

2000

## Nancy L. Kemp v. Paul G. Kemp : Reply Brief

Utah Court of Appeals

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Pamela C. Urry; Phillip W. Dyer.

James H. Woodall; Littlefield & Peterson.

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## ARGUMENT

1. The Court correctly declined to equalize the parties' incomes.

Although appellee ("Nancy") steadfastly maintained that she was entitled to an equalization of the parties' combined incomes, without regard to her needs, the Court correctly declined to adopt her approach. In Williamson v. Williamson, 983 P.2d 1103 (Utah App. 1999), the Court of Appeals made clear that it is only appropriate to equalize the parties' standards of living when insufficient resources exist to satisfy both parties' legitimate needs. Id. at 1106. Here there was adequate income to satisfy both parties' legitimate needs.

The Court correctly found Nancy's income to be \$53,269 annually. Appellant ("Paul") stipulated that he had the ability to pay alimony. The only dispute was whether Nancy's reasonable needs exceeded her income and justified an award of alimony. The Court concluded that Nancy's needs exceeded her income by \$60 per month. It then allowed Nancy an additional \$500 per month for savings, and ordered Paul to pay \$560 per month as alimony. There is no basis in law or fact to go beyond that amount and order an equalization of income.

Nancy's argument that the Court's award of \$500 per month for savings was proper because it was "major purchases and unexpected events" is misplaced. The Court already allowed for such items in awarding Nancy \$1,000 per month for "food.

car operation and repair, incidentals, and alarm system monitoring" (Finding 7(b)), \$100 for medical expenses (Finding 7(e)), \$280 for the purchase of a car (Finding 7(g)), and \$100 for home maintenance (Finding 7(i)). All of these items allow for nonrecurring expenses to be paid as they are incurred. The \$500 per month for savings was purely extra income, and it was unjustified.

2. The Court correctly limited the duration of Nancy's alimony. In determining Nancy's needs, and over Paul's objection, the Court allowed Nancy to request an accelerated mortgage schedule so that she could pay off her home mortgage in fifteen years, when she attained the age of sixty-five years. Nancy's argument was that she did not intend to keep working beyond that age, and that it would be inequitable to require her to maintain a house payment into her retirement years.

Nancy's regular house payment was \$818. The Court included this, plus an additional principal payment of \$199 per month, in her needs, to allow her to pay off her mortgage by age sixty-five. In limiting alimony to fifteen years, the Court correctly noted that "Fifty to sixty-five gives her fifteen years, she pays off the house, that's \$1,017 of this, so clearly ... she will not need this money to make up the difference between what I think is her lifestyle and what she needs to maintain that style of life."

With the house paid off, Nancy would realize a reduction in her needs of \$1,017 per month by age sixty-five. It was clear that Nancy would not need Paul's

alimony payment of \$560 per month, and there was no basis to award Nancy alimony for any longer period.

3. There was no error in allowing Paul to use a chart to illustrate his argument that Nancy had increased her claimed needs three times during the pendency of the case, or in refusing to admit evidence of Paul's postseparation travel. Paul's Exhibit 9 is a summary of Nancy's claimed needs as the case developed. It demonstrated that from her initial discovery responses to trial Nancy increased her claimed needs three times by 88%, from \$2,789 to \$5,244. It also showed what Paul felt would be reasonable, and Paul referred to it in his testimony. The Court committed no error in allowing this exhibit to be used for illustrative purposes.

Regarding the excluded evidence, after Paul stipulated that he had the ability to pay alimony, Nancy attempted to introduce Paul's postseparation vacation planner. Paul objected that the planner was irrelevant because he had not claimed an inability to pay, and it had nothing to do with the parties' marital standard of living. The Court agreed. The Court's ruling was correct; Paul's decisions regarding how to spend the money that he earned during the period of the parties' separation had no bearing on Nancy's legitimate needs.

Finally, the Court declined to consider speculation as to whether Paul's residual interest in his father's testamentary trust might provide additional income to

him when his mother dies. Paul had already conceded the ability to pay alimony: this was irrelevant to Nancy's needs.

4. The Court's division of retirement accounts was not an abuse of discretion. Trial courts enjoy "considerable discretion in determining the financial interests of divorced parties." Parker v. Parker, 996 P.2d 260 (Utah App. 2000) (quoting Hall v. Hall, 858 P.2d 1018, 1021 (Utah App. 1993)). Although courts generally value retirement accounts as of the date of divorce, the court is not required to do so when there is a reasonable justification for using another date. Id.

Here the parties separated prior to December 1998. They divided all of their property and executed a written agreement which made clear that their property interests had been resolved. They maintained all of their financial affairs separately following their separation. There is no requirement that the Court divide the parties' financial interests as of the date of the decree, particularly when they have already effected a division of their property. There is no basis to disturb the trial court's decision on this point.

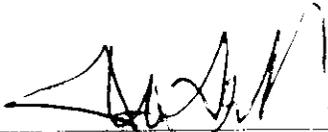
5. There was no basis to award Nancy her attorney's fees. Nancy testified that she paid her attorney's fees as they were incurred. At trial, she owed nothing, and she had over \$13,000 in her savings account, which was up from "close to \$9,000" when she and Paul separated. R. 575 at 162. Nancy correctly states that any award of fees must be based on need. Nancy demonstrated no need to have her

fees paid by Paul, and the Court correctly declined to order Paul to pay any of her fees.

### CONCLUSION

With an annual income of nearly \$54,000 Nancy failed to demonstrate a need for alimony. The Court erred in awarding Nancy alimony for uncategorized savings. The Court's evidentiary rulings were correct, and the Court's decision to value the retirement accounts as of the date of separation was within the Court's discretion. Finally, because Nancy had not shown a need for attorney's fees, and in fact had none owing at trial, there was no basis to order Paul to pay any of her fees.

DATED this 5 day of September 2000.



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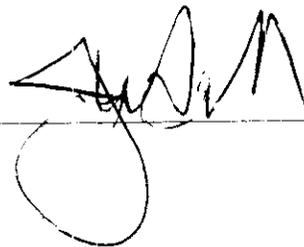
JAMES H. WOODALL  
Attorney for appellant

**CERTIFICATE OF DELIVERY**

I certify that I caused two copies of the foregoing **REPLY BRIEF OF APPELLANT** to be delivered to the following on September 5, 2000:

Pamela C. Urry  
136 South Main Street, Suite 221  
Salt Lake City, Utah 84101

Phillip W. Dyer  
136 South Main Street, Suite 318  
Salt Lake City, Utah 84101



A handwritten signature in black ink, appearing to read "Phillip W. Dyer", is written over a horizontal line. The signature is stylized and somewhat cursive.