

1998

Williamson v. Williamson : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 980293 - CA

IN THE UTAH COURT OF APPEALS

JOAN WILLIAMSON,
Petitioner/Appellant.

VS.

STUART KIM WILLIAMSON,
Respondent/Appellee.

Case No. 980245 CA

Trial Court No. 954100207 DA

Priority No. 15

BRIEF OF APPELLEE

Appeal from an Order Modifying Decree of Divorce
of the First Judicial District Court of
Cache County, Utah
The Honorable Clint S. Judkins, Presiding

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FILED

Utah Court of Appeals

JAN 19 1999

Julia D'Alesandro
Clerk of the Court

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vs.)	Trial Court No. 954100207 DA
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LIST OF ALL PARTIES IN THE DISTRICT COURT

The following parties and attorneys appeared in the proceeding in the trial court:

1. Joan Williamson, Petitioner/Appellant, represented by Larry E. Jones of Hillyard, Anderson & Olsen.
2. Stuart Kim Williamson, Respondent/Appellee, represented by Pete N. Vlahos of the Law Offices of Pete N. Vlahos.

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IN THE UTAH COURT OF APPEALS

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Petitioner/Appellant,)	Case No. 980245-CA
vs.)	Trial Court No. 954100207 DA
STUART KIM WILLIAMSON,)	
Respondent/Appellee.)	Priority No. 15

BRIEF OF APPELLEE

JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to the Constitution of Utah, Article VIII, Section 1 et. seq., Utah Code Ann. § 78-2a-3 (2) (h), and Rules 3 and 4 of the Utah Rules of Appellant Procedure.

ISSUES PRESENTED FOR REVIEW

1. Did the trial court commit error in failing to make findings on nearly all material issues, including:

A. Whether Stuart Williamson's \$3,550.00 gross per month income at the time of his involuntary termination from Morton International, Inc. due to unsatisfactory job performance should be imputed to Stuart Williamson for purposes of child support and alimony;

B. Whether Stuart Williamson is voluntarily underemployed at \$11.00 per hour when there is allegedly employment available to him at \$13.00 to \$15.00 per hour;

C. The effect of a new spouse's contributions to Stuart Williamson's household on Stuart Williamson's needs and ability to pay alimony;

D. The parties' needs and respective abilities to meet those needs relative to alimony, and equalization of the parties' respective standards of living; and

E. The reasonableness of Joan Williamson's attorneys fees and costs and the relative abilities of the parties to pay attorneys fees and costs.

2. Did the trial court commit error in failing to award Joan Williamson continued alimony even based upon the trial court's findings of \$2,090.00 gross monthly income to Stuart Williamson and \$1,692.00 gross monthly income to Joan Williamson representing a \$400.00 per month gross income disparity.

3. Did the trial court commit error in failing to award Joan Williamson her attorneys fees and costs.

4. Whether Joan Williamson should be awarded her attorneys fees and costs on appeal.

APPLICABLE STATUTES

Utah Code Ann. § 78-45-7.6(6) and (7):

(6) Gross income includes income imputed to the parent under Subsection (7).

(7) (a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.

(b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community.

(c) If a parent has no recent work history, income shall be imputed at least at the federal minimum wage for a 40-hour work week. To impute a greater income, the judge in a judicial proceeding or the presiding officer in an administrative proceeding shall enter specific findings of fact as to the evidentiary basis for the imputation.

(d) Income may not be imputed if any of the following conditions exist:

(i) the reasonable costs of child care for the parents' minor children approach or equal the amount of income the custodial parent can earn;

(ii) a parent is physically or mentally disabled to the extent he cannot earn minimum wage;

(iii) a parent is engaged in career or occupational training to establish basic job skills; or

(iv) unusual emotional or physical needs of a child require the custodial parent's presence in the home.

Utah Code Ann. § 30-3-5 (7) (a), (d) and (g):

(7) (a) The court shall consider at least the following factors in determining alimony:

(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; and

(iv) the length of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(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.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this subsection.

A. The court may consider the subsequent spouse's financial ability to share living expenses.

B. The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

Utah Code Ann. § 30-3-3 (1):

(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.

STATEMENT OF THE CASE

A. Nature of the Case. This is a case involving modification of the child support provision and termination of the alimony provision of a Decree of Divorce.

B. Course of Proceedings. The parties were divorced by Decree of Divorce entered May 2, 1996. On or about September 27, 1996, Stuart Williamson filed a Petition to Modify the child support provisions of the Decree of Divorce. On or about October 3, 1997, Stuart Williamson filed an Amended Petition to Modify seeking termination of the alimony provided in the Decree of Divorce. Trial was held on Stuart Williamson's petition on February 11, 1998. Findings of Fact and Conclusions of Law and Order Modifying the Decree of Divorce were entered March 25, 1998. Joan Williamson filed her Notice of Appeal on April 22, 1998. Copies are found in the Brief of Joan Williamson.

C. Disposition in the Trial Court: Finding that Stuart Williamson's income was different than at the time of the entry of the Decree of Divorce, the trial court found a "change in circumstances", reduced child support, terminated alimony, and ordered each party to pay their own attorneys fees and costs.

D. Statement of Facts Relevant to the Issues Presented for Review:

1. Joan Williamson and Stuart Williamson were married for twenty-three (23) plus years. The parties have two children, one

of whom, Julie, is still a minor, born on September 23, 1985 and in the custody of Joan Williamson. R. 48, 66, 67 and 82. T. page 130, lines 2-4.

2. Joan Williamson and Stuart Williamson were divorced by a Decree of Divorce entered on the 24th day of May, 1996. R. 82-96. A copy of the Decree of Divorce is included in the Appellant's Addendum. The Decree of Divorce was based upon a Stipulation of the parties. R. 47-65.

3. The Decree of Divorce provided for child support and alimony as follows:

4. [Stuart Williamson] shall pay to [Joan Williamson] the sum of \$368.00 per month as child support until such time as the payments are no longer due, which shall be when the child turns 18 or would graduate from high school with her normal high school class, whichever occurs later.....

6. [Stuart Williamson] shall maintain health, medical and dental insurance on the minor child of the parties.....

8. [Stuart Williamson] is required to pay [Joan Williamson] alimony in the sum of \$425.00 per month until [Joan Williamson] remarries or cohabits as defined in Utah Code § 30-3-5, or either party dies. Alimony shall commence July 1, 1995.

R. 83-85.

4. At the time of the divorce, Stuart Williamson, was employed at Morton International, Inc. where he earned approximately \$3,550.00 gross per month. Joan Williamson was employed at Bourns where she earned approximately \$1,442.00 gross per month. R. 61, 77 and 92. T. page 12, lines 13-24.

5. On or about September 27, 1996, Stuart Williamson filed a Petition to Modify and reduce the child support provisions of the Decree of Divorce. R. 116-20. On or about October 3, 1997, Stuart Williamson filed an Amended Petition to Modify which added a request to modify by reducing or terminating the alimony provision of the Decree of Divorce. R. 141-467.

6. Stuart Williamson was involuntarily terminated from his employment at Morton International, Inc. by a letter dated August 29, 1996, which stated the reason for termination to be a "violation of Company Policy; specifically unsatisfactory performance of job responsibilities." The letter also stated that Stuart Williamson could request review of his termination: "If you are dissatisfied with any aspect of your termination, you may review the Morton Automotive Safety Products Employee Handbook as it pertains to the Employee Grievance Process." Plaintiff's Exhibit No. 4; T. page 12, line 25; page 13, lines 1-3; page 16, lines 2-6; page 16, lines 19-25; page 17; page 18, lines 1-5; page 23, lines 13-25; pages 24-32; page 33, lines 1-9; page 95, lines 18-25; page 96; page 97, lines 1-3.

7. Stuart Williamson testified that he did not slur his co-workers in August 1996 and that he felt there was not justification for Morton International, Inc. to terminate his employment. T. page 30, lines 3-25; pages 31-34. Three co-workers testified that they did not personally hear Stuart

Williamson slur his co-workers in August, 1996. T. page 97, lines 18-25; pages 98-119; page 120, lines 1-21.

8. Stuart Williamson testified that he did not seek review of his termination nor seek legal redress because he didn't think it would do any good. T. page 77, lines 21-25; page 78, lines 1-17.

9. Stuart Williamson obtained new employment with his brother's drywall company where he is paid \$11.00 per hour. T. page 36, lines 1-5.

10. Stuart Williamson, and his brother, Kirk Williamson for whom Stuart works, testified that because of age and health concerns, Stuart Williamson was not as productive as he once was, but earned his \$11 an hour. T. page 14, lines 16-25; page 15, lines 1-20; page 55, lines 9-25, pages 56-57; page 58, lines 1-6; page 122, lines 1-22; page 124, lines 24-25; page 125; page 126, lines 1-11.

Mr. Vlahos. Okay. Now in reference to your brother would you tell the Court the circumstances surrounding him coming to work for you?

A. He showed up one, one afternoon and asked me for a job and said he'd been down to Heaps Drywall. And I said sure, I'll put you to work. So I hired him on and he told me that, you know, he hasn't drywalled for a while and he's not in too good a shape and his shoulder is sore. I mean, he was honest with me up front and said I'm not the man I used to be. So I started him out at \$11 an hour and--.

Q. Is that what he still earns?

A. That's what he still earns. And you know, that's companies around that, that will pay more and, and I, you

know, I'd pay Kim more too but he doesn't, he doesn't know how to hang. Well, he can hang but not very efficient. He doesn't know how to do metal stud framing. He doesn't know how to do T-bar ceiling or, you know, most of Kim's life he's been a taper.

Q. Okay. So are you paying him a salary that would be commensurate with a taper?

A. Yes.

.....

A. I'm paying him like I would pay anybody else, brother or not. It's the way we were raised. If you're worth it you get it, if you're not -- I can't afford to pay him any more.

Q. Why?

A. He could go to work somewhere else maybe for two to three months and get \$13.00 an hour. When the company got slow they'd lay him off or when they found out that he wasn't cutting it for \$13 they'd lay him off. Then he'd go to another company. I mean he, he's secure here. I mean, he's got a job as, as long as he wants to stay here and can, you know, perform. If, if he gets, if his should gets worse and he continues to gain weight and can't bend over and do his job then he's he's going to be, his price is going down, you know, his hourly wage.

Q. How does, how does bursitis or whatever on his shoulder, how does that affect his ability to do the job?

A. Well he's, his shoulders are not as strong as they used to be so he doesn't carry a full hod full of mud anymore because he can't hold the weight.

Q. Okay.

A. Plus he can't run a full range of motion with his trowel cause he's you know, it's just not strong enough and capable of pulling it so his, his strokes are limited. And you know in, in drywall it's, like I said before it's competitive. There's only so much money in the job or you're losing money. And sad to say we all get older and slow down.

Q. I hate to say it but you're right.

What about carpal tunnel in his wrists? Does that affect his job?

A. It does because his hand go numb.

Q. Have you seen that happen?

A. I have.

Q. On more than one occasion?

A. Yes. Nearly every day.

Q. Have you seen the affect that his bursitis and/or arthritis has had on his shoulder and his ability to do the job?

A. Yes, I have.

Q. On more than one occasion?

A. Yes.

Q. On a regular basis?

A. It's a, it's a nearly every day occurrence. And it's sad to say. Kim at one time was, was one of the best drywall men in the business, extremely talented. I should say taper. But he's, he's not the man he used to be.

Q. These other areas he has no expertise at all I take it then.

A. He's, he's learning how to do it but he's learning on a basis of, you know, our pay scale goes from minimum wage on up to \$15 an hour. But he's, on an average scale he's, he's an \$8, \$9 an hour man if you were to take him in a full perspective.

.....

A. T-bar is just grid ceiling system. Metal stud framing is a different aspect of it. So we try to keep Kim on taping as much as possible. But we also are branched out into stucco exterior where his skills of spreading the mud, you know he's, he's still very talented but he's, he's slow.

Q. Why is that?

A. Age, bursitis, wrist trouble, overweight.

Q. Let me ask you this. Has he worked overtime for you?

A. A couple occasions yes, he has.

Q. And has he volunteered to do overtime? Has he ever refused overtime? Let's put it that way.

A. No, he hasn't.

.....

Q. Okay.

A. I've mean Kim is-- It's, it's pretty tough for him, you know, to-- I mean I, when I was growing up Kim basically trained me in a lot, in a lot of the parts of drywall. And not it's, it's kind of tough for him to, to see the younger generation, you know, basically showing him up.

Q. Are you paying him more or less than what he is really capable and what he is really capable of doing for the job and work that he has?

A. Kim is, is holding his own at \$11 an hour.

T. pages 122-128.

11. Joan Williamson's income at Bourns increased from \$8.32 per hour at the time of the divorce (May 1996) to \$9.32 per hour at the time of the modification trial (February 1998). T. page 132, lines 12-25; pages 133, line 1. Joan Williamson had some overtime at Bourns in 1997. T. page 156, lines 7-14. Joan Williamson took an additional part-time job at King's a department store, in September, 1997 to supplement her income. T. page 141, lines 8-19; page 154 lines 10-25; page 155, lines 1-19.

12. At trial, Joan Williamson presented a monthly budget of \$2,288.35 for herself and the parties' daughter which included

her mortgage payment on her new home. Plaintiff's Exhibit No. 9; T. page 142, lines 16-25; pages 143-144.

13. At trial, Stuart Williamson presented a monthly budget of \$1,811.00 which did not include expenses for his current wife, most, if not all of which, were split off by Stuart Williamson, during his testimony, on the basis that his current wife could pay for her expenses out of her income. Defendant's Exhibit No. 1; T. page 45, lines 2-25; pages 46-49; page 50, lines 1-22.

14. The trial court found that "there has been a change of circumstances". T. page 180, lines 14-15.

15. The trial court found Stuart Williamson's gross income at Williamson Drywall, Inc. to be \$2,090.00 per month, which would include overtime of \$200.00 per month. T. page 44, lines 4-9. R. 197 (Findings of Fact, numbered paragraph 7); T. page 180, lines 16-18.

16. The trial court found Joan Williamson's gross monthly income to be \$1,643.00 at Bourns, although the court was not quite sure how that amount of income came up other than's Stuart Williamson's representations through his counsel. The court came up with a gross income for Joan Williamson in 1997 of \$1,832.66 gross per month, but accepted the figure of \$1,692.56, including some overtime at Bourns, and Joan Williamson's second job where she earned \$75.00 gross per month. R. 197 (Findings of Fact, paragraph 8, 9); T. page 181, lines 15-21.

17. After making its findings on the income of the parties, the trial court ruled: "I'm going to terminate alimony. Now to make this effective, and the Court paints this in broad strokes, I've often said that in the past and I'll reemphasize that here today." T. page 181, lines 22-25.

18. Joan Williamson's attorney pressed the Court on the alimony issue, pointing out the \$400.00 per month income disparity, to which the trial court finally responded that it was "close enough". T. page 184, lines 2-25; page 185; page 186, lines 1-2.

19. The trial judge ordered a reduction in the payment of child support, effective the 1st of March, 1998, based on the gross incomes of Joan Williamson at \$1,692.00 and Stuart Williamson at \$2,090.00. T. page 180, lines 14-21; T. page 182, lines 9-11.

20. The trial court accepted both parties' proffers of \$1,500.00 attorneys fees and ordered each party to pay his/her own attorneys fees and costs. T. page 145, lines 15-23; page 161, lines 9-16; R. 196-203; T. page 183, lines 1-2.

SUMMARY OF THE ARGUMENTS

I. The trial court did not commit error in failing to make findings on nearly all material issues, as there were sufficient findings by the trial court when supplemented with the facts in the record that were clear and uncontroverted to only support the

judgment or there is no mandate to make a finding of fact as to a particular issue as requested by the petitioner. The drafter (the petitioner) failed to draft appropriate findings.

II. The trial court did not abuse its discretion in terminating alimony based on a substantial change in circumstances, as it appropriately considered the three mandated elements to determine alimony and the trial court attempted to equalize the parties' respective standards of living at this time, taking into consideration the large income reduction of Stuart Williamson due to no fault of his own.

III. Joan Williamson is not entitled to attorneys fees or costs in the case at trial nor on appeal, as there was no abuse of discretion by the trial court where evidence that should have been proffered or given by Joan Williamson is not present.

ARGUMENTS

I. THE TRIAL COURT'S FINDINGS OF FACT ARE SUFFICIENT AS EITHER FOUND BY THE TRIAL JUDGE OR AS FOUND IN THE FACTS OF THE CASE TO SUPPORT THE JUDGMENT OF THE TRIAL COURT.

The trial court's findings in this case are sufficient to support the judgment entered by the trial judge by themselves and/or by supplementing them with the facts of the case. In Whitehouse v. Whitehouse, 790 P.2d 57 (Utah App. 1990), at page 61, the court held that "Trial courts enjoy broad discretion in deciding whether a decree of divorce should be modified due to a substantial change of circumstances." The court also held in

Whitehouse that "the trial court must make findings on all material issues, and its failure to delineate what circumstances have changed and why these changes support the modification made in the prior divorce decree constitutes reversible error unless the facts in the record are clear, uncontroverted and only support the judgment." (Emphasis added.)

A careful review of the facts in the record on each of the issues presented for review by Joan Williamson under subparagraphs IA, B, C, D, and E demonstrates that "the facts in the record are clear, uncontroverted and only support the judgment" to the point that even if this court finds that the trial court failed to make findings on all material issues, the ruling does not constitute reversible error and therefore the trial court's decision should be affirmed.

IA. The Petitioner, at trial, requested that the court impute to Stuart Williamson his prior monthly income of \$3,550.00 from Morton International, Inc. for purposes of child support and alimony on the alleged basis that the respondent was voluntarily terminated or involuntarily terminated due to unsatisfactory job performance.

The Utah Code Annotated § 78-45-7.6 (6) and (7) includes imputed income as gross income to a parent, but states as a condition of imputing income, that "Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a

hearing is held and a finding made that the parent is voluntarily unemployed or underemployed." If income is imputed based on a stipulation or finding by the court that the parent is voluntarily unemployed or underemployed then the imputed income shall be based upon employment potential and probable earnings, etc. as found in subsection (b). Without a stipulation between the parties as to imputed income, the court must have a hearing and make a finding of voluntary unemployment, or as alleged in this case, underemployment. See Griffith v. Griffith, 344 UAR 3 (Utah Ct. App. 1998) and Hall v. Hall, 858 P.2d 1018 (Utah Ct. App. 1993).

The trial court did not make a finding of underemployment. The court did find that the Kim Williamson's monthly income was \$2,090.00. The statute does not require a finding that the respondent/parent was not underemployed, it only requires, in order to impute income, in this particular case, a finding of underemployment, which the trial court did not find.

The record as cited is replete with testimony by the Stuart Williamson, and by Mr. Williamson's employer, of Stuart Williamson's ability to work and of his income at his current employment. There is also testimony by Kim Pitcher, as offered by the petitioner, of wages paid for similar work done. Testimony was given and proffered as to the respondent's termination from his previous employment with Morton. All of

this was considered by the trial court and no finding was made, as none had to be made, as to the Stuart Williamson's alleged underemployment.

Subsection (c) of the statute imputes minimum wage if the parent has no work history, which is not applicable here, as the Mr. Williamson/parent was working and had a work history. Subsection (d) lists four reasons, not applicable here, in which income would not be imputed.

The Order of the trial court on this issue should therefore be affirmed as there was no requirement of the trial court to make a finding of underemployment.

IB. As argued, above in response to subparagraph IA of the petitioner's Issues Presented for Review, the trial court did not make a finding of voluntary underemployment as he did not have to if the trial judge was not going to impute income to Mr. Williamson. Also a careful review of the facts in the record are clear, uncontroverted and only support the judgment by the court on the issue of the alleged voluntary underemployment such that the Order of the trial court on this issue should be affirmed.

IC. The petitioner on this issue for review is requesting that the trial court be found in error for failing to make findings on the effect of the Mr. Williamson's new spouse's contributions to the their household in considering Mr.

Williamson's needs and ability to pay alimony under the Utah Code Annotated §30-3-5 (7) (g) (iii).

This statute states that "in determining alimony, the income of a subsequent spouse of the payor may not be considered, except as provided in this subsection. The exceptions to the rule of not considering a subsequent spouse's income are: (1) the subsequent spouse's financial ability to share living expense; or (2) the court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

The trial court did not make a finding of fact as to the subsequent spouse's income as there was no requirement that such a finding be made, as the court did not consider that income. Mr. Williamson's current wife's income was never presented in evidence by either Joan Williamson or Stuart Williamson. Ms. Williamson's attorney questioned Mr. Williamson as to his current wife's employment in regard to insurance but failed to question him as to his current wife's income. T. page 76, line 22.

In fact, Mr. Williamson in his Exhibit # 1 did, in calculating his expenses and income, deduct from his living expenses, in arriving at his expenses of \$1,833.00, the sum of \$600.00, which he attributed to his current wife as her share of the mortgage and utilities.

With these facts in the record there was no justifiable reason to consider or make a judicial finding as to a consideration of Mr. Williamson's current spouses's financial ability to share living expenses, as this was already done by the respondent in his Exhibit # 1. Nor was there a reason to consider the income of Mr. Williamson's current wife as there was not any improper conduct alleged on the part of Mr. Williamson to justify that consideration.

ID. The court did make findings as to the parties' gross incomes and a review of the facts in the record, with the direct and cross-examination of each of the parties on their respective incomes, expenses, work history, health, questions of underemployment, and evidence of incomes at the time of the Divorce, marshals enough facts to show that the facts in the record are clear, uncontroverted and only support the judgment as a consideration of the parties' needs and respective abilities to meet those needs relative to alimony and an "equalization of the parties' respective standards of living.

After the trial court ruled, Joan Williamson's counsel continued to argue with the trial judge as to a disparity in the parties' gross incomes of \$400.00, \$200.00 or \$100.00 and the trial judge, in concluding and affirming his decision of a termination of alimony stated, "Well I appreciate your manipulation. But he's making \$2,100.00, she's making \$1,700.00.

He gives her \$250.00, she gets \$250.00. And he's \$100.00 in the hole. That's the way the Court looks at it." T. page 185, lines 19-23. The court considered the parties' incomes and expenses and other obligations, as can be gleamed from the trial record, as required by law and ruled that alimony should terminate based on a substantial change in circumstances. The facts in the record are clear, uncontroverted and only support the judgment on this issue.

Accordingly, the trial court did not commit error in failing to make findings on this issue of the appeal and the trial court should therefore be affirmed.

IE. In interpreting U.C.A. §30-3-3(1), the Utah Supreme Court held as follows in Beardall v. Beardall, 629 P.2d 425 (Utah 1981):

Although there was no detailed presentation of facts establishing the usual requisite factors to support an award of attorney's fees, the trial court did not abuse its discretion in awarding attorneys fees to plaintiff to enable her to prosecute an action to enforce a provision of divorce decree where the facts implicit in the proceeding and the evidence necessarily presented to the trial court, together with the deminimis nature of the award, constituted a sufficient basis to sustain the exercise of the trial court's discretion.

In this case, the trial court found that each party should pay their own attorneys fees and costs, such that it was not necessary to consider or rule on the reasonableness of Joan Williamson's attorneys fees and costs. There is no evidence by counsel as to the reasonableness of his attorneys fees or costs

nor was evidence specifically presented as to Joan Williamson's need for payment of the attorneys fees and costs by Mr. Williamson.

But the facts in the record are replete with evidence as to the parties' gross incomes and expenses and ability to pay for their obligations, including attorneys fees and costs. The facts in the record are clear, uncontroverted and only support the judgment such that the trial court's ruling that each party pay their own attorneys fees and costs should be affirmed under the analysis of Beardall.

Although the Mr. Williamson's attorney was ordered to prepare the Findings of Fact, Conclusions of Law and Order in this matter, Joan Williamson's attorney took it upon himself to prepare the documents and submit them to the court without Mr. Williamson's approval as to form and the pleading, accordingly, should be construed against the drafter.

II. THE TRIAL COURT DID NOT COMMIT ERROR IN TERMINATING THE ALIMONY AWARD TO THE PETITIONER BASED ON THE FACTS OR STATUTORY AND JUDICIAL MANDATES.

Due to no fault of Stuart Williamson, he lost his job earning \$3,550.00 gross per month and had to return to a construction job, taping, similar to the one he had abandoned five years earlier, due to health and physical problems that are now only more pronounced. The involuntary change in employment and return to previous employment resulted in a drastic change in

income and lifestyle for Mr. Williamson. Stuart Kim Williamson is now required to do manual labor, resulting in numbness to his extremities on almost a daily basis, earning a little more than one half of his previous monthly income or the sum of \$2,090.00 as found by the court. In the meantime, Joan Williamson's income and lifestyle have increased, a fractionally amount, to just under \$1,700.00 as found by the court, but based on her earnings of 1997, over \$1,800.00 a month.

Joan Williamson's expenses include those of the parties' minor child, and a contribution of about 14% of her income to a retirement fund for future use. T. page 160, lines 5-24. This retirement money could be used to pay Ms. Williamson's expenses, representing about \$250.00 a month. Stuart Kim Williamson cashed out his ESIP retirement and paid one-half of that to Joan Williamson. T. page 160-161. Mr. Williamson has no retirement benefits nor any health insurance benefits through his current employer.

In Whitehouse, at page 61, Id., this court found that "A court has continuing jurisdiction to modify a divorce decree. Cites omitted. However, a party requesting that a divorce decree be modified must demonstrate that there has been 'a substantial change of circumstances' occurring since the entry of the decree and not contemplated in the decree itself." The trial judge found a change in circumstances in favor of Mr. Williamson.

The Whitehouse case further held at page 61:

The change necessary to justify a modification of a decree of divorce varies with the type of modification contemplated. Provisions dealing with alimony and child support are more susceptible to alteration at a later date because the needs that such provisions are intended to fulfill are subject to rapid and unpredictable change.

The trial courts enjoy broad discretion in deciding whether a decree of divorce should be modified due to a substantial change of circumstances. See Jense v. Jense, 784 P.2d 1249 (Ct. App. 1989)

Also "[I]t is well established that in divorces, trial courts are given considerable discretion in adjusting the parties' financial and property interests, and their actions are entitled to a presumption of validity." Burnham v. Burnham, 716 P.2d 781, 782 (Utah 1986); and Savage v. Savage, 658 P.2d 1201, 1203 (Utah 1983). To overcome the presumption, the appealing party must demonstrate that "there was a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; or the evidence clearly preponderated against the findings; or such a serious inequity has resulted as to manifest a clear abuse of discretion." See Ruhsam v. Ruhsam, 742 P.2d 123, 124 (Utah App. 1987).

In a case involving alimony the trial court is mandated to meet the requirements of Godfrey v. Godfrey, 854 P.2d 585, 589 (Utah App. 1993) in considering the financial conditions and needs of the receiving spouse; the ability of the receiving

spouse to produce sufficient income; and the ability of the supporting spouse to provide support, and to the extent possible, to equalize the parties' respective standards of living." Not necessarily their respective gross or net incomes.

As argued earlier, the facts in the record and the trial court's findings support the judgment of a termination of alimony. The trial record is replete with evidence as to Joan Williamson's conditions and needs. She set forth and testified as to her expenses and her ability to meet those expenses. Evidence was presented as to Joan Williamson's income or ability to produce sufficient income with the court's finding that she earned just under \$1,700.00 gross per month, when in fact the trial court found that her gross income for the previous year was over \$1,800.00 a month.

There is considerable evidence as to Stuart Kim Williamson's gross income and a finding by the court that he makes \$2,090.00 gross per month including \$200.00 in overtime pay. There was no income imputed to the respondent and no finding as to underemployment with the testimony of both Williamsons as to Mr. Williamson's income. There was testimony submitted and proffered as to Mr. Williamson's termination and the facts surrounding it by lead men that worked with him, which facts were not refuted.

With all of this evidence, the court attempted with a finding of a substantial changes in circumstances to equalize the

parties' respective standards of living. The trial court is not required to equalize the parties' respective incomes, but to equalize, to the extent possible, taking into consideration the three elements of needs and income and ability to pay, their respective standards of living and maintain them at a level as close as possible to that standard of living enjoyed during the marriage.

The court in its ruling, considered the parties' standards of living. After extensive argument, by Joan Williamson's counsel, after the court's ruling, the court explained that it had considered the incomes of the parties and found that with the payment of child support by Mr. Williamson to Ms. Williamson that Mr. Williamson was in the hole about \$100.00 a month, if income disparity was considered in the manner that petitioner's counsel was arguing the court should. Earlier in the court's ruling, the trial judge held that considering the length of the marriage of 24 years, that, "when you take into account the child support that [Stuart Williamson] would pay and that [Joan Williamson] would receive and their actual incomes, etcetera, the Court finds that's close enough. The etcetera would have included a consideration of the parties' expenses, ability to pay and incomes of the parties.

Accordingly, the alimony obligation was appropriately considered by the trial court under both the statutory and judicial mandates and terminated without abusing its discretion.

III. JOAN WILLIAMSON IS NOT ENTITLED TO AN AWARD OF HER ATTORNEYS FEES AND COSTS FROM THE TRIAL NOR ON APPEAL.

The Utah Code Annotated § 30-3-3 (1) allows the trial court to order a party to pay the costs, attorney fees, and witness fees of the other party to enable the other party to prosecute or defend the action and the order may include a provision for costs of the action.

In applying this statute or in awarding attorneys fees and costs on the trial court level, the appellant courts have held that the decision to award attorney fees and the amount of attorneys fees, in divorce proceedings, rests primarily in the sound discretion of the trial court. However, the award must be based on evidence of both financial need and reasonableness. See Rasband v. Rasband, 752 P.2d 1331 (Utah Ct. App. 1988); Andersen v. Andersen, 757 P.2d 476 (Utah Ct. App. 1988); Morgan v. Morgan, 795 P.2d 684 (Utah Ct. App. 1990); Crouse v. Crouse, 817 P.2d 836 (Utah Ct. App. 1991); and Wilde v. Wilde, 357 UAR 29 (Utah Ct. App. 1998). In order to award attorney fees, the trial court must find the requesting party in need of financial assistance and that the fees requested are reasonable. Riche v. Riche, 784 P.2d (Utah Ct. App. 1989); Bagshaw v. Bagshaw, 788 P.2d 1057

(Utah Ct. App. 1990); Haumont v. Haumont, 793 P.2d 421 (Utah Ct. App. 1990; and Wilde v. Wilde, 357 UAR 29 (Utah Ct. App. 1998).

In deciding on an award of attorneys fees and costs, among other factors, the court may consider the difficulty of the litigation, the efficiency of the attorneys, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved. None of this was testified to by Joan Williamson nor presented by her attorney.

In Warren v. Warren, 655 P.2d 684 (Utah 1982), the Utah Supreme Court held that the trial court properly denied the wife's request for attorney fees in the divorce proceedings where she offered no evidence at trial to show the nature or amount of any attorney fees incurred or any need for court-ordered assistance in the payment of such fees. (Emphasis added). In Kallas v. Kallas, the Utah Supreme Court found it an abuse of the trial court's discretion to award attorney fees to the mother in a child custody modification proceeding where there was no presentation of facts establishing her financial need for such an award. 614 P.2d 641 (Utah 1980).

The trial court accepted both parties' proffers of \$1,500.00 in attorneys fees and costs. No evidence was presented specifically, by either party as to the reasonableness of the

attorneys fees nor the financial need of Ms. Williamson for an award of attorneys fees and costs. Based on the evidence before the trial court, it found that each of the parties should pay their own attorneys fees and costs.

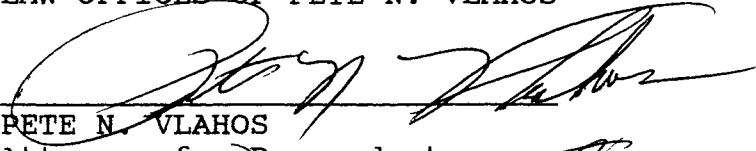
As to an award of attorney fees and costs on appeal, this court in Wilde v. Wilde, 357 UAR 29, 31, exercised its discretion in awarding attorneys fees and costs on appeal because the defendant there had prevailed in large part on appeal. But in this case no attorneys fees nor costs have been awarded on the trial level, Mr. Williamson prevailed in large part on the trial level, no evidence has been detailed as to the need of Ms. Williamson as to attorneys fees and costs on appeal, such that no attorneys fees and costs should be awarded on appeal.

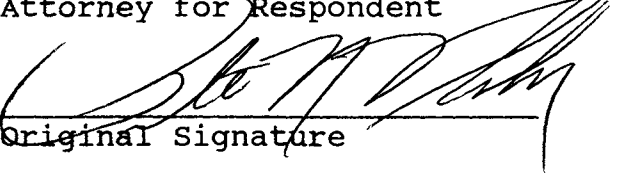
CONCLUSION

The trial court's judgment is sufficiently supported by the evidence of the case and his findings such that his ruling should be affirmed and no attorneys fees nor costs awarded unless they are awarded to Mr. Williamson on appeal.

DATED this 18 day of January, 1999.

LAW OFFICES OF PETE N. VLAHOS


PETE N. VLAHOS
Attorney for Respondent


Original Signature

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE was mailed, postage prepaid, to Larry E. Jones, of Hillyard, Anderson & Olsen, at 175 East First North, Logan, Utah 84321, this 18 day of January, 1999.

