

2000

Kathe C. Homer v. Stephen G. Homer : Brief of Appellant

Utah Court of Appeals

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Stephen G. Homer; pro se.

Helen E. Christian; Gustin, Christian, Skordas & Caston; Attorney for Appellee.

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ORIGINAL

IN THE UTAH COURT OF APPEALS

KATHE C HOMER,)	
)	
Plaintiff-Appellee)	
)	
vs)	Court of Appeals
)	Docket No. 20000008-CA
)	
STEPHEN G HOMER,)	Priority 15
)	
Defendant-Appellant)	

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY

The Honorable Ray M Harding Jr, District Judge

STEPHEN G HOMER
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FILED
Utah Court of Appeals
MAY 31 2000
Julia D'Alesandro
Clerk of the Court

ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED

CHECKLIST FOR BRIEFS (CROSS APPEAL)

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2. Appellant/Cross-appellee Reply: 25 pages
4. Appellee/Cross-appellant Reply 25 pages
3. Amicus or Intervenor: 50 pages

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☒ **ARGUMENT PRIORITY CLASSIFICATION (R. 29 Appellee)**

☒ **CONTENT REQUIREMENTS - IN ORDER STATED**

☒ List of all parties

☒ Table of Contents with page references

☒ Table of Authorities

☒ Jurisdictional Statement (**Mandatory for Appellant**)

☒ Statement of Issues & Standard of Review (**Mandatory for Appellant**)

- A. Citation to record showing issue preserved in Trial court; or
- B. Statement of grounds for seeking review of issue not preserved in Trial Court

☒ Constitutional or Statutory Provisions

☒ Statement of Case (**Mandatory for Appellant**)

☒ Statement of Facts

☒ Summary of Argument

☒ Argument

☒ Conclusion

☒ Signature of counsel of record OR party if Pro Se

☒ Proof of Service

☒ Addendum: Findings of fact; memorandum decision; final order; Court of Appeals opinion
Motion for Certiorari is granted (**Mandatory for Appellant**)

IN THE UTAH COURT OF APPEALS

KATHE C HOMER,)	
)	
Plaintiff-Appellee)	BRIEF OF APPELLANT
)	
vs)	
)	
STEPHEN G HOMER,)	Court of Appeals
)	Case No. 20000008-CA
Defendant-Appellant)	

DESIGNATION OF THE PARTIES

The Plaintiff-Appellee is Kathe C Homer, a natural person. The Defendant-Appellant is Stephen G Homer, a natural person. The parties are former spouses to each other, having been divorced in 1989.

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STATEMENT OF JURISDICTION OF THIS COURT

Jurisdiction of this Court is granted pursuant to the provision of Section 78-2a-3(2)(h), Utah Code [appeals from district court involving domestic relations].

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This "appeal" is NOT the garden-variety "divorce case". This "appeal" presents issues of "constitutional dimension" involving "denial of equal protection of the law" and the "uniform operation of the law", in contradiction to the state and national constitutions.

This appeal presents the following issues for review:

1. Whether the constitutional principles of "equal protection of the law" and "uniform operation of laws" are violated by the interpretation and application of specific provisions of 30-3-5(h), Utah Code [providing that "lifetime" alimony may not be awarded in "short term" marriages] and the general provisions of Section 30-3-5, Utah Code [providing for award of alimony in general] if applied only in divorce cases filed after the effective date of such new legislation.
2. Whether the trial court properly

interpreted and applied the relevant constitutional provisions in dismissing the petition to modify the decree of divorce.

The interpretation and application of provisions of the state and national constitutions as well as Utah statute by the trial court are matters of law. The trial court's conclusions of law in civil cases are reviewed for correctness. **United Park City Mines Company vs Greater Park City Company**, 870 P.2d 880, 885 (Utah Supreme Court 1993); **Society of Separationists, Inc. vs Taggart**, 862 P.2d 1339, 1341 (Utah Supreme Court 1993).

This standard of review has also been referred to as a "correction of error standard". **Jacobsen Investment Company vs State Tax Commission**, 839 P.2d 789, 790 (Utah Supreme Court 1992); **Sanders vs Ovard**, 838 P.2d 1134, 1135 (Utah Supreme Court 1992). "Correction of error" means that no particular deference is given to the trial court's ruling on questions of law. **State vs Pena**, 869 P.2d 932, 936 (Utah Supreme Court 1994); **Provo River Water Users' Association vs Morgan**, 857 P.2d 927, 931 (Utah Supreme Court 1993). The "correction of error" standard means that the appellate court decides the matter for itself and does not defer in any degree to the trial judge's

determination of law. **State vs Deli**, 861 P.2d 431, 433 (Utah Supreme Court 1993); **Howell vs Howell**, 806 P.2d 1209, 1211 (Utah Court of Appeals 1993).

STATEMENT OF THE CASE

The Petition for Modification alleges and presents the following material facts, implicitly admitted by the Respondent (wife) in the Motion to Dismiss:

1. The Plaintiff and Defendant were married in August 1980.
2. In September 1987 the Plaintiff filed this action for divorce, seeking an absolute divorce upon grounds of "irreconcilable differences", and obtained a restraining order requiring the Defendant-Petitioner to leave permanently the marital residence.
3. In October 1989 the Court entered a Decree of Divorce, granting to the Plaintiff the absolute divorce requested and ordered the Defendant to pay to the Plaintiff \$150.00 per month in alimony.
4. Beginning in August 1989 and continuously each month thereafter the Defendant has paid \$150.00 per month alimony to the Plaintiff.
5. The 1995 Utah Legislature passed into law House Bill No. 36, enacting new provisions

codified at Subsection 30-3-5(6)(h), Utah Code, to provide:

(h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

1995 Laws of Utah, Chapter 330.

6. There were and are no extenuating circumstances which justify the continuing and future payment of alimony.

[See Petition to Modify, attached hereto as EXHIBIT 1.]

The wife's "motion to dismiss"---granted by the district court---admits the truth of the allegations of the Petition. When considering a dismissal based on Rule 12, the court must accept the material allegations of the complaint as true, **Petersen vs Jones**, 16 Utah 2d 121, 122, 396 P.2d 748, 748 (Utah 1964). **Colman vs State Land Board**, 795 P.2d 622 (Utah 1990).

In 1995 the Legislature adopted House Bill 36, entitled "Revision of Alimony Standards", making significant changes in Section 30-3-5, Utah Code. The portion of the 1995 legislation---characterized herein as "the new statute"---applicable to this appeal is contained in subsections (g) [prohibiting modifications of alimony awards except in cases of "extenuating

circumstances"] and (h) [expressly denying to the trial court any power to order lifetime alimony]. When these two provisions are coupled with the alimony provisions found generally in Section 30-3-5, Utah Code, the legislative creation of a "classification" is evident.

On 29 October 1999 the District Court heard oral arguments concerning the Plaintiff's Motion to Dismiss; no sworn evidence was received. On 29 November 1999 the District Court entered an order [EXHIBIT #3, hereto] dismissing the Petition to Modify. This appeal was thereafter perfected.

ARGUMENT

THE NEW STATUTE VIOLATES CONSTITUTIONAL PRINCIPLES OF EQUAL PROTECTION, UNIFORM OPERATION OF LAWS, AND THE OPEN COURTS PROVISIONS

A

THE CONSTITUTIONAL FRAMEWORK

The Equal Protection Clause of the Fourteenth Amendment:

[Section 1] . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws.**

Emphasis added.

Article I, Section 24, of the Utah Constitution provides:

"All laws of a general nature shall have uniform operation."

Article I, Section 11, of the Utah Constitution provides:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

B

THE NEW DIVORCE STATUTE

This case and this appeal is not focused upon whether or not the new statute [i.e. Section 30-3-5(h), Utah Code] is "procedural" or "substantive" or whether it should be applied "retroactively" or only "prospectively". The case is about whether or not Section 30-3-5(h) and its companion statutory provisions sets up an unconstitutional classification.

When coupled with the new provisions codified at 30-3-5(g), Utah Code---simultaneously adopted as part of House Bill 36---the overall statute has the effect of creating two "classifications" under the law: those divorced under the "old" (i.e. pre-1995 statute) and those persons divorced under the "new" (i.e. 1995 statutory amendments) statute.

That the divorce statute sets up such a classification is clear from a close reading of House

Bill 36. As is facially obvious, subsection (h) precludes the court from awarding "lifetime" alimony, except in "extraordinary circumstances". [If the statute is applied "prospectively" only, then paying spouses under "old" divorces are obligated to pay "lifetime" alimony, whereas similarly-situated persons under the "new" (i.e. post-1995) divorce law are not so obligated.]

Under the provisions of subsection (g), the analysis AND EFFECT is almost flip-flopped. Those alimony-receiving persons (i.e. former wives, generally) under "old" divorces are statutorily precluded, except in cases of "extraordinary circumstances" from seeking and obtaining a modification of the decree increasing or extending alimony; it is as if the Legislature has envisioned and **is** attempting to curtail the "intellectual gamesmanship" reflected in the **Wilde vs Wilde** decision, 969 P.2d 438 (Utah Court of Appeals 1998).

This situation can best be illustrated with a hypothetical example---perhaps almost silly in the extreme---but it illustrates the principle.

Assume, for example, that two "twin" males separately marry "twin" sisters, on the same date. The two couples have the exact same marriages: same earnings, same number of children, same incomes, same everything---as ridiculously "same" as we can legally assume

things to have been in our contrived hypothetical. Seven years later, the twin sisters decide to file for divorce from their husbands. They go to the Clerk's Office of the District Court, where they wait in line. Their actions are taken at the end of the business day on the last day before the effective date of the new statute (circa 1 May 1995). The one "twin" is allowed to file, while the other twin is told to come back in the morning. She does so, and files AFTER the "new" statute (i.e. no permanent alimony) is in effect. The two cases proceed on the litigation track. They are assigned to the same judge. Because the two marriages are so absolutely "equal", the actual trial of the two divorce cases is consolidated. The later-filed case---the divorce filed AFTER the effective date of the new statute---is granted first. In that situation, the husband of that divorce is obligated to pay alimony for a period not longer than the marriage lasted (i.e. 7 years). However, his legal "twin" (in the hypothetical) is, because of the filing under the "old" statute, exposed to the possibility of "lifetime" alimony, merely because his former spouse was standing in line in the Clerks's office in front of the other spouse.

One might say that the "hypothetical" example is extreme; perhaps so, but it illustrates the point.

The Court of Appeals decision in **Wilde vs Wilde**, 969 P.2d 438 (Utah Court of Appeals 1998), is directly to that effect. [Why is "alimony" so jurisprudentially unique that a judgment regarding alimony is so fraught with intellectual dishonesty? What other kind of financial obligation, reduced to judgment, would be judicially increased---per **Wilde**---merely because the judgment of the court was not promptly paid? Why do courts engage in such substantively-insignificant

sophistries to award (or extend) alimony, and yet ignore the substantive legal effect of the underlying legislation obviously intended to terminate an award of "lifetime" alimony? Indeed, **Wilde**, when carefully understood, is authority for the trial court to properly terminate a previous award of alimony, under the "new" statute, whether that statute is characterized as "retroactive" or not!]

The only distinguishing feature between the two divorces is whether one is approached---for subsection (h) purposes---under the "old" statute or under the "new" statute. Yet the effect upon the parties is tremendous.

It is difficult to envision a more "real life" example---which doesn't carry with it all of the intellectual and jurisprudential "baggage" which alimony carries with it---which illustrates this point. An example might be the following: if the Legislature passed a statute which gave all "new" drivers their driver's license at not charge, whereas those who had already been granted driver's licenses had to continue to pay, even upon renewal. Surely such an invidiously discriminatory statutory scheme would not be allowed to stand.

If, as the wife now argues, the "new" statute is

procedural and should be applied only to "new" divorces, the husband in the later filed divorce will only have to pay alimony for ONLY seven years, whereas the other husband may have to pay alimony for a lifetime, merely because his former spouse filed under the "old" statute.

C

CONSTITUTIONAL APPLICATION

The foregoing constitutional provisions have, independently and/or in conjunction with one another, been utilized to invalidate a number of statutes. See, for example, **Berry vs Beech Aircraft Corporation**, 717 P.2d 670 (Utah Supreme Court 1986) [limitations provisions of Utah Product Liability Act]; **Sun Valley Water Beds of Utah, Incorporated vs Herm Hughes & Son**, 782 P.d 188 (Utah Supreme Court 1989) [architect's and builder's statute of repose]; **Horton vs Goldminer's Daughter**, 785 P.2d 1087 (Utah Supreme Court 1989) [former architect's and builder's statute of repose]. **Malan vs Lewis**, 693 P.2d 661 (Utah Supreme Court 1984) [automobile guest statute unconstitutional]; **Johnston vs Stoker**, 685 P.2d 539 (Utah Supreme Court 1984) [aircraft guest statute unconstitutional]; **State Tax Commission vs Department of Finance**, Utah, 576 P.2d 1297 (Utah Supreme Court 1978) [statute

unconstitutional because it singled out the state insurance fund from all insurance companies that were found to be within the same class to pay a special tax]; **Dodge Town Inc. vs Romney**, 480 P.2d 461 (Utah Supreme Court 1971) [Sunday closing law that required only licensed automobile dealers to close and permitted other businesses to transact business on Sunday unconstitutional because the discrimination failed to further the legislative purpose of preventing fraud and auto thefts]; **Broadbent vs Gibson**, 105 Utah 53, 69, 140 P.2d 939, 946 (1943) [general Sunday closing law unconstitutional because the statute had so many exceptions to the general rule that the statute actually constituted "a grant of a special privilege to the excepted classes" without a legal excuse for not granting the same privilege to others]; **Skaggs Drug Centers, Inc. vs Ashley**, 26 Utah 2d 38, 484 P.2d 723 (1971) [large number of exceptions to the statute in question casts substantial doubt on what the Legislature actually intended].

Malan vs Lewis, supra, held that Article I, Section 24 requires that a law must apply equally to all persons within a class and that statutory classifications must have a "reasonable tendency to further the objectives of the statute." 693 P.2d at

670. In this regard, the objectives of the statute are ambiguous, at best. On the one hand, the Legislature has clearly stated---in subsection (h)---that "lifetime alimony" is, in most cases (except in cases where "extenuating circumstances" are found), not to be awarded. That applies to the "new" divorces. But subsection (g) prohibits, except in "extenuating circumstances" cases going exactly the opposite way, the reopening of any divorce cases for the purposes of modifying alimony.

The Legislature cannot create two classifications of persons and deny to the one class the rights (i.e. to not have to pay "lifetime" alimony), merely based upon the filing date of the divorce!

What are the "reasonable objectives of the statute" when the statute prohibits (in most cases) the award of lifetime alimony, while simultaneously mandating that those similarly-situated persons from "old" divorces are obligated to pay a permanent alimony? It cannot be said (or assumed) that the Legislature was concerned about the minimal burden upon the courts; the courts have always had "continuing jurisdiction" to entertain modification orders. See, also, **Reed vs Reed**, 404 U.S. 71 (1971) [Idaho statute preferring males over equally-qualified females for appointment as administrators of

intestate estates violates Equal Protection Clause of 14th Amendment].

The new statute represents a significant change in the legal environment in which alimony is to be approached. This change in "the law of alimony" IS BINDING upon the Court and upon the parties hereto.

The trial court's "jurisdiction" (i.e. the power to order alimony in divorce cases) arises from statute, not from the inherent power of the court. Thus, the Court must follow those pronouncements of the Legislature, as embodied in the statute.

To do otherwise (i.e. to apply the statute only in cases of "new" divorces while ignoring the statute and its provision in "old" divorces, although recently brought before the Court in "petitions for modification" such as this one) invokes the very "constitutional" issues identified in Paragraph 8 of the Petition: that the effect of the so-called "no retroactivity" argument (as anticipated by the Petitioner) creates two "classes" of persons under the law: (1) those persons who must pay alimony because their divorce was granted BEFORE the 1995 effective date of the statute and (2) those persons who obtain a divorce AFTER the 1995 effective date of the statute.

In **Liedtke vs Schettler**, 649 P.2d 80 (Utah 1982),

the Utah Supreme Court stated that Article I, §24 is "generally considered the equivalent of the Equal Protection Clause of the 14th Amendment, U.S. Constitution." 649 P.2d at 81 n.1. Although their language is dissimilar, Article I, §24 and the Equal Protection Clause embody the same general principle: persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same. See **Baker vs Matheson**, 607 P.2d 233 (Utah 1979); **McLaughlin vs Florida**, 379 US 184 (1964).

The question thus is posed: does the "divorce law" (i.e. Section 30-3-5, Utah Code), under which "lifetime" alimony is (or has been) awarded PERMANENTLY in pre-1995 divorces (the "old" divorces) have "uniform operation" when men---which is almost universally the case, which raises its own set of "unconstitutional" discrimination issues---who are parties to post-1995 divorces (the "new" divorces) do not have to pay permanent (i.e. non-terminating) alimony, by reason of the application of the 1995 amendment to the statute? If the "no retroactive application" interpretation of the statute advanced by the Respondent is followed, the statute facially DOES NOT have "uniform operation" nor does it provide for the "equal protection" as is

constitutionally required.

In **Malan vs Lewis**, 693 P.2d 661 (Utah Supreme Court 1984), the Utah Supreme Court---invalidating the Utah "automobile guest statute"---illuminated and articulated the purposes and application of the "uniform operation of laws" and the "equal protection" provisions of the constitutions. The Court wrote:

Whether a statute meets equal protection standards depends in the first instance upon the objectives of the statute and **whether the classifications established provide a reasonable basis for promoting those objectives.**

Article 1, §24 protects against two types of discrimination. First, a law must apply equally to all persons within a class. Second, **the statutory classifications and the different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute. If the relationship of the classification to the statutory objectives is unreasonable or fanciful, the discrimination is unreasonable.** Equal protection of the law, both state and federal, "requires more of a state law than nondiscriminatory application within the class it establishes . " The classification must rest upon some difference which **"'bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis . . . [A]rbitrary selection can never be justified by calling it classification."** "The Courts must reach and determine the question whether the classifications drawn in a statute **are reasonable in light of its purpose.** The law under Article I, §24 is not different.

693 P.2d at 670-72. Emphasis added. Citations to cases

and footnotes omitted.

The claimed "legislative classification"---i.e. that former spouses under the "old" divorces must continue to pay lifetime (non-terminating) alimony while former spouses obtaining "new" divorces are entitled to terminating alimony, if any---arising from the "no retroactive application" interpretation advanced by the Respondent and followed by the District Court:

1. DOES NOT ". . .provide a reasonable basis for promoting those objectives;
2. IS NOT ". . . based on differences that have a reasonable tendency to further the objectives of the statute . . ."; AND
3. DOES NOT "[bear] a reasonable and just relation to the act in respect to which the classification is proposed. . ."

See **Malan vs Lewis**, supra. The clear legislative intent is to PROHIBIT awards of "lifetime" alimony!

Although alimony has, over time, been seemingly explained and seemingly justified on a number of bases over the centuries, those "historic" arguments for the continuation of lifetime alimony are now made "moot" by the legislative action embodied in Section 30-5-6(h), Utah Code. The statute reflects the present policy of

the state: that lifetime alimony is not to be awarded or required, except in "extenuating circumstances" (which Respondent herein has admitted DO NOT EXIST). With the state's "policy" (regarding the prohibition of "lifetime alimony") now clearly before us.

Given the fact that the Legislature has now, as a matter of public policy, mandated that "(permanent) alimony may not be awarded"), all of the "historic" and legalistic arguments for continuing the practice of economic bondage by which a former spouse is financially bound to another must fail. It is clear that the Legislature has said: "NO MORE permanent (lifetime) alimony!"

To continue to advance an interpretation of the statute so as to circumvent the clear legislative intent behind Section 30-5-6(h) is unconscionable and contrary to the Court's obligation to "obey the Constitution" and "uphold the law", particularly when the effective result of the Court's interpretation is to create the very unconstitutional "classification" complained of.

The Utah Supreme Court has stated:

For a law to be constitutional under Article I, section 24, it is not enough that it be uniform on its face. **What is critical is that the operation of the law be uniform.** A law does not operate uniformly if "persons similarly situated are not "treated similarly"

or if "persons in different circumstances" are "treated as if their circumstances were the same."

Malan vs Lewis, 693 P.2d 661 at 669 (Utah 1984). Emphasis added. That some former spouses must pay "lifetime" alimony while some do not---adjudicated merely upon the filing date of the divorce action---is not the "uniform operation" the constitution requires!

In **State Tax Commission vs Department of Finance**, the Utah Supreme Court stated:

Equal protection protects against discrimination within a class. The legislature has considerable discretion in the designation of classifications but **the court must determine whether such classifications operate equally on all persons similarly situated.**

Thus, whether a classification operates uniformly on all persons situated within constitutional parameters is an issue that must ultimately be decided by the judiciary.

576 P.2d 1297 at 1298 (Utah 1978). Emphasis added.

Similarly, the legislative denial of rights to those persons paying "lifetime" alimony under the "old" statute similarly offends the "open courts" provision [Article 1, Section 11 of the Utah Constitution).


CONCLUSION

The "classification" (and its resultant discrimination) cannot be condoned, especially in light of the legislative pronouncement that "lifetime" alimony is no longer to be awarded.

There is no legal or factual justification for

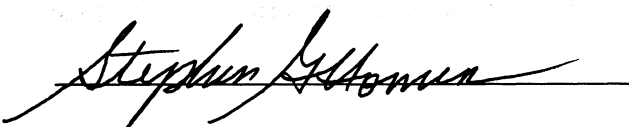
imposing upon one class of persons (those divorced under the pre-1995 ("old") statute) the obligation of "lifetime" alimony and the economic peonage it entails while simultaneously excusing those similarly-situated persons divorced under the post-1995 ("new") statute from paying "lifetime" alimony, solely because of the court's refusal to find "retroactive" application to that statute!

Respectfully submitted this 31st day of May, 2000.


STEPHEN G. HOMER
Attorney Pro Se
Appellant

CERTIFICATE OF DELIVERY

I certify that I caused two copies of the foregoing BRIEF OF APPELLANT to be hand-delivered to the office of Ms Helen E Christian, Attorney at Law, Gustin, Christian, Skordas & Caston, Boston Building, Suite #810, #9 Exchange Place, Salt Lake City, Utah 84111, this 31st day of May, 2000.



ADDENDA

EXHIBIT 1: PETITION TO MODIFY DECREE

EXHIBIT 2: MOTION TO DISMISS

EXHIBIT 3: DISTRICT COURT MEMORANDUM DECISION

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JUL 21 4 05 PM '99

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

KATHE C HOMER,)
) PETITION FOR MODIFICATION
Plaintiff-Respondent) OF
) DECREE OF DIVORCE
vs)
)
STEPHEN G HOMER,) Civil No. 87-2098
)
Defendant-Petitioner) Case assigned to Judge Harding

The Defendant-Petitioner STEPHEN G HOMER hereby petitions the Court for a modification of the Decree of Divorce, entered October 1989, in the above-entitled action.

This Petition for Modification of Decree of Divorce is based upon the following grounds:

1. The Plaintiff and Defendant were married in August 1980.
2. In September 1987 the Plaintiff filed this action for divorce, seeking an absolute divorce upon grounds of "irreconcilable differences", and obtained a restraining order requiring the Defendant-Petitioner to leave permanently the marital residence.
3. In October 1989 the Court entered a Decree of

Divorce, granting to the Plaintiff the absolute divorce requested and ordered the Defendant to pay to the Plaintiff \$150.00 per month in alimony.

4. Beginning in August 1989 and continuously each month thereafter the Defendant has paid \$150.00 per month alimony to the Plaintiff.

5. Subsection 30-3-5(6)(h), Utah Code, provides:

(h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

6. There were and are no extenuating circumstances which justify the continuing and future payment of alimony.

7. The Defendant-Petitioner is entitled to an Order modifying the Decree of Divorce, permanently and irrevocably terminating the requirement that alimony be paid.

8. Continued requirement of alimony, in any amount, in this case deprives the Defendant-Petitioner of the constitutional rights guaranteed him under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and under the uniform operation of laws clause of Article I, Section 24 of the Utah Constitution.

WHEREFORE, Defendant-Petitioner prays for the following relief:

1. That the Court enter an Order, modifying the Decree of Divorce previously-entered and permanently and irrevocably terminating the requirement that alimony be paid to the Plaintiff;
2. That the Court award judgment in favor of the Defendant Petitioner for his attorney's fees and costs incurred in bringing and prosecuting this Petition; and
3. That the Court award such other relief as is just.

Respectfully submitted this 21st day of July, 1999.


STEPHEN G. HOMER
Defendant-Petitioner Pro Se

Plaintiff's address:

KATHE C HOMER
1015 East 500 North
Orem, Utah 84097

Defendant's address:

STEPHEN G HOMER
9225 South Redwood Road
West Jordan, Utah 84088

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

KATHE C. HOMER,

Petitioner,

v.

STEPHEN G. HOMER,

Respondent.

MOTION TO DISMISS

Civil No. 87-2098

Judge Ray Harding, Jr.

Petitioner, KATHE C. HOMER, by and through her counsel, Helen E. Christian, moves the Court to dismiss the Petition for Modification of Decree of Divorce filed by Respondent on the following reasons and grounds set forth in the Memorandum in Support of Motion to Dismiss Petition for Modification of Decree of Divorce filed contemporaneously with this Motion.

DATED this 6 day of August, 1999.

GUSTIN & CHRISTIAN



HELEN E. CHRISTIAN
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6 day of August, 1999, I caused to be mailed,
postage prepaid, a true and correct copy of the foregoing MOTION TO DISMISS to:

Stephen G. Homer
9225 South Redwood Road
West Jordan, UT 84088

Kristine Wimmer Berg
Kristine Wimmer Berg

homer.mot

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

KATHE C. HOMER, Plaintiff, vs. STEPHEN G. HOMER, Defendant.	RULING Case No. 87-2098 Judge Ray M. Harding, Jr.
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This matter comes before the Court on Defendant's Petition for Modification of Decree of Divorce. The Court has reviewed the file, the memoranda filed by the parties, heard oral arguments, and being fully advised in the premises, hereby issues the following:

RULING

The parties to this action were married in August, 1980. Their Decree of Divorce was entered October 26, 1989. It provides that "[t]he Defendant shall pay to the Plaintiff the sum of \$150.00 per month as alimony payable in two equal monthly payments on the 5th and 20th of each month commencing July, 1989." The Defendant has paid \$150.00 in alimony each month since August 1989.

At the time the parties' Decree was entered the Utah Code provided that alimony would automatically terminate upon the remarriage of the recipient former spouse or upon a showing that the recipient former spouse was residing with a person of the opposite sex. Utah Code Ann. § 30-3-5(5) & (6) (1991). In 1995 the Legislature amended the statute to provide that "[a]limony may not be ordered for a duration longer than the number of years that the

marriage existed unless, at any time prior to the termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time." Utah Code Ann. § 30-3-5(7)(h) (1998 & Supp. 1999).

The Defendant contends that subsection (7)(h) applies to this action and requires this Court to modify the Decree by permanently and irrevocably terminating the requirement that he pay alimony. He reasons that he was only married for nine years and two months (from August 1980 to October 1989), and yet he has paid alimony for ten years and two months (from August 1989 to October 1999), which is longer than the number of years that the marriage existed. He also argues that there were and are no extenuating circumstances justifying the payment of alimony for a period longer than the duration of the marriage, as now required by the statute. Therefore, he reasons that the requirement that he continue to pay alimony for a period longer than the duration of the marriage violates subsection (7)(h).

The Plaintiff responds with the argument that subsection (7)(h) does not apply to this action because it cannot be retroactively applied. However, subsection (7)(h) clearly applies to this action. It is undisputed that "the substantive law to be applied throughout an action is the law in effect at the date the action was initiated." Wilde v. Wilde, 969 P.2d 438, 442 (Utah Ct. App. 1998). For example, in Wilde, the defendant filed a petition in August 1994 seeking to modify the divorce decree to provide for additional alimony. Id. at 441. In January 1996 the defendant filed an amended petition to modify. Id. Between the filing of the original and amended petitions, the 1995 amendments to § 30-3-5 took effect. Id. One effect of the 1995 amendments was to add subsection (7)(g)(ii) conditioning a modification of alimony for the recipient spouse only upon a showing of extenuating circumstances. Id. This raised the issue of whether the court should apply the 1994 version or the amended 1995 version of § 30-3-5 to

the petition to modify. The Utah Court of Appeals held that because the action commenced with the filing of the original petition, and because subsection (7)(g)(ii) was a substantive change that could not be applied retroactively, the 1994 version of the statute applied to the petition to modify. Id. at 443.

In the instant case there is no issue as to whether subsection (7)(h) applies retroactively because subsection (7)(h) was in effect at the time this action was filed. The instant action was initiated on July 21, 1999, when the Defendant filed his Petition for Modification. Because subsection (7)(h), enacted in 1995, was in effect at the date this action was initiated, it applies to this action regardless of whether it constitutes a substantive change in the law.

However, even though subsection (7)(h) applies to this action it is not dispositive of the issues raised in Defendant's Petition to Modify. The Defendant would have this Court interpret subsection (7)(h) to require that this Court must terminate any award of alimony entered prior to the 1995 amendment that extends beyond the number of years that the marriage existed, unless the recipient spouse can show the "extenuating circumstances" that the statute requires. The Court disagrees. Neither the language of the statute itself, nor the legislative intent behind the statute provide for such a result.

The statute states, "[a]limony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time." Utah Code Ann. §30-3-5(7)(h) (1998 & Supp. 1999). It is clear from the language of the statute itself that subsection (7)(h) merely limits the equitable powers of the courts in awarding alimony. It is not a command to courts to terminate previously entered alimony awards that extend beyond the duration of the marriage. The Legislature does not have the

power to require a court to reopen its prior orders, or to dictate the outcome of a case. Such a result would violate separation of powers principles. Utah Const. Art. V, § 1. Furthermore, the legislative intent, evident from the entire statutory scheme governing alimony, provides that an alimony award can only be terminated or modified upon a showing of a substantial material change in circumstances not foreseeable at the time of the divorce. Utah Code Ann. § 30-3-5(7)(g)(i) (1998). The purpose of subsection (7)(h) was not to terminate previously entered alimony awards, but simply to limit the equitable powers of the courts when entering orders awarding alimony. Therefore, subsection (7)(h) does not allow this Court to modify the Divorce Decree and terminate Plaintiff's alimony award.

Plaintiff contends that Defendant's Petition for Modification should be dismissed because it fails to state a claim upon which relief can be granted, pursuant to Utah R. Civ. P. 12(b)(6). In ruling on a motion to dismiss for failure to state a claim, the Court must construe the complaint, or in this case the Petition, in a light most favorable to the plaintiff and indulge all reasonable inferences in his favor. Mounteer v. Utah Power & Light Co., 823 P.2d 1055 (Utah 1991). Defendant's only grounds for modification of the Divorce Decree is that this Court should terminate the alimony award under subsection (7)(h). For the reasons set forth above, subsection (7)(h) does not allow this Court to modify the Divorce Decree and terminate Plaintiff's alimony award. Rather, this Court may only modify an alimony award upon a showing of "a substantial material change in circumstances not foreseeable at the time of the divorce." Utah Code Ann. § 30-3-5(7)(g)(i). Because the Defendant has failed to allege any facts which would show a substantial material change in circumstances his Petition fails to state a claim upon which relief can be granted.

The Defendant argues that if subsection (7)(h) does not require this Court to terminate the alimony award, then it violates the Equal Protection Clause of the 14th Amendment to the United States Constitution as well as Art. 1 Section 24 of the Utah Constitution which states that "[a]ll laws of a general nature shall have uniform operation." The Defendant reasons that applying subsection (7)(h) in divorces brought after 1995, while ignoring the statute in pre-1995 divorces brought before the Court on petitions to modify creates two classes of persons under the law: (1) those persons who must pay permanent alimony because they were divorced prior to the statute; and (2) those persons who only have to pay alimony for the number of years the marriage existed, absent a showing of extenuating circumstances. However, the Court finds that subsection (7)(h) does not violate the Equal Protection Clause or the Uniform Operation of Law Clause because it does not create any type of classification.

The protections contained in the Equal Protection and Uniform Operation of Law Clauses apply whenever the government acts to create distinct classes of individuals and treat them differently. Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984). Subsection (7)(h) does not violate these principles however, because it does not create any type of classification, or treat one group any different than another. Rather, the statute simply changes the substantive law regarding alimony by limiting the equitable powers of the courts in awarding alimony for a period longer than the marriage existed.

Furthermore, the Defendant is not now treated any differently under subsection (7)(h) than he was when his Decree was entered. The standard that the Defendant must meet in order to modify the amount he must pay in alimony is the same now as it was when his Decree was entered. In 1989 the standard for obtaining a modification of alimony required the movant to "show a substantial change of circumstances subsequent to the decree, that was not originally

contemplated within the decree itself." Jense v. Jense, 784 P.2d 1249, 1251 (Utah Ct. App. 1989). This is precisely the same standard that the Defendant must meet today, as codified in Utah Code Ann. § 30-3-5(7)(g)(i). Therefore, subsection (7)(h) does not create different classifications of individuals, or treat the Defendant any different than other similarly situated individuals who are ordered to pay alimony. The standard to modify alimony has always been the same, the only thing that has changed is that the Legislature has limited the equitable power of the courts in awarding alimony to extend beyond the number of years that the marriage existed. Accordingly, subsection (7)(h) is not unconstitutional under either the 14th Amendment to the United States Constitution or Article I, Section 24 of the Constitution of the State of Utah.

The Defendant also asserts that if subsection (7)(h) is not applied to terminate his obligation to pay alimony this may violate Article I, Section 11 of the Utah Constitution (the "open courts" provision). However, he does not offer any analysis or explanation as to why the statute would violate this provision. The provision states:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Utah Const. Art. I, § 11.

As discussed above, subsection (7)(h) does not allow this Court to modify the Divorce Decree and terminate Plaintiff's alimony award. Such a finding, however, does not bar Defendant from access to the courts or to a remedy. Rather, Defendant can petition this Court for a modification of his Divorce Decree upon a showing of "a substantial material change in circumstances not foreseeable at the time of the divorce." Utah Code Ann. § 30-3-5(7)(g)(i).

Therefore, subsection (7)(h) as applied in the instant case does not violate Article I Section 11 of the Utah Constitution.

CONCLUSION

For the foregoing reasons, this Court hereby rules as follows:

1. Defendant's Petition for Modification of Decree of Divorce is **DISMISSED**.
2. Counsel for Plaintiff shall prepare an order consistent with the terms of this ruling and submit it to opposing counsel for approval as to form prior to submission to the Court for signature, pursuant to Rule 4-504 of the Utah Rules of Judicial Administration.

DATED this 1st day of Nov., 1999.



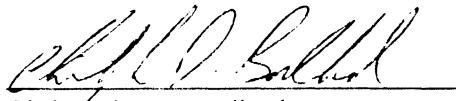
RAY M. HARDING, JR., JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Ruling with postage prepaid thereon this 1st day of November, 1999, to the following:

Stephen G. Homer
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Christopher D. Ballard
Law Clerk