

2000

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

Utah Court of Appeals

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Stephen G. Homer; Pro Se.

Helen E. Christian; Gustin, Christian, Skordas, Caston; Attorneys for Appellee.

Recommended Citation

Brief of Appellee, *Homer v. Homer*, No. 200000008 (Utah Court of Appeals, 2000).
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ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF UTAH

KATHE C. HOMER,

Plaintiff/Appellee,

v.

STEPHEN G. HOMER,

Defendant/Appellant.

Docket No. 200000008-CA

Priority No. 15

look @ the end of the
list of briefs
and its there.

BRIEF OF APPELLEE

APPELLANT'S APPEAL FROM THE ORDER DISMISSING
PETITION TO MODIFY DECREE OF DIVORCE
FOURTH JUDICIAL DISTRICT, UTAH COUNTY, UTAH,
THE HONORABLE RAY HARDING, JR., PRESIDING

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Attorneys for Plaintiff/Appellee

FILED

Utah Court of Appeals

JUN 29 2000

Julia D'Alessandro
Clerk of the Court

CHECKLIST FOR BRIEFS (CROSS APPEAL)

☒ **RECORD HAS BEEN RETURNED.**
☒ **TIMELY FILING OF BRIEF**

An untimely brief may be rejected under Rule 27(e). If a brief is untimely, a motion under Rule 26 will be mandatory for permission to file a late brief.

☒ **CORRECT NUMBER OF COPIES**

1. Supreme Court: 10 copies, one containing original signature
2. Court of Appeals: 8 copies, one containing original signature

☒ **LENGTH** (Excluding Addendum)

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

☒ **SIZE AND BINDING**

☒ **PRINTING REQUIREMENTS**

1. Proportionally spaced typeface must be **13-point** or larger for both text and Footnotes; mono-spaced typeface may not contain more than 10 characters per inch.
2. Print on both sides of the page.
3. Double-spaced; 1 ½ spacing is unacceptable.
4. 1" margin on all sides

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Appellee/Cross-appellant: Red Appellee/Cross-appellant Reply: Gray
Amicus, Intervenor, Guardian: Green
2. Name of counsel and parties represented

☒ **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

☒ Petition for Certiorari is granted (Mandatory for Appellant)

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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KATHE C. HOMER,	:	
	:	
Plaintiff/Appellee,	:	Docket No. 200000008-CA
	:	
v.	:	
	:	
STEPHEN G. HOMER,	:	Priority No. 15
	:	
Defendant/Appellant.	:	

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BRIEF OF APPELLEE

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

	-----oo0oo-----	
KATHE C. HOMER,	:	
	:	
Plaintiff/Appellee,	:	Docket No. 200000008-CA
	:	
v.	:	Priority No. 15
	:	
STEPHEN G. HOMER,	:	
	:	
Defendant/Appellant.	:	
	:	
	-----oo0oo-----	

BRIEF OF APPELLEE

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred by dismissing the Petition to Modify Decree of Divorce filed by Defendant/Appellant, Stephen G. Homer ("Mr. Homer").

STATEMENT OF THE CASE

Mr. Homer filed his Petition for Modification of Decree of Divorce in July of 1999. Plaintiff/Appellee, Kathe C. Homer ("Ms. Homer") filed her Motion to Dismiss on August 9, 1999. A hearing was held before the Honorable Ray Harding, Jr. on October 29, 1999. The court took the matter under advisement and issued its ruling dismissing Mr. Homer's Petition on November 1, 1999. The Findings of Fact and Order Dismissing Petition to Modify Decree of Divorce were entered on November 29, 1999.

Mr. Homer filed his Notice of Appeal on December 21, 1999.

STATEMENT OF FACTS

Mr. Homer and Ms. Homer were divorced, after nine years of marriage, by a Decree of Divorce entered in October of 1989. Under the terms of the Decree, Mr. Homer was ordered to pay alimony to Ms. Homer in the amount of \$150.00 commencing July 1989. (R. at 306).

In August of 1999, Mr. Homer filed a Petition for Modification of Decree of Divorce. (R. at 448), seeking to terminate his obligation to pay alimony to Ms. Homer. Mr. Homer's sole basis for terminating his alimony obligation was the 1995 amendment UTAH CODE ANN. §30-3-5 (1953, as amended) which limited alimony, except in extenuating circumstances, to a period equivalent to the duration of the marriage. He did not allege that any changed circumstances with respect to either Ms. Homer's income or expenses or his own had occurred since entry of the Decree.

At the time Mr. Homer filed his Petition, Ms. Homer had neither remarried nor cohabited. Ms. Homer filed a Motion to Dismiss Mr. Homer's Petition and filed a Memorandum in Support of her Motion. (R. at 449-454).

In October of 1999, the lower court heard arguments on Ms. Homer's Motion to Dismiss and took the matter under advisement. In its Ruling of November 1, 1999, the lower court granted Ms. Homer's Motion and dismissed Mr. Homer's Petition. (R. at 482-489). Findings of Fact and Order Dismissing Petition to Modify were entered on November 29, 1999. (R. at 490-498).

SUMMARY OF ARGUMENTS

I. THE LOWER COURT PROPERLY DISMISSED MR. HOMER'S PETITION FOR MODIFICATION OF DECREE OF DIVORCE AND ITS DISMISSAL SHOULD BE AFFIRMED

In his Petition for Modification of Decree of Divorce, Mr. Homer failed to allege that any substantial change of circumstances had occurred since entry of the Decree of Divorce, and the trial court properly dismissed his Petition. The lower court's decision should be affirmed.

II. MR. HOMER'S APPEAL IS FRIVOLOUS AND MS. HOMER SHOULD BE AWARDED HER ATTORNEY'S FEES PURSUANT TO RULE 33 OF THE UTAH RULES OF APPELLATE PROCEDURE

Ms. Homer has incurred attorney's fees due to the necessity of defending against Mr. Homer's Petition for Modification of Decree of Divorce and against his appeal of the lower court's ruling, and she should be awarded her attorney's fees and costs incurred in connection with this action.

ARGUMENT

I. THE LOWER COURT PROPERLY DISMISSED MR. HOMER'S PETITION FOR MODIFICATION OF DECREE OF DIVORCE AND ITS DISMISSAL SHOULD BE AFFIRMED

Mr. Homer argues that his alimony obligation to Ms. Homer should be terminated and relies on the 1995 amendment to Section 30-3-5, UTAH CODE ANN. (1953 as

amended) which limits an award of alimony, absent extenuating circumstances, to a period equivalent to the duration of the marriage in support of his claim. Mr. Homer's argument is without merit and the lower court properly dismissed his Petition for several reasons.

First of all, Mr. Homer failed to allege that there had been any substantial or material change in circumstances since entry of the Decree of Divorce as required by Section 30-3-5(7)(g)(i). Mr. Homer's sole basis for terminating his alimony obligation was the 1995 amendment to Section 30-3-5(7)(h).

When the parties were divorced in 1989, Section 30-3-5(5) and (6), UTAH CODE ANN. provided that alimony would terminate upon the recipient's remarriage or cohabitation with a person of the opposite sex. In 1995, subsection (7)(h) was enacted to limit an award of alimony, absent extenuating circumstances, to a period equivalent to the duration of the marriage. Mr. Homer argued that, therefore, subsection (7)(h) required the lower court to terminate his obligation to pay alimony as a matter of law.

The lower court, however, found that subsection (7)(h) was not dispositive of the issues raised in Mr. Homer's Petition for Modification of Decree of Divorce. It determined that that subsection merely limited the equitable powers of the court in awarding alimony. Contrary to Mr. Homer's argument, the subsection did not require the court to terminate previously entered alimony awards that extended beyond the duration of the marriage.

Second, Mr. Homer's argument that the amendment to the statute, if it does not apply to him, violates the Equal Protection Clause of the 14th Amendment to the United States Constitution, is without merit. He argues that the amendment creates two classes of obligors, i.e., those who must pay permanent alimony because they were divorced prior to the effective date of the amendment, and those who only pay alimony for a period equivalent to the duration of the marriage because they were divorced after enactment of the amendment.

The lower court properly concluded that the amendment does not violate these constitutional provisions because it does not create two classes of obligors. In its ruling, the lower court stated:

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. 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.

(R. at 485).

Finally, the lower court concluded that Mr. Homer was required to meet the same burden both pre- and post-enactment of the amendment, and that, therefore, subsection (7)(h) did not create different classifications of obligors, or treat Mr. Homer any differently than other similarly situated individuals who are obligated to pay alimony.

Specifically, it found that Mr. Homer "is not now treated any differently under Subsection (7)(h) than he was at the time the Decree of Divorce was entered." The standard Mr. Homer must meet in order to terminate his alimony obligation is the same now as it was when the Decree was entered, i.e., he has the burden 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). Prior to 1995, this was Mr. Homer's burden to establish; even with the enactment of Subsection (7)(h), his burden remains unchanged. Because he failed to meet his burden, the lower court properly dismissed his Petition for Modification for Decree of Divorce. This Court should affirm the decision of the lower court dismissing Mr. Homer's Petition.

II. MR. HOMER'S APPEAL IS FRIVOLOUS AND MS. HOMER SHOULD BE AWARDED HER ATTORNEY'S FEES PURSUANT TO RULE 33 OF THE UTAH RULES OF APPELLATE PROCEDURE

Rule 33 of the Utah Rules of Appellate Procedure defines a frivolous appeal as one that "is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law."

Mr. Homer's appeal has no legal or factual basis and is, therefore, a frivolous appeal. See Maughan v. Maughan, 770 P.2d 156 (Utah Ct. App. 1989). Ms. Homer has incurred attorney's fees and costs because of the necessity of defending against Mr. Homer's Petition for Modification of Decree of Divorce and against this appeal.

Mr. Homer, as a practicing attorney, has chosen to represent himself in the proceedings in the lower court and in this appeal of the lower court's decision. He has not incurred attorney's fees. Ms. Homer had no choice but to retain counsel to protect her alimony award. It is fair and reasonable that this Court should award her the attorney's fees and costs she has incurred in connection with this action.

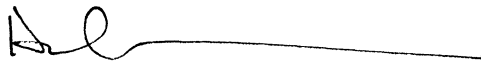
CONCLUSION

The lower court dismissed Mr. Homer's Petition for Modification of Decree of Divorce because it failed to state a claim upon which relief could be granted. He had not alleged that there had been any substantial and material changes of circumstances since entry of the Decree that were not foreseeable at the time of the Decree. Instead, Mr. Homer relied on the enactment of the amendment to UTAH CODE ANN. §30-3-5, specifically subsection (7)(h) as the sole reason his alimony obligation should be terminated. His reliance was misplaced. As the lower court properly concluded, the amendment merely limits the equitable powers of the court in awarding alimony; it does not terminate previously entered awards of alimony. The amendment does not create two different classes of obligors, as Mr. Homer was required prior to its enactment and since to meet his burden and show that a substantial change of circumstances had occurred since entry of the Decree of Divorce in order to terminate his alimony obligation. He failed to meet his burden. The lower court properly dismissed Mr. Homer's Petition for Modification of Decree of Divorce.

Ms. Homer has incurred attorney's fees and costs defending against Mr. Homer's Petition and this frivolous appeal, and she should be awarded her attorney's fees and costs pursuant to Rule 33 of the Utah Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 27th day of June, 2000.

GUSTIN, CHRISTIAN, SKORDAS & CASTON

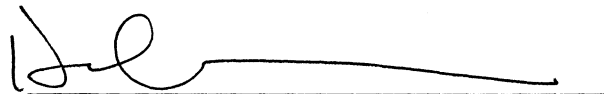


HELEN E. CHRISTIAN
Attorneys for Plaintiff/Appellee.

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the above and foregoing BRIEF OF APPELLEE were mailed, postage prepaid, to the following this 29th day of June, 2000.

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



HELEN E. CHRISTIAN

ADDENDUM

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Ruling	Exhibit "E"
Findings of Fact and Order Dismissing Petition to Modify	Exhibit "F"

OCT 25 1989



RICHARD B. JOHNSON, #1722
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IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY
STATE OF UTAH

KATHE C. HOMER,

DECREE OF DIVORCE ✓

Plaintiff,

vs.

STEPHEN G. HOMER,

Civil No. 87 2098

Defendant.

This matter came on before the Honorable Ray M. Harding for trial on the 13th day of July, 1989. The Plaintiff was present and represented by her attorney, Richard B. Johnson. The Defendant was present and represented by his attorney, Brent D. Young. The Court, after having entered its Findings of Fact and Conclusions of Law, now makes and enters the following:

DECREE OF DIVORCE

1. The Plaintiff is granted a Decree of Divorce from and against the Defendant upon the grounds of irreconcilable differences which Decree shall become final upon entry of the same in the records of the Clerk of the Court.

2. The Plaintiff is awarded the permanent care, custody, and control of the minor child of the parties subject to the

EXHIBIT "A"

Defendant's right to visit with the child at reasonable times and places. Specifically, the Defendant shall be allowed to visit as follows:

(a) Every other weekend from Friday at 6:00 p.m. to Sunday night at 6:00 p.m. with the child to be returned one hour prior to church and may pickup the child one hour after church is over.

(b) During the week in which the Defendant does not have overnight visitation, he shall be allowed to visit with the child on Wednesday evening from 5:00 p.m. to 8:00 p.m.

(c) The Defendant shall have the right to visit with the child on alternate holidays from 10:00 a.m. to 6:00 p.m. Holidays shall be January 1, President's Day, Memorial Day, Easter, July 4, July 24, Labor Day, Thanksgiving and Christmas as hereinafter defined.

(d) The Christmas holiday shall be divided between the parties. The Christmas vacation will be the time that the child is out of school for Christmas. During 1989, the Defendant shall have the right to the child from the time the children are out of school through December 25 at 2:00 p.m. The Plaintiff shall have the right to the child from December 25 at 2:00 p.m. until

minor child about the other.

(i) All visitation periods shall be exercised in a prompt manner so that both parties can make their plans accordingly. The noncustodial parent shall pick the child up from the front steps of the custodial parent's residence no earlier than 15 minutes prior and no later than 15 minutes after the visitation period commences. Return of the child to the front steps of the custodial parent's residence shall also be subject to the 15 minute rule. The custodial parent shall have the child fed and ready on time for visitation with sufficient clothing packed and ready for the visitation period.

(j) In the event the child is ill and unable to visit, a makeup visitation will be allowed to the noncustodial parent on the next succeeding weekend. However, if the noncustodial parent fails for any reason not to exercise his visitation for reasons of health or for any other reason, there will be no makeup visitation.

(k) The child will not be permitted to determine whether she wishes to visit with the noncustodial parent. Personal plans of the custodial parent or

the child goes back to school. The parties shall rotate from year to year the part of the Christmas vacation that they have with the child.

(e) The child shall be with the father, the Defendant herein, on Father's Day and his birthday from 10:00 a.m. to 6:00 p.m. The child shall be with the mother, the Plaintiff herein, on Mother's Day and her birthday. Father's Day and Mother's Day as with other holidays shall take precedence over normal weekend visitation.

(f) As it relates to summer visitation, two weeks of summer visitation shall be allowed.


(g) It is ordered that if holidays occur on a Friday or a Monday and the Defendant is entitled to the weekend visitation either immediately before or after the holiday, he shall have the right to have the child for weekend visitation and the holiday without the need of bringing the child back to the Plaintiff.

(h) All visitation in this case shall occur at the curb side and the Defendant is restrained from coming onto the premises of the Plaintiff. Neither party shall annoy or harass the other party and neither party shall make any disparaging comments to the

child, school activities, church activities, or other consideration will not be reasons for failing to adhere to the visitation schedule set forth in the order. Only substantial medical reasons will be considered sufficient for postponement of visitation.

(l) Both parties will provide addresses and contact telephone numbers to the other party and will immediately notify the other party of any emergency circumstances or substantial changes in the health of the child.

(m) The noncustodial parent shall, in addition to the visitation set forth in this order, have the unlimited right to correspond with the minor child of the parties and to telephone the minor child during reasonable hours without interference or monitoring by

 the custodial parent or anyone else in any way, so long as the phone calls and other correspondence are kept within reasonable limits. Unless otherwise agreed to between the parties.

~~telephone conferences between the noncustodial parent and the child shall be limited to no more than once per week and shall be, in total, 15 minutes or less in duration.~~

(n) Both parties are restrained and enjoined from making derogatory and disparaging comments about the

other party or in any other way diminishing the love, respect, and affection that the child has for either party.

(o) Defendant shall give Plaintiff 48 hours advance notice if he does not intend to exercise any visitation set-out herein.

3. The Plaintiff is awarded the home and property located at 1015 East 500 North, Orem, Utah, free and clear of any interest of the Defendant and the Defendant is ordered to quit claim any right, title or interest that he has in the home and property to the Plaintiff. The Plaintiff shall be responsible to pay any debts and obligations owing on the property and shall hold the Defendant harmless therefrom.

4. The Defendant is awarded the home and property located at 2877 West 9150 South in West Jordan, Salt Lake County, Utah, free and clear of any interest of the Plaintiff and the Plaintiff is ordered to quit claim any interest that she has in the home and property to the Defendant. The Defendant is required to pay all debts and obligations associated with the property and shall hold the Plaintiff harmless therefrom.

5. As it relates to the personal property of the parties, each of the parties is awarded the personal property in their possession as of the time of the trial in this case free and

clear of any interest of the other party. To the extent that any item of personal property held by a party is titled, the other party shall be required to sign any documents effecting the division of property.

6. No offset is required as part of an overall equitable property settlement in this case and the award of the automobiles as they existed at the time of trial is confirmed..

7. As it relates to the debts and obligations of the marriage, there are no debts and obligations of the marriage with the exception of the obligations each of the parties owe on the real property awarded to them herein. Each of the parties is responsible to pay any separately incurred debts and obligations since the time of their separation. As it relates to any medical expenses that are owed for the minor child, the claims for said sums shall be submitted to the respective insurance carriers and each of the parties shall pay one-half of any amounts not covered.

8. Each of the parties should be required to maintain a policy of health and accident insurance upon the minor child of the parties as the same is available to them through their respective places of employment. Further, ~~each of the parties~~ ^{Plaintiff} shall pay ~~one-half of~~ ^{Routine} any medical, dental, ~~orthodontic, optieal~~ or related expenses not covered by insurance. Non routine medical and dental expenses as well as orthodontic and optical expences are to be paid by the parties one half each.

9. Each of the parties is restrained from annoying, harassing, or otherwise interfering in the lifestyle of the other and further restrained from making any disparaging comments to the minor child about each other or otherwise involving the minor child in the issues between the parties.

10. The Defendant shall be required to name the minor child of this marriage as beneficiary of any life insurance ^{Presently held by} ~~purchased~~ by him or ~~made available to him through his employment~~ to the extent of ^{33%} ~~50%~~ of the value or death benefit thereof.

11. The Defendant shall pay to the Plaintiff the sum of \$404.95 as child support payable in two equal monthly payments on the 5th and 20th of each month commencing with July, 1989.

12. The 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.

13. Plaintiff is not awarded judgment for back due house payments against the Defendant.

14. The Court authorizes the entry of a Qualified Domestic Relations Order in this case to be submitted to the employers of each of the parties awarding each of them one-half of the retirement programs of the other accrued during the course of the marriage including the Defendant's pension plan, claimed to be a substitute for social security, and the retirement account which

Defendant claims belongs to West Jordan City among the others testified to at trial.

15. Each of the parties is entitled to one-half of the individual retirement account with accrued interest and the parties are ordered forthwith to distribute that amount so that each of the parties can choose their own retirement program.

16. Each side should bear their own attorney's fees.

17. Plaintiff is awarded her costs.

DATED this 26 day of ^{Oct.} ~~August~~, 1989.


RAY M. HARDING
District Court Judge

Approved as to form:

BRENT D. YOUNG
Attorney for Defendant

4TH JUDICIAL DISTRICT COURT
JUL 21 4 05 PM '99
HP

STEPHEN G HOMER (1536)
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Defendant-Petitioner Pro Se

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

KATHE C HOMER,)
Plaintiff-Respondent) PETITION FOR MODIFICATION
vs) OF
STEPHEN G HOMER,) DECREE OF DIVORCE
Defendant-Petitioner) Civil No. 87-2098
Case assigned to Judge Harding ✓
Div 6

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

EXHIBIT "B"

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:

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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

HELEN E. CHRISTIAN (2247)
GUSTIN & CHRISTIAN
Attorneys for Petitioner
Suite 722, Boston Building
9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 531-7444

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

-----oooOooo-----

KATHE C. HOMER,

Petitioner,

v.

STEPHEN G. HOMER,

Respondent.

:
: **MEMORANDUM IN SUPPORT OF**
: **MOTION TO DISMISS**
: **PETITION FOR MODIFICATION**
: **OF DECREE OF DIVORCE**

:
: 
: Civil No. 87-2098

:
: Judge Ray Harding, Jr.

-----oooOooo-----

Petitioner, KATHE C. HOMER, by and through her counsel, Helen E. Christian, submits the following in support of her Motion to Dismiss Petition for Modification of Decree of Divorce.

Pertinent Facts

1. Petitioner and Respondent were divorced by a Decree of Divorce entered by this Court in October of 1989.
2. Respondent was ordered to pay alimony in the amount of \$150 per month until such time as Petitioner remarried, cohabited or until the death of either party.
3. Petitioner has not remarried or cohabited and both parties are still living.

EXHIBIT "D"

Argument

Respondent's Petition for Modification of Decree of Divorce should be dismissed for several reasons.

First, the Petition for Modification of Decree of Divorce fails to state a claim upon which relief can be granted by this Court in that it fails to allege any substantial and material change of circumstances since entry of the Decree of Divorce.

Second, the amendment to UTAH CODE ANN. §30-3-5, enacted by the legislature in 1995, cannot be applied retroactively; rather its application is prospective only.

Third, the case of Throckmorton v. Throckmorton, 767 P.2d 121 (Utah App. 1988) is analagous here. In that case, Mrs. Throckmorton sought to modify the Decree of Divorce to claim one-half of Mr. Throckmorton's retirement benefits. The trial court found that her claim was barred by the doctrine of res judicata. Mrs. Throckmorton contended that Utah law did not recognize pension benefits as marital assets subject to distribution at the time of the divorce. She claimed that the Utah Supreme Court's decision in Woodward v. Woodward, 656 P.2d 431 (Utah 1982) recognized pension benefits as a marital asset, and that such recognition was in fact a substantial change of circumstances since entry of the Decree of Divorce.

The Court of Appeals, in concluding that the subsequent recognition of retirement benefits was not a substantial change of circumstances, relied on the reasoning of the Arizona Court of Appeals in the case of Guffey v. LaChance, 127 Ariz. 140, 618 P.2d 634 (Ct. App. 1980). The Utah Court stated:

We agree with the Arizona Court of Appeals and find that legal recognition of a new category of property rights after a divorce has been entered is not itself sufficient to establish a substantial change

of circumstances justifying a reevaluation of a prior property division. Thus, we hold that the legal principles articulated in Woodward, should only be given prospective application.

Id. at ____.

Similarly, the statutory amendment limiting alimony to a period not to exceed the duration of the marriage should not be given retroactive application.

WHEREFORE, Respondent's Petition for Modification of Decree of Divorce should be dismissed, and Petitioner should be awarded the attorney's fees and costs she has incurred by defending against it.

DATED this 6 day of August, 1999.

GUSTIN & CHRISTIAN

A handwritten signature in black ink, appearing to be 'Helen E. Christian', written over a horizontal line.

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 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PETITION FOR MODIFICATION OF DECREE OF DIVORCE to:

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

Kristine Wimmer Berg
Kristine Wimmer Berg

homer.mem

11/1/99 MR Deputy

**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.

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. Munteer 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 1, 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 November, 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
Attorney at Law
9225 South Redwood Road
West Jordan, UT 84088

Helen E. Christian
GUSTIN, CHRISTIAN, SKORDAS & CASTON
Suite 810 Boston Building
#9 Exchange Place
Salt Lake City, UT 84111

A handwritten signature in cursive script, appearing to read "Christopher D. Ballard", written over a horizontal line.

Christopher D. Ballard
Law Clerk

HELEN E. CHRISTIAN (2247)
GUSTIN, CHRISTIAN, SKORDAS & CASTON
Attorney for Petitioner
Suite 810 Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 531-7444
Telephone: (801) 531-8885

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

-----oo0oo-----

KATHE C. HOMER,	:	
	:	FINDINGS OF FACT AND
Petitioner,	:	ORDER DISMISSING PETITION
	:	TO MODIFY DECREE OF DIVORCE
v.	:	
	:	
STEPHEN G. HOMER,	:	Civil No. 87-2098
	:	
Respondent.	:	Judge Ray Harding, Jr.

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This matter comes before the Court on the Petitioner's Motion to Dismiss the Defendant's Petition for Modification of Decree of Divorce on Friday, October 29, 1999, before the Honorable Ray M. Harding, Jr., Judge of the Fourth Judicial District Court. Petitioner, KATHE C. HOMER, was present in person and represented by her counsel, Helen E. Christian. Respondent, STEPHEN G. HOMER, was present in person and pro se. The Court heard the arguments of counsel and took the matter under advisement for further determinations. The Court has reviewed the file, the memoranda filed by the parties, considered the oral arguments, and being fully advised in the premises, hereby issues the following:

Findings of Fact

1. 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.

2. 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).

3. The Respondent 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).

4. The Petitioner 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.

5. 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 Respondent 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.

6. However, even though subsection (7)(h) applies to this action it is not dispositive of the issues raised in Respondent's Petition to Modify. The Respondent 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.

7. 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.

8. Petitioner contends that Respondent'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). Respondent'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 Petitioner'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 Respondent 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.

9. The Respondent 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 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 Respondent reasons that applying subsection (7)(h) in divorces brought after 1995, while ignoring the statute in pre1995 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.

10. 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.

11. Furthermore, the Respondent is not now treated any differently under subsection (7)(h) than he was when his Decree was entered. The standard that the Respondent 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.

12. The Respondent also asserts that if subsection (7)(h) is not applied to terminate his obligation to pay alimony this may violate Article 1, 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 I 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.

13. As discussed above, subsection (7)(h) does not allow this Court to modify the Divorce Decree and terminate Petitioner's alimony award. Such a finding, however, does not bar Respondent from access to the courts or to a remedy. Rather, Respondent 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.

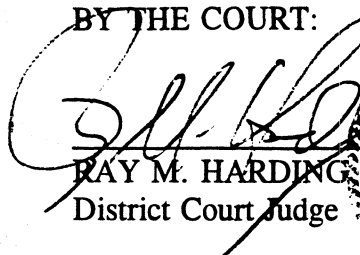
ORDER

For the foregoing reasons, this Court enters the following Order:

Respondent's Petition for Modification of Decree of Divorce is hereby DISMISSED.

DATED this 24th day of November, 1999.

BY THE COURT:


RAY M. HARDING, JR.
District Court Judge



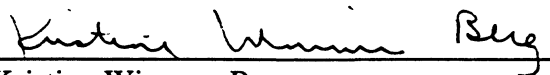
NOTICE TO COUNSEL

Pursuant to Rule 4-504 of the Utah Code of Judicial Administration, you are hereby notified that Petitioner's counsel will forward the original hereof to the Court for signature, and you have five (5) days from the date this notice is served upon you to file any written objections to the form of the foregoing order with the Court and mail a copy to Petitioner's counsel. If no objections are filed within that time, the original hereof will be signed and filed.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing FINDINGS OF FACT AND ORDER DISMISSING PETITION TO MODIFY DECREE OF DIVORCE, this 8 day of November, 1999, addressed to:

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



Kristine Wimmer Berg

homer.ord