained and from whatever source derived, including pension, funds or insurance in a divorce action. The Trial Court, in its findings, did specifically value the retirement funds of each of the parties and did make what it considered an equitable division of both the real and personal property and retirement funds by awarding the retirement funds to the individual possessors and owners or a retirement fund of just over \$15,000.00 to the Respondent and a retirement fund of approximately \$50,000.00 to the Petitioner/Appellant so that there is no direct conflict of the Appellant Court decision with the Supreme Court

decision pursuant to consideration 3 of Rule 43 of the Rules of the Utah Supreme Court.

Next the Petitioner/Appellant requests of this Court a different division of the property in the divorce action, which would entitle the Petitioner to one-half ($\frac{1}{2}$) of the Respondent's retirement and offsetting this amount against Plaintiff's share of the Trial Court's determined equity of the marital home while failing to make any provision for the Respondent to receive one-half ($\frac{1}{2}$) of the Petitioner/Appellant's retirement. The Petitioner cites this Court to two (2) Appellant Court decisions in support of considerations 2 and 3 of Rule 43 of the Rules of the Utah Supreme Court, but does not cite this Court to any particular interpretation of the Utah statute relied on, to-wit: §30-35-5 of the Utah Code Annotated.

The first Utah Court of Appeals case cited is that of Bailey vs. Bailey, 70 U.A.R. 20 (Ct. App. 11-13-87) which indicates that under their interpretation of Woodward the distribution of retirement benefits should generally be postponed until benefits are received or at least until the earner is eligible to retire, and that this is particularly true where there is a sparsity of other divisible assets. However, the Trial Court retains the discretion to divide

the retirement account, along with other assets at the time the divorce is entered. If that discretion is exercised, the Court must make specific finds as to reasons for immediate distribution. In the immediate case at hand, the Trial Court considered an offset of the \$15,000.00 some odd present value of the Plaintiff's retirement, but disagreed with that offset as he had the discretion to do and specifically found as follows:

The Defendant in this case has a right to receive retirement income in the amount of \$650.00 plus dollars per month. The present value of the right to receive for somebody his age should be valued far in excess of \$1,500.00. And I think there should be some kind of offset on that side.

Also I am considering that there is a basis for his medical retirement, and that some sort of physical disability. So if I wanted to charge him with the full value of a right to receive that, it would probably be upwards of around \$50,000.00. But what I intend to do is offset the two retirements. The Plaintiff is entitled to hers and he is entitled to his. And I am considering the fact that he is considered medically disabled, at least to some extent.

The Trial Court did consider, once again, that the retirements were assets of the marital estate and did offset the retirement benefits of both the Respondent and the Petitioner/Appellant one against the other, allowing an offset of

\$15,000.00 of the Respondent's retirement, which according to Bailey would be a present value as compared to the Petitioner/Appellant's retirement of \$50,000.00, which he is currently receiving. Based on these facts and the Bailey case, there is no conflict of decisions of the panel of the Court of Appeals regarding the Bailey case and the Writ of Certiorari should be denied.

Secondly, the Petitioner refers this Court to the Utah Court of Appeals case of Rayburn vs. Rayburn, 738 P.2d 238 (Utah App. 1987) wherein the Utah Court of Appeals found that the Respondent, wife in that matter, was entitled to one-half ($\frac{1}{2}$) of the present value of the Appellant, husband's, retirement, to be payable over a five (5) year period with interest, allowing the payor to make those payments as if they were alimony, entitling him to tax deductions. In Rayburn, the Respondent, wife, had not worked for several years during the marriage nor did she have a retirement fund of her own. The Respondent in Rayburn was allowed one-half ($\frac{1}{2}$) interest in her husband's retirement account as allowed by law. In the immediate case at hand, the Respondent, Mrs. Clontz, acknowledges the fact that not only is the Petitioner/Appellant entitled to one-half ($\frac{1}{2}$) of her retirement account, but likewise she is

entitled to one-half ($\frac{1}{2}$) of his retirement account, and that the Court has fully considered all of the assets of the marital estate and made an equitable distribution thereof by awarding to each of the parties their own retirement accounts. Additionally the Trial Court, by making such an award, has, as found in Rayburn, "avoided leaving the parties in a financial entanglement that would continue for several years and would probably result in further Court hearings and cause future animosity between the parties".

Both Respondent and the Petitioner/Appellant are each entitled to one-half ($\frac{1}{2}$) of the value of the retirement that each has accrued during their marriage. Any accrual of benefits subsequent to the divorce become the sole and separate property of each party and should not be considered as the Petitioner/Appellant which he requests this Court to do. The Respondent's retirement is a potential income whereas the Petitioner/Appellant's retirement for disability is a current paying asset and income, giving to the Petitioner/Appellant the sum of \$650.00 plus per month. Again the Court considered both retirements as assets of the marital estate, considered the values of each of those assets, \$15,000.00 as compared to upwards of \$50,000.00, considered the fact that it was a disability retirement that

was currently paying an income as opposed to the Respondent's expectancy of income in the future and decided to offset those assets, which is clearly within the discretion of the Trial Court and is not in conflict with the Utah Court of Appeal's decision of Rayburn vs. Rayburn under subparagraph 1 of Rule 43 of the Rules of the Utah Supreme Court, therefore the Writ should be denied.

Lastly, the Petitioner/Appellant refers this Court to the Utah State statute §30-35-5, but fails to cite this Court to any decision of the panel of the Court of Appeals that has decided a question of that State law as it conflicts with the decision of this Court, such that the Writ of Certiorari should be denied.

Wherefore, the decision of the Trial Court regarding the retirement benefits of the parties, which has been affirmed by the Court of Appeals, should not be reviewed by this Court on a Writ of Certiorari as the Petitioner/Appellant has failed to show that the Court of Appeals has rendered a decision in conflict with the decision of another panel of the Court of Appeals on the same issue of law, nor has the Petitioner/Appellant the panel of the Court of Appeals has decided a question of State law which in any way conflicts with the decision of this Court, nor has the

Petitioner/Appellant shown that a panel of the Court of Appeals has rendered a decision as departed from the accepted usual course of judicial proceedings or sanction a departure by the lower Court which would call for an exercise of this Court's power of supervision as alleged by the Petitioner/Appellant, such that this Court should deny a Writ of Certiorari for review of the issue of awarding of the retirement benefits in the immediate case at hand.

POINT 3

THE UTAH COURT OF APPEALS DECISION AFFIRMING THE LOWER COURT'S DECISION IN REGARDS TO ALIMONY HAS NOT BEEN SHOWN BY THE PETITIONER TO MEET ANY OF THE CONSIDERATIONS UNDER RULE 43 OF THE RULES OF THE UTAH SUPREME COURT AND THEREFORE THE WRIT OF CERTIORARI IN REGARDS TO ALIMONY SHOULD BE DENIED.

This Court held in Higley vs. Higley, 676 P.2d 379 (Utah 1983) that an Appellant Court will not disturb the Trial Court's award of alimony payments unless a clear and prejudicial abuse of discretion is shown and this Court further held in Graff vs. Graff, 699 P.2d 765 (Utah 1985) that the burden is on the attacker to show that the evidence does not support the findings.

In consideration of an alleged error of the Trial Court to award alimony to the Petitioner/Appellant, the Petitioner

has not referred this Court to considerations 2 or 4 governing review of certiorari under Rule 43 of the Rules of the Utah Supreme Court, but only two (2) considerations, 1 and 3.

The Petitioner has referred this Court to several Court of Appeal cases. Firstly, the Petitioner refers this Court to Petersen vs. Petersen, 58 UAR 28 (Ct. App. 1987). In this case, the Court of Appeals held that an award of a medical degree, as part of a property distribution, would be better awarded as alimony payments. Mrs. Petersen, at the time of the divorce, had no income and was able to obtain recertification for teaching, but the possibility of securing a teaching contract was speculative at best. The Court further found that she had no outside income, would have to recertify and that she had not been employed outside the home for the last fifteen (15) years and based on those factors and the income of Dr. Petersen, she was awarded a \$2,000.00 a month in alimony.

In the immediate case at hand, the Trial Court found as follows:

As far as alimony is concerned, I am not going to award alimony. The Defendant has \$650.00 plus dollars per month retirement. There is no indication that he is not employable. In fact, the evidence is he has been employed in the

past. He is looking for work at the present time.

There is no indication in the Petitioner's case, as in Mrs. Petersen's case, that he had no outside income. In fact, the Petitioner is receiving \$650.00 per month from a disability retirement, which he can supplement with employment. Petitioner has worked outside the home contrary to Mrs. Petersen's not working outside the home for the last fifteen (15) years. Petitioner is employable, he does not have to seek recertification as Mrs. Petersen was required to and there is no conflict with the Petersen decision by the Court of Appeals and the reaffirmation of the lower Court's decision in this case by the Court of Appeals.

Secondly, the Petitioner cites this Court to the Utah Court of Appeals case of Talley vs. Talley, 61 UAR 31 (Utah App. 1987) wherein the Utah Court of Appeals found that the Plaintiff, with a net income of \$953.00 a month, and the Defendant, with a net income of \$2,018.00 per month, that the Plaintiff was entitled to an award of alimony of \$250.00 per month for the first two (2) years and \$150.00 per month for the following three (3) years after the Court had considered the required factors found in Eames vs. Eames, 735 P.2d 395 (Utah App. 1987). Again, the facts in the immediate case at hand differ somewhat from those of Talley vs.

Talley. In this case, the Petitioner is not working, but has a guaranteed income during disability of \$650.00 a month which can be supplemented by outside employment and the Court did find that he was employable in reviewing the three (3) factors of Eames, which are:

1. The financial condition and needs of the receiving spouse,
2. The ability of the receiving spouse to produce a sufficient income for himself or herself and
3. The ability of the paying spouse to provide support.

The Court further found that the Petitioner was capable of employment, was indeed looking for employment and had worked in the past. The affirmation of the lower Court decision by the Court of Appeals is not in conflict with the decision rendered by the Utah Court of Appeals in Talley vs Talley, therefore the Writ of Certiorari for review by this Court should be denied.

Thirdly, the Petitioner refers this Court to the Utah Court of Appeals case of Eames vs. Eames, 55 UAR 49 (Ct. App. 1987). Petitioner points out that in the Eames case, the Court awarded alimony in view of the parties ages and education, as well as the length of their marriage and

substantial disparity in incomes and their earning potential.

Again the factual basis of the incident case and the Eames case are substantially different, in that:

The Trial Court did not find a substantial disparity in the incomes nor in their ages or education, but found it contrary that the Petitioner was employable, had worked outside of the home and was currently looking for work and was receiving over \$650.00 a month as a type of guaranteed income for which the Petitioner expended no hours and therefore could supplement that income with additional work time, such that there exists no conflict between the affirmation of the lower Court's decision and that of the Utah Court of Appeals decision in Eames.

Next, the Petitioner refers this Court to the Utah Court of Appeals case of Boyle vs. Boyle, 55 UAR 51 (Utah Ct. 1987) wherein the Plaintiff, wife, was not awarded alimony in a seven (7) year marriage with no children based on the fact that the Plaintiff, wife, had previously received several months of temporary alimony to give her an opportunity to rehabilitate. Those are essentially the facts in the immediate case, in that the Petitioner is receiving over \$650.00 a month for disability retirement and

was found to be employable and had and could work outside of the home, such that the Petitioner is receiving income for an opportunity to rehabilitate and can supplement that income by employment outside of the home so that again there is no conflict between the decisions rendered by the Court of Appeals and the Writ should be denied.

Next, the Petitioner refers this Court to the Utah Court of Appeals case of Lee vs. Lee, 69 UAR 51 (Utah App. 1987). The Petitioner fails to point out that the wife was married at the age of twenty (20) with a high school education and clerical skills and had devoted her time to raising the couples two (2) children and working for the income producing asset that was awarded to the husband and she was awarded no income producing assets or cash and had failed to find employment despite her persistent efforts. The Court of Appeals simply reversed and remanded the case to the Trial Court to fix alimony in light of the three (3) factors articulated above.

Again the facts differ substantially from those of the immediate case, wherein the Petitioner has income of over \$650.00 a month based on disability retirement, the Respondent was not awarded an income producing asset of the marriage, while Petitioner was awarded the home, which he could

either mortgage, remain in the home or sell out right, such that he will not incur the expense of moving a mobile home currently situated on someone else's property. A careful consideration of these facts as compared with those of the immediate case, once again show that there is no conflict with the decisions of the Courts of Appeal and the Writ should be denied.

Lastly, the Petitioner refers this Court to the Utah Court of Appeals case of Canning vs. Canning, 68 UAR 16 (Ut. App. 1987). Again a comparison of the facts between the two (2) cases will show that there is no conflict between the decisions of the Utah Court of Appeals and these two (2) cases. The Court of Appeals found in Canning that the Court did not consider making a finding of Mrs. Canning's current future ability to work, while quite the contrary was found here. The Petitioner/Appellant presented evidence of his inability to work and the Court found that he was able to work, he was employable and was, in fact, looking for work. Additional facts in the Canning case indicate that she had earned about \$1,200.00 during the prior year, she had only a high school education and insignificant job skills to market, that her off and on work was always in the minimum wage category. That her ability to work was impaired by an

ulcer and by the disabilities of her minor sons, both of which were handicapped, by learning disfunctions. One was being treated by a psychologist for emotional problems. She was seeking a flexible work schedule so she could devote necessary time to their special needs and the Court of Appeals found that it was doubtful that she could find and keep a full time job and even if she were able to do so, her earnings would be minimal for an extended period.

The Trial Court considered the testimony offered by the Petitioner/Appellant and found that he was employable and did not find that the Petitioner, in this case, had the special disabilities that Mrs. Canning had in taking care of minor children with learning disfunctions, and that she actually had minimal work experience. To the contrary, the Trial Court found that the Petitioner had worked outside of the home and was employable and again, in addition to that, he was receiving over \$650.00 a month in disability payments which could be supplemented, whereas Mrs. Canning had only earned \$100.00 per month during the prior year. The decision of the Court of Appeals in the immediate case and the Canning case are not in conflict when all facts are considered and the Writ of Certiorari should be denied.

Wherefore, Petitioner has failed to show, in regards to a request of review of the Trial Court's failure to award alimony that there is any conflict between the affirmation of the lower Court by the Utah Court of Appeals or other Utah Court of Appeal decisions pursuant to consideration to Rule 43 of the Utah Rules of Supreme Court and the Petitioner has also failed to show that this decision of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or has sanctioned such a departure by the lower Court as to call for an exercise of this Court's power of supervision, therefore the Writ of Certiorari should be denied.


CONCLUSION

A careful review of the facts and case law presented by the Petitioner, wherein the Petitioner alleges that there are conflicts between this Court of Appeals decision and other decisions of the Court of Appeals, or that the Court of Appeals has decided a question of State law is in conflict with the decision of this Court, or that a panel of the Court of Appeals has rendered a decision that is departed from the accepted and usual course of judicial proceedings or has sanctioned such a departure by the lower Court as to call for the exercise of this Court's power of super-

vision have not been substantiated by the Petitioner, such that the Writ of Certiorari, under Rule 43 of the Rules of the Utah Supreme Court should be denied and the affirmation of the Utah Court of Appeals of the Trial Court's decision should be allowed to stand, and the Respondent awarded her attorney's fees and costs in defending this Writ of Certiorari.

Respectfully submitted this 11th day of January, 1988.

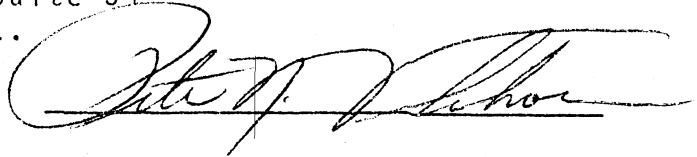
VLAHOS & SHARP

BY 
PETE N. VLAHOS,
Attorney for Respondent

CERTIFICATE OF SERVICE

This is to certify that four (4) copies of the foregoing Respondent's Brief in Opposition to Petition for a Writ of Certiorari was placed in the United States mail, postage prepaid on this 12th day of January, 1988 to:

Attorney Deirdre A. Gorman
Bamberger Square, Building 1
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A handwritten signature in dark ink, appearing to read "Deirdre A. Gorman", written over a horizontal line.