

1992

# Wendy E. Weaver v. Thomas A. Weaver, Jr. : Brief of Appellee

Utah Court of Appeals

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BRIEF

U.S. DISTRICT COURT  
DOCUMENT  
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DOCKET NO.

920149

IN THE UTAH COURT OF APPEALS

WENDY E. WEAVER,

Plaintiff/Appellee,

vs.

THOMAS A. WEAVER, JR.,

Defendant/Appellant.

COURT OF APPEALS NO. 920149CA

ARGUMENT CLASSIFICATION NO. 15

BRIEF OF THE APPELLEE

An Appeal from the THIRD JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF SALT LAKE,

STATE OF UTAH

Third District Court Judge JOHN A. ROKICH, Presiding

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FILED

Utah Court of Appeals

MAY 6 1993

  
Mary T. Noonan  
Clerk of the Court

WENDY E. WEAVER,  
Plaintiff/Appellee,  
vs.  
THOMAS A. WEAVER, JR.,  
Defendant/Appellant.

ARGUMENT CLASSIFICATION NO. 15

Third District Court Judge JOHN A. ROKICH, Presiding

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The caption of the case sets forth the names of each party  
of interest in the proceeding

TABLE OF CASES

<u>Haddow v. Haddow</u> , 707 P2d 669 (Utah, 1985) . . . . .	.1, 8
<u>Merriam v. Merriam</u> , 799 P2d 1172 (Utah App., 1990) . . .	.1, 8
<u>Stevens v. Stevens</u> , 754 P2d 952 (Utah App., 1988) . . .	2

TABLE OF CONTENTS

Table of Cases . . . . .	ii
Table of Statutes . . . . .	iii
Statement Showing Jurisdiction . . . . .	1
Statement of Issues . . . . .	2, 3
Determinative Statutes . . . . .	3
Statement of the Case . . . . .	3, 4
Summary of Argument . . . . .	4
Statement of Facts and Detail of Argument . . . . .	.4-10
Reply to Appellant's Argument One . . . . .	8
Reply to Appellant's Argument Two . . . . .	9
Reply to Appellant's Argument Three . . . . .	10
Reply to Appellant's Argument Four . . . . .	.10
Conclusion . . . . .	10, 11
Certificate of Service . . . . .	11, 12

TABLE OF STATUTES

None

### STATEMENT SHOWING JURISDICTION

This is an appeal from a decision by the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable John A. Rokich, District Court Judge Presiding, to the Utah Court of Appeals. The appeal is authorized pursuant to Section 78-2a-3(2)(i) Utah Code Annotated, as amended in 1992.

### STANDARD OF REVIEW STATEMENT OF THE ISSUES

1. Sexual infidelity by one of the parties during a marriage and before a divorce is granted, and such may constitute grounds for divorce, and may be relevant in a child custody dispute, however, notwithstanding the foregoing, in the absence of "cohabitation" occurring after divorce, the issue is not relevant to a permanent alimony award. See Haddow v. Haddow, 707 P2d 669, 671-672 (Utah 1985).

2. A party who leads a court into error cannot later complain of that error to obtain reversal, see Merriam v. Merriam, 799 P2d 1172, 1175 (Ut App 1990). Prior to entry of Finding of Facts, Conclusions of Law and the Divorce Decree, the court, in the instant case, did meet and seek counsels' advice, objection and approval of the proposed Findings of Fact, Conclusions of Law and Divorce Decree. Only after receiving said advice and approval from both counsel, did the Court sign and enter the same. Defendant's counsel's approval is evidenced by his signing-off on said pleading, by affixing his initials thereto. See the Court Minute



Entry (T-61) Likewise, without said approval, the Findings of Fact, Conclusions of Law and Divorce Decree in the instant case would not have been accepted, signed and entered by the Court. The Defendant did in effect co-author the Findings of Fact, Conclusions of Law entered by the Court, and the Defendant did thereby waive his right to challenge the adequacy of such findings of fact by the within appeal.

3. The appropriate criteria for an award of alimony is as follows: the financial condition of the spouse claiming a need for alimony, the ability the claiming party to provide such support and maintenance for him or herself, and the ability of the responding spouse to provide such support. See Stevens v. Stevens, 754 P2d 952, 958 (Ut Ct Appeals 1988) In the instant case the evidence was that the Plaintiff, at all times pertinent hereto, was on Public Assistance, she was and is without marketable job skills as a result of parties having married right out of high school and having children shortly thereafter, the raising of three small infant children while maintaining a household for the Defendant has substantially diminished Plaintiff's employment alternatives now and in the future, and in comparison, at the time of entry of the Decree herein, the Defendant had completed nearly Five (5) years of post high school or college courses, and the Defendant had a proven and established earning capacity far in excess of his regular and customary employment, evidenced both by his investment portfolio and the relatively large sums of money in his control at the time

of the parties' separation.

DETERMINATIVE STATUTES

None

Counsel for the Appellee urges that Section 30-3-5(6) Utah Code Annotated, as Amended is dispositive of any and all of the issues Appellee has raised on appeal. Said code section is not applicable because it applies to post decree alimony payments to a former spouse.

STATEMENT OF THE CASE

This is an appeal to the Utah Court of Appeals from a Third District Court determination that the Appellant pay permanent alimony to his former wife of a relationship and marriage that lasted nearly Eight (8) years. The parties commenced having a sexual affair three years before marriage, when the Plaintiff was a junior in high school (T-114). The parties married after the Plaintiff was Three (3) months pregnant. The divorce proceeding was commenced after the foregoing plus Five (5) years of formal marriage and three children later.

COURSE OF PROCEEDINGS

The Plaintiff commenced the divorce proceeding in the Third Judicial District Court In and For Salt Lake County, State of Utah, to dissolve the marriage between herself (Plaintiff/Appellee) and her husband (Defendant/Appellant). The matter came on regularly for Two and One Half (2 1/2) days of trial on the 4th, 5th and 6th days

of December, 1991, before the Honorable John Rokich, District Court Judge, presiding.

#### DISPOSITION AT THE TRIAL COURT

Following the trial of this matter the Third District Court awarded, among other things, permanent alimony to the Plaintiff/Appellee, and from said Court's order awarding permanent alimony to the Plaintiff the Defendant/Appellant now appeals.

#### SUMMARY OF THE ARGUMENT

The Court in the instant case did not abuse its discretion by awarding the Plaintiff permanent alimony. The evidence presented at trial showed that the Plaintiff was in need of support and maintenance, the Plaintiff lacked, now and in the future, the ability to adequately provide such support and maintenance for herself and that the Defendant had the ability to provide said support for the Plaintiff, and the children. The Defendant/Appellant co-authored the Findings of Fact and can not now claim error to obtain reversal.

#### STATEMENT OF THE FACTS AND DETAIL OF ARGUMENT

The Defendant/Appellant, husband was born the 29th day of November, 1966. The Plaintiff/Appellee, wife was born the 25th day of February, 1967. The parties began having sexual relations Three (3) years before their marriage while both were in high school. The parties were married on the 30th day of November, 1985. Since the

marriage and until the separation of the parties and the commencement of the within proceedings the Defendant/Appellant has been the primary income provider for the parties, and the Plaintiff has worked primarily in the home raising the parties' infant twins and elementary age children and maintaining the household. Three (3) children have been born as issue of this marriage. The oldest child was born on the 18th day of May, 1986. The twins were born on the 18th day of July, 1990. The Defendant had left and estranged himself from the Plaintiff at the time the twins were born on the 18th day of July, 1990, and he was living with another woman. (T-324). The parties formally separated in August, of 1990, and between the date of separation in August, 1990, and the trial of this matter in December, 1991, the Defendant failed, neglected and or refused to pay meaningful support to the Plaintiff, for her maintenance, and for the support and maintenance of the parties' minor children. The record shows that the Defendant only paid to the Plaintiff the sum of Three Hundred Eighty Five (\$385.00) Dollars on two occasions, other insignificant sums from time to time during the period from the parties' separation to the date of trial (T-165-172).

In 1989 the Defendant earned Sixteen Thousand Four Hundred Fifty One (\$16,451.00) Dollars in wages, Three Thousand Two Hundred Seven (\$3,207.00) Dollars in dividends or investments for a total income for 1989, of Nineteen Thousand Six Hundred Fifty Eight (\$19,658.00) Dollars (T-179).

The Defendant's 1990 Income Tax Return, Court Exhibit 4-P, reflected numerous investments made by the Defendant while married to the Plaintiff (T-180).

Furthermore, in 1990 while married to the Plaintiff, Defendant had on deposit at Valley Bank and Trust, on the 13th day of August 1990, the sum of \$14,472.00, (T-181), and just one month later, after the twins were born, and after the divorce proceeding was commenced, the said bank balance was \$355.00. During the said period \$14,000.00 was withdrawn from said account, and not one cent of that money was used for the use and benefit of the Plaintiff or the parties' minor children. (T-181, 187). The Defendant explains his failure to provide for the Plaintiff and his minor children by stating, "we were separated at the time". The net effect of the Defendant's failure to support his wife, the Plaintiff, and their three minor children were compelled to apply for, and receive public assistance. (T-79)

In addition to the foregoing, and approximately at the same time, the Defendant owned, possessed or controlled a Paine Webber Security Account having a balance or value of Nine Thousand (\$9,000.00) Dollars, (See court Exhibit 6-P). The Defendant sold the account at a discount and gave Seven Thousand Six Hundred Fifty (\$7,650.00) Dollars, of the proceeds from said account to his father. (T-184, 185). Purportedly to pay a questionable demand note that was suddenly called due.

The Defendant testified that after the twins were born he had

and maintained sole use and possession of the following revenues: Twenty Thousand (\$20,000.00) Dollars investment income; Fourteen Thousand (\$14,000.00) Dollars, from the checking account; Seven Thousand Five Hundred (\$7,500.00) Dollars from the Paine Webber Account; and in addition to the foregoing, the Defendant had his bi-weekly earnings of Six Hundred Fifty Two (\$652.00) Dollars. The Defendant further testified that he had expenses of Six Hundred (\$600.00) Dollars per month. The Defendant, during the described period, was residing with two women, sharing a bedroom with one, and not paying any meaningful support for the Plaintiff or for his three minor children.(T-186-189) (T-192-193).

The Plaintiff did testify to having sexual relations with a male friend, who was not residing or living with her. The Plaintiff did have and use in her residence a used T.V. and Two (2) chairs belonging to the male friend. The arrangement was one of convenience, the friend had moved to a new residence and did not have room at his new home for the said items. (T-149-152) The Plaintiff testified that the said male friend did not live with her and her children at her home. (T-151).

The trial Court heard testimony from the parties and other witnesses, reviewed the documentary evidence presented at trial, and at the conclusion of the court proceedings declared that the Court did not believe the testimony and the evidence of the Defendant/Appellant. The Court ordered that counsel for the parties prepare proposed findings of fact. That once the findings were

prepared the Court would conference with counsel to finalize the findings. At said conference the parties' counsel with the Court approved the Findings of Fact the subject herein. The approval by the Defendant is evidenced by counsel's initials thereon. The Defendant, who through that conference, and his approval can not now claim error to obtain reversal. See Merriam v. Merriam, 707 P2d, 669, 671-672 (Utah, 1985).

#### REPLY TO APPELLANT'S ARGUMENT ONE

In the instant case, there can be no question that the Plaintiff was not "cohabiting" with a member of the opposite sex under the guidelines set forth in Haddow v. Haddow, 707 P2d 669 (Ut 1985), and she certainly was not in violation of Section 30-3-5(6) Utah Code Annotated, as Amended, as being a "former wife" receiving alimony from the Defendant while residing with a person of the opposite sex. He was not living with her. He was not paying Plaintiff's utilities. The Plaintiff was under the watchful eye of Social Services as well as the Defendant herein, and the record fails to show that Plaintiff was cohabiting with her male friend. There was testimony by an independent witness, Erick Roosa, called by the Defendant to prove cohabitation by the Plaintiff. Mr. Roosa, testified that he couldn't say that Plaintiff's friend, Rick Onesta, was living in the home with the Plaintiff. Mr. Roosa testified as follows, that: "I can't come up with facts, No, I can't say that he's actually living there, or anything". (T-234-

235)

REPLY TO ARGUMENT TWO

Paragraph No. 5 of the Findings of Fact sets forth that Defendant did not adequately financially support the Plaintiff and their minor children.(T-63)

Paragraph No. 8 of the Findings of Fact sets forth that the Defendant was gainfully employed, having the following earnings:

... earned as an employee of Universal painting during 1990, the gross yearly sum of \$15,296.00, and presently earns the gross amount of \$1,387.00 monthly.(T-64)

In addition to the forgoing, the record is replete with Defendant's historical earnings from investments and other sources owned and controlled by the Defendant during the marriage and concurrently liquidated and paid over to Defendant's father. Said payment was purportedly to pay preexisting debt unknown to the Plaintiff, and asserted, suspiciously, just as the parties separated. (T-182-187)

Paragraph No. 13 of the Findings of Fact sets forth that the Plaintiff was without means or ability to pay for court costs and attorneys' fees rendered in this case. (T-64)

The record at trial established that the Plaintiff was receiving public assistance following the separation from the Defendant. She was the mother and custodial parent of three small children. She has graduated from high school having limited working experience, and she has no definable marketable working skills. (T-110-115)



#### REPLY TO ARGUMENT THREE

Defendant sets forth self serving statements that were answered and noted by the Court, when it observed, that: "He's got a credibility gap right now". "He's got a credibility gap, a serious one". (T-306) "This is probably one of the most blatant cases I have ever had before me in my seven years on the bench". The Court in its capacity as fact finder simply didn't believe the Defendant/Appellant.

#### REPLY TO ARGUMENT FOUR

Awarding the Plaintiff Two Hundred (\$200.00) Dollars a month permanent alimony and the Defendant calling it a "reward" under the facts of this case does beg the need for the Defendant to return to college for another Five (5) years of education, and perhaps thereafter the Defendant may understand that if it costs him Six Hundred (\$600.00) to Seven Hundred (\$700.00) Dollars a month to maintain and feed himself that the Plaintiff and the parties' three minor children need more than the Plaintiff has been awarded herein to feed and maintain themselves. The debts and obligations claimed by the Defendant, including the convenient debts owed to his father, can all be discharged in bankruptcy.

#### CONCLUSION

The Defendant/Appellant, who participated and co-authored the Findings of Fact, can not now claim error to obtain a reversal.

The Plaintiff/Appellee submits that there is adequate basis in

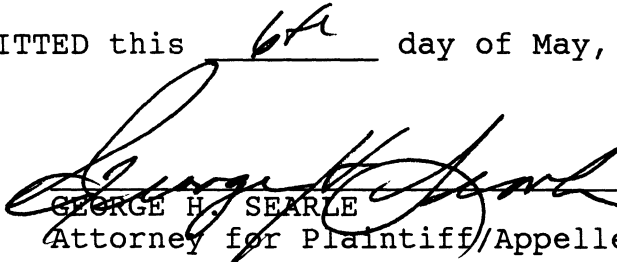
fact and law to support the award of permanent alimony in the instant case.

There is evidence in the record that Plaintiff/Appellee's is in need of support and maintenance, and that she does not have the ability to provide, if ever, said support for herself, and further that the Defendant/Appellant does have the income or the capability of generating income sufficient to meet his needs and the needs of the Plaintiff/Appellee.

It is cohabitation, and not sexual relations, that is the triggering contingency that terminates alimony. A finding of cohabitation is not supported by the evidence in the record.

The Plaintiff/Appellant respectfully requests that this Court affirm the lower Court determination, and hold that Defendant/Appellant be ordered to pay permanent alimony to the Plaintiff/Appellee, in the sum of \$200.00 per month.

RESPECTFULLY SUBMITTED this 6th day of May, 1993.

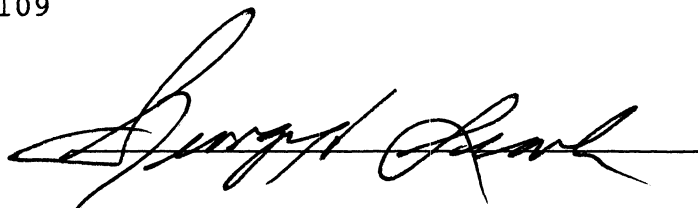
  
\_\_\_\_\_  
GEORGE H. SEARLE  
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 1993, two true and correct copies of the BRIEF FOR THE APPELLEE, was duly

served by personally delivering the same to:

JOHN WALSH  
Attorney at Law  
2319 South Foothill Drive, Suite 270  
Salt Lake City, Utah 84109

A handwritten signature in black ink, appearing to read "George A. Walsh", written over a horizontal line.