

2004

Jones v. Jones : Brief of Appellee

Utah Court of Appeals

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Amy E. Hayes; Kart, Adamson & Donovan; attorneys for appellee.

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IN THE UTAH COURT OF APPEALS

LYNDA F. JONES,)	
)	
Petitioner/Appellee,)	
)	
vs.)	Docket No. 2004-0192CA
)	
ALAN D. JONES,	)	Priority 15
)	
Respondent/Appellant.)	
)	

BRIEF OF APPELLEE

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY

The Honorable Leslie A. Lewis, District Court Judge

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UTAH COURT OF APPEALS
BRIEF

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UTAH APPELLATE COURTS

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BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

The Appellee agrees with and stipulates to the Appellant's Jurisdictional Statement which appears on Page 1 of his Brief

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue Number 1: Did the trial court abuse the broad discretion afforded to it in making its modified alimony award?

Issue Number 2: Was the trial correct when it imputed to Mr. Jones his previously demonstrated earnings after determining Mr. Jones was voluntarily underemployed and thus continued to have the ability to provide spousal support?

Issue Number 3: Did the trial court correctly apply UTAH CODE ANNOTATED § 78-45-9.3(4) when it declined to made its modification order retroactive to the date the Appellant filed his Petition to Modify Decree of Divorce.

DETERMINATIVE STATUTORY PROVISIONS

The following statutory provisions are determinative to this Court's consideration of the issues presented, above:

UTAH CODE ANN. § 30-3-5(8)

(a) "The court shall consider at least the following factors in determining alimony:

(i) the financial condition and needs of the recipient spouse;

(ii) the recipient's earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support;

(iv) the length of the marriage;

(v) whether the recipient spouse has custody of minor children requiring support;

(vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and

(vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining

alimony in accordance with Subsection (8)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a compensating adjustment in dividing the marital property and awarding alimony.

(f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(g)(i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial

material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this Subsection (8).

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

(h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time."

UTAH CODE ANN. §78-45-9.3(4)

"A child or spousal support payment under a child support order may be modified with respect to any period during which a modification is pending, but only from the date of service of the pleading on the obligee, if the obligor is the petitioner,

or on the obligor, if the obligee is the petitioner. If the tribunal orders that the support should be modified, the effective date of the modification shall be the month following service on the parent whose support is affected. Once the tribunal determines that a modification is appropriate, the tribunal shall order a judgment to be entered for any difference in the original order and the modified amount for the period from the service of the pleading until the final order of modification is entered."

STATEMENT OF THE CASE

Nature of the Case: This is a modification of a stipulated Decree of Divorce entered by the trial court in 1992 after 21 years of marriage. The Appellant filed his Verified Petition to Modify Decree of Divorce [Alimony Provisions] on October 19, 2001, seeking to reduce or eliminate his stipulated and court-ordered alimony obligation to the Appellee.

Course of Litigation: The parties stipulated to the terms of their Decree of Divorce entered by the Court on July 14, 1992. Due to the Appellant's failure to pay his stipulated and ordered alimony obligations, the Appellee moved for an Order to Show Cause seeking judgment from and a contempt sanction against the Appellant and on October 16, 2001, the Appellant was served with the trial court's Order to Show Cause issued October 9, 2001. The Appellant filed his Petition to Modify on October 19,

2001. The Appellee accepted service of the Appellant's Petition to Modify and filed her Answer on November 16, 2001.

On November 13, 2001, a \$2,800.00 judgment was entered against the Appellant for alimony arrearages and his contempt of court was certified for an evidentiary hearing. This evidentiary hearing took place on May 8, 2002, at which time the trial court found the Appellant in contempt of court and imposed an additional judgment of \$9,800.00 to be paid within six (6) months after the trial court's order. See, Order and Judgment Re: Contempt, Attorney's Fees, Alimony Arrears and Other Matters. As of December 2002, the Appellant had failed to satisfy the \$9,800.00 judgment against him and failed to remain current in his ongoing alimony obligation. The Appellee moved for a second Order to Show Cause seeking an additional arrearage judgment and additional contempt sanctions against the Appellant. These issues were certified for an evidentiary hearing, as well.

The trial court held a second evidentiary hearing on June 4, 2003, at which time the Appellant was found in contempt once more and ordered to serve 30 days in the Salt Lake County Jail. The court allowed the Appellant to purge his contempt by tendering an immediate \$1,000.00 payment to the Appellee and by making \$100.00 monthly minimum payments to the Appellee through the trial of the Appellant's Petition to Modify.

Trial Proceedings. A one-half day trial was held on August 14, 2003. Both parties were present and represented by their present counsel of record. Both parties were placed under oath and testified at the trial of this matter.

The Appellant testified the he voluntarily terminated his employment with the Lawson Company in 2001, which had consistently paid him an income of at least \$70,000.00 per year and sometimes as much as \$160,000.00 per year. Further, the Appellant testified that upon his voluntary termination from Lawson he received a \$62,000.00 lump sum retirement payment and had received approximately \$120,000.00 from his mother's estate. The Appellant testified that he used these monies to move to Montana, purchase a new home and a new car, among other things. When he moved to Montana, the Appellant had not secured new employment near his new residence nor had he actively sought employment that would compensate him near his historic rate.

At the time of the parties' divorce the Appellee earned approximately \$25,000.00 per year. At the time of trial of the Petition to Modify, the Appellee earned approximately \$48,000.00 per year. The Appellee further testified to her ongoing living expenses, her lifestyle and the financial hardship brought about by the Appellant's failure to provide any meaningful financial support to her for nearly two (2) years. The trial court found that the Appellee's attested monthly living expenses were

reasonable and, in fact, to have been understated with regard to the Appellee's professional clothing needs.

Based on the testimony of the parties and documentary exhibits adduced, the trial court found that the Appellee had a monthly financial need of \$500.00 per month and that the Appellant had the ability provide financial assistance to the Petitioner in this amount. Therefore, the trial court granted to Appellant's Petition to Modify and reduced his alimony obligation from \$1,400.00 to \$500.00 per month. The Appellant appeals from both the amount and the duration of the trial court's modified alimony award.

STATEMENT OF THE FACTS

The Appellant (hereinafter referred to as "Alan") and the Appellee (hereinafter referred to as "Lynda") were divorced by the trial court on July 14, 1992. Both parties were represented by counsel in the underlying divorce action and the parties stipulated to the terms of the resulting Decree of Divorce. The Decree of Divorce provides, in relevant part, that "[t]he [Appellant/Respondent] is hereby ordered to pay the [Appellee/Petitioner] \$905.00 each month for alimony during the period that the child support order is to be paid. After the child support terminates, it is hereby ordered that the alimony award shall automatically increase to \$1,400.00 each month."

See, Decree of Divorce at Paragraph 5. Alan's child support obligation ceased in 1993.

At the time of divorce the Lawson Company employed Alan as a sales manager. Alan had consistently earned approximately \$100,000.00 from his employment. Alan remained employed by Lawson until 2001 when Alan voluntarily resigned his position with Lawson. Alan claimed his resignation was influenced by a restructuring of the sales division at Lawson, which he claimed would have had a negative impact on his income, but he failed to provide any proof of this at trial. Further, Alan testified at trial that he received a \$62,000.00 lump sum retirement payment from Lawson after he quit. After quitting Lawson, Alan and his new wife moved to Montana in September 2001. Alan testified that he had not secured employment in Montana at the time of his move. It was in September 2001 that Alan ceased making any voluntary alimony payments to Lynda.

In May 2002, Alan was hospitalized after suffering an esophageal tear. Alan required emergency surgery and was comatose for ten (10) days. Alan testified at trial that his injury and medical complications were a result of his drug and alcohol abuse. Despite the trial court's directive, at trial Alan failed to provide any documentation of any presently existing medical conditions from which he may be suffering that would prevent him from seeking full time employment. See, Order

and Judgement Contempt (sic) and Other Matters entered July 17, 2003, at Paragraph 3. Alan testified at trial that he was working full-time as a delivery truck driver for Good Will Industries and earns \$8.00, or \$16,640.00 per year from this employment.

During the pendency of his Petition to Modify, Alan was twice held in contempt of court for failing to pay his ordered alimony obligations and for failing to promptly satisfy judgments entered by the trial court. First, Lynda filed an Order to Show Cause in October 2001, wherein judgment was entered against Alan in the amount of \$2,800.00 as and for unpaid alimony for the month of September and October, 2001. Further, Alan's contempt of Court for failing to pay his alimony was certified for evidentiary hearing.

Despite this initial judgment, Alan continued in his failure to pay his Court-ordered alimony obligation. When an evidentiary hearing was held before this Court on May 8, 2002, the judgment against Alan was increased to \$12,600.00. Alan was also held in contempt of Court and sentenced to 30 days in the Salt Lake County Jail, which was temporarily purged by his immediate tendering of the initial \$2,800.00 judgment amount. Alan was ordered to pay the \$9,800.00 balance of the judgment against him within six (6) months to avoid serving the 30 day jail sentence.

Despite the trial court's imposition of contempt sanctions, Alan failed to make any ongoing alimony payments or payments toward the \$9,800.00 judgment. Therefore, Lynda was forced to file a second Order to Show Cause to seek an increase of the judgment and the issuance of a Warrant for Alan's arrest. All issues in Lynda's second Order to Show Cause were certified for evidentiary hearing, which was held on June 4, 2003. After hearing evidence, the trial court again ordered Alan to serve 30 days in the Salt Lake County Jail. This jail time was temporarily purged due to Alan's immediately tendering \$1,000.00 to Lynda and payment of at least \$100.00 per month to her during the pendency of the modification action.

At the time of the divorce, Lynda earned approximately \$25,000.00 per year. At the time of trial of the Petition to Modify, Lynda testified that she had advanced in her field and was presently earning approximately \$48,000.00 per year from her employment. Lynda testified that her net monthly income was \$3,062.28 and that her monthly living expenses were \$3,367.00. In her statement of expenses, Lynda did not include any allowances for her clothing or dry cleaning expenditures. See, Petitioner's Trial Exhibit 9 at Section 4. The trial court found that in light of Lynda's professional position, it was reasonable to increase her stated budget to include the expense

for her clothing and dry cleaning and increased her expenses by \$300.00. See, trial court's Memorandum Decision at Page 4.

At the close of evidence, the trial court requested that each party submit a post-trial brief on the issue of imputation in income to Alan. Lynda submitted her brief on September 30, 2003. Alan failed to file his post-trial brief. On October 31, 2003, the trial court issued its Memorandum Decision, a copy of which is included in the Addendum of this Brief. Specifically, the trial court found that the sole basis for modifying Alan's alimony obligation was due to Lynda's increased income, which has resulted in a lessening of her financial need. The trial court went on to find Alan to be willfully underemployed and that it was proper for alimony purposes to impute to him his average income from his employment at Lawson. Thus, the trial court reduced Alan's alimony obligation from \$1,400.00 per month to \$500.00 per month effective September 2003. Judgment was also entered against Alan for all alimony remaining unpaid from the period of November 2001 through August 2003 at the previous rate in the amount of \$29,700.00.

SUMMARY OF THE ARGUMENTS

Point I:

Under Utah law, a trial court in a divorce modification action is afforded a wide latitude of discretion in fashioning a remedy which will fit the financial needs of the parties.

Decisions that fall within that ambit of discretion will not be disturbed unless the Appellant is able to demonstrate that the trial court misunderstood or misapplied the law or found facts not supported by the evidence. In this case, the Appellant has failed in his burden to demonstrate any error on the part of the trial court in connection with this or any issue raised in Appellant's Brief.

Point II:

Under Utah Law, a trial court may appropriately impute income to an unemployed or underemployed party for the determination of that party's ability to produce sufficient income. In the instant case, the trial court correctly imputed income to Alan when the evidence overwhelmingly demonstrates that Alan is voluntarily underemployed and has opted for his lowered income status as a lifestyle choice rather than as a result of poor health or lack of reasonable employment opportunities.

Point III:

Under Utah law, the trial court is not required to make alimony modifications retroactive to the time a petition for modification was filed. Further, due to the Appellant's inexcusable delay in prosecuting this action, a retroactive modification would have been adverse to public policy and would have been inequitable to the Appellee.

ARGUMENT

POINT I

THE DECISION OF A TRIAL COURT IN A DIVORCE ACTION SHOULD NOT BE DISTURBED UNLESS THERE IS A CLEAR SHOWING OF A MISAPPLICATION OF THE LAW OR AN ABUSE OF DISCRETION RESULTING IN A SUBSTANTIAL ERROR OR SERIOUS INEQUITY

The Appellant, Alan, contends that the trial court erred in its reduced alimony award to Lynda, the Appellee, and consequently, abused the wide discretion afforded it in making such an order. The evidence presented to the trial court clearly shows that this was not the case.

In order to prevail on this appeal, Alan is required to show that the trial court, in making its modified alimony award, misunderstood or misapplied the law, entered findings not supported by the evidence, or caused a serious inequity so as to constitute an abuse of discretion. See, English v. English, 565 P.2d 409,410 (Utah 1977).

In the context of an alimony modification, "[o]nce a party has established that a substantial material change in circumstances not foreseen at the time of the divorce has occurred, the trial court must then consider what a reasonable alimony award is in light of that change." See, Bolliger v. Bolliger, 2002 UT App 47, ¶ 22, 997 P. 2d 903. In the instant matter, neither party disputes that Lynda's increased income constitutes this substantial change of circumstance.

The factors to be considered by the trial court in determining the reasonableness of a modified alimony award are those codified at UTAH CODE ANNOTATED (2003) at Section 30-3-5(8) which include, in part: (i) the financial condition and needs of the recipient spouse; (ii) the recipient's earning capacity or ability to produce income; (iii) the ability of the payor spouse to provide support; and (iv) the length of the marriage. These are commonly referred to as the Jones factors. See also, Bolliger at ¶ 23, quoting Williamson v. Williamson, 983 P.2d 1103, 1105-06 (Utah App. 1999); Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985). "If these factors have been considered, we will not disturb the trial court's alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion." See, Kelley v. Kelley, 2000 UT App 236, ¶ 26, 9 P.3d 171 (citations and quotations omitted). In the instant matter, the trial court carefully examined and made supported findings on each of the above factors.

At trial Lynda's present income, ability to earn and stated financial needs were uncontroverted, as was the length of the parties' marriage.¹ The thrust of the trial court analysis went

¹ The trial court specifically questioned Lynda about her professional clothing and dry cleaning needs. Lynda testified that due to Alan's lack of support payments, that these were

to the ability of Alan to earn income sufficient to provide the financial support that Lynda requires. The trial court heard Alan's testimony that he voluntarily quit working for the company who had employed him for a number of years and where he had consistently earned between \$70,000.00 and \$160,000.00 per year. Alan then testified that he did not attempt to secure new employment in his field either in the Salt Lake Valley or in Montana before quitting, but rather chose to remain unemployed as his lifestyle choice. Despite surgery and complications in 2002, Alan testified that he was in good physical health and within months had resumed working full-time albeit as a delivery truck driver earning \$8.00 an hour. Based upon Alan's own testimony, the trial court properly found that Alan retained the ability to earn at his former levels and therefore could continue to provide financial support to Lynda.

The trial court made specific findings on each Jones factor and the record amply supports these findings. Therefore, Alan has not in any sense met his burden on appeal and, therefore,

items she was trying to get by without. The trial court found that this was unreasonable and increased Lynda's monthly budget by \$300.00 to accommodate these needs. Alan did not object to this line of questioning nor did he refute the trial court's assessment.

the judgment of the trial court should be affirmed in all respects.

POINT II

THE TRIAL COURT'S IMPUTATION OF INCOME TO
THE APPELLANT WAS APPROPRIATE,
SUPPORTED BY THE EVIDENCE AND
CONSISTENT WITH UTAH LAW

It is appropriate for a trial court to impute income to an unemployed or underemployed spouse as part of the determination of that spouse's ability to earn income for the purpose of analyzing the Jones factors. See, i.e., Cox v. Cox, 877 P.2d 1262, 1267 (Utah App. 1994), Hall v. Hall, 858 P.2d 1018, 1024 (Utah App. 1993) (each holding that a trial court must first determine that a spouse is voluntarily unemployed or underemployed before imputing income) (emphasis original). See also, Hill v. Hill, 869 P.2d 936 (Utah App. 1994) (holding that imputation of income to a spouse was appropriate where the payor spouse had a significant history of earning a higher income, that the spouse voluntarily quit this higher paying employment and did so without regard of the financial impact on the recipient spouse). This Court has articulated the goal of imputing income is to prevent spouses from reducing their alimony by purposeful unemployment or underemployment. See, Griffith v. Griffith, 959 P.2d 1015, 1018 (Utah App. 1998), citing Hill at Id.

In the instant matter, this trial court previously determined that Alan was voluntarily underemployed in its May 2002 ruling, as follows:

"That the Respondent has the ability to continue to meet his Court ordered obligation. The Court finds that the Respondent has ample resources available to him through a \$120,000.00 inheritance received from his mother's estate and a \$60,000.00 lump sum retirement payment received when Respondent voluntarily terminated his previous employment. Further, Respondent elected to voluntarily terminate his employment before securing new employment in the Salt Lake Valley. Just prior to Respondent refusing to pay his alimony obligation in September 2001, the Respondent made informal lump sum settlement offers of at least \$12,000.00 to Petitioner. The Respondent then remarried and relocated with his present wife to Helena Montana, again, without investigating the job market and without securing employment. The Respondent remained unemployed for nearly one year and is presently underemployed earning \$6.00 per hour, part time, when his recent earning history demonstrates that Respondent earned over \$100,000.00 per year. Finally, the Respondent willfully ignored Commissioner Arnett's 2001 judgment against the Respondent in the amount of \$2,800.00, that Respondent has recently provided as much as \$9,000.00 to the parties' adult daughter to defray some of her wedding expenses."

See, Order and Judgment Re: Contempt, Attorney's Fees, Alimony Arrears and Other Matters at Paragraph 1(b). Further evidence produced at trial in this matter supports the finding that Alan continued to be drastically underemployed based on his health, job skills and demonstrated work history. Accordingly, the trial court correctly imputed income to Alan. See, Hall at 1024.

Similar to the facts in Hill, Alan chose to drastically reduce his income; from earnings of over \$100,000.00 per year to \$8.00 per hour full time. Under these circumstances, it was appropriate to impute Alan's prior income to him as part of this Court's determination of his ability to produce income and contribute to the ongoing support of Lynda. See, Cox at 1267.

In his Brief, as he did at the trial of this matter, Alan makes great issue of the burden of alimony on his post-divorce lifestyle choices. Our laws have long considered marriage a contract, which while soluble, carries with it obligations which outlast the dissolution of the bonds of matrimony. Chief among these lasting obligations is the duty to support a financially dependent spouse or child, or in other words, to place the other party in the position they would have enjoyed had the marriage contract not been terminated. Alan, like all citizens, has the right to live and work as he chooses and a court may not infringe upon these rights absent compelling circumstances. However, Alan, like all citizens, has the duty to live up to reasonable court-ordered obligations and a court has the right to make equitable orders designed to ensure these obligations are met.

The trial court's finding that Alan retains the ability to meet a reasonable support obligation is supported Utah law and the record herein, and most notably that provided by Alan's own

testimony. While Alan may not like being bound by his obligation to continue to pay a reasonable sum in alimony, the trial court's ruling was sound and should not be disturbed.

POINT III

THE TRIAL COURT CORRECTLY MODIFIED THE APPELLANT'S ALIMONY OBLIGATION TO BE EFFECTIVE AFTER THE TRIAL OF HIS PETITION TO MODIFY

Although unclear in his reasons as to why, Alan in his Brief contends that the trial court's prospective application of the modified alimony award is "inequitable." Alan provides much rhetoric for his position, but fails to provide this Court with any guidance by way of case or statute as to why the trial court's prospective ruling is inequitable or incorrect.

UTAH CODE ANNOTATED (2003)§ 78-45-9.3(4) states, in relevant part, that a "child or spousal support payment under a child support order may be modified with respect to any period during which a modification is pending, but only from the date of service of the pleading on the obligee, if the obligor is the petitioner, or on the obligor, if the obligee is the petitioner. If the tribunal orders that the support should be modified, the effective date of the modification shall be the month following service on the parent whose support is affected." (emphasis added). This statute is clear and precise in its mandate. While a court may chose to make a support modification

retroactive, the only instance in which retroactive modification is required is in the modification of child support orders. This is supported by the Legislature's choice to use the case-specific term "parent" when discussing the mandatory retroactivity, but uses the general terms "obligor" and "obligee" throughout the rest of this statute.

" 'When interpreting statutes we determine the statute's meaning by first looking to the statute's plain language, and give effect to the plain language unless the language is ambiguous.' " See, Thomas v. Color Country Mgmt., 2004 UT 12, ¶ 12, 84 P.3d 1201 (quoting State v. Schofield, 2002 UT 132, ¶ 8, 63 P.3d 667. The plain language of the above statute, read in its clearest terms, supports the trial court's decision not to make to alimony modification retroactive.

The trial court's prospective modification is supported by statute and also by public policy. Alan filed his modification action claiming that he had experienced a "significant, material and permanent reduction" of his income. See, Petition to Modify Decree of Divorce at Paragraph 3(a) (emphasis added). Alan filed his modification petition in October 2001 and never certified the matter as being ready for trial despite having alleged the existence of permanent grounds for modification. It was only after Lynda was forced to bring Alan's contempt before the

district court for a second time was this matter set for trial nearly two (2) years after the Petition to Modify was filed.

If he had evidence of permanent grounds (not the temporary grounds hinted at by Alan in his Brief) to reduce or eliminate his alimony obligation as alleged in his Petition to Modify, then Alan should have moved this matter quickly to trial rather than letting it languish for two years. Indeed, after failing to prosecute his matter, a true inequity would have resulted to Lynda if the trial court had made its relief retroactive by two years rather than prospective as of trial. The trial court's ruling was correct by statute and supported by the public policy of concluding litigation in the most expedient manner. Therefore, the trial court's ruling should not be disturbed.

CONCLUSION

In reviewing the Appellant's Brief, it becomes clear that the Appellant has taken what can be properly described as a "shotgun approach" in connection with this appeal. Such an approach is not appropriate nor should it even be sanctioned.

The Appellee has fully addressed each of the issues raised by the Appellant and has specifically demonstrated that there was more than adequate evidence to support each of the trial court's findings of fact and the resulting orders of the court. The decision of the trial court and the concomitant findings

were thorough, well reasoned, consistent with existing law and more than fair to the Appellant.

The trial court's decision should be affirmed in its entirety. Further, the Appellee should be awarded her costs and fees related to this appeal. The case should be remanded for a determination of those fees.

Respectfully submitted this 6th day of December, 2004.

DART, ADAMSON & DONOVAN


AMY E. HAYES
Attorneys for Petitioner/Appellee

CERTIFICATE OF DELIVERY

I hereby certify that I caused two (2) true and correct copies of the foregoing Brief of Appellee to be hand-delivered to:

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AMY E. HAYES
Attorney for Petitioner/Appellee

ADDENDUM

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Petitioner's Trial Exhibit 9	A-19
Memorandum Decision (2003)	A-29

FILED DISTRICT COURT
Third Judicial District

KEVIN V. OLSEN #4105
Anderson & Dunn
2089 East 7000 South, Suite 100
Salt Lake City, Utah 84121
Telephone: (801) 944-0990

JUL 14 1992

By E. Matheson
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LYNDA F. JONES,)	
	)	DECREE OF DIVORCE
Plaintiff,	)	2175850
	)	7-15-92-8:16 am.
vs.)	
	)	Civil No. 914900581DA
ALAN D. JONES,	)	Judge Leslie A. Lewis
)	
Defendant.)	

The above-entitled action came on for hearing before the Honorable Leslie A. Lewis, one of the judges in the above-entitled court, on the 16th day of June, 1992. The Plaintiff was present and was represented by her counsel of record, Suzanne Benson, and the Defendant was present and represented by his counsel of record, Kevin V. Olsen. In the presence of the Court, the parties entered into a written stipulation with the modifications that were stated in the record and set forth in the Court's Findings of Fact and Conclusions of Law. The Court, after accepting the parties' Stipulation, after hearing

proffers from the parties on the issue of tax exemptions, and after having taken the proofs of the Plaintiff and making its Findings of Fact and Conclusions of Law, and otherwise being fully advised of the premises, now orders as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Plaintiff's complaint for divorce is granted and the bonds of matrimony heretofore existing between the parties is hereby dissolved, and the parties are hereby made free from all obligations by reason thereof.

2. The Plaintiff is awarded the permanent care, custody and control of parties' minor child, subject to Defendant's reasonable right to visitation.

3. The Plaintiff is hereby awarded \$495.00 per month as child support and that said support shall continue through the minor child's graduation in June, 1993.

4. The Defendant is ordered to maintain in effect a policy of dental, health and accident insurance at all times that such may be available through his employer at a reasonable cost, with the parties' minor child named as beneficiary thereunder. Further, the Plaintiff is hereby ordered to pay routine uninsured medical and dental expenses, including

routine office visits, physical examinations and immunization pursuant to UCA § 78-45-7.15(2). Each party is hereby ordered to pay one-half of all other reasonable and necessary uninsured medical and dental expenses for the said minor child.

5. The Defendant is hereby ordered to pay to the Plaintiff \$905.00 each month for alimony during the period that the child support is ordered paid. After the child support terminates, it is hereby ordered that the alimony award shall automatically increase to \$1,400.00 each month. The Defendant's obligation to pay said alimony shall terminate upon the death, co-habitation or re-marriage of the Plaintiff.

6. The personal property is hereby awarded to the parties as they have heretofore divided and distributed it with the exception that the chest and the box of year books are hereby awarded to the Defendant and the Defendant is ordered to return the photographs to the Plaintiff within one month after he has had an opportunity to have those photos duplicated.

7. It is hereby ordered that the life insurance policies currently in force shall be continued naming the

children as beneficiaries, with the policy on the Plaintiff's life being paid for by the Plaintiff and the policy on the Defendant's life being paid for by the Defendant.

8. It is hereby ordered that the Defendant shall continue health insurance on the party's adult child, Adrienne for so long as such insurance is available and needed because of her pre-existing health condition and it is ordered that the cost of premiums for said insurance shall be shared equally between the parties.

9. It is hereby ordered that the home and residence located at 1768 Mombo Drive, Sandy, Utah, 84092, shall be placed on the market for sale immediately after the minor child graduates from high school in June 1993 and that the said residence shall be sold in a commercially reasonable manner with the parties sharing equally in the equity that is realized after deducting the costs of sale. Until the home is sold, the Plaintiff is hereby ordered to be responsible for the first and second mortgage payments. She shall not receive a credit for those payments. Further, the Plaintiff shall have exclusive possession and use of the home until it is sold

and she is hereby ordered to be responsible for keeping and maintaining the property in a condition similar to that that the parties enjoyed when they were living together.

11. It is hereby ordered that the Defendant shall pay the actual cost of the automobile insurance premium for the minor child, Eric, up to the amount of \$1,013.20 each year until the minor child reaches the age of twenty-one (21).

12. The parties are hereby ordered to be responsible for and pay those obligations as they currently are divided.

13. It is hereby ordered that the parties shall share the federal and state tax exemption for the minor child by alternating the exemption on a yearly basis for those years that the child is claimed as an exemption, with the Defendant being awarded the tax exemption the first tax year of 1992, the Plaintiff being awarded the tax exemption the next tax year of 1993, etc.

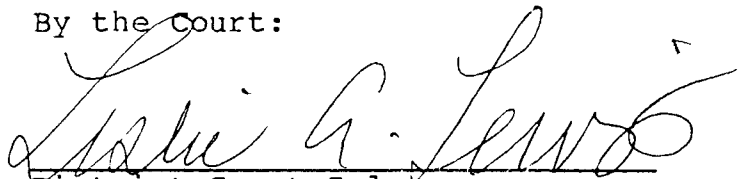
14. Each party is hereby awarded one-half of the other party's retirement benefits, profit sharing, and other similar benefit earned or accrued by either of them during the period of their marriage. This award is subject to a Qualified Domestic Relations Order where appropriate.

15. The parties are each ordered to execute in a timely fashion all documents that are necessary and reasonable to effectuate the provisions of the stipulation. In particular, each party is hereby ordered to cooperate in the transfer of title to the automobiles to the owner thereof.

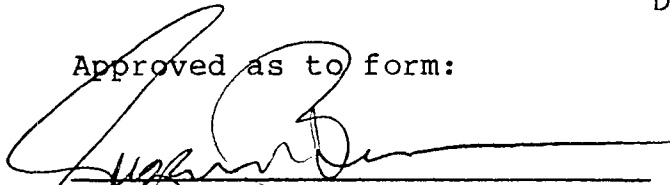
16. Each party is hereby ordered to pay their own attorney fees and costs that they have incurred in this matter.

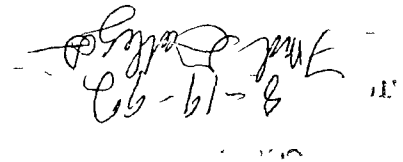
DATED this 14th day of July, 1992.

By the Court:


District Court Judge

Approved as to form:


Suzanne Benson
Attorney for Plaintiff


JML
8-19-92

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Decree of Divorce, postage prepaid, to Suzanne Benson at The Hermes Building, Suite 200, 455 East Fifth South, Salt Lake City, Utah 84111 this 18th day of June, 1992.


Christine Done

STEPHEN G HOMER (1536)
Attorney at Law
9225 South Redwood Road
West Jordan, Utah 84088
Telephone (801) 561-9665
Attorney for Defendant-Petitioner ALAN D JONES

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
SALT LAKE CITY DEPARTMENT, STATE OF UTAH

LYNDA F JONES,	)	DEFENDANT'S VERIFIED PETITION
	)	TO MODIFY
Plaintiff-Respondent	)	DECREE OF DIVORCE
	)	[ALIMONY PROVISIONS]
vs)	
)	
ALAN D JONES,	)	Civil No. 914900581DA
)	
Defendant-Petitioner	)	Case assigned to Judge Lewis

The Defendant-Petitioner ALAN D JONES hereby petitions the Court for a modification of the Decree of Divorce in the above-entitled action, based upon the following:

1. The parties hereto were divorced pursuant to that certain "Decree of Divorce" entered by this Court on or about 14 July 1992.
2. The original Decree of Divorce has not been subsequently modified.
3. Subsequent to the entry of the aforementioned Decree of Divorce, there have occurred substantial and material changes in the circumstances of the parties, not reasonably anticipated at the time of the entry of the original Decree, including but not limited to:
 - a. a significant, material and permanent reduction in

the income and/or earning-capacity of the Defendant-Petitioner ALAN D JONES;

b. the present and future ability and capacity of the Plaintiff-Respondent LYNDA F JONES to now fully provide for her own economic well-being and financial support.

These substantial and material changes in circumstances warrant a reexamination and reconsideration of the permanent award of alimony and the revocation and termination thereof.

4. Paragraph 10 of the original Decree of Divorce required the Defendant to pay \$905 each month for alimony as long as there were minor dependent children residing with the Plaintiff and for whom the Defendant-Petitioner was ordered to pay monthly child support. Paragraph 10 of the original Decree of Divorce automatically increased the alimony award to \$1,400 per month following the termination of the child support payments for the minor children.

5. The alimony award of the original Decree of Divorce was based upon the Defendant's "stipulated"---per Paragraph 4 of the Stipulation---earnings in excess of \$5,000 per month.

6. The Defendant ALAN D JONES presently is unemployed and is unable to make the court-ordered alimony payments in the amounts specified in the original decree.

7. The Plaintiff is employed and earns, to the best of Defendant's knowledge and belief, in excess of \$2000 per month.

8. The Plaintiff-Respondent LYNDA F JONES is in good health,

is educated, and is full-time employed in a career or occupation of her own choosing, has no dependents relying on her for support, and is fully capable of providing her for her own financial support without the continuing obligation on the part of the Defendant-Petitioner to pay permanent alimony long after the marriage has terminated.

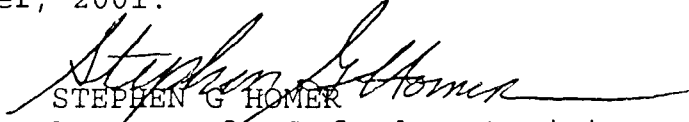
PRAYER FOR RELIEF

WHEREFORE, the Defendant-Petitioner ALAN D JONES prays for judgment in favor of the Defendant-Petitioner ALAN D JONES and against the Plaintiff-Respondent LYNDIA F JONES as follows:

- a. That the Court require the Plaintiff-Respondent LYNDIA F JONES, following service of a summons, to appear and answer these allegations.
- b. That the Court require the Plaintiff-Respondent LYNDIA F JONES to make full disclosure of her earnings and/or earning capacity and such other information as the Court may require pertinent to any future alimony obligation on the part of the Defendant-Petitioner.
- c. That the Court enter an order modifying the original Decree of Divorce, to effect an adjustment of the alimony support amounts to be paid by the Defendant-Petitioner ALAN D JONES to the Plaintiff-Respondent LYNDIA F JONES, to reduce said monthly alimony payments to zero.
- d. That the Court require each party to bear their own costs and attorney's fees incurred in this proceeding.

e. That the Court grant such further relief as may be properly before the Court.


Dated this 19th day of October, 2001.


STEPHEN G HOMER
Attorney for Defendant-Petitioner
ALAN D JONES

VERIFICATION

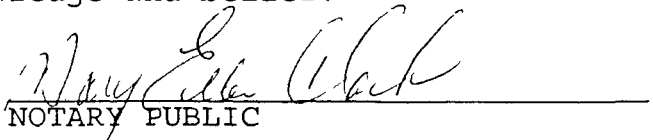
The foregoing statements contained in the DEFENDANT'S VERIFIED PETITION TO MODIFY DECREE OF DIVORCE [ALIMONY PROVISIONS] are true to the best of my knowledge and belief.

Dated this 19th day of October, 2001.


ALAN D JONES

STATE OF MONTANA)
) ss
COUNTY OF LEWIS & CLARK

On the 19th day of October, 2001, ALAN D JONES personally appeared before me and, on his oath, acknowledged to me that the statements contained in the foregoing DEFENDANT'S VERIFIED PETITION TO MODIFY DECREE OF DIVORCE [ALIMONY PROVISIONS] are true and correct, to the best of his knowledge and belief.

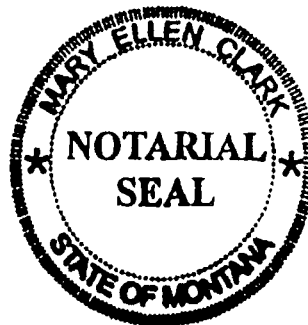

NOTARY PUBLIC

PLAINTIFF'S PRESENT ADDRESS:

LYNDA F JONES
2734 Hartford Street
Salt Lake City, Utah 84106

DEFENDANT'S PRESENT ADDRESS:

ALAN D JONES
301 Best Place Road
Helena, Montana 59602



AMY E. HAYES (7882)
DART, ADAMSON & DONOVAN
370 East South Temple, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 521-6383
Facsimile: (801) 355-2513

Attorneys for Petitioner

CLIENT COPIED
FILED DISTRICT COURT
Third Judicial District

MAY 30 2002

SALT LAKE COUNTY
By Deputy Clerk

**IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

-----oOo-----
LYNDA F. JONES,

Petitioner,

v.

ALAN D. JONES,

Respondent.

: **ORDER AND JUDGMENT RE:**
: **CONTEMPT OF COURT, ATTORNEY'S**
: **FEES, ALIMONY ARREARS AND**
: **OTHER RELATED MATTERS**

:
: Civil No. 914900581DA
: Honorable Leslie A. Lewis
: Commissioner Thomas N. Arnett, Jr.

-----oOo-----

The above-referenced matter came on regularly scheduled hearing before the Honorable Leslie A. Lewis, District Court Judge, on May 8, 2002, at 9:30 a.m. Petitioner was present and represented by her counsel, Amy E. Hayes, of Dart Adamson & Donovan. Respondent was present and represented by his counsel, Stephen G. Homer, Esq. The Court, having heard and considered the evidence adduced in this matter and being fully advised in the premises, now makes the following:

FINDINGS OF FACT

1. The elements of Respondent's contempt of court have been proven without question by clear and convincing evidence. Specifically, the Court finds that:

a. Respondent not only knew of this Court's Order that he pay alimony in the monthly amount of \$1,400.00 to Petitioner, but agreed that this order be entered by stipulation. Respondent clearly knew of his obligation;

b. The Court finds that Respondent has the ability to continue to meet his Court ordered obligation. The Court finds that Respondent has ample resources available to him through a \$120,000.00 inheritance received from his mother's estate and a \$60,000.00 lump-sum retirement payment received when Respondent voluntarily terminated his previous employment. Further, Respondent elected to voluntarily terminate his employment before securing new employment in the Salt Lake valley. Just prior to Respondent refusing to pay his alimony obligation in September, 2001, Respondent made informal lump-sum settlement offers of at least \$12,000.00 to Petitioner. Respondent then remarried and relocated with his present wife to Helena, Montana, again, without investigating the job market and securing employment. Respondent remained unemployed for nearly one year, and is presently underemployed earning \$6.00 an hour part-time, when his recent earnings history demonstrates Respondent earned over \$100,000.00 per year. Finally, Respondent willfully ignored Commissioner Arnett's November, 2001, judgment against Respondent in the

amount of \$2,800.00, Respondent has recently provided as much as \$9,000.00 to the parties' adult daughter to defray some of her wedding expenses.

c. Despite being fully aware of his alimony obligation, and despite having ample resources available to him and having voluntarily reduced his income substantially, Respondent has failed to pay his alimony obligation from September 1, 2001, through the date of this hearing. Respondent's total alimony obligation for this time is \$12,600.00.

Based upon the foregoing Findings of Fact, the Court makes and enters the following:

ORDER

1. Respondent is found in contempt of Court for having willfully and knowingly failed to pay his Court ordered alimony obligation to Petitioner.

2. Judgment is entered against Respondent in the amount of \$12,600.00 as and for unpaid alimony from September 1, 2001, up to and including May, 2002.

3. Respondent is sentenced to serve thirty (30) days in the Salt Lake County Jail, said sentence having been temporarily purged by Respondent's immediate tendering of payment of the full amount of Commissioner Arnett's initial judgment of \$2,800.00.

4. If the remaining \$9,800.00 of this Court's Judgment is not paid within six (6) months after this Order, Respondent shall surrender himself to the Salt Lake County Jail and serve this Court's thirty (30) day sentence.

5. A monetary fine against Respondent is not imposed at this time.

6. Petitioner is awarded her reasonable attorney's fees associated with prosecuting this contempt action in an amount to be determined by this Court.

7. By Stipulation of the parties, the term of alimony shall be defined as not to exceed the length of the parties' marriage.

8. Respondent's Petition to Modify is set for evidentiary hearing on July 18, 2002, at 9:30 a.m., before this Court.

9. Within fourteen (14) days of this Order, the parties are ordered to exchange their complete tax returns for the years 1994 through the present.

10. The parties are further ordered to complete all additional discovery necessary within thirty (30) days of this Court's Order.

DATED this 31st day of May, 2002.

BY THE COURT

LS!

LESLIE A. LEWIS
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

STEPHEN G. HOMER, ESQ.
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 2002, I caused a true and correct copy of the foregoing to be [x] mailed, postage prepaid, [] hand-delivered, [x] sent via facsimile to:

Stephen G. Homer, Esq.
Attorney for Respondent
9225 South Redwood Rd., Ste. B
West Jordan, UT 84088

561-9818



TRACI WILLIAMS

AMY E. HAYES (7882)
DART, ADAMSON & DONOVAN
370 East South Temple, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 521-6383
Facsimile: (801) 355-2513

Attorneys for Petitioner

RECEIVED
JUL 1 4 2003
Dart, Adamson & Donovan
FILED DISTRICT COURT
Third Judicial District

JUL 16 2003

SALT LAKE COUNTY

by _____ Deputy Clerk

COPIED EOC
etc

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----oOo-----
LYNDA F. JONES,

Petitioner,

v.

ALAN D. JONES,

Respondent.

:

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**ORDER IN RE: JUDGEMENT
CONTEMPT AND OTHER
MATTERS**

Civil No. 914900581DA
Honorable Leslie A. Lewis
Commissioner Thomas N. Arnett, Jr.

-----oOo-----

The above referenced matter came on regularly scheduled hearing before the Honorable Leslie A. Lewis, District Court Judge, on June 4, 2003, at 9:00 a.m. Petitioner was present and represented by her counsel, Amy E. Hayes, of Dart Adamson & Donovan. Respondent was present and represented by his counsel, Stephen G. Homer, Esq. The Court having heard and considered the evidence adduced in this matter and being fully advised in the premises, now makes the following:

FINDINGS OF FACT

1. The Respondent is in arrears regarding his Court ordered alimony payments to Petitioner.

2. Respondent has the ability to have made alimony payments to Petitioner.

Based upon the foregoing Findings of Fact:

IT IS HEREBY ORDERED:

1. The Respondent is to serve 30 days in the Salt Lake County Jail. This jail time is stayed for 10 days to allow for the Respondent time to purge the jail sentence. Jail time may be purged with a \$1,000.00 check or money order received by Petitioner's counsel by June 14, 2003. A \$25,000.00 warrant for Respondent's arrest will be held until June 16, 2003, to allow Respondent to make this payment. If Respondent does not make this initial payment, Petitioner's counsel shall notify the Court and the warrant will be issued immediately.

2. In addition to the payment of \$1,000.00, Respondent is to pay \$100.00 per month to Petitioner. The first \$100.00 is due on or before July 31, 2003, thereafter due the last day of each month. If at any time the monthly \$100.00 payment is not made, the arrest warrant shall issue.

3. Respondent's Petition to Modify Decree of Divorce shall be dismissed unless all medical records relating to any medical reasons for Respondent not working over the past year are produced. If these records have not been produced to Petitioner's counsel by noon, June 11, 2003, Respondent's Petition to Modify shall be dismissed with prejudice.

4. Notwithstanding the above, Respondent's Petition to Modify shall be heard by this Court on August 13, 2003, at 9:00 a.m. At this time, Respondent should be prepared to present to the

Court specific information regarding whether the Respondent chose to leave his previous employment or whether he was asked to do so.

DATED this 11 day of ~~June~~^{July}, 2003.

BY THE COURT

[S]
DISTRICT COURT JUDGE

Rule 4-504 Notice

Rule 4-504(2) of the Utah Code of Judicial Administration requires that any objection to the foregoing Order must be submitted to the Court and counsel within five (5) days of after service of this Order.

DATED this 25 day of June, 2003.

DART ADAMSON & DONOVAN

Amy Hayes
AMY E. HAYES
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 2003, I caused a true and correct copy of the foregoing to be [x] mailed, postage prepaid, [] hand-delivered, [] sent via facsimile to:

Stephen G. Homer, Esq.
Attorney for Respondent
9225 South Redwood Rd., Ste. B
West Jordan, UT 84088

Traci Williams
TRACI WILLIAMS



AMY E. HAYES (7882)
DART, ADAMSON & DONOVAN
370 East South Temple, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 521-6383
Facsimile: (801) 355-2513

Attorneys for Petitioner

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----oOo-----

LYNDA F. JONES,	:	PETITIONER'S FINANCIAL
	:	DECLARATION (AUGUST 2003)
Petitioner,	:	
	:	
v.	:	
	:	
ALAN D. JONES,	:	Civil No. 914900581DA
	:	Honorable Leslie A. Lewis
Respondent.	:	Commissioner Thomas N. Arnett, Jr.

-----oOo-----

Name:	Lynda Jones
Address:	2734 Hartford Street
	Salt Lake City UT 84106
Social Security No.:	529-66-1482
Occupation:	Fund Raiser
Employer:	Hale Centre Theatre
Employer Address:	3333 S Decker Lake Drive
	West Valley City UT 84119
Number of exemptions taken:	1
Birth Date:	3/15/45

STATEMENT OF INCOME, EXPENSES, ASSETS & LIABILITIES

1. GROSS MONTHLY INCOME:

From salary and wages, including commissions,
bonuses, overtime and allowances) \$4,250.00
Pensions and retirement
Social Security
Disability and unemployment insurance
Public assistance (welfare, AFDC payment, etc.)
Child support from any prior marriage
Dividend interest
Rents
All other sources (specify)

TOTAL MONTHLY INCOME: \$4,250.00

2. MONTHLY DEDUCTIONS:

Federal income tax \$549.56
State income tax 225.52
FICA 325.14
Health insurance 87.50
Life insurance
Union or other dues
Retirement or pension fund
401(k)
Savings plan
Credit union
Other (specify)

TOTAL MONTHLY DEDUCTIONS: \$1,187.72

3. NET MONTHLY INCOME: (Attach current

income verification) \$3,062.28

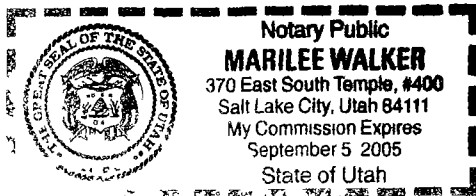
4. **MONTHLY EXPENSES:**

Rent or mortgage payments (residence) PITI	\$1,407.40
Real property taxes (residence)	
Real property insurance (residence)	
Maintenance (residence)	50.00
Food and household supplies	300.00
Utilities:	
Electricity	40.00
Natural gas	54.00
Water, sewer and garbage	50.00
Telephone	100.00
Laundry and dry cleaning	
Clothing	
Medical	
Dental	
Insurance (life, accident, comprehensive liability, disability: excluding deductions from wages in item 2, above)	71.00
Child care	
Payment of child support or alimony from a prior marriage	
School	
Entertainment	120.00
Gifts and donations	100.00
Transportation	
Auto expense	100.00
Auto payments	
Installment payments (from item 4, above, not including above)	
Other expenses (specify)	975.00
TOTAL MONTHLY EXPENSES	\$3,367.00

)

I swear that all of the information contained herein is true and correct:

Subscribed and sworn to before me this 8th day of August, 2003



My Commission Expires: Sept 5, 2005

ENR 1300221 700

0000910026

Earnings Statement



HALE CENTRE THEATRE
3333 S. DECKER LAKE DRIVE 801-984-9000
WEST VALLEY CITY, UT 84119

Period Ending: 07/31/2003
Pay Date: 08/05/2003

Taxable Marital Status: Single
Exemptions/Allowances:
Federal: 3
State: 3

LYNDA F. JONES
2734 HARTFORD STREET
SALT LAKE CITY, UT 84106

Social Security Number: [REDACTED]

Earnings	rate	hours	this period	year to date
Regular	2125.00		2,125.00	31,875.00
Gross Pay			\$2,125.00	31,875.00

Deductions	Statutory		
	Federal Income Tax	-274.78	4,305.29
	Social Security Tax	-131.75	1,976.25
	Medicare Tax	-30.81	462.19
	UT State Income Tax	-112.76	1,691.40
	Other		
	Aflac Posttax	-43.75	
	Checking	-1,531.15	
Net Pay			\$0.00

Your federal taxable wages this period are
\$2,125.00

FOR DOCUMENT AUTHENTICITY - COLORED AREA MUST CHANGE IN TONE GRADUALLY AND EVENLY FROM DARK AT TOP TO LIGHTER AT BOTTOM

HALE CENTRE THEATRE
3333 S. DECKER LAKE DRIVE 801-984-9000
WEST VALLEY CITY, UT 84119

Advice number: 00000310026
Pay date: 08/05/2003

Deposited to the account of
LYNDA F. JONES

account number: 002619583
transit ABA: 240 0005
amount: \$1,531.15

NON-NEGOTIABLE

FILED DISTRICT COURT
Third Judicial District

OCT 31 2003

SALT LAKE COUNTY

By Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LYNDA F. JONES	:	MEMORANDUM DECISION
Petitioner,	:	CASE NO. 914900581
vs.	:	
ALAN D. JONES,	:	
Respondent.	:	

This matter came before the Court for a bench trial on August 14, 2003. At the conclusion of the trial, the Court took the matter under advisement in order to give counsel an opportunity to submit post-trial briefs and additional documentation. The petitioner filed her Post-Trial Brief on September 30, 2003. The respondent did not file a post-trial brief and the time for doing so has now expired.

The Court has now had an opportunity to review the respondent's Petition to Modify, seeking to eliminate the respondent's alimony obligation, along with the remaining pleadings that have been filed and the exhibits that were presented into evidence. The Court has also revisited portions of the trial testimony and counsel's closing arguments. Finally, the Court has reviewed the petitioner's Post-Trial Brief and the case law cited

therein. Therefore, the Court is now fully advised and rules as stated herein.

LEGAL ANALYSIS

The respondent contends that his Petition to Modify is premised on two changes in circumstance that occurred subsequent to the entry of the Decree of Divorce and which were not contemplated by either party. Specifically, the respondent points to the substantial reduction in his income or earning capacity and to the petitioner's increased ability to provide for her own economic well-being because of the gradual, but steady increase in her income and earning capacity.

The Court's preliminary indication at the bench trial was that there has been a substantial and material change in circumstances which requires a modification in the respondent's alimony obligation. The Court now clarifies that this change in circumstance arises solely because of the petitioner's increased ability to meet her own financial needs and not because of the respondent's decision to earn less than he is capable of earning, particularly given his lengthy experience in the sales industry.

Specifically, the Court reiterates its prior finding that the respondent has voluntarily reduced his earning capacity with no basis for doing so. In other words, the Court is persuaded that the respondent did not have to leave Lawson Products because of a

change in the management scheme or because his earning potential would have decreased, or for any other viable reason.

Further, the Court is unpersuaded that the respondent's current underemployment is necessitated by any health concerns or physical impediments. To the contrary, the respondent's trial testimony was that he is currently in good health. In the end, the respondent's counsel articulated it best when he said that his client left Lawson Products because he simply intended to earn less. Counsel went on to question whether there was anything morally wrong with such a decision and how long the respondent should continue to be "enslaved" by his alimony obligation. The Court addressed these issues during the bench trial by emphasizing that she is concerned only with the legal issue of whether the respondent's voluntary underemployment obviates his alimony obligation. The Court concludes that while a person may choose to change careers or choose to earn less; this voluntary act does not obviate alimony. Therefore, this Court imputes to the respondent the full amount of income represented by his earning history prior to his voluntary departure from Lawson Products.

In contrast to the respondent's decision to voluntarily leave his job in order to "earn less," the petitioner has steadily progressed in her career and now earns approximately double what she earned at the time of the Decree of Divorce. Ironically,


however, it is the fruits of the petitioner's hard work and diligence that now provide the sole legal basis for the respondent to claim a change in circumstances and seek to modify his alimony obligation.

Having determined that the petitioner's earning capacity has dramatically increased, the question becomes to what extent the Court should modify the respondent's alimony obligation. Using the petitioner's reasonable financial needs as a reference point, the Court concludes that the petitioner is entitled to an amount of alimony that will address her unmet financial needs. In this regard, the Court finds that the petitioner has understated those unmet needs to be approximately \$300 per month. Taking into account a reasonable amount of expenses associated with clothing and dry-cleaning, the Court concludes that the petitioner's unmet needs are closer to \$500 per month. Therefore, the Court grants the respondent's Petition, finding a change in petitioner's income, and orders a modification of respondent's alimony from \$1,400 to \$500 per month.

Counsel for the petitioner is to prepare Findings of Fact and Conclusions of Law consistent with, but not limited to, this

Memorandum Decision. Each party is to bear their own attorney's fees.

Dated this 3 day of October, 2003.



LESLIE A. LEWIS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 31 day of October, 2003:

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