

2003

Kenneth D. Sursa v. Karen J. Sursa : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KENNETH D. SURSA,

Appellant/Petitioner,

vs.

KAREN J. SURSA,

Appellee/Respondent.

Case Number: 20030987-CA

BRIEF OF THE APPELLANT

AN APPEAL FROM THE ORDER OF DISMISSAL IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY, UTAH, THE HONORABLE JOHN R. ANDERSON PRESIDING.

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JURISDICTION

Jurisdiction is conferred on The Utah Court Of Appeals by §78-2a-3(2)(h) Utah Code (2003).

ISSUES PRESENTED FOR REVIEW, PRESERVATION OF ISSUES AND STANDARD OF REVIEW

Issue. The trial court erred in granting a dismissal of Appellant's Petition to Modify Decree of Divorce where appellant requested that alimony be terminated for co-habitation when his former spouse and boyfriend spent the majority of their time together, former spouse had her vehicle at the home of her boyfriend twenty out of every thirty days for at least a year, boyfriend had use of her vehicle, she paid some of boyfriend's utilities and satellite bill so she could watch satellite at his residence, she and boyfriend ate many if not most of their meals together, boyfriend cared for her at his house while she was sick, boyfriend had access to her house when she was not present, her adult children believed she lived with boyfriend and were told she would be at boyfriend's house whenever they could not get a hold of her, and she and boyfriend had a sexual relationship.

Standard of Review. "Whether dismissal was appropriate for failure to make a prima facie case is a question of law reviewed for correctness." *Grossen v. DeWitt*, 982 P.2d 581, 584 (Utah App. 1999). The court "may weigh the evidence, consider credibility, and dismiss if it finds that although plaintiff's evidence establishes a prima facie case in

the technical sense, it is unpersuasive.” *Id.* ¹; Utah Rules of Civil Procedure Rule 52 (2003).

Whether a former spouse is “residing” or cohabitating with another person for purposes of terminating alimony “is a mixed question of fact and law”. *Haddow v. Haddow*, 707 P.2d 669, 671 (Utah 1985). “While we defer to the trial court’s factual findings unless they are shown to be clearly erroneous, we review its ultimate conclusion for correctness.” *Pendleton v. Pendleton*, 918 P.2d 159, 160 (Utah App. 1996). In “reviewing a trial court’s actions in a divorce case, [the appellate court is] vested with broad equitable powers.” *Haddow v. Haddow*, 707 P.2d 669, 671 (Utah 1985).

PRESERVATION. APPELLANT FILED AN OBJECTION TO FINDINGS & ORDER (R.444) AND A SUBSEQUENT OBJECTION TO FINDINGS AND OBJECTION TO NOTICE TO SUBMIT. (R.453). APPELLANT FILED A TRIAL BRIEF AND UPDATED TRIAL BRIEF, PRIOR TO TRIAL, OUTLINING THE LAW ON THE ISSUES IN DISPUTE. (R.246, 393). APPELLEE ALSO FILED A TRIAL MEMORANDUM PRIOR TO TRIAL. (R. 358).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES ORDINANCES AND RULES

Utah Code (2003) Section 30-3-5(9). “Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.”

Utah Code (1994) Section 30-3-5(6).

¹ While Appellee’s “Order of Dismissal” refers to the granting of a “directed verdict”, the correct appellation is granting a “motion to dismiss”. *Grossen v. DeWitt*, 982 P.2d 581, 584 (Utah App. 1999)(“In the context of a bench trial, however, where there is no jury verdict, the directed verdict’s procedural counterpart is a motion to dismiss.”)

Utah Code (2003) Section 30-3-3(1).

Utah Code (2003) Section 30-1-4.5(e)

Utah Rules of Civil Procedure Rule 41 Dismissal of actions. (b) *Involuntary dismissal; effect thereof.*

Utah Rules of Civil Procedure Rule 52. Findings by the court. (a) *Effect.*

STATEMENT OF THE CASE

The parties to this dispute were divorced by stipulation on July 25, 2001 after a long-term marriage. On June 10, 2002 Appellant filed a Verified Petition to Modify Divorce, alleging a reduction of income and cohabitation of Appellee. Appellant subsequently moved to dismiss his claim related to the reduction of income, as it was no longer necessary, on July 14, 2003 and the court so ordered July 29, 2003. After several continuances trial was finally held on September 22, 2003. Appellant presented his case and rested. Appellee moved for dismissal, which was granted at trial by the court, pursuant to Rule 41(b) of the Utah Rules of Civil Procedure, with instructions to file an Affidavit of Attorneys Fees. The Order of Dismissal was submitted to opposing counsel on September 30, 2003 and signed by the court October 10, 2003. A Judgment for Attorneys Fees against Appellant was entered October 16, 2003.

Appellant filed an Objection to Findings & Order on October 14, 2003 and subsequent Objection to Findings & Objection to Notice to Submit on October 17, 2003. Appellee filed a Memorandum in Opposition to Objection to Findings on October 28, 2003. The Objection was not submitted or ruled upon by the court. Appellant filed his Notice of Appeal on November 7, 2003.

This case was randomly assigned to mediation, which was unsuccessful.

STATEMENT OF FACTS

The parties were married in Kansas on March 23, 1971, and later divorced June 25, 2001. R.6, 72. They had two children who were married adults at the time of the divorce. R.70. The divorce decree awarded substantial assets, real property and cash, to Appellee (hereinafter “Karen”) and \$3,100 per month in alimony. R.69-71. “A couple weeks after [the] divorce was final” Karen met Dane Gerkin (herinafter “Gerkin”), a tattoo artist, at Maddie’s Salon in Roosevelt and she began dating him. R.525:112:22-25; 525:114:7-12. Karen began spending the nights at Gerkin’s house in August or September 2001. R. 525:115:17-116:8. They continued their relationship for about two and a half years until at least April 2003, though Karen claimed it was no longer a sexual relationship at the time of trial. R. 525:116:17-117:1; 525:147:6-7.

In the divorce decree, Karen was awarded the marital home in Cedar View. R.75. Dane Gerkin resided in a pink house on the corner right across the street from the courthouse. R. 58. Karen’s daughter, Sammy Fillingim, believed her mother lived with Dane Gerkin. R. 525:21:15. Karen had told Sammy that if Sammy could not get a hold of Karen, she could always find her at Gerkin’s. R.525:22:6. Karen and Gerkin were seen together consistently for over a year and a half and ate together most of the time, either at Gerkin’s house or out. R.525:76:15-24; 525:28:21-29:23; 525:121:1-3; 525:120:18-22; 525:59:3-7; 525:60:3-7; 525:60:15-22; 525:61:15-18; 525:62:8; 525:62:23-24; 525:63:10-18; 525:66:4-6; 525:92:20-24; 525:93:1; 525:94:11-25; 525:101:5-102:7. During dozens of telephone calls between Karen and her daughter

Sammy, Karen stated she was at Gerkin's home. Sammy could usually reach Karen on her cell phone, not on the house phone at the home in Cedar View. R. 525:24:10-12,17-19; 525:25:4-17.

Karen's truck was seen at Gerkin's home about 50 times from April to August 2002 by one witness and about 20 out of 30 days each month for over a year from May 2002 to May 2003. R.525:50:22-51:5; 525:93:23 – 94:8. A private investigator conducting surveillance never saw the truck at Karen's home in Cedar View. R.525:71:15-21; 525:73:12.

Karen paid Gerkin's electric bill and satellite bill because she was bored with TV R. 525:35:14-20. Karen purchased groceries for Gerkin to cook for both of them at his home. R. 525:34:13-19. Gerkin could drive Karen's truck whenever he wanted, and often did so without Karen in it. R. 525:91:5-17; 525:92:2-3; 525:144:24-143:1.

Gerkin regularly took care of Karen, sometimes when Karen was ill. R.525:144:7-11; 525:143:14-18. Karen preferred to go home with Dane Gerkin. R.525:31:4-10; 525:31:23-32:23. Karen was arrested for DUI in January 2002. R. 525:50:22-51:5. After Karen lost her driver's license, Gerkin also ran her errands and took her to the doctor. R.525:144:16-23.

Gerkin was seen at the Cedar View home when Karen was out of town in Texas, though Karen denies Gerkin has a key to that home. R. 525:103:17-104:17; 525:151:4-11. Karen was seen alone at Gerkin's home on the porch, but it is unknown if Gerkin was inside at the time. R.525:95:5-7.

Karen and Gerkin had an ongoing sexual relationship for several months, if not years. Karen had bragged to Sammy about how good Dane was in bed and Sammy observed hickies on her mother. R. 525:28:9-15.

Because of these observations by friends and family of the parties, Appellant (hereinafter referred to as “Heavy”) believed that Karen was cohabitating with Dane Gerkin. At the same time Heavy had some substantial business reversals and his financial resources had decreased from the time of the divorce. Subsequently, in June 2002 he filed a Verified Petition to Modify Divorce, eleven months after the divorce. Trial was held September 22, 2003.

SUMMARY OF ARGUMENT

The trial court used the wrong standard in determining if the facts presented comprised cohabitation for purposes of terminating alimony. Cohabitation is a mixed question of law and fact, which requires evidence of common residency and sexual contact. *Sigg v. Sigg*, 905 P.2d 908, 917 (UtahApp. 1995). The case law provides that once evidence of a common residence is proven between a former spouse and another person, it is the former spouse’s burden to show that her relationship with another person is without sexual contact. *Wacker v. Wacker*, 668 P.2d 553 (Utah 1983).

The evidence presented at trial showed that Appellee and Gerkin had a long-term relationship from July 2001 to at least April of 2003. They spent most of their nights together at Gerkin’s home, as evidenced by the frequency of Appellee’s truck located outside of his home and the content of telephone calls between Appellee and her daughter. Gerkin had free access to Karen’s truck and was seen driving it with and

without Karen beside him. Karen paid expenses for Gerkin, including his electric and satellite bill and groceries. Gerkin cared for Karen and made sure she was all right, especially after Karen became ill. Gerkin was seen at Karen's home when she was out of town. Karen acknowledged there was a sexual relationship from the beginning, but claimed that it no longer existed at the time of trial.

The trial court erred in stating that cohabitation meant to "hold yourself out to the world as married." R.525:159:22-24. It concluded that, even though it called Gerkin a "gigolo", because Appellee would not want to "spend the rest of her life with somebody like" Gerkin, who was a tattoo artist with long hair, she had not cohabitated with Gerkin. R.525:159:17-160:1. The court did not "care what the cases say" about this issue, and did not care "who has the burden", but ruled based upon its subjective assumptions about the appropriateness of Appellee's evident intent. R.525:14:2-3; 525:160:8-9.

The trial court confused the elements of common law marriage and cohabitation. While there may be some overlap, cohabitation has specific factors to prove and a burden-shifting requirement not found necessary in common law marriage cases. The facts presented show that Karen and Gerkin shared a common residence and that they had a sexual relationship. Therefore, alimony should have been terminated.

ARGUMENT

Appellant seeks to have this court overturn the trial court's dismissal of his Verified Petition to Modify Decree of Divorce due to the cohabitation of Appellee with another person. Alimony terminates when the payee cohabitates with another person. §30-3-5(9) Utah Code (2003). Cohabitation "means the former spouse is residing with a

person of the opposite sex and engaging in sexual contact with that person.” *Sigg v. Sigg*, 905 P.2d 908, 917 (Utah App. 1995).²

I. THE EVIDENCE IS INSUFFICIENT FOR A MOTION TO DISMISS

When challenging a trial court’s ruling concerning a motion to dismiss or directed verdict, Appellant is first obligated to “marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict.” *Neely v. Bennett*, 448 UAR 14, 15 (Utah App. 2002).

A. Marshalling the Evidence.

The findings made by the court in this case are limited since Appellee presented no evidence during trial except upon cross-examination of Appellant’s witnesses. The Order of Dismissal provides only the following finding, as prepared by Appellee’s counsel:

The evidence, when viewed in a light most favorable to the Petitioner, shows that the Respondent and Mr. Gerken had a friendship and a dating relationship. There was no evidence to show an intent or desire by the Respondent to move in or live with Mr. Gerken. The evidence did not establish that the Respondent was cohabitating with Mr. Gerken. The facts did not meet either the residency or the sexual relationship requirements, required by the case law to establish cohabitation. R.442.

In the transcript of the trial proceedings, the court actually made a number of other observations, to wit: The court found that Karen had no intent to move in or cohabit with Gerkin “until she became dependent on him for health and other reasons.” R. 525:159:12-16. It noted that Gerkin “was more like a gigolo” and that because Gerkin

² The case of *Garcia v. Garcia* clarified that the new statute enacted in 1995 indicated that the sexual contact may be with another “person” of either sex. 460 UAR 27 (Utah App. 2002).

was “a guy that works in a beauty shop, doing tattoos with long hair, [Appellee] doesn’t want to spend the rest of her life with somebody like that.” R.525:159:17-19. The court concluded that cohabitation meant to “hold your self out to the world as being married” and surmised that, evidently because it assumed Appellee would not want to be married to someone like Gerkin, there was no cohabitation. R.525:159:24.

In marshalling the evidence in support of the verdict, the following facts were presented to the court:

1. **Karen Sursa and Dane Gerkin had a friendship and dating relationship, but evidenced no intent or desire to live together.** Not every telephone call between Karen and her daughter, Sammy, was when Karen was at Dane’s home. R.525:37:18:21. On one occasion Sammy took Gerkin to the Cedar View home for Gerkin to pick up Karen’s truck in order for him to pick up Karen from the airport. R. 525:42:7-10. Sometimes when Chad Richard, the investigator, saw Karen’s truck in front of Gerkin’s home, it was during the day. R.525:64:19-22. Mr. Richard acknowledged that Karen’s truck could have been in the garage at Cedar View, which might explain why he never saw it there. R.525:65:8-13. Mr. Richard also acknowledged he did not always have his notebook with him and therefore, the second time he saw Karen outside of Gerkin’s home, it was not recorded. Mr. Richard admitted he saw Karen with others besides Gerkin, including her daughters, her friends the Russells, and other women at a bar. R.525:64:19-22; R.525:65:3. Patsy Sursa, Appellant’s wife, admitted that sometimes she saw Karen’s mother driving

Karen's truck, but that was only during the last couple of months, prior to trial.

R.525:98:5-7. Karen Sursa testified that she and Gerkin never went to the local ballpark. R.525:121:11-14. She claimed she had no key to Gerkin's home, he did not have one for her home, and she had never been to Gerkin's home when he was not there. R.525:151:4-11. The \$100 payment she paid to the electric company for Gerkin's electric bill was actually payment for a picture he drew for her. R.525:133:20-23. The other checks she wrote and gave to him were for him to run errands for her, for groceries, the pharmacy, and gas, after she lost her license. R.525:133:12-17. She never gave Gerkin money, but bought things from him, usually drawings. R.525:122:8-15.

2. **Karen Sursa and Dane Gerkin did not have a permanent sexual relationship like husband and wife.** Karen testified she and Gerkin had a sexual relationship the first few months of their relationship but that now their relationship was platonic, though they would occasionally cuddle. R.525:166:1-8; 525:145:1-13, 20-146:7.

B. The Legal Standard

Though these facts provide some evidence for Karen's claim that she did not cohabitate with Gerkin, they do not offset the overwhelming evidence presented by Appellant. Whether someone is residing with another "is a mixed question of fact and law" and therefore very fact specific. *Pendleton v. Pendleton*, 918 P.2d 159, 160 (Utah App. 1996). Factors the court has looked at in the past include sharing living expenses, open access to each other's residence, eating together, sharing food expenses, keeping

clothing or toiletries in the other residence, using the same furniture, possession of a key to the other's residence, the presence of vehicles, and time spent at each other's residence. *See, Pendleton v. Pendleton*, 918 P.2d 159 (Utah App. 1996); *Sigg v. Sigg*, 905 P.2d 908 (Utah App. 1995); *Haddow v. Haddow*, 707 P.2d 669 (Utah 1985).

In *Haddow*, the court relied upon the boyfriend's lack of open access to appellant's home to deny cohabitation. *Haddow v. Haddow*, 707 P.2d at 673. There was no furniture moved into appellant's home and no items of personal property except toiletries and a few clothes. *Id.* The boyfriend left a van at the home, but only for storage purposes. The boyfriend had dinner with appellant five or six times a week and stayed until 10:30 or midnight, often returning in the morning for coffee, and spent the night about once a week. *Id.* at 670-671. The boyfriend kept a few clothes in appellant's home so he could shower there between work and going out for the evening with appellant and appellant sometimes laundered them. He used appellant's address but also used his parents' and his ex-wife's. The only financial contributions made were to reimburse appellant for food he ate. *Id.*

In *Sigg v. Sigg*, the parties acknowledged cohabitation had occurred but disputed at what point in time it commenced. 905 P.2d 908, 917 (Utah App. 1995). The court ruled that cohabitation began even when the parties had separate residences. It found they shared living expenses, had open access to each other's residences, ate together and shared food expenses, kept clothing in the same residence, used the same furniture and "otherwise lived as though they were husband and wife". *Id.* at 918.

The court found cohabitation in *Pendleton* because the boyfriend, who traveled extensively, spent ninety percent of his time, or four to five nights a week, with appellee when he was in town. *Pendleton v. Pendleton*, 918 P.2d 159, 160 (Utah App. 1996). He had a key and came and went three to four times daily, even when appellee was not there. *Id.* They ate almost all meals together either at appellee's home or dining out. *Id.* While the boyfriend kept some clothing at appellee's home, he also kept belongings in his car, in his apartment and at the home of his estranged wife. *Id.* There was no sharing of living expenses and the court was unmoved by the fact that none of the boyfriend's clothes were at appellee's apartment at the time of trial. *Id.*

The standard for concluding that the facts comprise cohabitation for purposes of terminating alimony should be distinguished from those sustaining a common law marriage. There is no requirement in proving cohabitation that the relevant parties "hold themselves out as married." R.525:159:24. The only relevant inquiries are if "the former spouse is residing with a person . . . and engaging in sexual contact with the person." *Sigg v. Sigg*, 905 P.2d 908, 917 (Utah App. 1995).

The court should clarify that the factors it looks at to determine if cohabitation exists are an objective, not subjective standard. While the trial court in this case found that (1) Dane Gerkin was like a "gigolo" and, (2) in its mind, a long-haired tattoo artist was not someone that Karen Sursa should "want to spend the rest of her life with", this is not necessarily a basis to deny that cohabitation existed. R.525:159:17-20; 525:160:1.

C. Insufficiency of the Evidence.

Contrary to the conclusion of the court, based upon its limited findings, the evidence presented showed that Karen and Gerkin were cohabitating “for purposes of an alimony analysis.” *Pendleton v. Pendleton*, 918 P.2d at 161. “While [the appellate courts] defer to the trial court’s factual findings unless they are shown to be clearly erroneous, [the appellate courts] review its ultimate conclusion for correctness.” *Id.* “Whether dismissal was appropriate for failure to make a prima facie case is a question of law reviewed for correctness.” *Grossen v. DeWitt*, 982 P.2d 581, 584 (Utah App. 1999). The conclusion of the trial court should have been that Karen had cohabitated with Dane Gerkin, thus terminating alimony. Many of the relevant facts were omitted from the findings of the court, as provided below.

1. Karen Sursa and Dane Gerkin had a dating relationship with no intent to live together. Contrary to this finding the evidence showed that Karen and Dane had a long term relationship in which they spent nearly all their available time together, publicly and privately, shared assets and expenses, and cared for each other, “akin to husband and wife”.

a. Long-term relationship. Karen started dating Gerkin a couple weeks after the divorce was final in July 2001. R.525:112:22-25; 525:114:7-12. Karen began spending the nights at Dane’s house in August or September 2001. R. 525:115:17-116:8. They continued their relationship for about two and a half years until at least April 2003, though Karen claimed it was no longer a sexual relationship at the time of trial. R. 525:116:17-117:1; 525:147:6-7.

- b. Majority of time together at Gerkin's home.** Karen's daughter, Sammy Fillingim, testified that she believed her mother lived with Dane Gerkin. R. 525:21:15. Karen had told Sammy that if Sammy could not get a hold of Karen, she could always find her at Dane's. R.525:22:6. In fact when Sammy could not find her mother, she located her at Dane Gerkin's home. R. 525:22:2-7. Sammy had picked up her mother from Dane's home before. R. 525:44:20-24.
- c. They shared Karen's truck.** Sammy saw her mother's truck at Dane's house "about 50 times" in the five months between April and August 2002, and about 10-15 times before Karen was arrested for DUI in January 2002 and lost her license. R. 525:50:22-51:5. Karen's truck was seen parked outside of Dane Gerkin's home about 20 out of 30 days each month for over a year from May 2002 through May 2003. R.525:93:23 to 94:8. From February to March 2002 a private investigator never saw anyone or Karen's truck at the house in Cedar View. R.525:71:15-21; 525:73:12.
- d. Telephone Contact Indicated Karen Usually at Gerkins'.** Whenever Sammy would call her mother between April and August 2002, she would try calling at the Cedar View house with no answer and then would reach her on her cell phone. R.525:24:10-12, 17-19; 525:25:4-17. Sammy called Karen about 20-30 times during that time period and Karen also called Sammy about 20-30 times during that time period. R. 525:25:23-25;

525:18-19. During these phone calls Karen would tell Sammy that she, Karen, was at Dane Gerkin's home. R. 525:27:9-23.

- e. **They Shared Expenses.** Karen had told Sammy Karen had paid Dane's electric bill because she felt sorry for him and that she had paid Dane's satellite TV bill because she was bored with TV and wanted to watch satellite. R. 525:35:14-20. Karen purchased groceries because Dane cooked for her at his home. R. 525:34:13-19. Karen and Dane were seen going into Dane's home carrying what appeared to be groceries. R.525:76:15-24.
- f. **Gerkin Cared for Karen.** On one occasion, when Karen was taken to the hospital after an overdose of pain pills; though family and friends were present, Karen preferred to go home with Dane Gerkin. R.525:31:4-10; 525:31:23-32:23. Dane frequently and regularly took care of Karen, stayed with her and made sure Karen was all right, sometimes when Karen was ill. R.525:144:7-11; 525:143:14-18. After Karen lost her driver's license he also ran her errands and took her to the doctor. R.525:144:16-23.
- g. **They Appeared Publicly Together.** Karen and Dane attended family social gatherings together and were publicly affectionate. R. 525:28:21-29:23; 525:121:1-3. They also ate out together regularly once or twice a week. R. 525:120:18-22. Other witnesses indicated Karen and Dane were seen around town or driving together in Karen's truck dozens of times. R. 525:59:3-7; 525:60:3-7; 525:60:15-22; 525:61:15-18; 525:62:8; 525:62:23-

24; 525:63:10-18; 525:66:4-6; 525:92:20-24; 525:93:1; 525:94:11-25;
525:101:5-102:7. Karen and Dane were also seen leaving the house at
Cedar View with Dane driving Karen's truck. R.525:102:11-22.

- h. **They Had Access to Home and Assets.** Dane was seen at the Cedar View home when Karen was out of town in Texas, though Karen denies Dane has a key to that home. R. 525:103:17-104:17; 525:151:4-11. Dane drove Karen's truck often without Karen as well, whenever he wanted. R.525:91:5-17; 525:92:2-3; 525:144:24-143:1.

2. **Karen Sursa and Dane Gerkin did not have a sexual relationship that qualified as the requisite factor in cohabitation for purposes of terminating alimony.** Contrary to this conclusion by the trial court, Karen and Gerkin dated for about two and a half years, from right after the divorce until at least April 2003. R. 525:116:17-117:1. Karen bragged to her daughter Sammy about how good Dane was in bed and Sammy observed hickies on Karen's neck. R.525:28:9-15. Karen told Sammy the hickies were also on her breasts. R. 525:28:13-15. Though Karen claimed it was no longer a sexual relationship at the time of trial, even if true, this does not negate the fact that they had had an ongoing sexual relationship. R.525:147:6-7. If, in fact, the sexual part of the relationship waned because of Karen's health, Gerkin and Karen continued to "cuddle" and care for one another. Such a relationship is exactly like that of a conjugal relationship, which waxes and wanes as circumstances allow.

In spite of the limited findings stated by the court in its Order of Dismissal, the omitted facts provided above show sufficient evidence of cohabitation for purposes of terminating alimony.

II. APPELLANT HAS THE BURDEN TO PROVE COMMON RESIDENCE

The Appellant has the burden to prove that the former spouse is residing with another person. Once this is established, the alimony obligation is terminated unless the former spouse receiving the alimony can show that the relationship is without any sexual contact. *Wacker v. Wacker*, 668 P.2d 553 (Utah 1983). This allocation of burden was clearly stated in the statute enacted prior to 1995. Currently while both residency and sexual contact are required to terminate alimony, the burden of proof cited in *Wacker* has not been overturned, in spite of a change in the language of the statute. *Pendleton v. Pendleton*, 918 P.2d 159 (Utah App. 1996) n.1.³ This burden allocation is reasonable unless we want to return to the days of undisclosed video cameras and surreptitiously removing sheets for evidentiary purposes. Even in *Haddow*, the court held under the old statute “that there are two key elements to be considered in determining whether appellant was cohabiting . . . common residency and sexual contact evidencing a conjugal association.” *Haddow v. Haddow*, 707 P.2d 669, 672 (Utah 1985). However, the burden

³ The earlier statute was §30-3-5(6), which provided: “Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that that relationship or association is without any sexual contact, payment of alimony shall resume.”

In 1995 the statute was amended and changed to its current form in 30-3-5(9) to provide: “Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.”

is separate and apart from the elements that must be shown. “Once residence is established, alimony obligations are terminated unless the recipient can show that the relationship is ‘without sexual contact.’” *Id.*, citing *Wacker v. Wacker*, 668 P.2d 533 (Utah 1983).

Once Appellant provided the court evidence of a common residence between Appellee and another individual, it should be Appellee’s burden to disprove the presumption of an ongoing sexual relationship “akin to that existing between husband and wife.” *Haddow v. Haddow*, 707 P.2d 669, 672 (Utah App. 1985). Appellee provided no evidence that her relationship with Dane Gerkin was “without sexual contact.” *Wacker v. Wacker*, 668 P.2d 553 (Utah 1983). In fact, she acknowledged there was a sexual relationship, but claimed it was not “akin to husband and wife”. Whether Appellant or Appellee had the burden regarding sexual contact, Appellee acknowledged sexual contact for a period of time and such contact was borne out by the evidence presented.

III. APPELLEE SHARED A COMMON RESIDENCE WITH DANE GERKIN

Common residency is the “sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of time.” *Pendleton v. Pendleton*, 918 P.2d 553 (Utah 1983). While the court has found common residency when the parties each own a separate residence, there should be indications a party can come and go, while a visitor coincides his visits with the presence of the person he is visiting. *Id.* at 160 (citing *Haddow v. Haddow*, 707 P.2d 669, 673 (Utah 1985)). The

sharing of living expenses, while not a requisite element of residency, may be relevant. *Pendleton v. Pendleton*, 918 P.2d at 160-161.

The weight of the evidence presented to the court shows that Karen Sursa and Dane Gerkin shared a residence for a substantial period of time. Karen stayed at Dane Gerkins home the majority of the time from August 2001 through May 2003, and relied upon Dane to take care of her, cook for her, run errands for her and otherwise “act akin to husband and wife.” They ate their meals together, they shared a vehicle, and Karen paid some of Dane’s expenses to make it more convenient for her to stay at his home. Karen’s belongings, including blankets and clothes, were seen at Dane’s home. Dane was also seen at Karen’s home when she was out of town, indicating open access.

IV. CONJUGAL SEXUAL CONTACT EXISTED

Appellee acknowledged an ongoing sexual relationship with Dane Gerkin. The only disputed fact is when or if that sexual relationship terminated. The legal question is whether the sexual contact involved was “relatively permanent”. *Haddow v. Haddow*, 707 P.2d 669, 672 (Utah App. 1985). The court found a “relatively permanent sexual relationship” where the parties had dated exclusively for 14 months and Mr. Hudson spent at least one night a week together. *Id.* Here the exclusive relationship admittedly went on for at least two and a half years. The evidence was that the parties were together most of the time for at least over a year.

Appellee presented no evidence there was no ongoing sexual relationship other than her self-serving testimony. There was no evidence Karen dated anyone other than Gerkin or that the exclusivity of their arrangement had changed. Karen admitted sexual

relations with Gerkin from either July/August or December 2001 extending at least several months. R.525:114:17-21. The Petition to Modify was filed in June 2002, less than a year after the divorce. The requisite permanency of the ongoing sexual relationship was clearly proven for that time period, primarily by Karen's own testimony.

V. USE OF THE APPROPRIATE STANDARD SHOWS COHABITATION

The court used the wrong standard by concluding that cohabitation meant to "hold yourself out to the world as being married". R.525:159:24. This is the standard for a common law marriage, not cohabitation for purposes of terminating alimony. §30-1-4.5(1)(e) Utah Code (2003). The court actually found that Mr. Gerkin "was more like a gigolo" and that because Mr. Gerkin was "a guy that works in a beauty shop, doing tattoos with long hair, [s]he doesn't want to spend the rest of her life with somebody like that." R.525:159:17-19.

When Appellant's counsel attempted to reference the relevant cases, the court stated that it did not "care what the cases say. That's the way I see it." R.525:160:8-9. The court also stated it did not "care who has the burden while you're presenting your case". R.525:14:2-3.

Whether it would make sense for Appellee to "want to spend the rest of her life with somebody like" Mr. Gerkin, is not indicative of whether or not Appellee was cohabitating with him. They shared a residence, vehicle, some expenses, meals and had an ongoing relationship in which Mr. Gerkin cared for Appellee as a husband cares for a wife. The court even recognized that Appellee was "dependent on him [Gerkin] for health or other reasons." R.525:259:16. That dependency, combined with the other

evidence provided to the court was sufficient to show the common residency requisite for cohabitation.

CONCLUSION

Based upon the foregoing facts and argument, it is clear that Appellant has made a prima facie case of cohabitation and therefore, granting the Motion to Dismiss was error. Appellant move this court to reverse the trial court and conclude that Appellee, Karen Sursa, cohabitated with Dane Gerkin. In the alternative, the court should deny Appellee's Motion to Dismiss and remand the case to the trial court for the completion of the trial.

Respectfully submitted this 20th day of October 2004.

SCRIBNER & McCANDLESS, P.C.

BY:



LORIE D. FOWLKE

DONALD E. McCANDLESS

Attorneys for Appellant

MAILING CERTIFICATE

I hereby certify that on this 21, day of October 2004, I mailed, postage prepaid, two accurate copies of the foregoing Appellant's Brief to:

Clark B. Allred
Allred McClellan & Trotter, P.C.
121 West Main Street
Vernal Utah 84078
Telephone: 435 789 4908



LORIE D. FOWLKE

ADDENDA

Table of Addenda

- | | | |
|-----|--|--------------------|
| 1. | Decree of Divorce | July 25, 2001 |
| 2. | Petition to Modify | June 10, 2002 |
| 3. | Order of Dismissal | October 10, 2003 |
| 4. | Objection to Findings and Order | October 14, 2003 |
| 5. | Objection to Findings & Objection to Notice to Submit | October 17, 2003 |
| 6. | Memorandum in Opposition to Objection to Findings | October 28, 2003 |
| 7. | Appellant's Trial Brief | June 13, 2003 |
| 8. | Appellant's Updated Trial Brief | September 16, 2003 |
| 9. | Appellee's Trial Memorandum | September 10, 2003 |
| 10. | Section 30-1-4.5(1) Utah Code (2003) | |
| 11. | Section 30-3-3(1) Utah Code (2003) | |
| 12. | Sections 30-3-5(6) Utah Code (1994); 30-3-5(9) Utah Code (2003) – See n. p.13. | |
| 13. | Rule 41(b) Utah Rules of Civil Procedure (2003) | |
| 14. | Rule 52(a). Utah Rules of Civil Procedure (2003) | |

ADDENDUM 1

JOHN C BEASLIN, P.C., #0258
Attorney for Plaintiff
185 North Vernal Avenue, Suite 1
Vernal, Utah 84078
Telephone: (435) 789-1201

FILED
JUL 10 2001
CLERK OF DISTRICT COURT
DUCHESE COUNTY, UTAH

84/

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY
ROOSEVELT DIVISION, STATE OF UTAH

KENNETH D. SURSA,)	
)	
Plaintiff,	)	DECREE OF DIVORCE
)	
Vs.)	
)	
KAREN J. SURSA,	)	Civil No. 004000114 DA
)	
Defendant.	)	Judge: John R. Anderson
)	

THIS MATTER came on for hearing before the above-entitled court on the 16th day of July 2001 before the Honorable John R. Anderson. The Plaintiff was present in court and represented by his counsel, John C. Beaslin and Kenneth G. Anderton. The Defendant was present in court and was represented by her counsel, Clark A. McClellan. Three (3) months have elapsed from the date the Complaint of the Plaintiff was filed. The Plaintiff testified with reference to the jurisdictional grounds and the parties indicated to the court that they had reached a settlement in this matter and counsel for the Plaintiff dictated the stipulation of the parties. Based upon the stipulation and the court having entered its Findings of Fact and Conclusions of Law in this matter it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The Plaintiff is hereby awarded a Decree of Divorce from the Defendant that shall become permanent and final upon entry into the computer by the Clerk of the Court.

2. The parties hereby stipulate and agree as follows:

The following-described property is hereby awarded to the Defendant, Karen Sursa:

A. 19.77 acres of real property located in Section 30, Township 1 South Range 1 West, USM, together with the improvements thereon. Defendant, however, is awarded the property subject to her paying the remaining balance due and owing on the mortgage to Zions Bank in Roosevelt, Utah, and holding Plaintiff harmless there from. The approximate mortgage balance is the sum of SEVENTY-FOUR THOUSAND FIVE HUNDRED DOLLARS (\$74,500.00). The Defendant is ordered to make all future payments on said property commencing August 10, 2001. The Defendant is ordered to be responsible for all taxes and insurance on said property for the year 2001 and all subsequent years.

B. A Trust Deed Note and Contract balance with Doug Fillingham and Sammi M. Fillingham with an approximate balance of FORTY THOUSAND DOLLARS (\$40,000.00). Said note is dated November 1, 1996. Plaintiff will assign his interest in said contract and note to the Defendant.

C. A riding mower located on the real property described in paragraph 5A. above is hereby awarded to the Defendant.

D. An account with Merrell Lynch in Salt Lake City, Utah, account #421-B1M16(401k) in the approximate sum of FORTY-SIX THOUSAND FIVE HUNDRED

TWENTY-FIVE DOLLARS (\$46,525.00). Plaintiff will assign his interest in said account to the Defendant.

E. An account with Merrell Lynch in Salt Lake City, Utah, account #421-82M32(SEP account) in the approximate sum of SIXTY-FIVE THOUSAND TWO HUNDRED DOLLARS (\$65,200.00). Plaintiff will assign his interest in said account to the Defendant.

F. Household items of furniture and furnishings located in the home set forth above are hereby awarded to the Defendant subject, however, to the Plaintiff receiving his personal property.

G. The additional sum of ONE HUNDRED FORTY-EIGHT THOUSAND DOLLARS (\$148,000.00) cash. Plaintiff has paid to the Defendant the sum of SEVENTY-FOUR THOUSAND DOLLARS (\$74,000.00), receipt of which is hereby acknowledged, on July 16, 2001. The remaining balance of SEVENTY-FOUR THOUSAND DOLLARS (\$74,000.00) will be payable commencing with a payment of at least FIVE THOUSAND DOLLARS (\$5,000.00) on August 16, 2001 with a like amount on the sixteenth (16th) day of each and every month thereafter until February 16, 2002. Interest on said amount will be at eight percent (8%) per annum commencing from July 16, 2001 until paid in full. The entire amount is to be paid in full on or before February 16, 2002. If there remains any unpaid principal amount and interest as of February 16, 2002, then the Defendant will be entitled to a judgment in that amount forthwith without further notice to the Plaintiff.

H. Each of the parties is hereby ordered to pay their own attorney fees and costs of court incurred in this matter. The Defendant is hereby ordered to pay the appraisal fees to

Dale Cameron. The Defendant is hereby ordered to pay for any debts or obligations that were to be paid on her Order to Show Cause, which was not heard by the court.

I. The Plaintiff, commencing on August 1, 2001, and each month thereafter is ordered to pay to the Defendant the sum of THREE THOUSAND ONE HUNDRED DOLLARS (\$3,100.00) per month. A separate account will be established at the bank for an automatic deposit to Defendant's account each month. Alimony will continue until such time as it is either modified or terminated by the court or upon the remarriage or co-habitation of the Defendant.

6. The Plaintiff, Kenneth Sursa, is hereby awarded the following property:

A. All of the parties' interest in Kappen Enterprises, Inc., a Utah Corporation, dba Tiger Tanks. The Defendant will execute and surrender any stock certificates that might be in her name. Right, title and interest to the said stock are hereby awarded to the Plaintiff and the Defendant will have no interest in the business.

B. A fifth-wheel trailer

C. Two (2) horses

D. A horse trailer

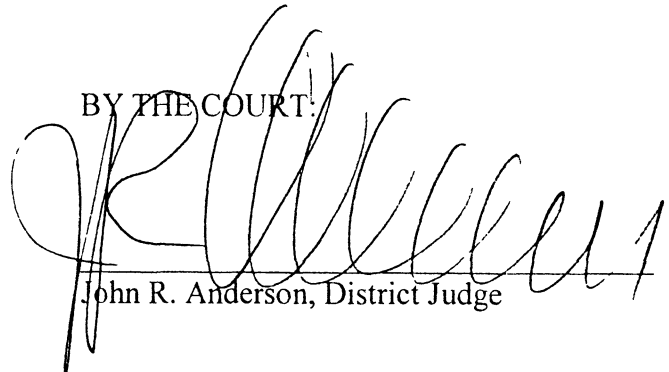
E. All personal property belonging to the Plaintiff as set forth above that is in the home awarded to the Defendant is hereby awarded to the Plaintiff along with all items of household furniture and furnishings in the apartment in Roosevelt, Utah belonging to the Plaintiff.

7. Both parties are hereby ordered to sign all documents, including assignments, to transfer assets to each other pursuant to the stipulation.

8. The parties have agreed to a mutual restraining order and it is so ordered by the court.

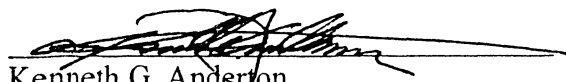
DATED the 25 day of July 2001.

BY THE COURT:

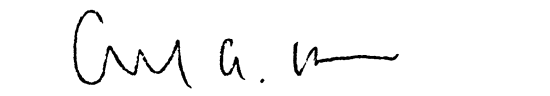


John R. Anderson, District Judge

APPROVED BY:



Kenneth G. Anderson
Attorney for Plaintiff



Clark A. McClellan
Attorney for Defendant

ADDENDUM 2

The Law Offices of
LANCE DEAN - #6206
134 West Main Street, Suite 202
Vernal, Ut 84078
Telephone: (435) 789-4900
Fax.: (435) 789-4999

FILED
JUN 18 2002
DISTRICT COURT
JUDICIAL DISTRICT
CLERK

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY
STATE OF UTAH

KENNETH D. SURSA,	:	VERIFIED
Petitioner,	:	PETITION TO MODIFY
	:	
	:	
	:	
	:	
	:	No.: 004000114 DA
KAREN J. SURSA,	:	
Respondent.	:	JUDGE: JOHN R. ANDERSON
	:	

COMES NOW the Petitioner, Kenneth D. Sursa, by and through his attorney, Lance Dean, and petitions the Court for a Modification of the Alimony provisions of the Divorce Decree signed by the Court on July 25, 2001, by the Honorable John R. Anderson. As grounds, the Petitioner alleges as follows:

1. By a stipulated Decree of Divorce on or about July 25, 2001, the Petitioner was divorced from Karen J. Sursa, the Respondent.
2. Paragraph 2I of the Divorce Decree specifically states

The Petitioner, commencing on August 1, 2001 and each month there after is ordered to pay to the Respondent THREE THOUSAND ONE HUNDRED DOLLARS (\$3,100.00) per month. A separate account will be established at the bank for an automatic deposit to Respondent's account

each month. Alimony will continue until such time as it is either modified or terminated by the Court or upon the marriage or the cohabitation of the Respondent.

3. Since the Divorce Decree was entered by the Court a substantial and material change of circumstances has occurred requiring a modification of the alimony provision of that decree.
4. The Petitioner pleads two alternative grounds justifying modification of the alimony provision as follows:
 - (a) Based upon nearly two months of surveillance of the Respondent, on information and belief the Respondent is having sexual relations with another man namely Dane Gerken, and is cohabitating, which cohabitation justifies a termination of the alimony provisions of the divorce decree. In the alternative,
 - (b) The Petitioner has had a financial reversal making it impossible for him to pay the court ordered amount of \$3,100.00 per month for alimony, justifying a reduction in the monthly amount he should be required to pay.
5. It is just and appropriate for the court to modify the current alimony provisions now in effect between the parties.
6. The Petitioner has had to employ the services of an attorney for this modification and requests an award of the attorney's fees for the necessity of bringing this action.

WHEREFORE, Petitioner prays that the court:

1. Terminate the Petitioner's requirement to pay alimony, or in the alternative to modify the monthly amount of alimony that Petitioner pays;
2. To for an award of attorney's fees for the necessity of bringing this action;
3. Any and all other relieve the court deems just and proper.

DATED this ____ day of _____, 2002.



Lance Dean
Attorney for Petitioner

VERIFICATION

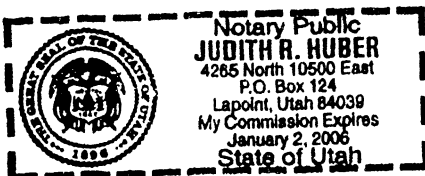
STATE OF UTAH)
 :SS.
COUNTY OF UINTAH)

KENNETH D. SURSA, having been duly sworn on oath deposes and says that she is the Petitioner and that she has read the foregoing *VERIFIED PETITION TO MODIFY*, knows the contents thereof and believes the same to be true.

Kenneth Sursa

Petitioner

SUBSCRIBED and SWORN to before me this 30 day of May, 2002.



Judith R. Huber
NOTARY PUBLIC FOR UTAH

ADDENDUM 3

FILED
DISTRICT COURT
DUCHESNE COUNTY, UTAH

OCT 10 2003

JOANNE McKEE, CLERK
BY AKS DEPUTY

CLARK B ALLRED - 0055
CLARK A. McCLELLAN - 6113
McKEACHNIE, ALLRED, McCLELLAN & TROTTER, P.C.
Attorneys for Respondent
72 North 300 East (123-14)
Roosevelt, Utah 84066
Telephone: (435) 722-3928

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY
STATE OF UTAH, ROOSEVELT DEPARTMENT

KENNETH D. SURSA,)	
)	
Petitioner,	)	ORDER OF
	)	DISMISSAL
vs.)	
)	
KAREN J. SURSA,	)	Civil No. 004000114 DA
)	
Respondent.	)	Judge John R. Anderson

The above captioned matter came before the Court for trial on September 22, 2003. The Petitioner, Kenneth E. Sursa, was present with his attorney Bryan Sidwell. The Respondent, Karen J. Sursa, was present with her attorney Clark B Allred. The Petitioner called several witnesses and then rested. The Respondent moved for a directed verdict and requested that the Petitioner's petition be dismissed. The Court having heard the evidence and argument from counsel and having reviewed the case law and other information provided granted the motion and based thereon makes and enters the following order.

1. The issue before the Court was whether the Court should terminate the Petitioner's obligation to pay alimony on the claim that the Respondent was cohabitating with Dane Gerken.

2. Pursuant to Utah Code Ann. §30-3-5(10), the Petitioner who is seeking to terminate alimony, had the burden to establish that the Respondent, Karen J. Sursa, was cohabitating with Dane Gerken.

3. The evidence, when viewed in a light most favorable to the Petitioner, shows that the Respondent and Mr. Gerken had a friendship and a dating relationship. There was no evidence to show an intent or desire by the Respondent to move in or live with Mr. Gerken. The evidence did not establish that the Respondent was cohabitating with Mr. Gerken. The facts did not meet either the residency or the sexual relationship requirements, required by the case law to establish cohabitation.

4. The Petitioner dismissed his alternative claim to reduce alimony based on a change of financial circumstances prior to the trial.

5. Because the Court granted a directed verdict evidence was not received on the issue of reimbursement of legal fees. The Respondent had submitted to the Court an affidavit regarding the attorney fees and costs she has incurred thru September 15, 2003.

The Court Therefore Orders as follows:

1. The Petitioner's Petition to Modify is dismissed.

2. The Respondent is to file with the court documentation and affidavits regarding the income, expenses and ability to pay legal fees and costs and supplement the affidavit regarding the fees she incurred. If the Petitioner disagrees with the information provided or desires to submit additional information on the issue of whether the court should award fees and if so how much he may file that additional information and an objection within ten days of the date Respondent furnishes her information. If no objection is received, the Court, based on the information provided will determine that issue. If there is an objection the Court will then schedule a hearing on the attorney's fee issue.

DATED this 10th day of Oct, 2003.

BY THE COURT

By: 


John R. Anderson
District Court Judge

MAILING CERTIFICATE

I, Cheree Brotherson, am employed by the office of McKEACHNIE, ALLRED, McCLELLAN & TROTTER, P. C. attorneys for Respondent herein and hereby certify that I served the attached ORDER OF DISMISSAL on Petitioner by placing a true and correct copy thereon in an envelope addressed to:

BRYAN SEDWELL
ATTORNEY AT LAW
134 WEST MAIN, SUITE 202
VERNAL, UTAH 84078

and deposited the same, sealed, with first class postage prepaid thereon, in the United States mail at Roosevelt, Utah, on the 30th day of September, 2003.


CHERE E BROTHERSON

ADDENDUM 4

BRYAN SIDWELL #7625
134 West Main Street, Suite 202
Vernal UT 84078
Telephone: (435) 789-4900
Fax: (435) 789-4999

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY ⁷⁶²⁵

STATE OF UTAH

KENNETH D. SURSA,

*

Petitioner,

*

vs.

*

**OBJECTION TO FINDINGS AND
ORDER**

KAREN J. SURSA,

*

Civil No. 004000114

Respondent.

*

Judge JOHN R. ANDERSON

COMES NOW, Kenneth D. Sursa, and objects to the Findings and Order and requests additional time to review the tape of the hearing held on September 22, 2003

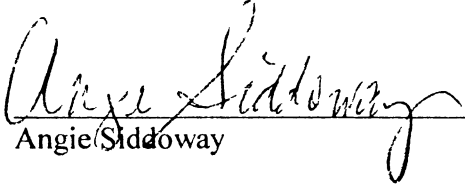
DATED this 9th day of October, 2003.

Bryan Sidwell iAB
Bryan Sidwell
Counsel for Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this 10th day of October, 2003 a true and correct copy of the foregoing OBJECTION TO FINDINGS AND ORDER was mailed, postage prepaid addressed as follows:

Clark Allred
72 North 300 East (123-4)
Roosevelt, UT. 84066


Angie Siddoway

ADDENDUM 5

BRYAN SIDWELL(#7625)
Attorney for Petitioner
134 West Main Street, Suite 202
Vernal, Utah 84078
(435) 789-4900

FILED
DISTRICT COURT
DUCHESNE COUNTY, UTAH

OCT 17 2003

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY

JOANNE MCKEE, CLERK
BY DEPUTY

STATE OF UTAH

KENNETH D. SURSA,	(	OBJECTION TO FINDINGS AND
	(	OBJECTION TO NOTICE TO SUBMIT
	(	FOR DECISION
	(
Petitioner,	(
	(
v.	(	Case No. 00400014
	(
KAREN J. SURSA,	(
	(
	(	Judge Anderson
Respondent.	(

COMES NOW petitioner and objects to the following.

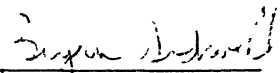
1. The petitioner objects to the findings which state that Karen Sursa and Dane Gerkin had a dating relationship and that they were just friends. The court stated that they had a dating relationship, but did not state they were friends. Instead the court stated that Dane Gerkin was more like a gigolo.
2. In addition, the findings need to include that the court found that the parties had no intention of staying together in a permanent relationship as husband and wife.
3. It should be noted that the petitioner believes that the court used the wrong standard in determining who had the burden of proving sexual contact.
4. It should be noted that the petitioner believes that the court used the wrong standard in

determining whether Karen Sursa was residing with another person.. The petitioner believes the court used a standard that the parties residing together must have an intention of permanently residing together as husband and wife.

5. Petitioner objects to the Notice to submit for decision, because the petitioner objected in a timely manner. Rule 4-504 of Rules of Judicial Administration states that an objection should be made within five days. Rule 6, of the Utah Rules of Civil procedure allows three additional days for mailing. In addition, Rule 6 states that when the time period is less than 11 days Saturdays, Sundays and holidays should not be counted. Therefore, the petitioner objected in a timely manner and requested additional time.

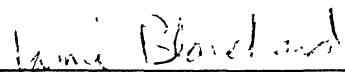
6. The petitioner should be awarded attorney fees for having to answer this matter.

DATED this 14th day of October, 2003.


Bryan Sidwell
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was sent to Clark A. Allred at 121 West Main Street, Vernal, Utah 84078, by hand delivering ~~October~~ 15, 2003.


Jamie Blanchard

ADDENDUM 6

FILED
DISTRICT COURT
DUCHESNE COUNTY, UTAH

OCT 28 2003

JOANNE MCKEE, CLERK
BY fw DEPUTY

CLARK B ALLRED - 0055
CLARK A. McCLELLAN - 6113
McKEACHNIE, ALLRED, McCLELLAN & TROTTER, P.C.
Attorneys for Respondent
72 North 300 East (123-14)
Roosevelt, Utah 84066
Telephone: (435) 722-3928

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY

STATE OF UTAH, ROOSEVELT DEPARTMENT

KENNETH D. SURSA,)	
	)	MEMORANDUM IN OPPOSITION
Petitioner,	)	TO OBJECTION TO FINDINGS AND
	)	OBJECTION TO NOTICE TO SUBMIT
vs.	)	FOR DECISION
)	
KAREN J. SURSA,	)	Civil No. 004000114 DA
)	
Respondent.	)	Judge John R. Anderson

Respondent submits the following memorandum in opposition to the Petitioner's Objection To Findings and Objection to Notice to Submit For Decision.

1. The Court has signed and entered it's Order of Dismissal. The findings set forth therein are accurate and consistent with the Court's ruling.

2. The time period in which the Petitioner had to make appropriate objection passed and the Court has properly signed the Order.

DATED this ²⁷~~29~~th day of October, 2003.

McKEACHNIE, ALLRED,
McCLELLAN & TROTTER, P.C.
Attorneys for Respondent

By: _____

Clark B Allred

MAILING CERTIFICATE

I, Cheree Brotherson, am employed by the office of McKEACHNIE, ALLRED, McCLELLAN & TROTTER, P. C. attorneys for Respondent herein and hereby certify that I served the attached MEMORANDUM IN OPPOSITION TO OBJECTION TO FINDINGS AND OBJECTION TO NOTICE TO SUBMIT FOR DECISION on Petitioner by placing a true and correct copy thereon in an envelope addressed to:

BRYAN SEDWELL
ATTORNEY AT LAW
134 WEST MAIN, SUITE 202
VERNAL, UTAH 84078

and deposited the same, sealed, with first class postage prepaid thereon, in the United States mail at Roosevelt, Utah, on the 28th day of October, 2003.



CHERE BROTHERSON

ADDENDUM 7

Bryan Sidwell #7625
Attorney for Petitioner
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FILED
DISTRICT COURT
DUCHESNE COUNTY, UTAH
JUN 13 2003
BY JOANNE McKEE, CLERK
DEPUTY

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR
UINTAH COUNTY, STATE OF UTAH

KENNETH D. SURSA	)	TRIAL BRIEF
Petitioner,)	
)	
)	
vs.	)	Case No. 004000114
)	
KAREN J. SURSA	)	Judge A. Lynn Payne
Respondent.	)	<i>7/10/03</i>

COMES NOW, the petitioner and submits the following trial brief:

ISSUE

Should alimony in the above entitled matter be terminated, because of cohabitation on the part of the respondent?

LEGAL BACKGROUND

Prior to 1995 the Utah statute governing termination of alimony based on cohabitation stated that alimony may be terminated if the recipient was "residing with a person of the opposite sex". After 1995 the statute was changed and states that alimony terminates if the recipient is cohabitating with another person.

Although the language of the statute has changed the Courts use the same standard of

review for interpreting the language of the statute.

The version of the statute in force at the time of this action uses the term “residing but makes clear that both residency and sexual contact are required and required to terminate alimony. Utah Code Ann. § 20-3-5(6)(1989). The divorce decree refers to “Cohabitation” as a basis for terminating alimony, as does the most recent version of the statute. Utah Code Ann. § 30-3-5(9) (Supp. 1995). The semantic distinction is inconsequential. Cohabitation is comprised of the same two elements: (1) common residency and (2) sexual contact evidencing a conjugal association. Pendleton v. Pendleton, 918 P.2d 159 (Utah 1996) citing Haddow v. Haddow, 707 P.2d 669, 672 (Utah 1985).

STANDARD OF REVIEW

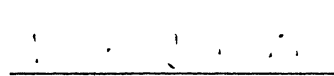
The petitioner has the burden to establish that the former spouse is “residing” with a person of the opposite sex. Once residence is established, then the burden shifts and alimony obligations are terminated unless the recipient can show that the relationship is “without sexual contact”. Haddow v. Haddow, 707 P.2d 669 (Utah 1985) citing Wacker v. Wacker, 668 P.2d 533 (Utah 1983). See also Hill v. Hill, 968 P.2d 866 (Utah 1998) and Pendleton v. Pendleton, 918 P.2d 159 (Utah 1996).

In Sigg v. Sigg, 905 P.2d 908 (1995), the court found that the people in question resided together although they had separate condominiums, because they had open access to each other’s condominiums. Id.

The primary focus of the court in determining residency is whether the person travels freely in and out of the home. Two factors used to determine free access to the home are 1) whether the person has a key to the home and 2) whether the person spends time there when the other person is not there. Pendleton v. Pendleton, 918 P.2d 159 (Utah 1996). Other factors the court may use in determining residency are: where did they eat their meals and are clothing kept at the house. Id.

“The person seeking to avoid his or her alimony obligation because his or her former spouse is residing with a member of the opposite sex has the initial burden of proof to show that the former spouse is residing with a person of the opposite sex; once this is established, the alimony obligation is terminated unless the former spouse receiving the alimony can show that the relationship is without any sexual contact.” Katherine D. Black and Stephen T. Black, Family Law in Utah, second edition, p. 153 (1997).

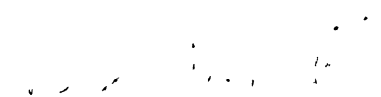
DATED this 12th day of June, 2003.



Bryan Sidwell
Attorney for Respondent

CERTIFICATE SERVICE

I hereby certify that a true and correct copy of the trial brief was sent to the office of Clark Allred at 121 West Main Street, Vernal, Utah 84078, by placing it in the U.S. mail, postage prepaid, on July 12, 2003.



Bryan Sidwell

ADDENDUM 8

Bryan Sidwell
Attorney at Law
134 West Main Street, Suite 202
Vernal, Utah 84078
(435) 789-4900

September 16, 2003

Honorable John R. Anderson

RE: Updated Trial Brief Sursa v. Sursa Case No. 004000114 DA

Dear Judge Anderson:

The following is an updated Trial Brief. The original trial brief was filed prior to the first scheduled trial date several months ago. Also enclosed is a courtesy copy of relevant case law.

One of the legal issues that will be present for the courts determination has to do with the burden of proof. The petitioner believes that he has the burden to show that the respondent Karen Sursa is residing with another person, then the burden shifts to the respondent to show that she did not have sexual relations.

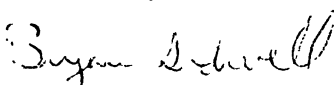
Relevant case law is Haddow v. Haddow, 707 P. 2d 669, (Utah 1985). "Once residence is established, alimony obligations are terminated unless the recipient can show that the relationship is "without sexual contact". Id. at 672. The statute that Haddow was interpreted under was changed in 1995. In Pendleton v. Pendleton, 918 P.2d 159 (Utah 1996), a case that was decided after the language change in the statute, the court stated. In Pendleton, the court compares the statutory language under the old statute and the language under the new statute and states, "the semantic distinction is inconsequential". Id. at 160. In Pendleton, the court reaffirmed the the Haddow standard by stating, "any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is residing with a person of the opposite sex. However, if it is further established by the person receiving alimony that thet relationship or association is without any sexual contact, payment of alimony shall resume." (Underline added). Id. at 160. In Hill v. Hill, 968 P. 2d 866 (App Ct. 1998), the court stated, "accordingly, we conclude the trial court correctly followed the supreme court's direction by applying the Haddow definition of cohabitation in this case. For further discussion of this issue I have enclosed three pages from a treatise on familly law. Katherine D. Black and Stephen T. Black, Family Law in Utah second edition. 1997.

The court must also determine whether Karen Sursa has been residing with Dane Gerken and whether they have had sexual relations. In determining with Karen Sursa is residing the court should consider the following:

1. Portable possessions in the other home.
2. Sharing of living expenses
 paying mortgage, utilities etc.
3. Eating together and shared food expenses
4. Duration of staying with other person
5. Whether they have a key
6. Whether they are free to come and go
7. Share vehicles

The cases that will aid the court regarding residence are Sigg v. Sigg, 905 P.2d 908 (1995); Pendleton v. Pendleton, 918 P.2d 159 (App. Ct. 1996) and Haddow v. Haddow, 707 P.2d 669 (1985). It should be noted that in Sigg v. Sigg, the court found that the parties were cohabitating even though they each had there own condominium.

Yours Truly,



Bryan Sidwell
Attorney for Petitioner

cc: Clark Allred attorney for Respondent sent on September 16, 2003.

ADDENDUM 9

CLARK B ALLRED - 0055
CLARK A. McCLELLAN - 6113
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FILED
DISTRICT COURT
COUNTY UTAH

10

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY
STATE OF UTAH, ROOSEVELT DEPARTMENT

KENNETH D. SURSA,)	
	)	TRIAL MEMORANDUM
Petitioner,)	
)	
vs.)	
)	
KAREN J. SURSA,	)	Civil No. 004000114 DA
)	
Respondent.	)	Judge John R. Anderson

Respondent Karen Sursa submits the following Memorandum in support of her position at trial on the Petitioner's Petition to Amend the Decree.

Relevant Facts

1. The parties were divorced from each other pursuant to a Decree of Divorce dated July 21, 2001.

2. The parties, prior to the divorce, had been married for a period of thirty years. Respondent was 16 years of age when she married the Petitioner. The parties had two daughters who had reached their majority age at the time of the divorce.

3. Respondent did not work during the marriage, and has not worked outside the home at any time during or after the marriage. Respondent cared for the parties' children, and stayed at home taking care of the household responsibilities. At the time of the divorce and presently the Respondent has health problems that cause her additional expenses.

4. At the time of the divorce Petitioner and Respondent owned a 50% interest in a company known as Kapen Enterprises, Inc., dba Tiger Tanks. The parties agreed that Petitioner should be awarded all of the stock the parties owned in the corporation in the Decree of Divorce. That business was acquired and developed during the marriage. While the Respondent cared for the children, the home and livestock the Petitioner was able to develop this oil field rental business which provides the Petitioner income of over \$250,000.00 per year plus numerous benefits.

5. Petitioner agreed to pay Respondent permanent alimony in the amount of \$3,100.00 per month. That is her main source of income. She has limited income from investment of monies awarded her in the divorce.

6. Petitioner filed a Petition to Modify on May 29, 2002. The Petition to Modify, which he fashioned in the alternative. The

Petition sought termination of the alimony award based on alleged cohabitation of the Respondent, or a reduction of the amount of alimony based on an alleged "financial reversal" that makes it "impossible for [Petitioner] to pay the court ordered amount of \$3,100.00 per month for alimony."¹

7. Prior to the divorce, the Kappen Enterprises dba Tiger Tanks issued sizeable distributions to the shareholders. In 2000, for example, the distributions to the shareholders were in the amount of \$269,600.00; for the year 2001 it was \$661,600.00; and for the year 2002 through September it was \$213,000.00. Respondent's one-half share of the distributions were \$134,000 in 2000, \$330,800 for 2001 and \$106,500 for the first nine months of 2002. These distributions were in addition to a monthly salary of \$4,000.00 per month, plus additional expenses that were being paid on behalf of the Petitioner. Petitioner concedes in his motion to withdraw his claim of a reduction in income that he continues to

¹Just weeks prior to the trial date and after discovery was completed the Petitioner filed a motion seeking to withdraw his claim that he had a substantial reduction in income. The Respondent is entitled to recover all attorney's fees she incurred on defending against that claim. Furthermore the Petitioner's income remains relevant information because of the Respondent's need for reimbursement of the attorney's fees and costs she has incurred in defending against this Petition.

receive income in at least the same amount that he received at the time of the divorce which was in excess of \$200,000.00 per year.

8. The stress of the divorce and now the stress of this litigation has compounded the health problems of the Respondent. She needs additional medical care but can not afford that care because of the litigation expenses.

9. Respondent has not cohabitated with Dane Gerkin. She has on occasion stayed at his home and at the home of other friends when her health prevented her from being alone. She has left her vehicle there to avoid the continual harassmt and stalking by the Petitioner and others that he has hired.

LEGAL ARGUMENT

Point I

THERE MUST BE A PERMANENT SEXUAL RELATIONSHIP AND THE PARTIES MUST BE RESIDING TOGETHER AS HUSBAND AND WIFE BEFORE ALIMONY TERMINATES.

Utah law and Utah Courts recognize a narrow and specific definition of cohabitation that justifies a termination of an award of permanent alimony. The cases begin with a general definition of "cohabitation" found in Black's Law Dictionary, which defines

²Petitioner certainly can afford to pay alimony of \$37,200.00 per year with an income of \$200,000.00 to \$500,000.00 per year.

cohabitation as follows: "[t]o live together as husband and wife." The statute addressing when alimony is to be terminated in the event of cohabitation provides as follows:

Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.
Utah Code Ann. § 30-3-5(9).

The statute makes it clear that the burden on all elements is on the Petitioner in this case.

A. The Parties Must "Reside" Together:

In defining what constitutes "residing" for the purposes of the statute, the Courts have held that there must be a showing that the parties are residing together in a situation that is more than a temporary stay. The Courts note that "common residency means the sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of time." Haddow v. Haddow, 707 P.2d 669 (Utah 1985). "Cohabitation is not a sojourn, nor a habit of visiting, nor even remaining with for a time; the term implies continuity." Id.

In Haddow, the Court considered a number of factors alleged to show that the Petitioner, who spent a lot of time with a man, was cohabitating. The Court found that there was no cohabitation.

The facts in Haddow established that spending significant time together, even at one person's residence, does constitute cohabitation. In Haddow the Court found that the following evidence was not sufficient to show they were residing/cohabitating together: 1) The woman spent most of her free time with a man; 2) had dinner with the man five or six times a weeks at her house and he usually stayed at her house until between 10:30 p.m. and midnight five or six nights a week, and that the man would often return for breakfast in the morning; 3) that she and the man usually spent the night together one night a week; 4) that the man had clothes at her house and that sometimes she took his clothes to the dry cleaner; 5) that the man occasionally changed and showered at her house; and 6) that the man received some mail at her house, and also at other places. In spite of the number of interactions with the parties, and the amount of time that they stayed together, that was not evidence that the parties resided/cohabitated.

In Pendleton v Pendleton 918 P.2d 159 (Utah App. 1996) relying on Haddow the Court said that two key factors to establish are whether the cohabitating party had a key to the other persons home and was free to come and go from that home even when the other party was not present. Other factors included the sharing of

living expenses and having ones personal items and possession at the other parties home.

In this case none of these factors exist. Petitioner's entire case is based on testimony that for a two month period the Respondent's vehicle was often at the Dane Gerkin's house and that on occasion Dane Gerkin would be driving the Respondent's vehicle or they would be seen at a store together. There is no evidence on the key factors in the case nor evidence of a permanent sexual relationship. The evidence will show that the Respondent did not have a key to Dane Gerkins home, that she did not freely come and go and that there was no permanent sexual relationship. Rather the evidence will show that Mr. Gerkin assisted the Respondent when she was ill, that they dated on occasion, that he assisted her to appointments when she did not have a driver's license, that the vehicle was often left at his house to elude those stalking her, and that the Respondent has her own home where she maintains her own utilities and possessions.

B. There Must be a Permanent Sexual Relationship:

In addition to residing together, to establish cohabitation, the party seeking to terminate alimony must show that the parties are participating in a relatively permanent sexual relationship

akin to that generally existing between husband and wife.³ Haddow at 672, Sigg v Sigg 905 P.2d 908, 917 (Utah App. 1995). In the Haddow case, the Court found that there was sufficient evidence of a "permanent sexual relationship." The evidence of the sexual relationship included the parties sleeping together approximately one night per week, vacations in Hawaii and Nevada where they had sexual relations, and exclusive dating for a period of fourteen months. Although this type sexual contact was sufficient to establish a "permanent sexual relationship", the case does not establish how much sexual contact there must be to qualify as a "permanent sexual relationship." However, the implication from Haddow is that where the sexual relations are few and far between, then there is no "permanent sexual relationship" established. There is no evidence in this case showing a permanent sexual relationship.

³Petitioner's Trial Brief argues that Karen Sursa has the burden to show that any relationship she has is without sexual contact. Petitioner fails to inform the court that that was a prior version of the statute that put that burden on the recipient of the alimony. The statute has changed and is cited correctly in this memorandum. The present statute puts the burden on the Petitioner to establish all elements of cohabitation.

ATTORNEY'S FEES

The Respondent is entitled to be awarded her legal fees on two basis. The Petitioner has abandon his claim of a change of circumstances and the facts show there was no basis for that claim. It was without merit and the Respondent should be awarded the fees incurred in defending against that claim. The facts will further show the claim of cohabitation is also without merit and only pursued as part of the continued harassment by the Petitioner.

Respondent is also entitled to reimbursement of fees based on need. She has medical needs including surgery she can not afford because of the legal fees incurred. Petitioner certainly has the ability to pay those fees from his half million dollar income and should be ordered to reimburse the fees he has caused to be incurred. Wilde v Wilde 2001 UT APP 18, 35 P.2d 314.

It is respectfully requested that the court deny the Petition and that the Respondent be awarded the attorney's fees and costs she has incurred.

DATED this ____ day of September, 2003.

McKEACHNIE, ALLRED,
McCLELLAN & TROTTER, P.C.
Attorneys for Respondent

By: Clark B Allred
Clark B Allred

MAILING CERTIFICATE

Tara Duncan, legal assistant of McKEACHNIE, ALLRED, McCLELLAN & TROTTER, P.C., certifies that she served the attached TRIAL MEMORANDUM upon counsel by placing a true and correct copy thereon in an envelope addressed to:

Lance Dean
134 West Main Street, Suite 202
Vernal, Ut 84078

and deposited the same, sealed, with the first class postage prepaid thereon, in the United States mail at Roosevelt, Utah on the 12th day of September, 2003.

Tara Duncan
Tara Duncan

ADDENDUM 10

10. Section 30-1-4.5(1) Utah Code (2003)

“(1) A marriage which is not solemnized according to this chapter shall be legal and valid if a court or administrative order establishes that it arises out of a contract between two consenting parties who:

- (a) are capable of giving consent;
- (b) are legally capable of entering a solemnized marriage under the provisions of this chapter;
- (c) have cohabited;
- (d) mutually assume marital rights, duties, and obligations; and
- (e) who hold themselves out as and have acquired a uniform and general reputation as husband and wife.

ADDENDUM 11

11. Section 30-3-3(1) Utah Code (2003)

In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

ADDENDUM 13

13. Rule 41(b) Utah Rules of Civil Procedure

(b) *Involuntary dismissal; effect thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

ADDENDUM 14

14. Rule 52(a). Utah Rules of Civil Procedure (2003).

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.