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Becky Sue Myers v. Tracy Lynn Myers : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

BECKY SUE MYERS, Petitioner/Appellant, vs. TRACY LYNN MYERS, Respondent/Appellee.	District Court No. 064400347 Appellate No. 20080911

REPLY BRIEF OF APPELLANT

APPEAL FROM FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER MODIFYING DECREE OF DIVORCE, OF THE UTAH FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY, THE HONORABLE SAMUEL MCVEY PRESIDING

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ARGUMENT

I. RESPONDENT FAILS TO CORRECTLY STATE AND APPLY THE APPLICABLE STANDARD OF REVIEW. FURTHER, PETITIONER IS NOT REQUIRED TO MARTIAL THE EVIDENCE WHEN CHALLENGING THE ULTIMATE CONCLUSION OF THE TRIAL COURT REGARDING COMMON RESIDENCY.

Respondent has failed to adequately state, and as a result apply, the applicable standard of review. Respondent provides the elements that must be met in order to satisfy cohabitation, and then concludes that if these elements are met, alimony is terminated. Respondent's Brief at 10. Following, Respondent provides citations to case law regarding the discretion available to trial courts in determining the appropriateness of modifications, and issues regarding alimony. *Id.* at 10-11. Missing from Respondent's analysis is the standard of review, specifically, that "[w]hether cohabitation exists 'is a mixed question of fact and law. While we defer to the trial court's factual findings unless they are shown to be clearly erroneous, we review its ultimate conclusion for correctness.'" *Jensen v. Jensen*, 2007 UT App 377, ¶ 2, 173 P.3d 223, quoting *Pendleton v. Pendleton*, 918 P.2d 159, 160 (Utah Ct. App. 1996); See also *Haddow v. Haddow*, 707 P.2d 669, 671 (Utah 1985) ("the determination of whether given circumstances constitute cohabitation requires the application of the terms of a court order to a given set of facts. This process is in reality a mixed question of fact and law, and we are not bound by the conclusion reached by the trial court.").

This failure to recognize and formulate arguments in accordance with the standard of review is evident in Respondent's argument that Petitioner has failed to adequately

martial the evidence in regard to common residency. Respondent's brief at 16-19. What Respondent fails to recognize is that Petitioner does not dispute the findings that the trial court made in regard to common residency, but rather the ultimate conclusion of the trial court when applying those findings to the applicable law. Under these circumstances, in accordance with the standard of review that the ultimate conclusion of the trial court is reviewed for correctness, Petitioner is not required to martial the evidence. See *Jensen*, 2007 UT App 377, ¶ 2.

Respondent also confuses findings of fact with conclusions of law. The conclusion of the trial court was that "Petitioner and Mike Hart had a common residency," and it is this ultimate conclusion that Petitioner challenges on appeal. R. at 185, ¶ 3. It is important to note that this conclusion is appropriately contained in the "Conclusions of Law" section of the trial court's Findings of Fact and Conclusions of Law. R. at 188 & 185. It was Respondent who drafted the Findings of Fact and Conclusions of Law. R. at 188 & 184. Respondent appears to treat this ultimate conclusion, incorrectly, as a finding of fact in Respondent's brief. Again, Petitioner does not challenge the findings that the trial court made in regard to the residency issue. Rather, Petitioner argues that these findings of fact, and the evidence supporting them, were inadequate to support the trial court's ultimate conclusion that a common residency existed between Petitioner and Mr. Hart. The trial court's ultimate conclusion that a common residency existed, is reviewed for correctness. *Jensen*, 2007 UT App 377, ¶ 2.

Therefore, Respondent's arguments that Petitioner has failed to martial the evidence in regard to common residency should be disregarded.

II. RESPONDENT WRONGLY MINIMIZES THE IMPORTANCE OF FACTORS IN DETERMINING WHETHER OR NOT A COMMON RESIDENCY EXISTS.

Respondent wrongly minimizes the importance of factors in determining whether or not a common residency exists. As a result, Respondent's conclusion that a common residency was shared between Petitioner and Mr. Hart is incorrect. In order for a common residency to exist, it must be shown that there was a "sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of time." *Haddow*, 707 P.2d at 672. Further, common residency "implies continuity, not simply a habit of visiting or a sojourn." *Pendleton*, 918 P.2d at 160. There are several factors that a trial court can and should consider when making this determination. Specifically, the sharing of living expenses, whether or not the parties had access to each other's living quarters, if the parties eat together regularly, share food expenses, and whether or not the parties kept clothing or other personal items in each other's living quarters. See *Haddow*, 707 P.2d at 673-674; *Pendleton*, 918 P.2d at 161; and *Jensen*, 2007 UT App. 377, ¶¶ 2-3. While it is true that no one factor is dispositive on its own, these factors are important, relevant and material to any determination that a common residency exists. Further, where all of the factors fail to be satisfied, the trial court's ultimate conclusion that a common residency exists is incorrect, and

Respondent's attempt to minimize their relevance is misguided. See *Haddow*, 707 P.2d 673.

In regard to the sharing of living expenses, Respondent states that in this case, the factor is "irrelevant to the question of common residency." Respondent's Brief at 15. The flaw in this reasoning is obvious in light of the Utah Supreme Court's comment that "[a]lthough we do not consider the sharing of the financial obligations surrounding the maintenance of a household to be a requisite element of cohabitation, we do find it *significant* that Mr. Hudson did not pay any of appellant's living expenses or consistently share with her any of his assets." *Haddow*, 707 P.2d at 673 (emphasis added). Clearly it is relevant, just not dispositive. It is not Petitioner's assertion that the failure to share living expenses automatically nullifies the trial court's ultimate conclusion, however, its absence in this case is important when none of the other factors commonly examined by the Utah Court of Appeals and Supreme Court of Utah are satisfied.

Respondent next addresses the issue of whether or not the parties had access to each other's living quarters. Respondent's Brief at 15. Respondent states that "both Mr. Hart and Appellant came and went from the residence as they pleased, and that they both had access to each other's living quarters." *Id.* It is true that Petitioner's living quarters were more or less a common area in the home and as a result were not conducive to excluding others. Specifically, Petitioner was sleeping on a couch in her parents' home. See R. at 186: 9; Tr. at 12:24, 106:1-2, and 107:1-3. As a result, the living arrangements present in this matter do not fit neatly into the situation where two individuals have their

own private residences with a resultant expectation of privacy, but have unfettered access to each other's private residence. For example, consider the living arrangements present in *Pendleton*, where the boyfriend "had his own key to Joyce's home," and "he came and went from Joyce's home three to four times daily, even when she was not there." 918 P.2d at 161. What is important here is that Petitioner did not have unfettered access to Mr. Hart's living quarters, which were meant to be private. Mr. Hart had his own room, which was shared with a roommate. Tr. at 106:1-2 & 17-23, and 107:1-7. There is a complete lack of evidence that Petitioner had any access to Mr. Hart's living quarters. This fact is completely ignored by Respondent. Respondent only makes the conclusory statement that both parties "had access to each other's living quarters," and fails to cite to anything to support that assertion. Respondent's Brief at 15. As was stated in Petitioner's initial brief, this situation is similar to that in *Jensen*, where the party was found to not share a common residence with her boyfriend even though she stayed at her boyfriend's residence "off and on for two months," and shared "a bedroom with Mr. Andrews's sister." 2007 UT App. 377, ¶ 2. It is also akin to the living arrangements that exist in a boarding house where the parties have open access to the structure they are living in, but maintain their own separate quarters.

Finally, Respondent addresses the issue of whether or not Mr. Hart and Petitioner ate together regularly, shared food expenses, or kept clothing or other personal property in the same bedroom. See Respondent's Brief at 15-16. Instead of pointing to specific findings, Respondent instead argues what the trial court may have assumed. Specifically,

Respondent states "[r]egarding food expenses, it is a reasonable assumption from the evidence that neither she nor Mr. Hart paid for food, as that was provided by Appellant's parents;" that "[t]he Court could also reasonably assume from the fact that neither of them maintained another permanent residence that the Appellant and Mr. Hart both kept personal property and clothing at the residence;" and finally "[t]he Court could also reasonably find that they probably ate together." *Id.* at 16. What is important is that the trial court made no specific findings as to these issues; it is simply lacking anywhere in the transcript and record. Respondent's assertions as to what the trial court may have assumed are therefore irrelevant and should be ignored.

Respondent would ask for an oversimplified analysis where the fact that the same structure is being lived in is enough. If that were all that were required, it seems nonsensical that the Utah Court of Appeals and Supreme Court of Utah would bother looking at any of the factors that are discussed in cohabitation cases. All that would be required is that the parties either shared or did not share the same address. Nothing more would be required to either prove or disprove common residency. Therefore, Respondent's arguments that a common residency was shared between Mr. Hart and Petitioner are incorrect.

III. THERE WAS NO SEXUAL RELATIONSHIP BETWEEN MR. HART AND PETITIONER.

Finally, Respondent argues that the trial court did not abuse its discretion when it found that there was a sexual relationship between Petitioner and Mr. Hart. Respondent's

Brief at 19-22. Sexual contact is defined as "participation in a relatively permanent sexual relationship akin to that generally existing between husband and wife." *Haddow*, 707 P.2d at 672.

Respondent states that Petitioner does not "cite any statute or case to support her assertion that direct evidence is needed to establish sexual contact." Respondent's Brief at 19. This is an oversimplification of Petitioner's argument. In light of Respondent's statement however, it is worth reiterating the factual patterns present in reported cohabitation cases in Utah, and to note that in those cases the evidence of a sexual relationship was much stronger than it was in the present matter. For example, in several cases it was admitted to. See *Sigg v. Sigg*, 905 P.2d 908, 911, n. 4 (Utah Ct. App. 1995); *Garcia v. Garcia*, 2002 UT App. 381, ¶ 2, 60 P.3d 1174; *Knuteson v. Knuteson*, 619 P.2d 1387, 1388 (Utah 1980); and *Pendleton*, 918 P.2d at 160, n.1. In other cases, the evidence was uncontroverted. Consider *Wacker v. Wacker*, where on direct examination the party "admitted that early in her relationship with Dennis Warr, they did have sexual relations and that she gave him a venereal disease." 668 P.2d 533, 534 (Utah 1983). Further, in *Haddow*, where the couple had "taken a vacation together to Hawaii, 'sleeping in the same bed and having sexual relations.'" 707 P.2d at 672.

Direct evidence may not be necessary, but it must be more than was presented here. No evidence was even presented showing that the two kissed, embraced, or ever held hands. There simply is not enough evidence in this case to show a "permanent

sexual relationship akin to that generally existing between husband and wife," and the findings and ultimate conclusion of the trial court in this regard are incorrect. *Id.*

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that the trial court's decision to terminate alimony be reversed.

RESPECTFULLY SUBMITTED this 8th day of October, 2009.

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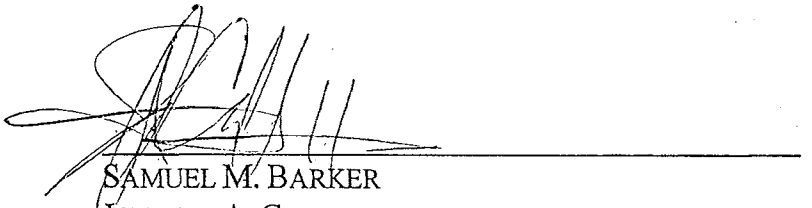

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MAILING CERTIFICATE

I hereby certify that on this 8th day of October, 2009, I deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing **Reply Brief of Appellant** to Guy L. Black, attorney for Respondent/Appellee, at the following address:

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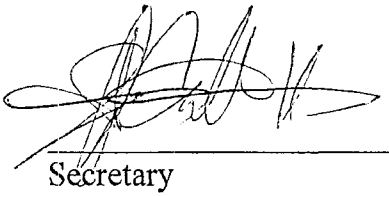

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