

1992

# Kathy P. Bingham v. David P. Bingham : Reply Brief

Utah Court of Appeals

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NO. 920508

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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ATHY P. BINGHAM,	:	
	:	
Plaintiff/Appellee.	:	
	:	
s.	:	Case No. 920508
	:	
AVID P. BINGHAM,	:	Priority No. 16
	:	
Defendant/Appellant.	:	

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REPLY BRIEF OF APPELLANT

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APPEAL FROM A DECISION OF THE FIRST  
DISTRICT COURT, BOX ELDER COUNTY,  
HONORABLE F. L. GUNNELL

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**FILED**

DEC 23 1997

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STATE OF UTAH

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KATHY P. BINGHAM,	:	
	:	
Plaintiff/Appellee.	:	
	:	
vs.	:	
	:	Case No. 920508
DAVID P. BINGHAM,	:	
	:	
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STATUTES AND CONSTITUTIONAL SECTIONS

Utah Code Annotated, Section 78-45-7.5(4)

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	:	
Defendant/Appellant.	:	

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STATEMENT REGARDING REPLY BRIEF

Plaintiff/Appellee previously filed a Cross-Appeal, and has now filed her Brief. Pursuant to Rule 24(h), Utah Rules of Appellate Procedure, the Appellee's Brief contains her issues and arguments raised by her Cross-Appeal, as well as her Answer to Appellant's Brief. Pursuant to Rule 24(c), Utah Rules of Appellate Procedure, Appellant files this Brief as a Reply Brief and in response to issues presented by the Cross-Appeal.

STATEMENT OF ISSUES PRESENTED

1. The Court did not error in its interpretation of Section 78-45-7.5(4) by allowing money spent for the purchase of assets to be deducted as a necessary expense for self-employment or business operations. The Court correctly

applied the section in question regarding the purchase of assets.

2. The Court's refusal to classify principal payouts on loans as necessary expenses for self-employment or business operations was an error, and a misapplication of Section 78-45-7.5(4).

3. The Trial Court abused its discretion in awarding alimony. The Court clearly has power to award alimony equalizing the parties' living standards and attempting to maintain them at a level as close as possible to the standard of living enjoyed during the marriage. The Court's error was in miscalculating the amount of defendant's income, and in awarding an amount of alimony greater than plaintiff's need.

4. The Trial Court erred in failing to subtract the gift from defendant's parents prior to calculating the equity in the defendant's business.

5. The Trial Court erred in determining that the feed inventory was part of the equity to be divided.

6. The Trial Court did not abuse its discretion in ordering each party to pay its own attorney's fees and costs.

#### STATEMENT OF FACTS

Refer to Appellant's original Brief. Appellee's Brief

contains one major error in its Statement of Facts, on Page 3, the first sentence of the second paragraph, wherein she states that "Bingham Dairy was purchased by the couple in 1982." In fact, Bingham Dairy was incorporated in 1982 to purchase an existing dairy. Defendant and his father incorporated Bingham Dairy, and plaintiff has never had any ownership interest whatsoever in Bingham Dairy. (Tr, p. 174,)

### ARGUMENT

#### POINT I

THE COURT PROPERLY APPLIED SECTION 78-45-7.5(4),  
BY ALLOWING MONEY SPENT FOR THE PURCHASE OF ASSETS  
TO BE DEDUCTED AS A NECESSARY EXPENSE FOR SELF-  
EMPLOYMENT OR BUSINESS OPERATIONS.

The Trial Court, without the benefit of explanatory factual findings, decided that money spent for the purchase of assets is an appropriate self-employment deduction, while at the same time ruling that principal payouts on loans are not.

Defendant's position is that both should be allowed as deductions, because both represent money reasonably and necessarily expended for self-employment or business operation.

The Court is referred to Appellant's original Brief, Point I, beginning on Page 10 of the Brief. That argument, which refers in turn to defendant's Exhibit 4, explains



defendant's argument thoroughly.

POINT II

THE COURT'S REFUSAL TO CLASSIFY PRINCIPAL PAYOUTS  
ON LOANS AS A NECESSARY EXPENSE FOR SELF-EMPLOYMENT  
OR BUSINESS OPERATION WAS ERROR.

This issue is thoroughly discussed in Point I of Appellant's original Brief, and Point I immediately above. Any further discussion would be repetitive.

POINT III

THE ALIMONY AWARD WAS IN ERROR.

In Point I of his original Brief, defendant shows that the Court erred by calculating his income improperly. This resulted in both the alimony and child support calculations being improperly high. Furthermore, in Point II of his original Brief, defendant shows that the Court further erred by awarding more alimony than plaintiff's own evidence established as her need.

The Trial Court certainly has discretion to equalize and maintain the standard of living comparable to that enjoyed during the marriage.

The issue in this case is whether or not the Court, through its misinterpretation of Section 78-45-7.5(4), calculated defendant's income incorrectly. The issue for consideration is the amount of alimony which should have

been awarded; if this Court determines that the Trial Court incorrectly calculated defendant's income, then the issue of alimony must be reconsidered, and the amount awarded reduced correspondingly.

Plaintiff ran her household, paid all of her living expenses, and took care of the children on a draw of \$2,000 per month. (Tr, p. 75; p. 193.) She testified that she needed alimony of \$1,500 per month (Tr, p. 44, lines 8-22; p. 45, lines 23-25), and submitted her Exhibit 16 showing her current monthly expenses to be \$2,035.

The Trial Court correctly awarded plaintiff the home, and her new Van, neither of which requires a monthly payment. That is exactly what plaintiff had prior to the divorce, except for the additional \$2,000 per month to run a household consisting of herself, all of the children, and her husband. Her husband is no longer part of her household; if her standard of living is maintained exactly as it was prior to the termination of the marriage, her total alimony and child support should be somewhat less than \$2,000 per month. The Court awarded \$3,181.

The alimony issues are discussed and argued in Point I and II of Appellant's Brief.

#### POINT IV

**THE COURT ERRED IN FAILING TO SUBTRACT A GIFT FROM DEFENDANT'S PARENTS IN CALCULATING THE DAIRY EQUITY.**

Appellee's argument in her Point IV partially misses the point.

In this particular case, the focus is upon the source of the property. Defendant agrees that property accumulated by joint efforts of the parties should be divided equally between the parties, or at least be subject to equitable division.

A careful reading of Appellant's Point III in his original Brief would show that defendant assumes the total appraised value of the dairy to be the beginning point. This approach accounts for and allows any appreciation in the dairy assets, and treats such appreciation as a joint asset. The issue is whether the amount of the gift (\$174,000) should be deducted from that total equity.

Appellant's Point III addresses this issue; to the extent Appellee's Point IV does not, she misses the point.

#### POINT V

THE FEED INVENTORY IS NOT PART OF THE  
EQUITY TO BE DIVIDED.

This issue is thoroughly discussed in Appellant's Point IV, in his original Brief.

#### POINT VI

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN  
REQUIRING EACH PARTY TO PAY ITS OWN ATTORNEY'S FEES.

The Trial Court clearly has discretion to award attorney's fees in a divorce case, pursuant to the standards enunciated by the cases quoted in plaintiff's Point V of her Brief.

The Court is to base its decision upon evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the fees.

The award of the attorney's fees must be based upon evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees. See Bell vs. Bell, 810 P2d 489 (Utah App. 1991). Sufficient evidence must be offered regarding attorney's fees at the trial. See Maughan vs. Maughan, 770 P2d 156 (Utah App. 1989).

In the instant case, no evidence regarding attorney's fees was presented, except as appears on Pages 53 and 54 of the record, where plaintiff's attorney asked if she wanted attorney's fees and if she was able to pay them. Plaintiff's counsel then merely stated that he would "submit an affidavit at the end of this matter".

Plaintiff was not awarded attorney's fees, and should not be, because she presented no evidence at that trial in support of those fees.

Concerning costs, at the end of the trial plaintiff's attorney asked to recall his expert witness for the purpose

of testifying to his fees and charges (Tr. p. 211, lines 1-7).

The parties, in effect, stipulated that plaintiff's expert witness fees could be submitted by affidavit. (Tr. p. 211, lines 8-13).

The Court then ordered that the attorney's fee affidavit proposed by plaintiff's counsel should be submitted along with a post-trial brief. (Tr. p. 211, lines 14-19).

There was never any stipulation regarding submitting attorney's fees by affidavit.

Furthermore, it is submitted that the Court did consider the issue of attorney's fees and costs, and exercise its discretion properly, at least based upon the facts as the Court found them. The Court found that defendant had a gross monthly income of \$5,587, of which he awarded \$3,181 to the plaintiff, leaving defendant \$2,406. Using these erroneous figures, it is respectfully submitted that the Court calculated the plaintiff had more money than the defendant, and could afford to pay her own attorney's fees and costs.

Also, it is possible the Trial Court considered the argument raised by defendant in his post-trial brief regarding attorney's fees, found at Pages 186-187 of the Record, challenging the reasonableness of the fees.

### CONCLUSION

The Trial Court's basic error in failing to allow principal payouts on loans as necessary expenses, pursuant to the applicable statute, resulted in the Court's award for child support and alimony being improperly high.

Additionally, regarding the alimony, the Court awarded more than plaintiff's own testimony purportedly established as her need, and far more than the evidence established as her actual need.

The failure to subtract the gift of \$174,000 to defendant from the dairy equity resulted in an improper and inequitable property division; the Trial Court's error in determining that the feed inventory should be divided as part of the equity further compounded that error.

The Court did not abuse its discretion by ordering each party to pay its own attorney's fees and costs; plaintiff failed to present evidence of attorney's fees in the required fashion, and the Court declined to award costs and fees because under the Court's ruling the plaintiff had a greater monthly income than the defendant.

The Trial Court failed to make findings concerning any of these issues, leaving the Appellate Court to guess at the Trial Court's reasoning. The Trial Court is required to make adequate factual findings on all material issues, unless the facts in the record are clear, uncontroverted,

and capable of supporting only a finding in favor of the judgment. See Chambers vs. Chambers, 198 Utah Adv. Rep 49 (Utah App. 1992); Haumont vs. Haumont, 793 P2d 421 (Utah App. 1990); Throckmorton vs. Throckmorton, 767 P2d 121 (Utah App. 1988); Acton vs. Deliran, 737 P2d 996 (Utah, 1987).

In this particular case, the Trial Judge has resigned from the bench and is incapacitated, so any remand should be for a new trial.

Defendant does not necessarily request a remand; in a divorce case, the Appellate Court can review the transcript and make its own findings and rulings.

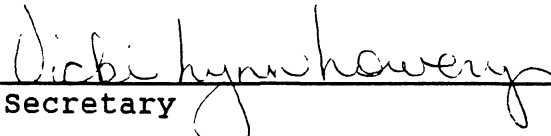
However, if this Court deems remand to be an appropriate remedy, it is requested that the Court rule on the core issue in this case, that being the proper interpretation of Section 78-45-7.5(4) as it applies to the purchase of assets and principal payouts on loans.

DATED this 16 day of December 1992.

  
\_\_\_\_\_  
JON J. BUNDERSON  
ATTORNEY FOR DEFENDANT/APPELLANT

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT, to the Appellee's attorney, David Paul White, 7434 South State, #102, Midvale UT 84047, postage prepaid, this 16 day of December 1992.

  
Secretary