

2004

Jones v. Jones : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LYNDA F JONES,)	
)	
Plaintiff-Appellee)	
)	
vs)	Docket No. 2004-0192CA
)	
ALAN D JONES,)	Priority 15
)	
Defendant-Appellant)	ORAL ARGUMENT REQUESTED

APPELLANT'S BRIEF

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

The Honorable Leslie Lewis, District Judge

UTAH COURT OF APPEALS
BRIEF

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UTAH APPEALS

COURTS

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IN THE UTAH COURT OF APPEALS

LYNDA F JONES,)	
)	
Plaintiff-Appellee)	APPELLANT'S BRIEF
)	
vs)	
)	
ALAN D JONES,)	Oral Argument Requested
)	
Defendant-Appellant)	Case No. 2004-0192CA

DESIGNATION OF THE PARTIES

The Plaintiff-Appellee is Lynda F Jones, a natural person. The Defendant-Appellant is Alan D Jones, a natural person. The parties are former spouses to each other, having been divorced in 1992.

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STATEMENT OF JURISDICTION OF THIS COURT

Jurisdiction of this Court is granted pursuant to the provision of Section 78-2a-3(2)(h), Utah Code [appeals from district court involving domestic relations].

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal presents the following issues for review:

1. Whether or not the trial court abused its discretion in modifying the alimony award to an amount greatly in excess of the payor spouse's ability to pay and greatly in excess of the needs of the recipient spouse.
2. Whether the trial court abused its discretion in making the modification of the alimony award prospectively from the time of the order of modification, rather than from the time the petition for modification was filed.

STATEMENT OF THE CASE

The parties were married in 1968. In 1991 the Plaintiff filed for divorce, which was granted in 1992. At the time of the divorce, the Defendant [Mr Jones] was earning in excess of \$5,000 per month. The original Decree of Divorce provided for an alimony award of \$900 per month, which would increase to \$1400 per month when the parties' youngest child reached the age of 18 and the \$500 monthly child support would terminate.

Pursuant to the original Decree, Mr Jones paid the \$16,800 annualized alimony for about eight years, paying Mrs Jones in excess of one hundred thousand dollars.

In 1992 he---as a Sales Manager for a regional company (Lawson)---was earning in excess of fifty thousand dollars per year. [His income varied, based upon the percentage of commissions "override" earned by the numerous salesmen he supervised.] In 2000 Mr Jones' employer (Lawson) restructured the compensation schedule paid to Mr Jones and other sales managers: his compensation dropped from the annual \$60,000-range he had been earning to \$23,000 per year. His duties would have remained the same. Rather than accept the diminished compensation, he severed his relationship with his former employer and sought other employment.

Mr Jones has been unable to find employment which pays him anywhere near his former earnings. Major medical problems have restricted, albeit temporarily, his employment. Currently he earns about \$17,000 per year in wages.

Presently, Mrs Jones---having no dependents, in acknowledged good health, and capable of supporting herself---earns \$50,000 per year.

In October 2001 Mr Jones petitioned for a modification of the alimony award, based upon his diminished ability to pay.

The District Court ultimately reduced the alimony award to \$500 per month, which the Appellant [Mr Jones] believes is still excessive, given the recipient spouse's ability to support herself [on her \$50,000+ per year annual income] and his extremely diminished ability to pay alimony.

During the modification proceedings the District Court entered an order tentatively reducing the Defendant's alimony support obligation to \$100 per month [July 2003; RECORD at page 207; EXHIBIT #1, hereto]; however, as the modification proceeded to towards finality, the District Court entered a "judgment" against the Defendant for approximately \$30,000 as unpaid arrearages of alimony, thus ignoring

its previous order and further allowing the Plaintiff-Appellee a "double recovery", as explained herein.

This appeal ensued.

ARGUMENT

I

THE TRIAL COURT ABUSED ITS DISCRETION
IN ORDERING THE DEFENDANT TO PAY
\$500 PER MONTH ALIMONY,
SAID AMOUNT GREATLY IN EXCESS
OF THE RECIPIENT'S NEEDS
AND HER OWN ABILITY TO EARN
INCOME AND CREATING A "SERIOUSLY INEQUITABLE" RESULT

In divorce cases, the District Court is granted "broad discretion" in making alimony determinations, and those determinations will not be disturbed on appeal unless the alimony award results from a "misunderstanding or misapplication of the law resulting in substantial and prejudicial error, the evidence clearly preponderates against the findings, or such a **serious inequity has resulted as to manifest a clear abuse of discretion.**" *Naranjo vs Naranjo*, 751 P.2d 1144 at 1146. Emphasis added. See also *English vs English*, 565 P.2d 409 (Utah Supreme Court 1977), *Eames vs Eames*, 735 P.2d 395 (Utah Appeals 1987), and *Ring vs Ring*, 29 Utah 2nd 436, 511 P.2d 155 (Utah Supreme Court 1973) ["manifest injustice" exception].

In the present case the \$6,000 per year alimony award is a "serious inequity as to manifest a clear

abuse of discretion."

Subsection 30-3-5(7)(a), Utah Code, concerning the award of alimony (and, arguably, petitions for modification thereof), provides in relevant part:

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;**

. . .

Concerning these principles the Utah Court of Appeals has written:

The purpose of alimony is to "enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage and to prevent the spouse from becoming a public charge." Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986); Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985). **It should, so far as possible, equalize the parties' "respective standards of living** and maintain them at a level as close as possible to the standard of living enjoyed during the marriage." Olson v. Olson, 704 P.2d 564, 566 (Utah 1985); Higley v. Higley, 676 P.2d 379, 381 (Utah 1983). "[T]he ultimate test of the propriety of an alimony award is whether, given all of these factors, the party receiving alimony will be able to support him or herself 'as nearly as possible it the standard of living ... enjoyed during marriage.'" Davis v. Davis, 749 P.2d 647, 649 (Utah 1988) (quoting English, 565 P.2d at 411).

The Utah Supreme Court has consistently articulated three factors which must be

considered in fixing a reasonable alimony award: (1) **the financial condition and needs of the party seeking alimony**; (2) **that party's ability to produce a sufficient income for him or herself**; and (3) **the ability of the other party to provide support**. English, 565 P.2d at 411-12; Davis, 49 P.2d at 649; Lee v. Lee, 744 P.2d 1378, 382 (Utah Ct.App.1987). **Failure to analyze the parties' circumstances in the light of these three factors constitutes an abuse of discretion**. Paffel, 732 P.2d at 101; Jones, 700 P.2d at 1075; Boyle v. Boyle, 35 P.2d 669, 671 (Utah Ct.App.1987). As long as the "trial court exercises its discretion **within the bounds and under the standards we have set** and has supported its decision with adequate findings and conclusions, we will not disturb its rulings." Davis, 749 P.2d at 649.

. . .

751 P.2d at 1146-1147. Emphasis added.

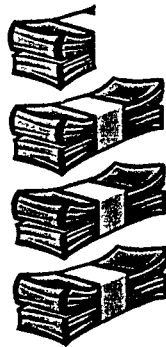
Concerning the "ability of the payor spouse", per Subsection (iii) of the statute, that is the present ability---based on what he earns---not based on what he might have earned in the past. That he, as an older worker finding difficulty in obtaining better employment, has not been able to find employment commensurate with his experience and his abilities, does not give him the "ability" when the job and its resultant monies simply are not present!

In the instant situation, Appellant ALAN present earns approximately \$17,000 per year. On the other hand, Appellee LYNDIA earns \$50,000 per year---approximately THREE TIMES MORE than ALAN.

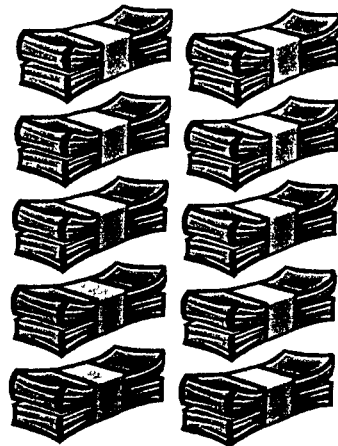
The disparity of earnings and "post-alimony" resources is illustrated by the following chart:

ANNUALIZED "PRE-ALIMONY" EARNINGS

ALAN
c. \$17,000/year



LYNDA
\$50,000/year

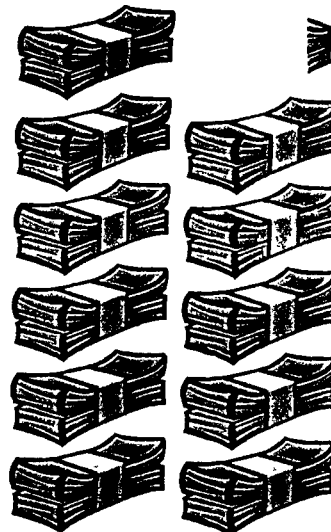


ANNUALIZED "POST-ALIMONY" RESOURCES

ALAN
c. \$11,000/year



LYNDA
\$56,000/year



LEGEND:  = \$5,000.

Nevertheless, the District Court ordered ALAN to pay alimony at a rate of \$500 per month, which equates to \$6,000 per year. When the \$6,000 annual amount is deducted from his side of the financial "balance sheet" and simultaneously added to her side of the "balance sheet", the inequity is even more extreme:

	ALAN	LYNDA
Annualized income	\$17,000	\$50,000
Alimony award	- <u>6,000</u>	+ <u>6,000</u>
Net available to party	\$11,000	\$56,000

LYNDA has \$56,000 annualized "income" and ALAN has but \$11,000: LYNDA has FIVE TIMES MORE "annualized income" (including the alimony) than does ALAN.¹

Clearly, the trial court's award of the \$500.00 per month (\$6,000 per year), against his total earnings of \$17,000 per year, is clearly and "seriously inequitable", particularly in context of LYNDA's earnings and her ability to produce income for herself.

II

THE TRIAL COURT'S CHARACTERIZATION OF VOLUNTARY UNDEREMPLOYMENT IS ERRONEOUS, IGNORES THE EVIDENCE, AND IS ESSENTIALLY A MISAPPLICATION OF THE LAW

Throughout the modification proceedings, on

¹Under the federal and state tax laws, ALAN is entitled to deduct from his "income" the \$6,000 paid to LYNDA as alimony, which she is required, under the tax laws, to include as her income. The tax saving which ALAN receives from the tax "deduction" is minimal, in comparison to the amount of remainder monies he's left with.

numerous occasions, the District Court frequently characterized ALAN's situation as being "voluntary underemployment", in that he chose to quit his employment. Admittedly, ALAN did choose to terminate his employment at Lawson. But such was only AFTER had adopted the compensation plan, under which ALAN's compensation was decreased from approximately \$70,000 per year to a mere \$23,000 per year. [At the time of the compensation decrease, ALAN was facing an alimony obligation of \$16,800 per year, leaving him but \$6,200 to live on. LYNDA at the time was earning \$40,000 per year, which later increased to \$50,000 per year!] The resulting difference in earnings---\$23,000 had he continued to stay with Lawson, vs the \$17,000 he presently earns---is materially insignificant. The District Court chose to focus more upon the "voluntary termination" (so characterized as "voluntary underemployment") and overlooked the actual salary issue. Had ALAN stayed with Lawson, at the much diminished salary, the Court would likewise be able to characterize such as "voluntary underemployment".

Faced with the "arithmetic" of the situation, it was entirely reasonable for ALAN to terminate his employment with Lawson, in order to seek a more economically-rewarding employment. [Aside from the

"arithmetic" issues, most employees---faced with a situation wherein their wages were "cut" to effectively one-third of the former level---would not continue to do the same job, alimony obligation outstanding or not.

The District Court was similarly critical, on a repeated and continuous basis, about ALAN's personal choice of relocating his residence to Helena, Montana, where he had chosen to attempt to start a new economic future. The District Court phrased this criticality in terms of "you (ALAN) had (alimony) obligations!" or words to that effect. Admittedly so, but the existence of alimony "obligations" ought not to be deemed to constitute the permanent "economic enslavement" precluding the free and unfettered exercise of a citizen's constitutional right of interstate travel and to locate his residence in any state of his choosing. Indeed, the District Court's frequent characterization and articulation---at times in an argumentative tone---of the "you have obligations" issue exhibited less than a detached, impartial, neutral judicial decision: it was if the District Court were personally involved in ALAN's actions vis-a-vis the court-ordered alimony award!

III

THE \$500 MONTHLY ALIMONY AWARD IS IN EXCESS OF THE RECIPIENT'S NEEDS

During the modification proceedings LYNDIA candidly acknowledged she earned \$50,000 per year, was in good health, and had no dependents to support. In spite of her actual earnings (and explicit abilities to earn those amounts), she resisted the modification proceeding: LYNDIA's position was to the result that ALAN should continue to pay the \$16,800 per year, in perpetuity.²

When questioned about her "needs" and the effect of ALAN's "reduction" in the alimony he had actually paid, in recognition of his own distressed financial condition (Lawson employment was terminated) and the "petition to modify", her answer was to the effect that the reduction required her to forego her "Sunday morning golfing game"!

In similar vein, she testified that when faced with the "reduction" in alimony payments to her, she was forced to incur "credit card debt" in the amount of \$30,000 in order to maintain her "lifestyle" (not necessarily her terminology) at the time. She

²LYNDIA did concede---and the trial court did rule---that ALAN's support obligation would terminate, as per the statutory amendment adopted in 1995, at the end of 23 years following the entry of the Decree (approximately 2015), when ALAN would be in his late-sixties (67)!

apparently got her "lifestyle" under control, was able to live within her \$50,000 per year income, and is incurring no new "credit card indebtedness".³

The \$900 "extra" each month LYNDIA has available should likewise be examined in a long-range context, thus: ignoring, for the sake of argument, the economic effect of the existing "judgment" (which would fully cover the claimed disparity), in less than three years her payments of \$900 per month will have fully paid back the \$30,000 of "credit card indebtedness" she incurred. Thus, by the time this "modification" proceeding (and this appeal) is terminated, she will be the \$900 "ahead", each month. She won't then need the monies, and ALAN should not be saddled with that obligation.

The "inequity" (see **Naranjo**, supra) in the alimony award---in the context both of LYNDIA's earnings and in the context of "her needs"---is the simple fact that

³LYNDIA testified that she is "paying off" that credit card indebtedness---not further explained and certainly not documented by her during the proceedings---at the rate of \$900 per month, which she included in the listing of her "monthly expenses". Those payments, arguably, are nevertheless "covered" by the \$30,000+ "judgment" the District Court awarded her for the alimony "arrearages" not paid by ALAN following the "modification" petition. [As previously noted, the District Court ignored its previous ruling that during the pendency of the proceedings the alimony would be at the \$100 per month amount.]

The net effect of the "credit card repayment" expense is, effectively, that LYNDIA has \$900 unencumbered income at the end of the month: that's \$900 "more" than her "needs".

her statement of "expenses" is entirely self-serving. What person, given an essentially-unrestricted quantity of money, isn't able to spend the entirety of that quantity, every month month-after-month. It is almost a truism that most persons spend the entirety (or almost the entirety) of their incomes, and LYNDA seemingly is no exception: whether the \$50,000 per year, or even \$66,800 (approximately) per year, for almost two years (during which she accrued the extra "credit card debt", which she is not NOW accruing).

The "bottom line" is, nevertheless, LYNDA earns presently \$50,000 and ALAN earns \$17,000. That is a fact which cannot be ignored, the District Court's "voluntary underemployment" characterization or not.⁴ [See MEMORANDUM DECISION, RECORD at 267 (line 14). EXHIBIT #2, hereto.] Undoubtedly, LYNDA will always be able to find the ability to spend whatever is available. [Although she claimed that \$100 was needed

⁴The District Court, in its apparent enthusiasm that its own alimony award be fully enforced notwithstanding ALAN's involuntary economic downturn (including inability to find employment commensurate with his skills and experience), ignored---in an "abuse of discretion"---that evidence.

Given ALAN's medical condition---life-threatening "bleeding esophagus, coma for several days, and doctor's orders to refrain from working for a year afterward (which he has disregarded, as he had to provide for himself)---it is entirely reasonable that he might choose to "slow down" and obtain employment which might be less stressful, although less economically rewarding. There are perhaps other things in life---time, relationships, enjoyment of environment and leisure---which are to some (including ALAN) which are more important than the pursuit of "the almighty dollar"!

per month for "clothing" expense, the District Court gratuitously raised that "expense" to \$300 per month, so as to justify---in part---a greater alimony amount.]

It has been frequently observed in judicial decisions---particularly in the context of the initial alimony award---that the alimony award might be adjusted to "equalize the parties' respective standards of living". See Section 30-3-5, Utah Code. Although we are here not dealing with an initial award of alimony, that principle should nevertheless apply. Conversely, the principle (i.e. "equalize the parties' standards of living")---for which the court arguably has "continuing jurisdiction"---should certainly not be ignored in circumstances where the alimony award (reinforced within the "modification" proceeding) is utilized to achieve an "inequitable" result in which even a greater disparity is inflicted upon ALAN. [To illuminate the inherent inequity in the present situation, a rhetorical question---described in greater detail below---is posed: perhaps LYNDIA, now "riding high" in an economic sense, ought to pay ALAN alimony, as she is certainly capable of paying something and he's in need, if only to "equalize" their lifestyles. Such is unlikely to happen, if mainly for the simple reason that out of the hundreds if not thousands of reported

appellate and unreported unappealed divorce cases, there has not been a single case in which "alimony" has been awarded to the male spouse, notwithstanding the "gender-neutral" status⁵ of the present statute, the practice uniformly continues: women are awarded alimony, and men aren't!

III

**THE TRIAL COURT'S REFUSAL TO ORDER THE DECREASED
ALIMONY AWARD BACK TO THE DATE OF THE FILING
OF THE MODIFICATION PETITION AND/OR THE
DISTRICT COURT'S "INCOME-AVERAGING"
APPROACH TO THE ALIMONY AWARD IS LIKEWISE
"INEQUITABLE" AND NOT IN COMPLIANCE WITH THE LAW**

In adjudicating the "modification" petition, the District Court required the Petitioner ALAN to provide evidence---which he did---of his "historic" (i.e. "most recent five years") earnings (in the form of income tax returns). Upon that basis the District Court determined the \$500 per month (\$6,000 per year) alimony award. The "income-averaging" approach---while perhaps justified in situations where the income of a payor-spouse might vary significantly from year-to-year (due to bonuses,

⁵Such was not always the situation. See **Anderson vs Anderson**, 110 Utah 300, 172 P.2d 132 (Utah Supreme Court 1946) ["Alimony" relates to support of the divorced wife]. Alimony is payment by former husband (i.e. male) to former (wife) (i.e. female). It was only in the 1970s when the Legislature realized that such gender-based discriminations were constitutionally impermissible that the statute was "sterilized". Notwithstanding the current status of the statute, the practice---i.e. alimony is awarded the wife, but not the husband---is consistently followed, in the trial courts and in the appellate courts. This gender-based discrimination must stop: see argument below.

economic factors such as stock market performance, etc.) and thus it would make sense (and be "fair") to get an "historical average" upon which to determine future alimony at the time of initial divorce---is "inequitable" and improper, for at least two reasons:

First, because the practice ignores the PRESENT "ability of the payor spouse to provide support". See Section 30-3-5(7)(a)(iii), Utah Code. In the instant setting, ALAN earns presently what he earns: approximately \$17,000 per year, if that! He's not likely to earn more, as much as he perhaps would like to (or had intended to earn, when he moved to Montana). The immutable fact is, simply, that he earns what he earns and the District Court should not be able to ignore that fact, the Court's "voluntary underemployment" characterizations or conclusions to the contrary.

Secondly, LYNDIA, as recipient spouse, has ALREADY RECEIVED her allegedly deserved "alimony" by reason of those in-the-past "historic" earnings; she ought not be enabled to receive future alimony on the basis of incorrectly assumed "income" (which IN FACT is

simply not there), which ALAN does not presently have, on the basis that he had income in those amounts years ago! She's not entitled to "double-dip" in this manner.

In similar vein, the District Court's award of the \$30,000 "judgment" against ALAN (for unpaid alimony accruing "post-petition") during the pendency of the "modification" proceeding and/or the District Court's award of the \$500 per month prospectively (from the date of actual entry thereof) and no retroactively (to the date of filing for the "modification") is "inequitable" and imprudent. "Inequitable" because that approach (i.e. no retroactivity to filing date) ignores the evidence: ALAN didn't have the income then to pay the \$1600 then any more than he has the income to pay the \$1600 now. If the reduction is justified---which it most certainly is---now on the basis that he doesn't (present and future tense) have the earnings and income to pay the \$1600, the retroactive reduction is likewise justified on the basis that he didn't have the income in past (after the filing of the "modification" petition)!

The non-retroactive approach is likewise imprudent because it forces the party-litigants and the Courts to engage in a "hurry-up" manner of litigating complex and

enduring issues, on the basis of assumed, artificial urgency and perhaps without full basis to develop the necessary facts and/or resources to litigate the case. [That ALAN resides out-of-state and/or doesn't have a huge war chest to "bankroll" this litigation hasn't made the case move any quicker.] Regardless of how quickly the case moved or is perceived to should have moved, the fact that ALAN was earning what he was earning hasn't changed! In fact, that he has continued in his diminished earning capacity---a fact that LYNDIA and the District Court would like to conveniently ignore---for several years should be seen as a benefit to the judicial process, rather than as a personally-inflicted "penalty" upon ALAN. [It is not necessarily his fault that he just can't jump into a new position wherein he earns the \$70,000 he historically earned prior to 2000, after decades of working for Lawson and working himself into a supervisory position. Regardless of his experience and qualifications for such a position, a willing employer has to be found to pay him that much. And lots of times employers are, for reasons justified or not (i.e. were this not the Congressionally-perceived practice, we wouldn't have the Age Discrimination in Employment Act and similar statutes on-the-books). ALAN earns what he earns and

the Court and/or LYNDA simply cannot change the fact. ALAN's age is what it is; his health condition is what it is. And those facts cannot be changed!

ALAN's situation is not merely the result of a "temporary" decrease in income; for all intents and purposes, his earnings ought to be deemed to be permanent. [If those earnings should change substantially, LYNDA would arguably have the right to petition for a modification upwards.] See, in contrast, **Cox vs Cox**, 877 P.d 1262 (Utah Court of Appeals 1994) [historic review of income justified where party experiences temporary decrease in income or unusual prosperity during one year], and **Olson vs Olson**, 704 P.2d 564 (Utah Supreme Court 1985) [temporary decrease in ex-husband's income]. ALAN's situation is simply NOT "temporary"; it is, unfortunately, PERMANENT (or seemingly so), and must be judicially recognized! Wishing it otherwise by looking in the past will not change the future!

IV

THE COURT SHOULD RE-EXAMINE THE ALIMONY AWARD IN THIS CASE AND AS A MATTER OF PRINCIPLE FOR ALL OTHER CASES

The instant fact situation (LYNDA earns \$50,000 per year, ALAN earns but \$17,000 and she wants \$16,800---or at least \$6,000---of that \$17,000 each year, in

effective perpetuity, illuminates the inequity of the situation, in this specific case and in an across-the-board setting for all divorcing spouses.

What is it about "alimony" which is so imbued with judicial wisdom and jurisprudential insight, particularly in the Twenty-first Century? Why is it that some ex-spouses---probably about one-half, because statistically (but hard statistics are probably not available) about one-half of ex-wives "waive" any alimony award---pay alimony, and others are under no similar obligation? Merely at the whim of the recipient spouse, even at the nominal amount of "one dollar per year" (in order to keep the door open, in case of unanticipated claims or needs in the future)? Given the fact that the Legislature has adopted the "no fault" (i.e. "irreconcilable differences") grounds for divorce, is alimony to an ex-wife even defensible as a matter of public policy?

Persons marry for a variety of reasons; those reasons include but are not necessarily limited to love, romance, economic reasons, companionship, desire to have and raise (but sometimes only to have) children, and a million other reasons perceived by the private citizen-parties to those marriages. The resultant marriages are as diverse and unique as are

the number of marriages. The Legislature and the Court generally---except in "domestic violence" and "abuse" situations---do not care about the quality or tenor of those "marriage relationships". But about one-half of those marriages will, over time, end in divorce. The Legislature has selected the District Courts to adjudicate and implement general law to grant divorce to the parties. [Numerous other states have non-judicial and/or non-adversarial proceedings to effectuate divorce.] Those divorces result in an effective and complete severing of the "marital relationship", and the parties are free and able to go on their way---except in the case of alimony.

In the alimony context, now arguably with "legislative authorization" but enforceable at the whim and/or "needs" of the recipient ex-wife, the courts feel the power and responsibility to award alimony. Why is this so? Why---for all the reasons that private parties marry---is the "duty of economic support" so significant that it continues, in some cases (at the ex-wife's claim and demand) after the marital relationship has long since terminated and the parties are judicially sent on their way? Why are the two parties essentially absolved of the entirety of their "marital" obligations---whatever those are, as the

private spouses decide amongst themselves sans state or legal involvement---except for the continuing obligation to pay alimony?

Formerly alimony has been judicially justified on the basis of assuring that the recipient "ex-wife" (so stated) would not "become a public charge" (go on welfare). See **Porco vs Porco**, 752 P.2d 365 (Utah Court of Appeals 1988); **Paffel vs Paffel**, 732 P.2d 96, 100 (Utah 1986); **Jones vs Jones**, 700 P.2d 1072, 1075 (Utah 1985); and **Rosendahl vs Rosendahl**, 876 P.2d 870 (Utah Court of Appeals 1994), cert. denied 883 (Utah Supreme Court 1994). Not only is this alleged "not become public charge" justification disingenuous (and inapplicable) in the instant situation⁶, but history and present "divorce" practice is to the contrary. [For example, hypothetically the divorcing "ex-wife" could, as many do, "waive" her claim to alimony. No alimony would be decreed. The State wouldn't be involved in that "waiver" specifically, or in the private "divorce" action generally. Thereafter the ex-wife could apply "for welfare" and her "alimony" (or non-alimony) status would be immaterial. Alimony not being awarded in the first instance, the State would be powerless to

⁶The Court could take "judicial notice" of the fact that LYNDIA, earning \$50,000 per year, is not entitled to "public welfare".

intervene in the then-closed divorce and force the ex-husband to make payments, thus relegating him to "second class" citizenship by reason of the "public charge" responsibilities which the public-at-large has chosen to incur. The resultant "private welfare system" imposed upon a few cannot be justified and defended.

In the Twenty-first Century, the economic opportunities for women (as "ex-wives" or not) abound. Statistically, women constitute presently approximately one-half (sometimes more than one-half) of the "classes" of medical schools, law schools and other post-graduate and professional training. We are no longer in the archaic, anachronistic time-frame centuries ago, in "merry old England", when concepts of "alimony" were first developed, but have subsequently been changed (in England), but were "imported" to America with the colonists and have been incorrectly applied, basically on the basis "that we've always done it this way". Some states---notably Texas---preclude, as a matter of state policy---the award of alimony to the ex-spouse!

If the "marriage" were---hypothetically---strictly one of "economic" or "financial" significance, that "marriage" might be characterized as a "partnership" might like a business. Yet at the break-up of the

business and the resultant adversarial (i.e. judicial) proceeding if the parties couldn't "agree", would the District Court feel empowered to award seemingly permanent, on-going economic payments from the one party to be paid to the other party? Certainly not! And certainly not in recognition of an "fault" on the part of one party (business partner) or the other. [The Legislature's abandonment of the "fault" adjudication of the "grounds" necessary for divorce---together with the instant parties' utilization of "irreconcilable differences" as their "grounds" for divorce, precludes LYNDIA from asserting anything other than "she and/or ALAN just didn't agree" on things any more and she wanted a divorce. Regardless of his intentions---and/or regardless (obviously) of the parties' commitments and promises to each other at the inception of marriage, most of which were not only vaguely stated, if at all, because the parties were "in love with each other" and nothing else mattered, including what happened were divorce to enter the picture decades down the road---to the contrary. She's got "grounds", and the marriage ends---except for her "alimony".⁷

⁷The legislative recognition of "fault" of the parties in the marital break-up is unavailing and confusing. First, in light of the "irreconcilable differences" grounds allowed by statute and relied upon by the instant parties. Secondly, due to the inherently vague and ambiguous legal standard established for the private parties within the privately-decided "marriage" relationship. And

Utah appellate decisions have previously encouraged the trial courts to avoid, where possible "long-lasting financial entanglements" in effecting property settlement awards. See **Marchant vs Marchant**, 734 P.2d 199 (Utah Court of Appeals 1987) [extended distribution of retirement benefits]. The instant case is exactly that situation: LYNDA, earning \$50,000 per year and clearly able to take care of herself (and responsible for no one else), is certainly not IN NEED thereof. Particularly in the face of the simple fact that ALAN earns so much less! ALAN has---as he was then able---has paid LYNDA almost \$140,000 in alimony already.

The District Court's \$500 per month is clearly a "serious inequity" (**Naranjo**, supra) in that context and constitutes an "abuse of discretion". The \$500 per month alimony award must be overturned.

CONCLUSION

LYNDA earns \$50,000 per year. She's in good health and has no dependents. Her living expenses, when properly understood and characterized, are well within

thirdly, not only do the parties not know how to ascertain "fault" and "who is a fault?" for the divorce---which the Legislature has said it doesn't matter---but it is a ludicrous and incredible judicial endeavor to engage in such a "fault" determination, if only for the "alimony" issue! Do the courts really "want to go there"? When one examines how much judicial time---trial court and appellate court---has been spent on "alimony" resolution and imposition, one comes to the conclusion that such has been a very "slippery slope" indeed.

that income, to allow her to support herself.

On the other hand, ALAN earns about one-third of what LYNDA earns and, but for the gender-based discrimination upon which alimony awards have been historically approached, should be receiving alimony from her, so as to "equalize" his standard of living to hers.

The District Court's award of the \$6,000 per year alimony award is, in light of the evidence, a "serious inequity" (**Naranjo**, supra) in light of the immutable evidence before the Court and constitutes an "abuse of discretion" which must be overturned.


The District Court's refusal to make the "alimony modification" retroactive to the date of filing is likewise improper and must be overturned.

If the Court of Appeals can honestly say, in good conscience and recognition of the facts, that it is not clearly a "serious inequity" to award LINDA approximately \$56,000 worth of annual "income" (i.e. earnings and alimony), while ALAN has but one-fifth of that amount (approximately \$11,000: income, less the \$6,000 in alimony), then the District Court judgment should be affirmed. But if---personalities, judicial and otherwise, aside---the unfairness and "serious inequity" is apparent within those simple facts, then

the Court must reverse the District Court and/or enter a more realistic alimony award, perhaps as low as \$0 (or the proverbial "dollar a year", until modified by future Court order).

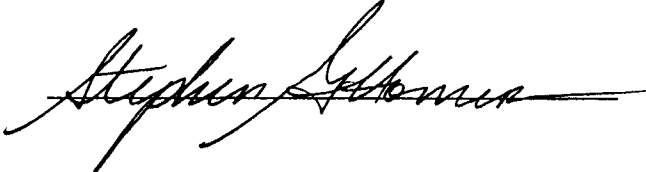
The Court should nevertheless utilize this opportunity---blatantly illuminating the unfairness and illogical extreme to which "alimony" awards are pursued---as an opportunity to revisit the whole idea of alimony in general, regardless of the statutory provisions.

Respectfully submitted this 1st day of November, 2004.


STEPHEN G. HOMER
Attorney for Appellant
ALAN D JONES

CERTIFICATE OF DELIVERY

I certify that I caused two copies of the foregoing BRIEF OF APPELLANT to be mailed, first-class postage prepaid, to Ms Amy E Hayes, Attorney at Law, Dart, Adamson & Donovan, 370 East South Temple Street, Suite #400, Salt Lake City, Utah 84111, this 1st day of November, 2004.



APPENDICES

EXHIBIT #1:
16 July 2003
ORDER IN RE: JUDGMENT

EXHIBIT #2:
31 October 2003
"MEMORANDUM DECISION"

EXHIBIT #3:
10 November 2003
ORDER AND JUDGMENT

EXHIBIT #4:
27 January 2004
FINDINGS OF FACT AND CONCLUSIONS OF LAW

EXHIBIT #5:
29 JANUARY 2004
ORDER MODIFYING DECREE OF DIVORCE

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

FILED DISTRICT COURT
Third Judicial District

JUL 16 2003

By SALT LAKE COUNTY
Deputy Clerk

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

LYNDA F. JONES,

Petitioner,

v.

ALAN D. JONES,

Respondent.

:

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:

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:

Civil No. 914900581DA

Honorable Leslie A. Lewis

Commissioner Thomas N. Arnett, Jr.

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.

EXHIBIT #1

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 11th day of June, 2003.

BY THE COURT


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.

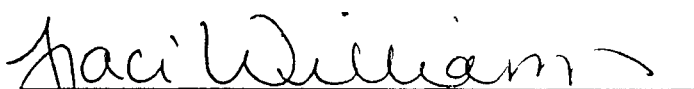
DART ADAMSON & DONOVAN


AMY 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
EXHIBIT #1

FILED DISTRICT COURT
Third Judicial District

OCT 31 2003

SALT LAKE COUNTY
By M. Smith
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,

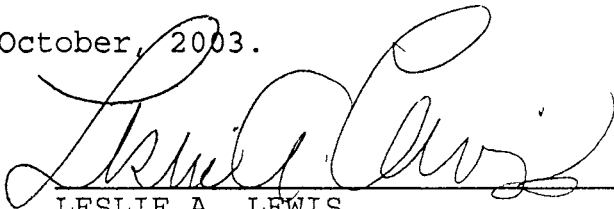
however, it is the fruits of the petitioner's hard work and diligence that now provide the sole legal basis for the respondent to claim a change in circumstances and seek to modify his alimony obligation.

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.

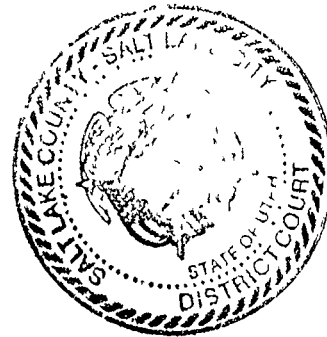
Counsel for the petitioner is to prepare Findings of Fact and Conclusions of Law consistent with, but not limited to, this

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

Dated this 30th day of October, 2003.



LESLIE A. LEWIS
DISTRICT COURT JUDGE



IMAGED

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

FILED DISTRICT COURT
Third Judicial District

NOV 19 2003

ENTERED IN REGISTRY
OF JUDGMENTS

SALT LAKE COUNTY

Deputy Clerk

Attorneys for Petitioner

DATE 11/13/03

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

LYNDA F. JONES,

Petitioner,

v.

ALAN D. JONES,

Respondent.

ORDER AND JUDGEMENT

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

The Respondent's Petition to Modify Decree of Divorce came on Trial before this Court on August 14, 2003. The 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. Based upon the evidence produced at Trial and the record herein and for good cause appearing,

IT IS HEREBY ORDERED:

1. The Petitioner is awarded a judgment in the amount of \$29,700.00 against Respondent as and for unpaid alimony for the months of November 2001 through August 2003.

Order and Judgment @J

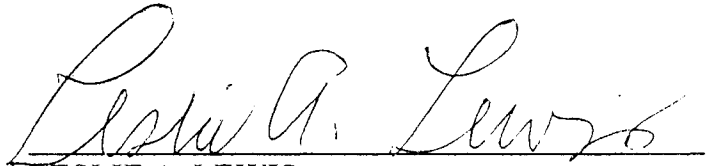


2. Pursuant to Utah Code Annotated §15-1-4, statutory interest shall accrue on this judgment until paid in full.

3. All remaining issues pertaining to the Respondent's Petition to Modify Decree of Divorce have been taken under advisement and shall be addressed in a separate Order and Judgment.

DATED this 10th day of ~~September~~ ^{Nov.}, 2003.

BY THE COURT

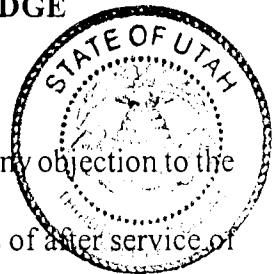


LESLIE A. LEWIS

THIRD 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 30 day of September, 2003.

DART ADAMSON & DONOVAN



AMY E. HAYES

Attorneys for Petitioner

2003. The Respondent did not file a Post-Trial Brief within the time period allotted by the Court to do so. The Court, after considering the evidence and testimony produced at trial, the arguments of counsel and the record herein, and being otherwise fully advised in the premises, now makes the following:

FINDINGS OF FACT

1. This Court finds that the Respondent alleged two changes of circumstance in this Petition to Modify which he contends support his claim that Petitioner's alimony award should be eliminated, to wit: Respondent's alleged substantial reduction in his income and/or earning capacity and the Petitioner's increased ability to provide for her own financial needs.

2. This Court finds that there has been a substantial and material change of circumstances which requires a modification in the Respondent's alimony obligation. This change of circumstance, however, 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.

3. This Court reiterates its previous finding that the Respondent has voluntarily reduced his earning capacity with no basis for doing so. Specifically, the Court is not persuaded that the Respondent had to leave his employment with Lawson Products because of a change in management scheme or because his earning potential would have decreased, or for any other viable reason.

4. This Court finds that the Respondent's current under-employment is not necessitated by any health concerns or physical impediments of the Respondent. To the contrary, the Respondent testified at trial that he was currently in good health. This Court agrees with the contention of Respondent's counsel that the Respondent left Lawson Products simply because he intended to earn less money.

5. This Court finds that while a person is free to change careers or choose to earn less money; this voluntary act does not obviate one's alimony obligation. Therefore, this Court will impute to the Respondent the full amount of income represented by his earning history prior to his voluntary departure from Lawson Products.

6. In contrast to the Respondent's voluntary choice to leave his previous employment to earn less money, the Petitioner has steadily progressed in her career and now earns approximately double of what she earned at the time of the Decree of Divorce. This Court further finds it ironic that 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 of circumstance and seek to modify his alimony obligation.

7. This Court finds that, using the Petitioner's reasonable financial needs as a reference point, that the Petitioner is entitled to an amount of alimony that will meet her unmet financial needs.

8. This Court finds that the Petitioner's attested unmet financial need of \$300.00 per month is understated. By taking into account the reasonable amount of expenses associated with

clothing and dry-cleaning, this Court finds that the Petitioner's unmet financial needs are closer to \$500.00 per month.

9. This Court finds that having substantiated a change in the Petitioner's income, that the Respondent's Petition to Modify Decree of Divorce should be granted and his alimony awarded reduced from \$1,400.00 per month to \$500.00 per month.

10. This Court finds that each party should bear his or her own costs and attorney's fees incurred in connection with this action.

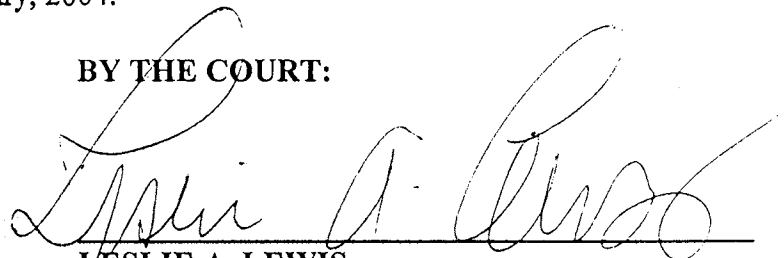
Based upon the foregoing Findings of Fact, this Court makes and enters the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and this action;
2. Grounds exist for this Court to modify the Decree of Divorce as set forth above; and
3. An Order Modifying Decree of Divorce should enter consistent with the Findings of Fact, above.

DATED this 2nd day of January, 2004.

BY THE COURT:



LESLIE A. LEWIS

Third District Court Judge



IMAGED

AMY E. HAYES (7882)
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Salt Lake City, Utah 84111
Telephone: (801) 521-6383
Facsimile: (801) 355-2513

FILED DISTRICT COURT
Third Judicial District

JAN 29 2004

SALT LAKE COUNTY
By M. [Signature] Deputy Clerk

Attorneys for Petitioner

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

LYNDA F. JONES,

Petitioner,

v.

ALAN D. JONES,

Respondent.

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: ORDER MODIFYING DECREE
: OF DIVORCE
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: Civil No. 914900581DA
: Honorable Leslie A. Lewis
: Commissioner Thomas N. Arnett, Jr.

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The Respondent's Verified Petition to Modify Decree of Divorce came on trial before the Honorable Leslie A. Lewis, District Court Judge, on August 14, 2003, at 2:00 p.m. The Petitioner was present and represented by her counsel, Amy E. Hayes of Dart, Adamson & Donovan. The Respondent was present and represented by his counsel, Stephen G. Homer, Esq. Both Petitioner and Respondent testified under oath and the court received documents in evidence offered by both Petitioner and Respondent. 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 as requested by the Court. The Petitioner filed her Post-Trial Brief on September 30,

Signed on 1/27/04, Order Modifying Decree of Divorce



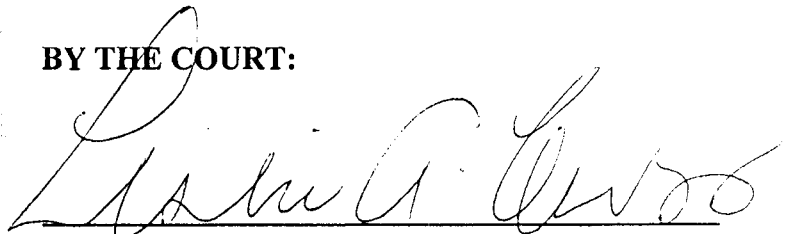
2003. The Respondent did not file a Post-Trial Brief within the time period allotted by the Court to do so. The Court, after considering the evidence and testimony produced at trial, the arguments of counsel and the record herein, and being otherwise fully advised in the premises, and having made its Findings of Fact and Conclusions of Law, and therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Effective September 1, 2003, the Respondent's alimony obligation is modified to \$500.00 per month, payable to the Petitioner until her re-marriage, co-habitation, either parties' death, or the expiration of 21 years from the date of entry of the parties' original Decree of Divorce.
2. All provisions of the parties' original Decree of Divorce not expressly modified herein shall remain in full force and effect.
3. Each party shall pay his or her own costs and attorney's fees incurred in connection with this action.

DATED this 27th day of January, 2004.

BY THE COURT:



LESLIE A. LEWIS

Third District Court Judge

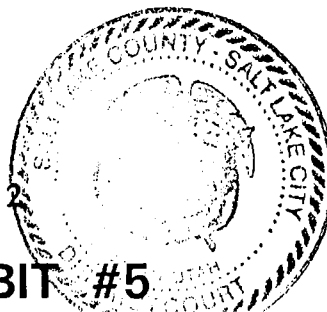


EXHIBIT #5