

2003

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KENNETH D. SURSA,)	
)	
Petitioner/Appellant,)	
)	
vs.)	
)	
KAREN J. SURSA,)	
)	Case No. 20030987-CA
Respondent/Appellee.)	
)	

BRIEF OF APPELLEE

Appeal From the Order of Dismissal in the Eighth Judicial
District Court of Duchesne County
Honorable John R. Anderson

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UTAH COURT OF APPEALS
BRIEF

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this case pursuant to Utah Code Section 78-2a-3(2)(h).

ISSUES PRESENTED FOR REVIEW

The following issues are presented for review:

1. Should this Court consider Mr. Sursa's appeal of the dismissal of his petition to terminate alimony when Mr. Sursa uses the wrong standard of review?

2. Should this Court consider Mr. Sursa's appeal of the dismissal when Mr. Sursa fails to marshal the evidence that supports the trial court's findings and order?

3. Did Mr. Sursa meet his burden to prove cohabitation when the facts showed a dating relationship with only a brief sexual relationship at the dating relationship's inception?

4. Should Ms. Sursa be awarded the fees and costs she incurred on appeal?

STANDARD OF REVIEW

The Appellant, Mr. Sursa, must marshal the evidence and show that the court's ruling was clearly erroneous based on that evidence. "[T]he clearly erroneous standard [applies] to . . . findings supporting a dismissal because the trial court was not persuaded by the evidence." Sorenson v. Kennecott-Utah

Copper Corp., 873 P.2d 1141, 1144 (Utah Ct. App. 1994). A finding of cohabitation, or by implication a finding of the lack of cohabitation, is "not reverse[d] . . . unless the appellant . . . shows the finding to be clearly erroneous." Barber v. Barber, 792 P.2d 134, 136 (Utah Ct. App. 1990).

APPLICABLE STATUTES AND RULES

Utah Code § 30-3-5(10):

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 R. App. P. 24(a)(9):

A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.

Utah R. Civ. P. 41(b)

Utah R. Civ. P. 52(a)

STATEMENT OF THE CASE

A. Course of Proceedings:

The parties were divorced on July 25, 2001, after a thirty year marriage. Addendum No. 1. The decree awarded the Respondent/Appellee (herein referred to as "Ms. Sursa") the home, monies and personal property. The Petitioner/Appellant (herein referred to as "Mr. Sursa") was awarded the family business, vehicles and property. Ms. Sursa was awarded

alimony of \$3,100.00 per month. Ms. Sursa had married at age 16, had not worked outside the home during the marriage and had health problems. On June 10, 2002, Mr. Sursa filed a petition to modify claiming that the business had financial reversals and that Ms. Sursa was cohabiting. After discovery showed no financial reversal, Mr. Sursa dismissed that part of his petition and the case proceeded to trial on the cohabitation issue. Trial was on September 22, 2003. At the end of Mr. Sursa's case, the trial court dismissed the petition finding that the evidence showed a dating relationship, but did not show cohabitation. The court also awarded Ms. Sursa the fees and costs she had incurred. This appeal followed.

B. Statement of Facts:

Ms. Sursa, who lives in her home in Cedar View (an area northwest of Roosevelt City), R. 525:37:18-19, and Dane Gerkin, who lives in Roosevelt City, R. 525:58:13-16, began dating a few weeks after Ms. Sursa's divorce was finalized on July 26, 2001. R. 525:114:7-16. At the beginning of the relationship, August and September of 2001, Ms. Sursa stayed "most of the night" at Mr. Gerkin's house on "[a] few occasions," R. 525:116:1-117:5, and, on those occasions,

"sometimes" engaged in sexual activity. R. 525:145:2-146:7. The sexual contact ended in September 2001. R. 525:146. After that date the only time Ms. Sursa spent nights at Mr. Gerkin's residence was when she was ill, R. 525:117:4-5, and "ha[d] no one else to take care of her." R. 525:150:12-13. After September 2001, the physical contact between Ms. Sursa and Mr. Gerkin on overnight stays was limited to "[s]itting beside [each other] on the couch." R. 525:146:12.

The majority of testimony relied on by Mr. Sursa was that Ms. Sursa's vehicle was parked at Mr. Gerkin's residence. The evidence, ignored by Mr. Sursa, was that Mr. Gerkin did not own a vehicle and during much of the time in question Ms. Sursa lacked a driver's license. R. 525:150:15-16; 525:151:19-22. Ms. Sursa, therefore, allowed Mr. Gerkin to use her truck to run errands and "a few times" for his own purposes. R. 525:152:6-9; 525:144:12-25; 525:23:16-22; 525:42:7-10; 525:152:6-9. Ms. Sursa was the only person who made payments on the truck. R. 525:144:18-21. The truck was at times left at Mr. Gerkin's residence. R. at 525:84:21-85:6. Witnesses called by Mr. Sursa conceded that Ms. Sursa's vehicle's presence at Mr. Gerkin's residence was not necessarily evidence that Ms. Sursa was present. An investigator

retained by Mr. Sursa testified that he knocked on the door and no one was home. R. 525:84. Ms. Sursa's daughter testified she transported Ms. Sursa from Mr. Gerkin's home without taking the truck. R. 525:119:11-18. Ms. Sursa testified she left the truck at Mr. Gerkin's because she did not have a driver's license and therefore he used the truck to assist her. R. 525:122.

On an unspecified number of occasions, while Ms. Sursa was visiting Mr. Gerkin, he prepared and shared food that he had purchased. R. 525:120:9-15. They also dined out together "once or twice every two weeks" for an undefined period. R. 525:120:18-20. "[Mr. Gerkin] paid most of the time," while Ms. Sursa paid sometimes when she had family members with them. R. 525:120:23-25.

Ms. Sursa and Mr. Gerkin did not share utility expenses or any other expenses. Ms. Sursa maintained her residence in Cedar View and Mr. Gerkin maintained his residence in Roosevelt. Ms. Sursa did pay Mr. Gerkin for pictures he sketched for her. R. 525:135:21-138:21. And, on one occasion, Ms. Sursa paid the purchase price for one of the artworks by paying on a utility bill to keep Mr. Gerkin's power on, rather than paying Mr. Gerkin. R. 525:131:17-132:1.

Throughout their friendship, Mr. Gerkin never had a key to Ms. Sursa's home, and she did not have one to his. R. 525:151:4-11. The only personal items of Ms. Sursa that a witness saw on one occasion at Mr. Gerkin's house were Ms. Sursa's purse, cigarettes, keys, blanket, shoes and an outfit of clothing, part of which Ms. Sursa was wearing and the rest of which was near her as she lay ill on the floor. R. 525:22:17-23:13; 525:41:6-12. In contrast, the same witness observed furniture and toiletries in place at Ms. Sursa's home in Cedar View. R. 525:42:16-43:7. Neither Mr. Gerkin nor Ms. Sursa remained at the home of the other while the other was away. R. 525:151:4-11.

Following the divorce, and during their friendship, Ms. Sursa also dated others. A witness observed Ms. Sursa "socializing . . . with other people," and saw her in the company of a man other than Mr. Gerkin at her Cedar View home. R. 525:65:8-22.

SUMMARY OF ARGUMENT

1. The trial court, based on the evidence adduced at trial, dismissed this case on the merits. Thus, the clearly erroneous standard applies to the findings made by the trial court, including the court's finding that there was no

cohabitation.

2. A party challenging findings undertakes the weighty responsibility of marshaling the evidence supporting the findings, and then illuminating an incurable defect derived from the evidence. In this matter, Mr. Sursa did compile some of the evidence supporting the trial court's findings, but ignored other evidence, and, he did not present evidence that unalterably undermined the findings. Thus, the Court should sustain the trial court's findings.

3. Mr. Sursa did not establish cohabitation, which is his burden under the statute. Mr. Sursa presented evidence that Ms. Sursa spent time with Mr. Gerkin, but did not establish residency nor show an ongoing sexual relationship. The evidence at most showed a dating relationship. The statute is clear that a party seeking to terminate alimony bears the burden of proving cohabitation. As that party, Mr. Sursa must establish both elements of cohabitation.

4. Ms. Sursa is entitled to be awarded the fees and costs she incurs on appeal.

ARGUMENT

POINT I

**MR. SURSA USES THE WRONG STANDARD OF REVIEW BY
MISTAKENLY COUCHING THIS CASE AS ONE DISMISSED ON**

**PRIMA FACIE GROUNDS RATHER THAN AS ONE DISMISSED ON
THE MERITS.**

Rule 41(b) of the Utah Rules of Civil Procedure involves two types of dismissal, each with its own standard of review. Sorenson, 873 P.2d at 1144. The trial court may afford dismissal either "when the plaintiff has failed to adduce sufficient evidence to establish a prima facie case or when the trial court is not persuaded by the evidence introduced." Id. (emphasis added). In cases of the first kind, this Court "review[s] for correctness." Id. In contrast, "[i]f the court renders judgment on the merits against the plaintiff, the court . . . make[s] findings as provided in Rule 52(a)," Utah R. Civ. P. 41(b), and this Court "appl[ies] the clearly erroneous standard to the findings supporting a dismissal that was granted because the trial court was not persuaded by the evidence." Sorenson, 873 P.2d at 1144.

In this case, the trial court received Mr. Sursa's evidence, but was not convinced by it. Indeed, the court stated its findings, that "this case cr[ie]d out for a finding of failure to show cohabitation," R. 525:161:2-3, and entered findings to that effect. R. 441 § 3. Consequently, this Court "view[s] the evidence in the light most favorable to the trial

court's determination." Gillmor v. Cummings, 904 P.2d 703, 706 (Utah Ct. App. 1990).

Mr. Sursa's assertion that he "made a prima facie case of cohabitation and therefore, granting the Motion to Dismiss was error," is without merit and misses the standard of review. Appellant's Br. at 21. "[T]he trial court may grant a Rule 41(b) motion even if the plaintiff has made out a prima facie case." Sorenson, 873 P.2d at 1144. Once it does, and "make[s] findings," Utah R. Civ. P. 41(b), those "[f]indings . . . shall not be set aside unless clearly erroneous." Utah R. Civ. P. 52(a).

Among the findings Mr. Sursa must demonstrate to be clearly erroneous are the findings related to the lack of cohabitation in this case. In Barber, this Court confirmed a trial court decision that terminated alimony due to the lower court's "finding that [she] was cohabiting." 792 P.2d at 134. This Court said:

Anita's attack on the termination of alimony is simply an attack on the finding of cohabitation. However, in that attack, she wholly fails to take into account our standard of review. We do not reverse a trial court's finding of fact unless the appellant . . . shows the finding to be clearly erroneous.

Id. See also Sigg v. Sigg, 905 P.2d 908, 918 (Utah Ct. App. 1995).

POINT II

MR. SURSA FAILS TO MARSHAL THE EVIDENCE SUPPORTING THE TRIAL COURT'S FINDINGS.

Rule 24(a)(9) of the Utah Rules of Appellate Procedure requires that "[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding." The party must "then demonstrate that the evidence is legally insufficient to support the finding even in viewing it in the light most favorable to the court below." Alta Indus. Ltd. v. Hurst, 846 P.2d 1282, 1286 (Utah 1993) (quoting Reid v. Mutual of Omaha Ins., 776 P.2d 896, 899 (Utah 1989)). If "the duty to marshal is not properly discharged, [the Court] refuse[s] to consider the merits of challenges to the findings and accept[s] the findings as valid." Oneida/SLIC v. Oneida Cold Storage, 872 P.2d 1051, 1053 (Utah Ct. App. 1994) (quoting Mountain States Broadcasting Co. V. Neale, 783 P.2d 551, 553 (Utah Ct. App. 1989)). Meeting the marshaling mandate requires more than including "some evidence that supports the . . . findings." West v. Keil, 48 P.3d 888, 893 (Utah 2002).

This Court expanded upon these basic precepts in West Valley City v. Majestic Investment Co. 818 P.2d 1311, 1315 (1991), explaining:

[t]he marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

Id.

Mr. Sursa falls short of meeting the marshaling threshold by overlooking evidence, including Ms. Sursa's statements, that are contrary to his position. The following is part of the evidence from the trial that supports the trial court's findings that were ignored by Mr. Sursa showing he did not marshal the evidence as required.

Mr. Sursa's relies on a claim by Sammi Fillingim that she believed her mother lived with Dane Gerkin. Appellant's Br. at 14. He fails to note that Ms. Fillingim had three versions to the claim that Ms. Sursa lived with Mr. Gerkin. The letter

she wrote, denoted Exhibit 1, her deposition testimony and her trial testimony. R. 525:39-48. Mr. Sursa neglects to mention other testimony offered by Ms. Fillingim that favored the trial court's findings. For example, Ms. Fillingim testified that she had been to the Cedar View home, following her parents' breakup, and seen furniture and toiletries in the house, R. 525:42:16-43:7, bolstering the proposition that Ms. Sursa was living in the home. Ms. Fillingim also testified that she transported Ms. Sursa from Mr. Gerkin's house, and that Ms. Sursa's truck remained behind, R. 525:44:20-45:3, demonstrating that the presence of the truck did not indicate the presence of Ms. Sursa at the residence. Perhaps most importantly, Ms. Fillingim testimony exposed her biases and inconsistencies. Mr. Sursa did not mention that, at the time of trial, Ms. Fillingim had no relationship with her mother, R. 525:35:21-24, that Ms. Fillingim conceded, at her deposition, that she harbored feelings of bitterness for Ms. Sursa, R. 525:39:13-17, that Ms. Fillingim admitted that one reason for her hostility was that she believed Mr. Sursa was treated unfairly when her parents divorced, R. 525:39:20-25, that Ms. Fillingim did not think her father should pay "as much" alimony, R. 525:40:1-3, and that Ms. Fillingim authored

a letter, prior to the trial, that conflicted with her statements before the court, R. 525:48:1-3, Exhibit 1.

Chad Richard, a longtime friend of Mr. Sursa, R. 525:57:7, also contributed information supportive of Ms. Sursa's position which was omitted from Mr. Sursa's brief. Mr. Richard testified that he noticed Ms. Sursa's mother driving Ms. Sursa's truck, R. 525:63:20-21, that he observed a man other than Mr. Gerkin at Ms. Sursa's house one evening, when he, Mr. Richard, visited her home following her divorce, R. 525:65:8-13, and that he drove by the Cedar View home "occasionally," and had seen Ms. Sursa's truck there. R. 525:66:12-15.

Chris Port, the investigator retained by Mr. Sursa, offered testimony, not included in the Mr. Sursa's brief, that buttresses the court's findings, as well. Mr. Sursa states that "a private investigator never saw anyone or Karen's truck at the house in Cedar View." Appellant's Br. at 14. He, however, ignores the admission by Mr. Port that the truck could have been in the garage without his knowing it, R. 525:83, and that there were numerous days when the vehicle was not at the Gerkin residence. R. 525:84. Mr. Sursa also excludes evidence, derived from Mr. Port's testimony, that,

during his two months of observations, he saw Mr. Gerkin and Ms. Sursa together at Mr. Gerkin's house only twice, R. 525:78:20-79:79:2, that, with the exception of these few times, all Mr. Port saw was the truck and that he did not know who was in the house, R. 525:83:2-6, that he did not know when the truck arrived at or departed from Mr. Gerkin's house, R. 525:84:21-23, that Mr. Port knocked at Mr. Gerkin's house while the truck was there and no one was home (again indicating the presence of the truck did not equate with the presence of people), R. 525:84:24-85:1, and that he did not observe the house for a number of the days during the two-month period. R. 525:83:25-85:9.

Patsy Sursa, Mr. Sursa's new wife, like Mr. Port, testified that she often saw the truck at Mr. Gerkin's house. Appellant's Br. at 15. However, Mr. Sursa does not mention that between May, 2002, and March, 2003, R. 525:93:24-94:2, though Pasty Sursa drove by multiple times per day, R. 525:94:3-4, she saw Ms. Sursa (Karen) at Mr. Gerkin's house only once. R. 525:97:8-11.

Mr. Sursa relies on his brother, Ronnie Sursa, to argue that Mr. Gerkin was at the Cedar View home when Ms. Sursa was away. Appellant's Br. at 16, 19. He fails to tell the Court

that this testimony was stricken by the court because it was not reliable. R. 525:105:8-9.

Portions of Ms. Sursa's own testimony were also overlooked by Mr. Sursa in his brief. In terms of the residency element of cohabitation, Mr. Sursa omits Ms. Sursa's direct response that she never lived at Mr. Gerkins' home. R. at 525:151:2-3. Mr. Sursa further makes inaccurate claims supporting his position or fails to couple claims with contradictory evidence. For instance, Mr. Sursa asserts that "[Ms. Sursa] purchased groceries because [Mr. Gerkin] cooked for her at his home," Appellant's Br. at 15, but ignores Ms. Sursa's testimony that it was Mr. Gerkin who paid for food she consumed when she ate at his house. R. 525:120:8-13. Mr. Sursa asserts that Mr. Gerkin took Ms. Sursa's vehicle "whenever he wanted." Appellants' Br. at 16. As support, he cites the "testimony" not of any of the witnesses, but a statement of Mr. Sursa's attorney at the trial court. Meanwhile, Mr. Sursa leaves out Ms. Sursa's direct testimony to the contrary. R. 525:152:6.

There are also omissions in Mr. Sursa's brief concerning Ms. Sursa's testimony about her relationship with Mr. Gerkin. Ms. Sursa outlined the time line for her sexual contact with

Mr. Gerkin. Ms. Sursa's testimony establishes that she had very limited sexual contact with Mr. Gerkin during August and September in 2001 and none thereafter, which testimony was never refuted. After those first two months, Ms. Sursa explained that she stayed some nights at Mr. Gerkin's house only because she was ill and the doctor had recommended that she not be alone, R. at 525:117:4-5, something she reaffirmed in later testimony. R. at 525:147:2-10.

Mr. Sursa overlooked, in his brief, testimony from every witness, which supports the trial court's decision. As a result, the Court should "refuse to consider the merits of challenges to the findings and accept the findings as valid." Oneida/SLIC, 872 P.2d at 1503 (quoting Mountain States Broadcasting Co., 783 P.2d at 553.

Even if Mr. Sursa had adequately assembled "every scrap of competent evidence," West Valley City, 818 P.2d at 1315, which he did not do, he needed to do more than highlight disputes. He had to reveal a "fatal flaw in the evidence." Id. Mr. Sursa did not show any flaw to the findings, let alone a fatal flaw. Thus, the findings should stand regardless of the success or failure of his marshaling attempt.

POINT III

THE TRIAL COURT CORRECTLY RULED THAT ALIMONY PAYMENTS TO MS. SURSA SHOULD NOT TERMINATE, BECAUSE SHE DID NOT COHABIT.

Even if this court reviews the trial court's determination for correctness, Mr. Sursa has not established that Ms. Sursa cohabited with Mr. Gerkin. Utah Code Ann. § 30-3-5(10) dictates that "[a]ny 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."¹ "Cohabitation is comprised of . . . two elements: (1) common residency and (2) sexual contact evidencing a conjugal association." Pendleton v. Pendleton, 918 P.2d 159, 161 n.1 (Utah Ct. App. 1996).

A. MS. SURSA DID NOT SHARE A COMMON RESIDENCE WITH MR. GERKIN.

"Cohabitation," the Utah Supreme Court explained, "is not a sojourn, nor a habit of visiting, nor even remaining with for a time; the term implies continuity." Haddow v. Haddow, 707 P.2d 669, 673 (Utah 1985) (quoting Burke v. Burke, 340 P.2d

¹Mr. Sursa argues that Ms. Sursa has the burden on the sexual contact element. He fails to inform the court that the cases that he relies on were based on a former version of the statute that provided for that split in the burden. The present statute now clearly puts that burden on Mr. Sursa.

948, 950 (Or. 1959)). Indeed, illustrating the threshold requirement of continuity, the court wrote that cohabiting is akin "to liv[ing] together as husband and wife." Id. at 671 (quoting Black's Law Dictionary 236 (5th ed. 1979)). The court additionally stated 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." Id. at 672.

In Pendleton, this Court, applying these principles, determined that a couple, Bill and Joyce, did cohabit. 918 P.2d at 161. The "largely undisputed facts" included "[Bill's] stay[ing] with Joyce ninety percent of the time when he was in town," "Bill['s] . . . [possessing] his own key to Joyce's home," Bill's having "free access to the home," Bill's "spen[ding] time there when Joyce was away," "Joyce['s] and Bill['s] [eating] almost all meals together when Bill was in town," and "Bill['s] ke[eping] clothing and other personal effects at Joyce's home." Id. In short, Bill lived at Joyce's home. "He came and went . . . three or four times daily, even when she was not there." Id. Those facts do not exist in this case, nor does anything remotely similar.

In Sigg, 905 P.2d at 918, this Court upheld a trial court finding of cohabitation when the parties had a sexual relationship, shared living expenses, had open access to each other's condominiums, ate together and shared food expenses, kept clothing in the same condominium, used the same furniture and 'otherwise lived as though they were husband and wife.'" Id.

In Pendleton and Sigg the court fairly found that the respective couples "lived as though they were husband and wife." Sigg, 905 P.2d at 918. The facts relating to Ms. Sursa and Mr. Gerkin, however, deviate dramatically from the facts supporting cohabitation in the cited cases. Ms. Sursa and Mr. Gerkin truly lived apart. There is no evidence that either kept furniture or clothing at the other's home other than the clothing Ms. Sursa had on the occasion she was recuperating from an illness at Mr. Gerkin's home. She was not even occupying one of his beds but was lying on the floor. Moreover, the presence of one personal item, the blanket, that Ms. Sursa had with her at Mr. Gerkin's home seems unremarkable in light of Ms. Sursa's sickness. R. 525:41:6-7.

Although Ms. Sursa occasionally ate at Mr. Gerkin's house, and she and Mr. Gerkin ate out one or two times during

a two week time period, for an unspecified tenure, this does not indicate that they "ate almost all meals together." Pendleton, 918 P.2d at 161.

Ms. Sursa and Mr. Gerkin's overnight visits were rare, and spanned a very brief period of their friendship. Ms. Sursa describes the number of times she stayed with Mr. Gerkin early in the relationship as "[a] few occasions." R. 525:116:4-5. She also testified that "on the occasions [she] spent several nights, [she had] been sick." R. 525:117:4-5. Therefore, although the actual number of times stayed at Mr. Gerkin's was not mentioned at trial, the evidence supports Ms. Sursa's testimony that the overnight visits were sporadic and after the first two months were due to illness and a need to have another adult present. In addition, Mr. Gerkin's overnight stays at Ms. Sursa's home were likewise "few," and without sexual contact. R. 525:146:2-5. Mr. Sursa's counsel posited that there were 15 such stays between October, 2002 and April, 2003. R. 525:145-147. Ms. Sursa did not confirm this figure, R. 525:145:25-146:2, but, even if she had, it is an average of roughly two stays per month, half the mean found insufficient to establish residency in Haddow. 707 P.2d at 671.

Perhaps most importantly, Mr. Gerkin and Ms. Sursa lacked the right to enter the other's abode at will. Neither had a key to the home of the other, and Ms. Sursa testified that she never remained at Mr. Gerkin's house when he was away. R. 525:151:4-11. Additionally, no one else testified that either Mr. Gerkin or Ms. Sursa tarried unaccompanied at the residence of the other. The instant case passes the two-prong test (lack of a key and absence of free access) for lack of residency set forth in Haddow. 707 P.2d at 673.

The fact that the evidence here does not even meet the test stated in Haddow is significant because the Haddow case, where the Court determined there was no cohabitation, has much stronger evidence that could conceivably support a finding of cohabitation than this case. The court instructed:

The time petitioner's boyfriend spent in the dwelling was extensive, easily sufficient to qualify as residence if time alone controlled. But the time was not spent as a resident. He maintained a separate residence and shared none of the expenses of this one. He did not even have a key or freedom to enter it except when petitioner was present. In simple terms he did not live there.

Id. at 674 (quoting In re Marriage of Gibson, 320 N.W.2d 822, 824 (Iowa 1982)). The evidence presented to the trial court in this case does not establish an amount of time spent at Mr. Gerkin's home, and does not illustrate that Ms. Sursa was

anything other than a visitor at Mr. Gerkin's home. The evidence certainly does not support a finding of residency but rather supports the court's finding that it was a dating relationship and that there was not cohabitation.

**B. MS. SURSA'S ABBREVIATED SEXUAL INVOLVEMENT
WITH MR. GERKIN DOES NOT SUPPORT A FINDING
OF COHABITATION.**

Haddow established not only the element of common residency but also set the standard for the second prong of cohabitation—"sexual contact evidencing a conjugal association." Haddow, 707 P.2d at 672. "Sexual contact," explained the court, "means participation in a relatively permanent sexual relationship akin to that generally existing between husband and wife." Id.

Likewise, this Court, in Garcia v. Garcia, a case in which a party admitted sexual contact over a period of roughly eighteen months, found the threshold for the second prong met. 60 P.3d 1174, 1174-1175 (2002). In Sigg, the period of Ms. Sigg's sexual involvement with her live-in boyfriend began in February of 1993 and continued beyond the initiation of Mr. Sigg's action in November of that year. 905 P.2d at 911. Again, this Court upheld a finding of cohabitation. Id. at 918. The duration of the contact was somewhat shorter in

Pendleton, where it began only a few months prior to the exhusband's entreaties to the court to end alimony. 918 P.2d at 160. This Court commented, however, that it "was still going on as of the time of trial," id., and made specific reference to "ongoing sexual contact" in its holding. Id. at 161. Though there are differences among these cases, one commonality that unites them is that the sexual relationships were relatively long-term, consistent and persisted until the time of trial. See Haddow, 707 P.2d at 672; Garcia, 60 P.3d at 1174; Sigg, 905 P.2d at 917; Pendleton, 918 P.2d at 160.

The instant case stands in contrast to the above authorities. Ms. Sursa and Mr. Gerkin were sexually involved for only a two-month time period. R. 525:145:2-146:7; 525:116:1-117:5; 525:149:23-25; 525:150:3-8. They quickly decided, however, to abandon that course, although they remained friends. R. 525:145:2-13; 525:116:1-13. On the whole, their relationship cannot fairly be characterized as "a relatively permanent sexual relationship akin to that generally existing between husband and wife," as mandated by Haddow. 707 P.2d at 672. Ms. Sursa and Mr. Gerkin discontinued sexual relations months before the petition was filed. The facts fully support the court's finding "they had

a sexual relationship at first," but that it was of short duration and did not create a case of cohabitation. R. 525:159:19-20

C. MS. SURSA AND MR. GERKIN DID NOT SHARE EXPENSES.

In the court's quest to distill the essence of cohabitation in Haddow, it stated "that in some jurisdictions a third element [of cohabitation], shared living expenses, is either an essential ingredient of cohabitation, or evidence of it." 707 P.2d at 673 (citations omitted). The Utah court favored the second approach. Id. at 673-674. Thus, in Utah, "the sharing of living expenses . . . may . . . be indicative of maintaining a shared household and be regarded as some evidence of residency." Pendleton, 918 P.2d at 160. This Court propounded the rationale, expressing that "while it is not important if . . . two share assets in a general sense, it may indeed be relevant if one party pays the other's mortgage, the insurance on his or her house, or the utility bills-actions which would be quite atypical for a mere visitor." Id. at 160-161.

In this case there was no sharing of living expenses except occasionally sharing a meal together. When Mr. Gerkin and Ms. Sursa ate together at his house, he purchased the food

and she offered no reimbursement. R. 525:120:12-15. When they ate out, "[h]e paid most of the time." R. 525:120:23-25. She covered the bill occasionally, "depend[ing] on who [sic] [she] had with [her]." R. 525:24-25. In other words, when she picked up the tab for a larger group which generally included her family members, she also paid Mr. Gerkin's portion.

These circumstances diverge markedly from what seems the prototypical meal-sharing system, in which, as in Pendleton, a pair "[eats] almost all meals together." Pendleton, 918 P.2d at 161. Moreover, Ms. Sursa's withholding of reimbursement evinces that she and Mr. Gerkin did not share food expenses. Instead, as in the typical friendship or dating relationship, Mr. Gerkin, as the owner of his home, supplied food to his guest without slipping her an invoice before she stepped out his door. Finally, even in Haddow, where Mr. Hudson gave money to Mrs. Haddow to buy food, 707 P.2d at 674, and where "Mr. Hudson had dinner at [Mrs. Haddow's] house five or six times a week," id. at 670-671, the Utah Supreme Court ruled that Mr. Hudson and Mrs. Haddow did not qualify as common residents.

In addition to eating with Mr Gerkin, Ms. Sursa allowed Mr. Gerkin to drive her truck. R. 525:152:6-9. Mr. Gerkin

owned no automobile. Thus, when Mr. Gerkin and Ms. Sursa went somewhere together that required motorized transportation, they necessarily had to use Ms. Sursa's pickup. On at least some of these outings, he did drive. R. 525:152:6-7. At other times, Mr. Gerkin drove the truck without Ms. Sursa's company, as he utilized the truck to run errands for her when she was ill. R. 525:144:12-25. Mr. Gerkin, however, was not unique in taking the truck to assist Ms. Sursa--other individuals helping her also used the vehicle. R. 525:150:23-151:1. Significantly, for a period, Ms. Sursa lacked a driver's license, 525:150:15-16; 525:151:19-22. Thus, she was dependent upon on others to drive her, and, because Ms. Sursa obviously was not supposed to drive, and Mr. Gerkin had no car of his own to travel between his home and her residence outside of Roosevelt, it made sense to keep the truck at Mr. Gerkin's house some of the time, though Ms. Sursa remained at her home in Cedar View. In short, Ms. Sursa and Mr. Gerkin did not share an automobile. The vehicle was Ms. Sursa's. She allowed others to use it as they acted on her behalf, and, as a courtesy, she imparted minimal driving privileges to Mr. Gerkin, who had no vehicle.

Not only was Ms. Sursa considerate enough to lend her vehicle to Mr. Gerkin when he departed to run her errands, but, unsurprisingly, she also gave him the funds he needed to accomplish them. R. 525:144:16-21. Indeed, the checks she signed for her prescriptions, groceries, etc., witness that she did not expect Mr. Gerkin to cover her costs of living. Like the money given by Mr. Hudson to Mrs. Haddow for his dry cleaning, these checks "were reimbursements and evidence an intent to bear [personal] expenses." Haddow, 707 P.2d at 674. By giving Mr. Gerkin resources or repayment for her private acquisitions and obligations, Ms. Sursa manifested her intent not to draft him into sharing her expenses.

Ms. Sursa paid some money to Mr. Gerkin to acquire pictures she used as gifts. R. 525:135:21-138:21 These and other payments for Mr. Gerkin's artistic services, however, cannot be categorized as a sharing of expenses.

Ms. Sursa did buy one drawing from Mr. Gerkin knowing he would use the funds to satisfy a household expense. "He drew [her] a picture and [she] paid his electric bill so [his power] wouldn't be turned off." R. 525:131:17-21. At his request, she wrote the check to the company rather than paying him directly. R. 525:131:24-132:1. In sum, though Ms. Sursa

was acquainted with Mr. Gerkin for more than two years, R. 525:112:18-21, only one utility bill was paid by her for him, and this was not a gift, but rather in exchange for artwork he sketched. Mr. Gerkin and Ms. Sursa did not share living expenses.

POINT IV

MS. SURSA SHOULD BE AWARDED THE FEES AND COSTS SHE INCURS ON APPEAL.

In Lyngle v. Lyngle, 831 P.2d 1027, 1031 (1992) this Court instructed that "[g]enerally, when the trial court awards fees in a domestic action to the party who then substantially prevails on appeal, fees will also be awarded to that party on appeal." This statement of law is widely accepted in Utah as the general rule. See Hall v. Hall, 858 P.2d 1018, 1027 (Utah Ct. App. 1993); Hill v. Hill, 869 P.2d 963, 967 (Utah Ct. App. 1994); Potter v. Potter, 845 P.2d 272, 275 (Utah Ct. App. 1993). In such cases, the Court "remand[s] for entry of reasonable fees." Lyngle, 831 P.2d at 1031.

Ms. Sursa, having been awarded attorney's fees at the trial court, Addendum 4, should be awarded the fees and costs she incurs on this appeal.

//

//

CONCLUSION

Ms. Sursa requests that the Court affirm the trial court's dismissal, and award her the costs and legal fees she incurs on appeal.

DATED this 20th day of December, 2004.

ALLRED & McCLELLAN, P.C.
Attorneys for Appellee

By: _____
Clark B Allred

By: Clark A. McClellan
Clark A. McClellan

ADDENDUM

1. DECREE OF DIVORCE
2. ORDER OF DISMISSAL
3. TRIAL EXHIBIT 1
4. JUDGMENT FOR ATTORNEY FEES
5. Utah R. Civ. P. 41(b)
6. Utah R. Civ. P. 52(a)

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

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

KENNETH D. SURSA,

Plaintiff,

Vs.

KAREN J. SURSA,

Defendant.

DECREE OF DIVORCE

Civil No. 004000114 DA

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

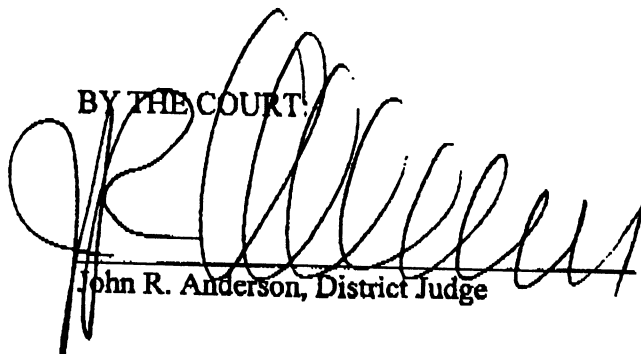
E. All personal property belonging to the Plaintiff as set forth above that is in the home awarded to the Defendant is hereby awarded to the Plaintiff along with all items of household furniture and furnishings in the apartment in Roosevelt, Utah belonging to the Plaintiff.

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.

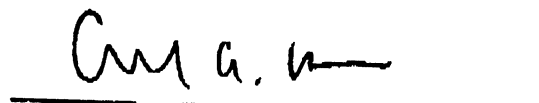
DATED the 25 day of July 2001.

BY THE COURT:

A large, stylized handwritten signature in black ink, appearing to read 'John R. Anderson', written over a horizontal line.

John R. Anderson, District Judge

APPROVED BY:

A handwritten signature in black ink, appearing to read 'Kenneth G. Anderson', written over a horizontal line.
Kenneth G. Anderson
Attorney for PlaintiffA handwritten signature in black ink, appearing to read 'Clark A. McClellan', written over a horizontal line.
Clark A. McClellan
Attorney for Defendant

OCT-23-2003 THU 11:29 AM DISTRICT COURT

FAX NO. 435 722 0236

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P. 02FILED
DISTRICT COURT
DUCHESNE COUNTY, UTAH

OCT 10 2003

JOANNE MCKEE, CLERK
BY 702 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:

OCT-23-2003 THU 11:30 AM DISTRICT COURT

FAX NO. 435 722 0236

P. 04 PAGE 09

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 BROTHERSON

I am Karen Gursas
Oldest daughter, I am
writing you concerning the
charges my Dad is making
against my mom.

Mr. Gerken has been a
family friend for 2 years.
He has been around me,
my husband & kids several
times before my mom & him
ever met. My mom met
him about a month ago,
they have been friends
since then. Mr. Gerken helps
my mom around the house
with things she cannot do
by her self due to her health
problems when we are unable
to. In return my mom lets
him borrow her pick-up to
go around selling his drawings
and to go places with his
kids. I have never known
them to be anything but
friends.

they go to the movies and go out to eat + occasionally mr. Gerken has invited her over to eat with him + the kids.

She is still living in her home on Center View highway. I have never witnessed or know of them to be anything but friends.

mr Gerken has done several drawings for my mom + me. She had him draw a picture for my son's birthday + she also had him do drawings for Xmas Presents. + for herself. I have went to mr. Gerken's house several times to get my mom + go to town or Vernal. ~~She~~ mr Gerken has also dropped her off at my house so he could borrow her Pick-up when this happens she stays at my house.

She has Stayed overnite at our house Several times due to her health Problems + Seizures. I have Seen my mom's health get worse Since all of this has happened.

When She has been Sick or Just needing to talk I have made her Stay With us, and If She needed anything or needed to go anywhere I drove her + Since She wasnt using her Pick-up She let mr Gerken use it.

I feel the Charges are my dad's way of getting back at my mom. he has harrassed her Several times.

he has also threatened her In front Of my kids. + me

he also gets my oldest +

daughter alone and Questions her about what my mom is doing + tries to get her to say thing that are not true.

My dad has also threatened Mr Gerken several times in front of my family.

My dad also said in my house that he would do whatever he had to, to keep from paying my mom alimony for the rest of her life.

In the Past he has also told me to lie about the whereabouts of what my mom was doing + where she was. + I took this as a threat.

My mom has no other family but us. My husband helps her when he can, but

because of the type of job
he has he has to work a lot
of hours + at the time I
think I am pregnant +
I'm not able to help her
as much, so Mr Gerken
has been helping her when
she needs to do or fix things
around the house.

I will testify to all of
this I have wrote.

Dammi Fullington 4/24/02

CLARK B ALLRED - 0055
 CLARK A. McCLELLAN - 6113
 McKEACHNIE, ALLRED, McCLELLAN & TROTTER, P.C.
 Attorneys for Respondent
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FILED
 DISTRICT COURT
 DUCHESNE COUNTY, UTAH
 OCT 16 2003
 BY JOANNE McKEE CLERK
 DEPUTY

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

KENNETH D. SURSA,)	
Petitioner)	JUDGMENT FOR
)	ATTORNEY'S FEES
)	
vs.)	
)	
KAREN J. SURSA)	Civil No. 004000114
)	
Respondent)	Judge: John R. Anderson
)	
)	

The above captioned matter came before the Court for trial on September 22, 2003. At the conclusion of the Petitioner's case, the Court granted a motion for a directed verdict. The Respondent had requested reimbursement of her attorney's fees and had, prior to trial, filed with the Court an Affidavit regarding the attorney's fees incurred prior to trial. The Court, after dismissing the case, directed the Respondent to furnish additional information regarding the fees and costs incurred and her need for reimbursement of those fees as well as the Petitioner's ability to pay those fees. The Court ordered that the Petitioner would have ten (10) days to file an objection.

The Petitioner filed a supplemental affidavit regarding attorney's fees, a document entitled Exhibits Regarding Petitioner's Ability to Pay Fees and Lack of Merit on Change of Circumstances Claim, which has attached to it the Petitioner's current tax returns and excerpts from depositions and Respondent's affidavit regarding her income and expenses.

Those documents show that the Respondent has incurred substantial attorney's fees in defending this matter in the amount of \$14,656.63. The Petitioner dismissed his claim of a change of circumstances prior to trial but after significant fees and costs were incurred and the Respondent was the prevailing party at the trial. The Respondent's sole source of income is the alimony payments that she receives. Due to her age, lack of work experience and health, she does not have the ability to earn income. Her monthly living expenses exceed the amount that she receives in alimony. She was required to incur legal fees and has need to be reimbursed for those fees. The Petitioner's tax returns show that he earns income ranging from \$247,000 to \$363,000 per year. He also receives significant benefits from the business including vehicles, fuel, retirement, insurance and entertainment. His income is significantly more than Respondent's and he certainly has the ability to reimburse her for the fees she has incurred.

The Court Therefore Orders, Adjudges and Decrees that the Petitioner is to reimburse the Respondent for the attorney's fees

and costs she has incurred in the amount of \$14,656.63. Pursuant to Rule 4-911 of the Rules of Judicial Administration, those fees are to be paid within thirty (30) days of the entry of this Order.

DATED this 16 day of October, 2003.

BY THE COURT:

By: 

John R. Anderson
District Court Judge

Utah R. Civ. P. 41(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.

Utah R. Civ. P. 52(a)

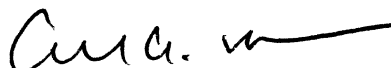
Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly 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.

MAILING CERTIFICATE

I, Clark A. McClellan, office of ALLRED & McCLELLAN, P. C. attorneys for Respondent herein and hereby certify that I served the attached BRIEF OF APPELLEE on Petitioner by placing a true and correct copy thereon in an envelope addressed to:

LORIE D. FOWLKE
SCRIBNER & MCCANDLESS, P.C.
2696 NORTH UNIVERSITY AVE., SUITE 220
PROVO, UTAH 84604

and deposited the same, sealed, with next-day postage prepaid thereon, to United Parcel Service at Vernal, Utah, on the 20th day of December, 2004.



Clark A. McClellan