

2009

# Diane Fish v. Jeffrey Fish : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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DIANE FISH,

Petitioner/Appellee,

vs.

JEFFREY J. FISH,

Respondent/Appellant.

**BRIEF OF THE APPELLANT**

Appellate Case No. 20090916

Civil No. 074901990DA

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**BRIEF OF THE APPELLANT**

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Appeal from the Second Judicial District Court in  
and for the County of Weber, State of Utah  
Honorable Ernie W. Jones, District Court Judge

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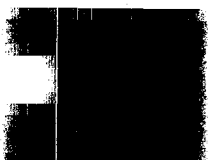
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IN THE UTAH COURT OF APPEALS

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DIANE FISH,  Petitioner/Appellee,  vs.  JEFFREY J. FISH,  Respondent/Appellant.	<b>BRIEF OF THE APPELLANT</b>  Appellate Case No.      20090916  Civil No.                      074901990DA
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**STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction of this appeal pursuant to Utah Code Annotated § 78A-4-103(2)(h), appeals from the district court involving domestic relations including, but not limited to, divorce.

**STATEMENT OF THE ISSUES**

**1. Did the trial court err in failing to impute full-time employment to Appellee, Diane Fish?**

Standard of Review. Trial courts have broad discretion in making alimony awards so long as they consider at least the following factors:

- (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 the 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)(i)-(vii) (Supp. 2008). In addition, trial courts must be mindful of the primary purposes of alimony: “(1) to get the parties as close as possible to the same standard of living that existed during the marriage; (2) to equalize the standards of living of each party; and (3) to prevent the recipient spouse from becoming a public charge.” *Richardson v. Richardson*, 201 P.3d 942, 943 (Utah 2008). Where a trial court considers these factors, we will disturb its alimony award only if there is “a serious inequity...manifest[ing] a clear abuse of discretion.” *Kelley v. Kelley*, 2000 UT App 236, ¶ 26, 9 P.3d 171 (quoting *Childs v. Childs*, 967 P.2d 942, 946 (Utah Ct.App.1998))

Issue preserved in the record: the issue was preserved in the record in *Transcript volume I p. 17-18; volume p. 45-46*.

**2. Did the trial court err in imputing full-time income to Jeffery Fish, considering he was engaged in career or occupational training, and fail to support it with specific, detailed findings of fact?**

Standard of Review. Trial courts have considerable discretion in determining the financial interests of divorced parties. *Allred v. Allred*, 797 P.2d 1108, 1111 (Utah App.1990). Although “the trial court’s ‘actions are entitled to a presumption of validity,’” *id.*(quoting *Hansen v. Hansen*, 736 P.2d 1055, 1056 (Utah App.), *cert. denied*, 765 P.2d 1277 (Utah 1987)), appellate courts cannot affirm its determination when the trial court abuses its discretion. *Allred v. Allred*, 797 P.2d at 1111 (Utah App.1990). The trial court abuses its discretion when it fails to enter specific, detailed findings supporting its financial determinations. *See id.* Findings are adequate only if they are “sufficiently



detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached.” *Id.* (Quoting *Stevens v. Stevens*, 754 P.2d 952, 958 (Utah App.1988)). *See also Sukin v. Sukin*, 842 P.2d 922, 924 (Utah App.1992) (detailed findings are necessary to determine whether trial court has exercised its discretion in a rational manner).

Issue preserved in the record. The issue was preserved in the record in *Transcript volume I p. 197-200; volume II p. 6; volume II p. 15-32; volume III p. 53-56.*

**3. Did the trial court err in establishing alimony by failing to consider the parties’ historical income and standard of living?**

Standard of Review. An appellate court reviews a trial court’s determination of alimony for abuse of discretion. *Willey v. Willey*, 951 P.2d 226, 230 (Utah 1997). A district court has broad discretion when deciding alimony awards. *Higley v. Higley*, 676 P.2d 379, 382 (Utah 1983). In addition to the *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985) factors, a trial court shall consider the primary aims of alimony when establishing an award: (1) to get the parties as close as possible to the same standard of living that existed during the marriage, *see* Utah Code Ann. § 30-3-5(8)(c) (Supp.2007); (2) to equalize the standards of living of each party, *see id.* § 30-3-5(8)(d); and (3) to prevent the recipient spouse from becoming a public charge, *English v. English*, 565 P.2d 409, 411 (Utah 1977).

Issue preserved in the record. The issue was preserved in the record at *Transcript volume III p. 47.*

**4. Did the trial court err in imputing \$30,000 to \$40,000 annual income to Jeffery Fish and fail to support it with specific, detailed findings of fact?**

Standard of Review. An appellate court will not disturb the trial court's award of spousal support absent a showing of a clear and prejudicial abuse of discretion. *Paffel v. Paffel*, 732 P.2d 96, 100 (Utah 1986). However, [t]he findings of fact must show that the court's judgment or decree "follows logically from, and is supported by, the evidence." *Smith v. Smith*, 726 P.2d 423, 426 (Utah 1986). The findings "should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached."

*Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987) (quoting *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979)). *See also Parks v. Zions First Nat'l Bank*, 673 P.2d 590, 601 (Utah 1983) (findings of fact must clearly indicate the mind of the court).

Issue preserved in record. The issue was preserved in the record in *Transcript volume III* p. 48-52.

## DETERMINATIVE STATUTES

The following statutes are of central importance to the appeal:

1. Utah Code Ann. § 30-3-5(8)(a)-(d)

(8)(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;
- (iv) the length of the marriage;
- (v) whether the recipient spouse has custody of the 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.

(b) The court consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (8)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

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

2. Utah Code Ann. § 78B-12-203(7)

(7)(a) Income may not be imputed to a parent unless the parent stipulates to the amount imputed, the parent defaults, or, in contested cases, a hearing is held and the judge in a judicial proceeding or the presiding officer in an administrative proceeding enters findings of fact as to the evidentiary basis for the imputation.

(b) If income is imputed to a parent, the income shall be based upon employment potential and probable earnings as derived from employment opportunities, work history, occupation qualifications, and prevailing earnings for persons of similar backgrounds in the community, or the median earning for persons in the same occupation in the same geographical area as found in the statistics maintained by the Bureau of Labor Statistics.

(c) If a parent has no recent work history or a parent's occupation is unknown, 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 and the condition is not of a temporary nature:

- (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 unable to 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.

## STATEMENT OF THE CASE

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Nature of the case. This is a domestic relations case in which Diane Fish filed for divorce against Jeffery J. Fish on October 30, 2007. The Pre-Trial Order certified for trial the issue of whether Diane Fish should receive alimony and, if so, the amount. Incorporated in Diane Fish's claim for alimony was that Jeffery Fish was capable of employment. Also, certified for trial was Diane Fish's claim for one-half (1/2) of Jeffery Fish's military retirement with the provision she was not entitled to any of his disability pay.

Course of the proceedings. Diane Fish filed a Complaint for Divorce on October 30, 2007 on the grounds of irreconcilable differences. On November 19, 2007, Jeffery Fish filed an Answer. Pursuant to stipulation, Jeffery Fish filed an amended Answer and Counter Claim through counsel. On January 31, 2008, Diane Fish's Motion for Temporary Orders was heard before the Domestic Relations Commissioner. The parties agreed each would be paid \$10,000 from the sale of their marital residence. Approximately \$83,000 was held in Petitioner's attorney trust account from sale of their marital home. During the pendency of the proceedings, prior to trial, Diane Fish was not awarded temporary alimony nor division of the military retirement. A non-jury trial was held on April 27, 28, and 30, 2009 before District Court Judge, Ernie W. Jones.

The trial court issued a Memorandum Decision on June 16, 2009. The trial court affirmed the parties' stipulation Diane Fish was to receive approximately \$633 per month as her one-half (1/2) of Jeffery Fish's military retirement acquired during the marriage; that Jeffery Fish was to receive \$421 per month VA Disability and \$649 per month as his share of the military retirement.

The trial court found Jeffery Fish was underemployed at the time of trial. The Court determined he was capable of full-time employment and imputed \$30,000 to \$40,000 annual income

to him. The trial court found Diane Fish's monthly gross income in 2009 was about \$2,000 per month and her monthly net pay in 2008 was \$1,628.

The trial determined Jeffery Fish's monthly living expenses to be \$2,374 and Diane Fish's monthly living expenses to be about \$3,000. The trial court found the parties' 2002 through 2008 tax returns to be relevant in establishing income potential for both parties. The Court found Diane Fish had a need for alimony based on her income and expenses and that Jeffery Fish had an ability to pay and ordered \$800 per month alimony for a period of 27 years. Each party was ordered to pay their own attorney fees as both were found at fault for the divorce and each had the ability to pay their own attorney fees.

Jeffery Fish timely filed a Notice of Appeal on October 27, 2009.

## STATEMENT OF FACTS

1. Diane Fish and Jeffery Fish were married on September 5, 1980. *Transcript volume 1 p. 126.* The parties' separated in October, 2007 and Diane Fish filed for divorce on October 30, 2007. *(Record at p. 0001)*

2. Diane was 48 years old at the time of trial and had attended technical college after high school. *Transcript volume 1 p. 127*

3. Diane studied medical assisting at the technical college. *Transcript volume 1 p. 128*

4. Diane works for Dr. Robert Capener, DDS as the office manager. The office consists of two (2) dentists and five (5) hygienists. *Transcript volume 1 p. 158-159.* She schedules all of the appointments and prepares the payroll. *Transcript volume 1 p. 158*

5. There is also employed three (3) other front staff people and other part-time assistants. Diane has worked there 14 to 15 years. *Transcript volume 1 p. 159*

6. Diane works Monday through Thursday from 7:30 a.m. to 4:30 p.m., although she does work some Fridays. *Transcript volume 1 p. 158*

7. Diane Fish earns \$15 per hour and had earned that for three (3) or four (4) years. *Transcript volume 1 p. 160*

8. Diane testified she was prepared to seek other employment in order to have medical insurance after the divorce. *Transcript volume 1 p. 160*

9. Diane testified it was not unreasonable to say she was able to work 40 hours per week. *Transcript volume 1 p. 161*

10. Diane also acknowledged it was the norm in this day and age to work 40 hours per week. *Transcript volume 1 p. 161*

11. Diane worked part-time throughout the marriage, working around Jeffery's military schedule and their children. *Transcript volume 1 p. 161*

12. Diane had considered relocating to Las Vegas, Nevada, near her daughter, and also looked into a position in Florida as well. *Transcript volume 1 p. 162*

13. Diane acknowledged she was looking around for other employment as she had to be able to take care of herself. *Transcript volume 1 p. 162*

14. Diane admitted she was looking for a 40-hour per week job. *Transcript volume 1 p. 162*

15. Diane claimed monthly living expenses of approximately \$3,600 per month. *Petitioner's Exhibit 6*

16. Diane claimed entertainment expenses of \$300 per month, \$200 per month travel expenses, \$300 per month for miscellaneous expenses, \$50 per month for counseling, and \$552 per month for automobile expenses in addition to her car payment of \$280 per month. *Petitioner's Exhibit 6*

17. The trial court found Diane's monthly expenses to be about \$3,000 a month. *Findings of Fact 32*

18. Jeffery Fish claimed monthly living expenses of \$2,374 per month. *Respondent's Exhibit 1*

19. The trial court found Jeffery's monthly living expenses to be \$2,374 as claimed. *Findings of Fact 28*

20. Jeffery Fish testified he joined the United State Air Force on June 5, 1980 and retired on August 1, 2000. *Transcript volume 1 p. 96*



21. Jeffery's monthly military retirement pay is \$1,703 gross and \$1,477 net monthly pay, after taxes and life insurance. *Respondent's Exhibit 1 p. 8*

22. The trial court found Diane was entitled to \$633 per month gross pay and Jeffery \$649 per month gross pay, pursuant to the Woodward formula in dividing the military retirement as per stipulation of the parties, with Jeffery also receiving \$421 per month disability pay. *Findings of Fact 9, 10, and 11*

23. Diane testified, after Jeffery retired in 2000, his work was off-and-on jobs, nothing stable and that he really did not work a great deal after he retired from the military. *Transcript volume 1 p. 128, 129, and 175*

24. In 2002, Jeffery earned \$45,085 as a logistics specialist at Karta Technologies. *Petitioner's Exhibit 16, W-2*

25. In 2003, Jeffery earned \$18,889 at Karta Technologies. *Petitioner's Exhibit 17, W-2*. Jeffery was terminated at Karta in 2003 for unacceptable performance. *Petitioner's Exhibit 1 p. 5*

26. In 2004 and 2005, Jeffery had no earnings as he sold auto parts on E-bay and lost money. *Respondent's Exhibit 3, p. 3 and Transcript volume 1 p. 128, 129*

27. In 2006, Jeffery earned \$20,545 at Fair Air Aviation as an aircraft mechanic. *Petitioner's Exhibit 20 and Respondent's Exhibit 3, p. 3*

28. In 2007, Jeffery earned \$25,710 as an aircraft mechanic at Fair Air Aviation. *Petitioner's Exhibit 37*

29. In 2008, Jeffery had no earnings as he was attending school at Ogden Weber ATC and was paid \$671 per month by the Department of Veteran Affairs for vocational rehabilitation. *Petitioner's Exhibit 1, p. 2 and Transcript volume 1 p. 198*

30. In 2009, Jeffery was still attending Ogden-Weber ATC, receiving \$671 per month for vocational rehabilitation, having started school in September, 2008 and anticipated graduating in January, 2010. *Transcript volume 1 p. 198*

31. Diane Fish earned \$17,529 in 2002; \$18,561 in 2003; \$25,582 in 2004; \$27,000 in 2005; \$26,186 in 2006; \$25,710 in 2007; and \$25,862 in 2008. *Petitioner's Exhibits 16, 17, 18, 19, 20, 37 and 30*

32. Jeffery testified in 2008 he felt like he could be no longer be an aircraft mechanic and applied for vocational rehabilitation. *Transcript volume 1 p. 197*

33. Jeffery completed a Functional Capacity Evaluation in 2008, at Wasatch Physical Therapy, Inc., which determined his physical ability did not match the requirements of remaining an aircraft mechanic as he could not often carry heavy equipment weighing over 70 pounds, engage in repetitive bending and twisting to work on aircraft, and stand for eight (8) hour shifts. *Respondent's Exhibit 6, p. 3*

34. The United States Department of Labor 2008-09 Occupational Outlook Handbook for Aircraft Mechanics states aircraft mechanics must lift or pull objects weighing more than 70 pounds, often stand, lie, or kneel in awkward positions, and occasionally must work in precarious positions such as on a ladder or scaffold, usually work 40 hours a week for eight (8) hour shifts, and that agility is important for the reaching and climbing necessary to do the job. *Respondent's Exhibit 8, p. 2-3*

35. Ernest Chavez, therapist for Wasatch Physical Therapy, who completed the Functional Capacity Evaluation, testified Jeffery also had an abnormal foot condition known as plantar fasciitis, which causes pain in the feet if you stand on cement for long periods of time. *Transcript volume 11 p. 11-12*

36. Martin Peterson, Jeffery's supervisor at Fair Air Aviation, testified Jeffery would pull off his shoes and rub his feet before the shift was over, complaining of sore feet and said his feet hurt him badly and he had a hard time getting through the day. *Transcript volume II p. 58-59*

37. Jeffery was retired from the Air Force with a 10% disability for lumbar sacral strain. *Transcript volume II p. 9, volume III p. 10*

38. Martin Peterson testified, aircraft mechanics have to lift and pull objects weighing more than 70 pounds, stand and kneel in awkward positions, pull or push airplanes the distance of a hangar about 400 feet, and work under the instrument panel and tail section of the airplane. *Transcript volume II p. 59-61*

39. Kristy Farnsworth, a vocational specialist, was called by Diane Fish regarding jobs in Utah and wages. *Transcript volume I p. 38*

40. Kristy Farnsworth's vocational report was dated August 11, 2008, approximately one (1) month before Jeffery started school for vocational rehabilitation. *Transcript volume I, p. 54*

41. Kristy Farnsworth testified Jeffery could find employment as an aircraft mechanic, a sales representative, or a logistics specialist. *Transcript volume I p. 43*. She did not agree with the conclusion of Ernest Chavez of Wasatch Physical Therapy, Inc. that Jeffery could not be an aircraft mechanic. *Transcript volume I p. 58*

42. Kristy Farnsworth relied on the Dictionary of Occupational Titles for a job analysis of aircraft mechanics. *Transcript volume I p. 60*. That job analysis is found in *Section 1* of her report. *Petitioner's Exhibit 1*

43. Kristy Farnsworth testified that the job analysis contained in Jeffery Fish's *Exhibit 8* for Aircraft and Avionics Equipment Mechanics and Service Technicians is a different occupation from that of an airframe and power plant mechanic referred to in *Section 1* of her report found in

*Petitioner's Exhibit 1 and Transcript volume 1 p. 67, 68,*

44. Jeffery Fish's *Exhibit 8*, from the United States Department of Labor for Aircraft Mechanics states, on pages 1, 2 of *Exhibit 8*, that aircraft mechanics are also called airframe mechanics, power plant mechanics, and avionics technicians. Most mechanics working on civilian aircraft are A&P mechanics.

45. Martin Peterson testified there is no distinction between aircraft mechanics and A & P mechanics and that Jeffery Fish was a licensed A & P mechanic. *Transcript volume II p. 57-58*

46. Kristy Farnsworth testified that aircraft mechanics must only lift or pull 50 pounds, not 70 pounds. *Transcript volume I p. 61, Section 1 of Petitioner's Exhibit 1*

47. Kristy Farnsworth testified the "M" in *Section 1 of Petitioner's Exhibit* stands for 50 pounds, not 70 pounds. *Transcript volume I p. 61*

48. Kristy Farnsworth, in her report, relied on *Section 1* to describe the job description of an aircraft mechanic, which was written in 1996 and has not been updated since, compared to Jeffery Fish's *Exhibit 8*, prepared for the 2008-09 time frame.

49. Kristy Farnsworth, in her report, *Petitioner's Exhibit 1*, does not address the issue of repetitive bending, kneeling, awkward positions or plantar fasciitis suffered by Jeffery. *Petitioner's Exhibit 1*

## SUMMARY OF ARGUMENT

The trial court has a statutory duty to consider the recipient's earning capacity or ability to produce income in determining alimony. Diane Fish is underemployed, which the trial court failed to address. Diane Fish earns \$15 per hour working Monday through Thursday from 7:30 a.m. to 4:30 p.m., although she testified she works some Fridays. She is the office manager for a dental office that has two (2) dentists, five (5) hygienists, and several part-time employees. She has worked at that office for 14 to 15 years.

She admitted at trial it was not unreasonable to impute 40 hours a week employment to her. She further admitted she was looking for a 40-hour per week job. She testified she was prepared to seek other employment in order to have medical insurance after the divorce. She acknowledged it was the norm to work 40 hours per week.

If Diane Fish worked 40 hours per week at \$15 per hour, she would gross \$2,600 per month and net \$2,080. Adding to her monthly net pay of \$2,080 her share of the military retirement of \$633 per month would yield a total net monthly pay of \$2,713. Her need for alimony would be \$287 per month to meet her monthly financial needs of \$3,000, not \$800 per month.

The trial court imputed full-time employment to Jeffery Fish even though he was engaged in career or occupational training, attending Ogden-Weber ATC full-time in computer technology. In effect, the trial court mandated that Jeffery quit school and become employed full-time, earning \$30,000 to \$40,000 per annum in order to pay Diane Fish \$800 per month.

Jeffery Fish completed a Functional Capacity Evaluation with a physical therapist, which determined he did not have the physical capabilities to continue to work as an aircraft mechanic. Jeffery Fish's work history in the military and civilian workforce was primarily as an aircraft

mechanic. Based upon the Functional Capacity Evaluation, Jeffery could not continue as an aircraft mechanic and qualified for vocational rehabilitation with the Department of Veteran Affairs, receiving \$671 per month to attend Ogden-Weber ATC full-time for an estimated 17 month course in computer technology.

It was error to mandate Jeffery quit school in the middle of his vocational rehabilitation training and impute full-time employment to him. Income may not be imputed to Jeffery if Diane was asking the Court to impute income to Jeffery for child support and alimony purposes, pursuant to Utah Code Ann. § 78B-12-203(7)(d). This statute states income may not be imputed to a parent if the parent is engaged in career or occupational training to establish basic job skills and the condition is not of a temporary nature. It is unreasonable to impute income to Jeffery at this time, for alimony purposes, when, if Jeffery had an obligation to support a minor child, income could not be imputed to him if he was engaged in career or occupational training.

The trial court failed to follow its statutory duty to get the parties as close as possible to the same standard of living that existed during the marriage and to equalize the standards of living of each party, pursuant to Utah Code Ann. § 30-3-5(8)(c) and (d). The parties maintained a modest family income and standard of living during the marriage. Ordinarily, the standard of living shall be established at the time of separation which, in this case was October, 2007. However, Diane Fish did not put on evidence at trial as to the parties' standard of living at the time of separation. She did not testify to the parties' past mortgage, utilities, or food at separation. She testified as to her present rent, utilities, food and auto expenses in April, 2009, at the time of trial.

The trial court found Diane's monthly living expenses were \$3,000 per month and Jeffery's were \$2,374 per month. The parties' historical income does not justify a present standard of living of

\$5,374 per month compared to their actual standard of living during the marriage. Diane testified Jeffery really did not work a great deal after he retired in 2000 from the military and his employment was not stable.

Jeffery earned \$45,085 in 2002; \$18,889 in 2003; none in 2004; none in 2005; \$20,545 in 2006 as an aircraft mechanic; \$25,710 in 2007 as an aircraft mechanic; none in 2008 and none in 2009.

Diane earned \$17,529 in 2002; \$18,561 in 2003; \$25,582 in 2004; \$27,060 in 2005; \$26,186 in 2006; \$25,710 in 2007 and \$25,862 in 2008.

Based upon the parties' historical monthly gross earnings, their monthly net pay would not justify a standard of living of \$5,374 per month as determined by the trial court. The parties' historical net monthly pay would establish a monthly standard of living of approximately \$2,000 to \$2,300 per month to each.

The trial court erred in imputing \$30,000 to \$40,000 per annum income to Jeffery Fish without supporting the imputation of earning ability by detailed, specific findings of fact. The trial court does not specify what occupation Jeffery may follow to earn this salary or such jobs were available in the present economy.

The Functional Capacity Evaluation indicates Jeffery does not have the physical ability to continue as aircraft mechanic. Jeffery has no experience as a sales representative, which would not support the contention he could earn, as a salesman, \$28,000 to \$53,000 per annum in today's economy. The imputation of this wage is speculative and not substantiated. Jeffery was terminated at Karta Technologies as a logistics specialist for unacceptable performance. The employment at Karta is not a benchmark to establish his ability to earn a living as a logistics specialist. A logistics

specialist is really a technical writer which, according to Kristy Farnsworth's report, requires a bachelor's degree. The trial court failed to make detailed, specific findings of fact, justifying its conclusion that Jeffery can earn \$30,000 to \$40,000 per annum.



## ARGUMENT

### I

#### **THE TRIAL COURT ERRED IN FAILING TO IMPUTE FULL-TIME EMPLOYMENT TO APPELLEE, DIANE FISH**

Counsel for Appellant, Jeffery Fish, requested the trial court impute full-time wages to Appellee, Diane Fish, of \$2,600 per month (\$15 per hour, 40 hours per week). (*R at volume III p. 46*). It was argued Diane Fish is underemployed. Diane Fish testified she earns \$15 per hour as the office manager for Dr. Robert Capener, DDS. *Transcript volume I p. 160*. If Diane Fish worked 40 hours per week earning \$15 per hour, she would gross \$2,600 per month and receive a net monthly pay of \$2,080 per month. *Transcript volume III p. 45, 46*. It was argued Diane Fish has the ability to earn \$2,080 per month net pay by simply working 40 hours per week. *Transcript volume III p. 46*. Counsel for Jeffery Fish, in his opening statement, made this argument as well as at the conclusion of the trial. (*R at volume I p. 17, 18*).

The trial court, in *Findings of Fact 29*, found Diane Fish earned about \$25,000 in gross wages in 2008. In *Findings of Fact 30*, the trial court found her net monthly income for 2008 was \$1,628. The trial court did not make any findings of fact as to her net monthly income in 2009. However, the trial court found her average gross monthly income for January through April, 2009 was \$2,000 per month.

If the trial court imputed \$2,080 per month net income to Diane Fish from full-time employment and added \$633 per month as her share of the military retirement, her total net monthly income would be \$2,713. In *Findings of Fact 32*, the trial court found Diane Fish's monthly expenses to be \$3,000 per month. Accordingly, Diane Fish's need for alimony would be \$287 per month if she

would only work 40 hours per week. Diane Fish's underemployment should not be condoned by the Court and imputation of full-time wages to her is appropriate. Diane Fish admitted it was not unreasonable to say she was able to work 40 hours a week. (*R at volume I p. 161*). She further admitted it was the norm to work 40 hours per week. (*R at volume I p. 161*). Diane Fish has been employed by Dr. Capener for 14 to 15 years. (*R at volume I p. 159*). She schedules all the appointments for the office. (*R at volume I p. 158*). She prepares all the payroll. (*R at volume I p. 158-159*). The office has two (2) dentists and five (5) hygienists and several part-time employees. (*R at volume I p. 159*).

Diane Fish testified she was looking for a 40-hour per week job. (*R at volume I p. 162*). She considered relocating to Las Vegas to be near her daughter and she had also looked into a position in Florida as well. (*R at volume I p. 162*). She admitted she was looking around to see what is out there as she has to be able to take care of herself. (*R at volume I p. 162*).

Diane Fish also admitted Dr. Capener was bringing on a new associate, Dr. Tom Matthews. *Transcript volume I p. 159*. She was hopeful Dr. Matthews would be employed full-time. *Transcript volume I p. 159*.

Diane Fish testified she was prepared to look for other work if she had to obtain medical insurance. *Transcript volume I p. 160*. She has a high school degree and technical college training. *Transcript volume I p. 127*. Diane Fish did not testify to any health concerns preventing her from full-time work.

The trial court has a statutory duty to consider the ability of the receiving spouse to produce sufficient income for herself. Utah Code Ann. § 30-3-5(8)(a) provides:

(8)(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;
- (iv) the length of the marriage;
- (v) whether the recipient spouse has custody of the 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.

Numerous Utah cases also hold, in determining alimony, the Court must make adequate findings and conclusions, demonstrating it has considered three (3) factors: (1) the financial condition and needs of the party seeking alimony; (2) that party's ability to produce a sufficient income; and (3) the ability of the other party to provide support. *Noble v. Noble*, 761 P.2d 1369 (Utah 1988); *Chambers v. Chambers*, 840 P.2d 841 (Utah Ct. App.1992); *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985).

The trial court abused its discretion in not imputing Diane Fish's income at \$2,600 per month gross wage, \$2,080 per month net pay, based upon full-time employment at her present salary. In *Thronson v. Thronson* the trial court imputed full-time wages to Ms. Thronson, assuming she was employed on a full-time basis. *Thronson v. Thronson*, 810 P.2d 428, 435 (Utah App.1991)

In *Willey v. Willey*, 866 P.2d 547, 554 (Utah App.1993), the trial court imputed income to Mrs. Willey based upon a projection of full-time work at her present salary. The Utah Court of

Appeals held, “we do not question the trial court’s authority to impute income to Mrs. Willey. Imputing income to an unemployed or underemployed spouse when getting an alimony award is conceptually appropriate as part of that spouse’s ability to produce a sufficient income.”

In this case, even though Diane Fish admitted it was not unreasonable to impute 40 hours per week employment to her and that she was looking for a 40-hour per week job, the trial court did not impute full-time wages to her. The trial court made no findings of fact why it is inappropriate to impute full-time employment to her. Failure to consider the factors enumerated in *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985) and Utah Code Ann. § 30-3-5(8)(a), constitutes an abuse of discretion. *Stevens v. Stevens*, 754 P.2d 952, 958 (Utah Ct.App.1988). Accordingly, the trial court must make sufficiently detailed findings of fact on each factor to enable a reviewing court to ensure that the trial court’s discretionary determination was rationally based upon these factors. The trial court failed to make any findings of fact why Diane Fish should not have full-time employment at \$15 per hour imputed to her. Considering the facts of this case, Diane Fish should have full-time wages imputed to her and it was error not to do so.

## II

### THE TRIAL COURT ERRED IN IMPUTING FULL-TIME INCOME TO JEFFERY FISH, CONSIDERING HE WAS ENGAGED IN CAREER OR OCCUPATIONAL TRAINING AND FAILED TO SUPPORT IT WITH SPECIFIC, DETAILED FINDINGS OF FACT

The trial court found Jeffery Fish was capable of working full-time and imputed an income in a sum of between \$30,000 to \$40,000 annually to him. *Findings of Fact 26*. The trial court found Jeffery Fish to be underemployed at the time of trial. *Findings of Fact 27*.

Jeffery Fish did not stipulate that income may be imputed to him. Jeffery presented evidence to the Court of his historical earnings since his retirement from the military in 2000 and that he was engaged in vocational rehabilitation through the Department of Veteran Affairs. Jeffery Fish testified he felt he could not be an aircraft mechanic anymore and, after testing, the Department of Veteran Affairs accepted him for the vocational rehabilitation. *Transcript volume I p. 197*

Jeffery was attending the Ogden-Weber Applied Technology Center at the time of trial. *Transcript volume I p. 198*. He started attending Ogden-Weber ATC full-time in September, 2008 and was on track to graduate in January, 2010. *Transcript volume I p. 198*. Jeffery was being trained to be a computer technician, to install software and hardware devices. *Transcript volume I p. 199*. He was going to school full-time. *Transcript volume I p. 199*. Jeffery received the sum of \$671.13 per month to attend Ogden-Weber ATC for vocational rehabilitation. *Transcript volume I p. 215*

Jeffery has a history of back pain. *Respondent's Exhibit 5*. He takes Flexeril for back pain. *Transcript volume I p. 204-205*. Before Jeffery could qualify for vocational rehabilitation, he was required to obtain a functional evaluation of his back. *Transcript volume I p. 206*. Dr. Troy Schwartz, medical doctor at Hill AFB, Utah, requested he obtain a functional evaluation of his back and feet. *Transcript volume I p. 206*

Jeffery completed a two (2) day Functional Capacity Evaluation on January 8 and 9, 2008 at Wasatch Physical Therapy, Inc. *Respondent's Exhibit 6*. The last page of *Respondent's Exhibit 6* indicates Jeffery was referred to Wasatch Physical Therapy as he suffered from chronic back and foot pain and needed an evaluation regarding his ability to work as an aircraft mechanic. *Respondent's Exhibit 6*. Jeffery's complaint to Wasatch Physical Therapy was that of lower back pain from working in awkward positions and repetitive bending, lifting, and twisting as an aircraft mechanic as well as chronic foot pain from standing on cement floors for extended periods of time. *Respondent's Exhibit 6, p. 9*. Jeffery was retired from the Air Force with a 10% disability for lumbar sacral strain (*R at volume II p. 9*).

The results of the Functional Capacity Evaluation revealed the physical requirements of his job as an aircraft mechanic did not meet his physical abilities to be an aircraft mechanic. *Respondent's Exhibit 6, p. 2*. Jeffery could not lift and carry heavy equipment weighing over 70 pounds nor engage in repetitive bending and twisting to work on aircraft, nor stand for eight (8) hour shifts. *Respondent's Exhibit 6, p. 2*

Ernest Chavez, physical therapist at Wasatch Physical Therapy, testified at the trial. His focus in testing the physical capabilities of Jeffery was to test Jeffery to see if he could continue to be an aircraft mechanic. *Transcript volume II p. 6*. In testing Jeffery, Mr. Chavez documented Jeffery suffered from a condition known as plantar fasciitis, a tenderness of the plantar fascia on the bottom of the foot. *Transcript volume II p. 11*

Ernest Chavez testified that Jeffery Fish's physical capabilities did not match the job description of an aircraft mechanic. *Transcript volume II p. 15*. He recommended job modifications or alternative placement. *Transcript volume II p. 15*. As for a job modification, he recommended that

Jeffery could not lift anything over 70, 80 pounds, not be standing on his feet, and try not to be in awkward positions, which can cause more back strain and pain. *Transcript volume II p. 16.*

Martin Peterson, an aircraft mechanic and shop foreman at Fair Air Aviation, testified he was Jeffery Fish's supervisor when Jeffery Fish worked at Fair Air Aviation. *Transcript volume II p. 56-58.* Jeffery was employed there in 2006 to about September, 2007. *Transcript volume II p. 58.* He recalls Jeffery complaining of sore feet, they hurt him badly, and Jeffery had a hard time getting through the day. *Transcript volume II p. 59.* He described aircraft mechanics as being required to push and pull aircraft for a distance of 400 feet, lift four (4) 60 pound sand bags to stabilize the tail of the aircraft, work underneath the instrument panel, and crawl in the tail section. *Transcript volume II p. 59-61.* He described, at the end of the day, "I'm tired." (*R at volume II p. 62*)

After completing the Functional Capacity Evaluation on January 9, 2008, Jeffery applied for vocational rehabilitation on March 13, 2008. *Transcript volume I p. 207.* He was accepted and qualified for vocational rehabilitation by the Department of Veteran Affairs. *Transcript volume I p. 197*

If, in this case, Diane Fish was asking the Court to impute income to Jeffery for child support and alimony purposes, Diane Fish would have to comply with the requirements of Utah Code Ann. § 78B-12-203(7)(d). Diane would have to prove Jeffery was not engaged in career or occupational training to establish basic job skills. Utah Code Ann. § 78B-12-203(7)(d) states:

(d) Income may not be imputed if any of the following conditions exist and the condition is not of a temporary nature:

- (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 unable to 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.

It is not unreasonable to also require, when a party is asking the Court to impute income for alimony purposes only, as in this case, that the same requirements be met as when one asks the Court to impute income to a spouse for child support and alimony purposes.

In *Hall v. Hall*, 858 P.2d 1018 (Utah App.1993) the husband challenged the trial court's ruling regarding his child support and alimony obligations. He specifically argued, in determining the amount of income to be imputed to him, the trial court failed to follow statutory directives in assessing his employment potential and probable earnings as required by Utah Code Ann. § 78B-12-203(7)(b).

In this case, the trial court should not impute income to Jeffery Fish without considering that income may not be imputed if one is engaged in career or occupational training to establish basic job skills not of a temporary nature.

In *Mancil v. Smith*, 18 P.3d 509, 512 (Utah App.2000) the Utah Court of Appeals held that § 78B-12-203(7)(d)(iii) applies only to short-term job training that is a condition of employment at a fairly fundamental level.

It is not necessary in this case that we definitively state what kind of training would qualify: Would a year of vocational school training in welding? An 18-month course to obtain a paralegal's certificate? A two-year program at a community college culminating an associate's degree in bookkeeping? We can, however, say that obtaining a bachelor's degree affords employment at a level so far beyond "basic" that, as a matter of law, it does not satisfy the statute.



In this case, Jeffery was attending Ogden-Weber Applied Technology Center from September, 2008 and was scheduled to graduate in January, 2010, approximately a 17 month course of study. The Department of Veteran Affairs was paying Jeffery \$671.13 per month to retrain Jeffery in computer technology. He was going to school full-time, engaged in vocational rehabilitation.

The same argument should apply to imputing income to Jeffery Fish for alimony purposes as applies to establishing income for child support and alimony purposes. Jeffery's qualifications for vocational rehabilitation with the Department of Veteran Affairs is clear evidence that the Functional Capacity Evaluation completed by Wasatch Physical Therapy was accepted by the United States government and that Jeffery qualified for vocational rehabilitation as he was not suited to be an aircraft mechanic.

It is error for the Court to impute an income to Jeffery at this time. The trial court stated, at the conclusion of the case that, "What I am being asked to do is somehow find a way to give Mr. Fish more money and I have got to decide that Mr. Fish has got to go to work and pay alimony or I've got to decide that he is unable to do that, based on his physical ability and ability to earn income." *Transcript volume III p. 64.* In this case, Jeffery's imputed income should be established after he completes his training, consistent with the requirements of Utah Code Ann. § 78B12-203(7)(d)(iii).

The trial court made no specific findings of fact that Jeffery was not engaged in career or occupational training. The trial court received evidence Jeffery was being paid by the Department of Veteran Affairs to attend a 17 month course at the Ogden-Weber ATC. The trial court does not reveal its analysis of Jeffery's attendance at school on his ability to pay alimony or have income imputed to him at the time of trial.

### III

#### THE TRIAL COURT ERRED IN ESTABLISHING ALIMONY BY FAILING TO CONSIDER THE PARTIES' HISTORICAL INCOME AND STANDARD OF LIVING

The trial court erred in awarding alimony of \$800 per month to Diane Fish, considering the parties' standard of living enjoyed during the marriage. The trial court's award of alimony creates a serious inequity manifesting a clear abuse of discretion.

In assessing alimony, trial courts have appropriately relied on historical income rather than income at the time of the divorce where a party has experienced a temporary decrease in income. *Olsen v. Olsen*, 704 P.2d 564, 566 (Utah 1985); *Cox v. Cox*, 877 P.2d 1262, 1267 (Utah App.1994); and *Westenskow v. Westenskow*, 562 P.2d 1256, 1257 (Utah 1977). Trial courts have also relied on historical income where a spouse experiences unusual prosperity during one (1) year. *English v. English*, 565 P.2d 409, 412 (Utah 1977).

In this case, the parties have maintained a very modest standard of living with modest incomes. In 2003, Jeffery earned \$18,889 as a logistics specialist in addition to his military retirement. *Petitioner's Exhibit 17, W-2*. Diane earned \$19,160 that year. *Petitioner's Exhibit 17, W-2*. The total family monthly net pay would be approximately \$1,214 for Diane and \$1,200 net pay for Jeffery, plus approximately \$1,477 per month military pay for a total monthly net pay of \$3,891. This figure is well below the monthly living expenses the trial court determined for the parties at trial of \$5,374 (\$3,000 plus \$2,374).

In 2004, Jeffery had no income as he worked as a salesman selling parts on E-bay. *Petitioner's Exhibit 18 and Respondent's Exhibit 3*. Jeffery's only source of income was his military retirement of approximately \$1,477 per month net pay. Diane earned \$25,582 in 2004 with

approximately \$1,620 net pay per month. The parties had a monthly net combined pay of \$3,097.

In 2005, Jeffery had no monthly income except his military retirement as he worked as a salesman selling parts on E-bay in 2005. *Petitioner's Exhibit 19*. Diane earned \$27,060 in 2005 and would have earned approximately \$1,714 per month net pay. The parties would have a combined monthly net pay of \$3,191 in 2005.

In 2006, Jeffery earned \$20,545 at Fair Air Aviation as an aircraft mechanic plus his military retired pay. *Petitioner's Exhibit 20 and Respondent's Exhibit 3*. Diane earned \$26,186 in 2006. *Petitioner's Exhibit 20*. Their combined monthly net pay would have been approximately \$4,436.

In 2007, Jeffery earned \$25,710 as a mechanic at Fair Air Aviation plus his military retirement. *Petitioner's Exhibit 32*. Diane earned \$24,582 in 2007. *Petitioner's Exhibit 32*. Their combined monthly net pay would be approximately \$4,663.

In 2008, Jeffery earned \$671 per month vocational rehabilitation pay plus his military retirement pay. *Petitioner's Exhibit 30*. Diane earned \$25,862 in 2008. *Petitioner's Exhibit 30*. Their combined monthly net pay in 2008 would have been approximately \$3,786.

In 2009, Jeffery was earning \$671 per month vocational rehabilitation pay plus his military retirement. *Respondent's Exhibit 1*. Diane was earning \$2,027 per month gross wage and monthly net pay of \$1,545. *Petitioner's Exhibit 4*. Their combined monthly net pay in 2009 would have been \$3,693.

The parties' historical income and standard of living does not support a monthly alimony award of \$800. Diane would actually have greater income than Jeffery if she is credited with her woodward share of the military retirement pay in 2004, 2005, 2006, 2008, and 2009. In 2003 and 2007, Jeffery's income was slightly higher that of Diane's. The parties' historical income and

standard of living during the marriage is very modest and does not justify an award of \$800 per month alimony. The parties' standard of living should be approximately \$2,000 to \$2,300 per month to each party based upon their past standard of living during the marriage. Their historical standard of living does not support the findings of the trial court that Jeffery's monthly needs should be \$2,374 per month and Diane's monthly needs be \$3,000 per month.

Trial courts have broad discretion in making alimony awards so long as they consider at least the following factors, pursuant to Utah Code Ann. § 30-3-5(8)(a) (Supp.2009):

- (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 the 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.

In addition, trial courts must be mindful of the primary purposes of alimony: "(1) to get the parties as close as possible to the same standard of living that existed during the marriage; (2) to equalize the standards of living of each party; and (3) to prevent the recipient spouse from becoming a public charge." *Richardson v. Richardson*, 201 P.3d 942, 943 (Utah 2008); *Jensen v. Jensen*, 197 P.3d 117, 120 (Utah App.2008).

Also, trial courts must consider Utah Code Ann. § 30-3-5(8)(c) (Supp.2009) in determining the standard of living of the parties:

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (8)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living at the time of trial.

It is necessary for the trial court to analyze the parties' standard of living that existed during the marriage. The bench trial in this case occurred on April 27, 28, and 30, 2009. The parties separated on or about October 15, 2007 and Diane Fish filed for divorce in this case on October 30, 2007. At trial, Diane Fish did not submit her monthly living expenses incurred at the time of separation in October, 2007. Diane only submitted her monthly living expenses at the time of trial in April, 2009. *Petitioner's Exhibit 6*. The parties' historical income and standard of living during the marriage do not support the standard of living determined by the trial court of \$2,374 per month to Jeffery and \$3,000 per month to Diane, and support an award of \$800 per month alimony. It was error for the trial court to award \$800 per month alimony.

#### IV

### THE TRIAL COURT ERRED IN IMPUTING \$30,000 TO \$40,000 ANNUAL INCOME TO JEFFERY FISH AND FAILED TO SUPPORT IT WITH SPECIFIC, DETAILED FINDINGS OF FACT

The trial court found Jeffery Fish was capable of working full-time and imputed an income to him in a sum between \$30,000 and \$40,000 annually. *Findings of Fact 33*. However, the trial court does not indicate what job Jeffery could have that pays him \$30,000 to \$40,000 per year.

Jeffery was an aircraft mechanic while he was enlisted in the United States Air Force. *Transcript volume I p. 109*. He retired after 20 years of military service in 2000. *Transcript volume I p. 96*. His taxable income in 1999, the last full year he served in the military, was \$29,383. *Respondent's Exhibit 3*. After retiring from the military, Jeffery was employed as an aircraft mechanic by Great Western Aviation. *Transcript volume I p. 101*. In 2001, he earned \$31,930 as an aircraft mechanic at Great Western. *Respondent's Exhibit 3*. He worked for Great Western for a little over a year. (*R at volume I, p. 101*). In 2002, Jeffery worked the entire year at Karta Technologies and earned \$45,085 as a logistics specialist. *Petitioner's Exhibit 16*. Jeffery was terminated in May, 2003 because of unacceptable performance. *Petitioner's Exhibit 1, p. 4-5*. Jeffery was employed at Karta as a logistics specialist. *Petitioner's Exhibit 1, p. 4-5*. He typed documentation related to aircraft maintenance testing procedures into technical order format. *Petitioner's Exhibit 1, p. 4-5*.

After being terminated by Karta in May, 2003, Jeffery sold auto parts on E-bay during 2004 and 2005, operating as Fish Enterprises. *Petitioner's Exhibits 18 and 19*. Jeffery reported no income in 2004 and 2005, incurring business losses on his tax return for those years. *Petitioner's Exhibits 18 and 19*

In 2006, Jeffery earned \$20,545 as an aircraft mechanic for Fair Air Aviation. *Respondent's Exhibit 3*. In 2007, Jeffery earned \$25,710 as an aircraft mechanic for Fair Air. *Respondent's Exhibit 3*. In 2008, Jeffery was approved for vocational rehabilitation and started attending Ogden-Weber Applied Technology Center for computer training. He was paid \$671 per month by the Department of Veteran Affairs while attending school. Jeffery was still attending school at the time of trial in April, 2009. Jeffery had not earned more than \$25,000 per annum since 2002, a period of seven (7) years before the trial.

Jeffery's occupation in the military, at Great Western Aviation, and at Fair Air Aviation was an aircraft mechanic. Jeffery testified he felt he could no longer be an aircraft mechanic. (*R at volume I p. 197*). Jeffery was referred to Wasatch Physical Therapy for a Functional Capacity Evaluation to determine if he could physically perform as an aircraft mechanic. (*R at volume 1, p. 206*). Jeffery's goal was to regain employment in something that would not increase his pain. *Respondent's Exhibit 6, p. 9*

The Functional Capacity Evaluation revealed Jeffery's physical abilities were not a job match for an aircraft mechanic. Jeffery could not work for eight (8) hours a day, five (5) days a week, lift and carry heavy equipment often weighing over 70 pounds, perform repetitive bending and twisting to work on aircraft and stand for eight (8) hour shifts. *Respondent's Exhibit 6, p.3*

Ernest Chavez, therapist for Wasatch Physical Therapy, also documented Jeffery experienced pain in his feet from a condition known as plantar fasciitis. (*R at volume II p. 11*). Plantar fasciitis is a tenderness of the plantar fascia on the bottom of the foot. (*R at volume II p. 11*)

Ernest Chavez's recommendation was that Jeffery could work, but not as an aircraft mechanic. (*R at volume II p. 13*). Jeffery could lift 70 pounds to 80 pounds up to three (3) times a day, but not

more often during a work day. (*R at volume II p. 14*). Jeffery could not also perform repetitive bending and twisting. (*R at volume II p. 15*). He also could not stand on cement floors for eight (8) hours a day and increase pressure on his feet by carrying heavy objects. (*R at volume II p. 15*)

Kristy Farnsworth, vocational rehabilitation specialist, testified for Diane Fish that, based upon Jeffery Fish's work experience, he would most likely be able to obtain employment as an aircraft mechanic at a starting salary in the range of \$43,070 up to \$55,720. *Petitioner's Exhibit 1, p. 19*. Her report states it appears that the abilities Mr. Fish demonstrated during the Functional Capacity Evaluation are compatible with the physical demands of an aircraft mechanic. *Petitioner's Exhibit 1, p. 4*. Her report indicated an aircraft mechanic is required to lift a maximum of 50 pounds, citing the Department of Labor, and only occasionally climb, balance, stoop, kneel, and crouch. *Petitioner's Exhibit 1, p. 3*. She interpreted the designation "M" for strength on being 50 pounds. *Petitioner's Exhibit 1 Section 1*. Kristy Farnsworth offered no independent medical evidence of Jeffery's physical capabilities other than that presented by Wasatch Physical Therapy.

Kristy Farnsworth's report is contrary to the U.S. Department of Labor Occupational Handbook, 2008-09. *Respondent's Exhibit 8, 9, and 10*. The Department of Labor Handbook for Aircraft Mechanics actually states, "Mechanics usually work in hangars or in other outdoor areas. Frequently mechanics must lift or pull objects weighing more than 70 pounds. They often stand, lie, or kneel in awkward positions, and occasionally must work in precarious positions such as on scaffolds or ladders...agility is important for the reaching and climbing necessary to do the job." *Respondent's Exhibit 8, p. 2*

Kristy Farnsworth's analysis of the Functional Capacity Evaluation is incorrect. The Functional Capacity Evaluation indicates Jeffery's physical abilities are not a match for an aircraft



mechanic. Her conclusion that Jeffery is most likely to obtain employment as an aircraft mechanic is not credible and it appears she has simply ignored the findings of the Functional Capacity Evaluation. The trial court made no specific findings of whether Jeffery could be employed as an aircraft mechanic.

Kristy Farnsworth reports that Jeffery may obtain full-time employment as a sales representative with a beginning salary of \$28,330. *Petitioner's Exhibit 1, p.2*. However, the current advertised job openings with the Utah Department of Workforce Services listed the pay for sales representatives was \$10 to \$11 per hour. *Petitioner's Exhibit 1, p. 11-16*. Considering today's economy and high unemployment rate, it is questionable that a good paying sales representative job is available. Jeffery has no work experience as a sales representative. Kristy Farnsworth's report is speculative as to Jeffery's ability to be successfully employed as a salesman.

Kristy Farnsworth also reported Jeffery's vocational option could also be full-time employment with the Federal government as a logistics specialist. However, Jeffery was terminated as a logistics specialist with Karta Technologies because of unacceptable performance. Jeffery has not demonstrated a historical ability to be a logistics specialist. A logistics specialist is actually a technical writer, which requires a bachelor's degree. *Petitioner's Exhibit 1, Section 2, p. 3*.

In *Findings of Fact 26*, the trial court found Jeffery capable of working full-time and imputed a wage of between \$30,000 and \$40,000 per year. The Court does not make a specific finding that Jeffery is employable as an aircraft mechanic, as a sales representative, or as a logistics specialist. Based upon the lack of specific findings, it is unknown what type of employment the trial court actually found Jeffery could obtain. It was error for the trial court to impute \$30,000 to \$40,000 per annum income to Jeffery without specific, detailed findings of fact to support the trial court's

determination.

## CONCLUSION AND RELIEF SOUGHT

Diane Fish is underemployed and full-time wages should be imputed to her. Jeffery Fish was engaged in career or occupational training and full-time employment should not be imputed to him until he completes his training. The trial court failed to consider the parties' standard of living that existed during the marriage and, instead, adopted an inflated standard of living. The trial court's award of \$800 per month alimony created a serious inequity, resulting in an abuse of discretion. The trial court erroneously imputed \$30,000 to \$40,000 per annum income to Jeffery Fish. Jeffery Fish lacks the physical capabilities to continue to be employed as an aircraft mechanic, he has never been employed as a sales representative, and was terminated for unacceptable performance as a logistics specialist, all of which refute the trial court's imputation of income to him. The trial court made no specific, detailed findings of fact supportive of its imputation of income to Jeffery Fish and designating what employment it found Jeffery Fish to be suited. The trial court's award of \$800 per month should be reversed.

Respectfully submitted this \_\_\_\_\_ day of April 2010.

NEELEY & NEELEY

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ROBERT L. NEELEY  
Attorney for Respondent/Appellant

## CERTIFICATE OF SERVICE

In accordance with Utah Rules of Appellate Procedure 26(b), I hereby certify that on the \_\_\_\_\_ day of April, 2010 two (2) true and correct copies of the foregoing Brief of the Appellant were served by U.S. mail, postage prepaid, to Timothy W. Blackburn, attorney for Petitioner /Appellee, at the following address:

Timothy W. Blackburn  
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SECRETARY

## ADDENDA

- A. Memorandum Decision
- B. Findings of Fact and Conclusions of Law
- C. Decree of Divorce