

1993

Larsen v. Larsen : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Larsen v. Larsen*, No. 930240 (Utah Court of Appeals, 1993).

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DOCKET NO. 930240

IN THE UTAH COURT OF APPEALS

BELINDA LARSEN,)	
)	
Plaintiff-Appellant)	
)	Case No. 930240-CA
vs.)	
)	Priority No. 15
RICHARD C. LARSEN,)	
)	
Defendant-Appellee.)	

BRIEF OF APPELLEE

APPEAL FROM A DECREE OF DIVORCE OF THE FIFTH
JUDICIAL DISTRICT COURT IN AND FOR IRON COUNTY,
STATE OF UTAH

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FILED

SEP 16 1993

COURT OF APPEALS

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BRIEF OF APPELLEE

JURISDICTIONAL AUTHORITY

Jurisdiction is vested with the Court of Appeals pursuant to Utah Code Annotated Section 78-2a-3(2)(1) (1992).

ISSUES AND STANDARD FOR REVIEW

The issues presented for review are as follows:

1. Did the Trial Court have sufficient evidence and act within its discretion in awarding Plaintiff permanent alimony in the amount of \$285.00 per month? The applicable standard of appellate review for resolution of this issue is the "clear abuse of discretion" standard as cited in Kerr v. Kerr, 610 P.2d 1380, 1382 (Utah 1980) and Morgan v. Morgan, 213 Utah Adv. Rep. 22 (Utah Ct. App. 1993).

2. Did the Trial Court have sufficient evidence and act within its discretion when it denied Plaintiff's request that the Defendant pay attorney's fees? The applicable standard of appellate review for resolution of this issue is the "clear abuse of discretion" standard as cited in Kerr v. Kerr, 610 P.2d 1380,

1382 (Utah 1980).

3. Should the appellate court award Defendant reasonable attorneys fees pursuant to Rules 24(k) and 33, Utah Rules of Appellate Procedure (1953 as amended)? Because this issue is not a review from a trial court decision this would be considered a matter of "first impression" and is left to the sole discretion of the appellate court.

**CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES,
RULES, AND REGULATIONS**

1. Rule 33, Utah Rules of Appellate Procedure, is reproduced in the Addendum.

2. Rule 24(k), Utah Rules of Appellate Procedure, is reproduced in the Addendum.

STATEMENT OF THE CASE

The divorce action was heard in the Fifth Judicial District Court before the Honorable Robert T. Braithwaite, District Court Judge, on January 7, 1993 at which time the Court took the matter under advisement. The parties appeared again before the Court on January 12, 1993 and argued the matter.

At trial, the parties stipulated to the custody of the minor children, visitation rights, the value of the family home and the value of an equity lien in favor of Defendant. The parties stipulated that the Defendant's retirement account would be divided under the guidelines established in Woodward v. Woodward, 656 P.2d 431 (Utah 1982), and that a Qualified Domestic Relations Order should be entered. The parties further stipulated to the value of

a piece of real property known as the "corrals" and that this property should be awarded to the Defendant. The parties also stipulated to the division of personal property. (Tr. 3-7, 11).

The remaining issues before the Court were that of alimony, attorneys fees and the value of the personal property which each party kept in their possession. (Tr. 7-12).

The trial court awarded Plaintiff permanent alimony in the sum of \$285.00 per month; the Court determined that the proof before the trial court, as it related to the value of personal property was not sufficient to give either party an offset one way or another; and finally, the trial court concluded that Plaintiff was not entitled to attorneys fees. The trial court did not make a finding with regard to the reasonableness of attorney's fees, determining that the Defendant did not have the ability to pay Plaintiff's attorneys fees. Findings of Fact and Conclusions of Law (hereinafter "FF")

STATEMENT OF FACTS

At the time of trial, Plaintiff and Defendant had been married for slightly less than twenty (20) years. They had three children, Chad, age 16; Kim, age 14 and Melissa, age 13. Plaintiff was 41 years of age and Defendant was 45. When the parties were married, they both worked for U S West and were living in Provo, Utah. The parties then relocated to Cedar City, Utah and the Defendant continued working for U S West while the Plaintiff continued working at various part time employments.

Plaintiff is currently employed full time with the State of Utah Division of Water Rights and earns \$15,683.00 per year. The Plaintiff also receives \$718.00 per month as child support and/or an additional \$8,016.00 per year. Plaintiff will also receive, as was testified to by Claude Slack, Certified Public Accountant, State and Federal income tax refunds in the amount of \$2,199.00. (Tr.227) This gives the Plaintiff a yearly income of \$26,498.00 and/or a gross income of \$2,208.16 per month.

The Defendant is employed by Mountain Bell, now U S West, with a current gross monthly income of \$3,357.51. At trial, Defendant submitted a Full Disclosure Financial Declaration (Ex. 13) and testified that his total monthly expenses were \$2,874.66. However, the Defendant's net monthly disposable income is \$2,349.00 (which does not include his child support payment). (Exhibit 13).

Defendant's yearly income is \$40,273.00. Because the Defendant is no longer claiming the children as exemptions for State and Federal income tax purposes he is required to pay Federal taxes in the amount of \$7,078.00 per year. (Tr. 224) He is required to pay State taxes in the amount of \$2,181.00 per year and the amount which will be withheld by FICA is \$3,081.00. (Tr. 224) This leaves the Defendant with a gross income, after taxes, in the amount of \$27,933.00 per year. Out of that amount he is required to pay \$8,616.00 per year to the Plaintiff for child support which leaves the Defendant a gross income of \$19,317.00 per year. If you divide that number by 12 that leaves the Defendant with a net monthly disposable income of \$1,609.75.

This Appellee agrees with Plaintiff's statement of the facts as it relates to what the parties stipulated to and therefore feels that a recitation of those facts is not necessary.

This Appellee does not agree with the Statement of Facts as it relates to a sale of a family horse. First there was no evidence introduced at trial that a family horse had been sold and any conversations that took place between counsel for Plaintiff and Defendant in the Court's chambers was certainly not a part of the record.

The parties stipulated as to the division of personal property, but there was some dispute as to the value of the property retained by each party. Testimony and evidence was taken and presented on that issue and the trial court found that neither party had produced sufficient evidence to convince the Court that the stipulated property division was in any way inequitable. (FF. 8).

As to the R & B Account, those funds were clearly spent on marital debts and extracurricular activities for the children and family (Tr. 205).

At trial, Plaintiff requested attorneys fees and testified that she was without funds to pay an attorney. Plaintiff's counsel submitted an affidavit in support of attorneys fees and testified that Plaintiff incurred attorneys fees in the amount of \$3,597.00 and that said sum was fair and reasonable and necessary on behalf of Plaintiff.

The Court found that both parties had incurred legal fees

relative to this action, that neither party, at the present time, had the funds to pay attorney's fees, and the Defendant did not have the ability to pay Plaintiff's attorney's fees, and ordered each party to pay their own costs and attorney's fees, payment of which was to be negotiated between client and attorney. (FF. 9).

Finally, the court granted permanent alimony to the Plaintiff in the amount of \$285.00 per month, but did not require cash to be paid to Plaintiff until June of 1994. The Court ordered that the Defendant's share of the equity lien of the home be reduced at the rate of \$285.00 per month for approximately 1 1/2 years. (FF. 19).

SUMMARY OF ARGUMENTS

POINT I: The Plaintiff failed to marshal the evidence in favor of the Court's findings and demonstrate why, when the evidence is viewed in a light most favorable to the Court's findings, the evidence is insufficient to support the decision. Based on the case law in the State of Utah, if the appellant does not marshal the evidence the reviewing court will not disturb the Trial Court's findings.

POINT II: The Plaintiff is challenging the trial courts Findings of Fact and Conclusions of Law. The Appellant has used and cited to matters outside of the record which was inappropriate, irrelevant, and should not be considered on appeal. The Plaintiff is attempting to mislead the Court by inserting addenda and arguments in her brief that were clearly not before the trial court. Therefore, such material should not be considered on appeal.

POINT III: The trial court correctly awarded Plaintiff permanent alimony in the amount of \$285.00 per month. The trial court properly followed the criteria set forth in Jones v. Jones, 700 P.2d 1072 (Utah 1975), and its progeny. The trial court acted within its discretion and made extensive findings as it relates to the issue of alimony. The trial court properly considered and made findings regarding the need of the receiving spouse, her ability to provide for herself, and the ability of the responding spouse to provide support.

POINT IV: The trial court acted properly when it denied Plaintiff an award of attorneys fees. The factors to be determined in awarding attorneys fees are set forth in Muir v. Muir, 200 Adv. Rep., 41 (Utah App. Ct. 1992). The trial court had sufficient evidence to determine that the Defendant did not have the ability to pay Plaintiff's attorneys fees. Because the trial court concluded that the Defendant did not have the ability to pay Plaintiff's attorneys fees, it was unnecessary for the trial court to make findings as to whether the fees claimed by the Plaintiff were reasonable.

POINT V: Defendant is entitled to attorneys fees for the reason that Plaintiff's appeal is frivolous and without merit. First, the Plaintiff has failed to marshal the evidence, in direct violation of the policies and procedures established by the appellate courts. Second, the Plaintiff has attached several addenda and set forth arguments her brief which are clearly not a part of the trial court's record. Because the Plaintiff has

attempted to mislead the Court, it has become necessary for this Defendant to set forth additional arguments and to expend additional time, resources, and effort to defend himself against accusations made by the Plaintiff against the Defendant which are not a part of the record.

ARGUMENT

POINT I

PLAINTIFF HAS FAILED TO MARSHAL THE EVIDENCE
IN FAVOR OF THE COURT'S DECISION AND DEMONSTRATE
WHY, IN THE LIGHT MOST FAVORABLE TO THE COURT'S
DECISION, THE EVIDENCE IS INSUFFICIENT TO
SUPPORT THE DECISION

Plaintiff has failed to marshal the evidence in favor of the Court's findings and demonstrate why, in the light most favorable to the Court's findings, the evidence is insufficient to support the findings. The Plaintiff asserts that the trial court abused its discretion when it awarded Plaintiff an inequitable and insufficient amount of alimony. Plaintiff argues that the permanent alimony awarded, \$285.00 per month, is clearly erroneous and therefore the trial court abused its discretion in awarding said amount.

The Plaintiff relies upon Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985) which correctly sets forth the three criteria a trial court must use in determining a reasonable alimony award. Plaintiff concedes that the Jones factors were considered and therefore, an appellate court should not disturb the trial court's award (unless serious inequity has resulted to manifest a clear abuse of discretion). English v. English, 565 P.2d 409 at 411,

(Utah 1977). The Plaintiff argues the same evidence that was elicited during trial and does not demonstrate that the evidence was insufficient to support the findings. This court has ruled, in the case of Schindler v. Schindler, 766 P.2d 84, 88 (Utah Ct. App. 1989) that:

to mount a successful attack on the trial court's factual findings, an appellant must marshal all of the evidence in support of the trial court's findings and then demonstrate that, even viewing the evidence in the light most favorable to the findings, the evidence is insufficient to support the findings, or that its findings are otherwise clearly erroneous. (citing Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985)).

Plaintiff asks this Court to arbitrarily set alimony in the amount of \$700.00 per month. Appellant has not demonstrated, in any way, shape or form, that the evidence in this case was insufficient to support the Court's findings, thus their claim for any increase in the alimony award should not be considered.

Another case directly on point is Online Corp., v. Granite Mill, 208 Utah Adv. Rep. 79 (Utah Ct. App. 1993). In that case this court stated:

"An appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, 'the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them clearly erroneous.'"..."If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower courts conclusions of law and the application of that law in the case".

Id. at 79-80 (quoting In re Estate of Bartell, 776 P.2d 885,886

(Utah 1989); Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991)).

Moreover, in Ohline this Court held that Ohline had failed to marshal the evidence. Instead, Ohline had merely selected facts from trial that are most favorable to its position and then reargued those facts to this court on appeal. Ohline, 208 U.A.R. at 80.

In the case at bar, the Plaintiff has merely selected those facts which are most favorable to her position, which have already been argued in the Fifth Judicial District Court, and is now rearguing those facts on appeal. The Plaintiff has neither marshalled the evidence in favor of the Courts findings nor demonstrated its insufficiency in the light most favorable to those findings. Therefore, Plaintiff's claims should be rejected.

POINT II

IN CHALLENGING THE TRIAL COURT'S FINDINGS OF
FACT AND CONCLUSIONS OF LAW, PLAINTIFF HAS USED
AND CITED TO MATTERS OUTSIDE OF THE RECORD WHICH
IS INAPPROPRIATE, IRRELEVANT, AND SHOULD NOT BE
CONSIDERED ON APPEAL

Plaintiff has attached addenda and have set forth certain arguments in her brief which are not a part of the record and should not be considered by this court. Those addenda and/or arguments include the following:

(a) Page 6 and 7 of Plaintiff's brief which relates to the sale of a family horse and how that should attack the credibility and truthfulness of the Defendant. There is nothing in the record that states that this horse was ever sold by the Defendant. Therefore, any reference to the sale

of the family horse should not be considered by this Court;

(b) Addendum A-3 of Plaintiff's brief, which is a copy of Forest Service Documents, once again indicates that there was a sale of the horse. This is not a part of the record nor does this Court know whether that horse was purchased on consignment or whether that horse was returned to Defendant;

(c) Addendum A-4 of Appellant's brief. This was a document used by Plaintiff in closing arguments, it was never marked as an exhibit nor was it admitted into evidence and therefore this Court should not consider Addendum A-4 of Appellant's brief;

(d) Addendum A-5. Once again, this was used for illustrative purposes in closing argument and was never marked as an exhibit nor was it introduced into evidence;

(e) Addendum A-6. This was used for illustrative purposes in closing argument and was never marked as an exhibit nor was it introduced into evidence;

(f) Addendum A-7. This was used for illustrative purposes in closing argument and was never marked as an exhibit nor was it introduced into evidence.

Case law in the State of Utah is very clear as to what constitutes the record on appeal. In Ebbert v. Ebbert, 744 P.2d 1019 (Utah Ct. App. 1987), this Court held that "Matters not admitted into evidence before the trier of fact will not be considered on appeal to this Court." Id. at 1023 (emphasis added) The Utah Supreme Court has also made the identical finding in the

case of Pilcher v. State of Utah, Department of Social Services, 663 P.2d 450 (Utah 1983). The Court held that "reliance on documents not found in the record is improper. Matters not admitted in evidence before the trier of fact will not be considered here." Id. at 43 (citing In re Estate of Cluff, Utah 587 P.2d 128 (Utah 1978)).

The Plaintiff has attempted to mislead this Court by trying to attack the Defendant's veracity with evidence that is not in the record specifically regarding the sale of the family horse. Such evidence was not marked as an Exhibit nor was it otherwise introduced into evidence. Further, the Plaintiff is attempting to mislead this Court by introducing evidence that was submitted at the time of closing argument which is clearly not a part of the record. Based on the case law in this State, this Court should not consider and/or take into account the documentation which is listed above and which is contained in Appellant's brief.

POINT III

THE TRIAL COURT CORRECTLY AWARDED PLAINTIFF
PERMANENT ALIMONY IN THE AMOUNT OF \$285.00
PER MONTH

Plaintiff has correctly set forth the criteria to be considered by the trial court in determining a fair and equitable alimony award. Those factors are as follows:

1. The financial conditions and needs of the receiving spouse.
2. The ability of the receiving spouse to produce a sufficient income for herself.

3. The ability of the responding spouse to provide support Jones v. Jones, 700 P.2d 1072, (Utah 1985) (citing English v. English, 565 P.2d 409, 411-12 (Utah 1977)).

Plaintiff is also correct that if a trial court does not consider and make specific findings as to any of the above three factors, then its award of alimony is an abuse of discretion. On the other hand, if the three factors have been considered, this Court should not disturb the alimony award "unless such a serious inequity has resulted as to manifest a clear abuse of discretion." Schindler v. Schindler, 776 P.2d 84, 90 (Utah Ct. App. 1989).

In the instant case, the trial court did make specific findings as to all three factors. As to the financial condition and needs of the requested spouse, the Court found, based upon competent evidence, that Plaintiff had certain expenses that exceeded her income and that she had reasonable monthly expenses of \$2,256.00 per month. (FF. 15). Plaintiff contends that the trial court did not make a finding that the expenses of Plaintiff were "reasonable". However, the trial court specifically stated that "with the deductions and with what the Court feels is reasonable [Plaintiff's] total monthly expenses would be \$2,256.00 per month". Id. Indeed, in making a reduction in expenses, the trial court is impliedly making a decision regarding the reasonableness of Plaintiff's expenses.

The trial court also made a specific finding regarding the ability of Plaintiff to produce a sufficient income for herself. It was uncontroverted that Plaintiff had a net income of \$956.00

per month from her employment. The Court so found. (FF. 16). It was also uncontroverted that Plaintiff would receive an additional \$718.00 per month as income from Defendant as and for child support. Finally, based upon testimony from Mr. Claude Slack, C.P.A., the trial court found that, by the judicious exercise of her exemptions, Plaintiff would have an additional tax savings of some \$145.00 per month. This latter evidence was essentially un rebutted by Plaintiff. Plaintiff did not call any expert or other witness to contradict the opinion of Mr. Slack. However, even if Plaintiff had presented evidence to rebut Mr. Slack, the trial court was perfectly within its discretion to totally ignore any contradictory evidence to Mr. Slack and adopt his opinion as its own. As discussed in Point I, above, Plaintiff has failed to marshal the evidence in support of the Court's findings and then show that they are clearly erroneous. The testimony of Mr. Slack amply supports the trial court's finding regarding Plaintiff's additional income from tax withholding savings.

Based upon the above factors, the trial court had adequate basis to find that Plaintiff had a total income, including child support, of \$1,819.00 per month. (without child support, Plaintiff's income, presumably for her own use, would be \$1,101.00). Thus, based upon the Court's findings regarding Plaintiff's expenses, Plaintiff would have a net monthly shortfall of \$437.00.

Finally, the trial court considered and made specific findings regarding the ability of Defendant to pay alimony. As with

Plaintiff's income, it was undisputed that Defendant's monthly net income after taxes was \$2,348.00. The trial court so found. (FF. 17). Again, based upon competent evidence presented to the Court, the Court found that Defendant's monthly expenses were \$2,693.00, including his child support obligation. As with Plaintiff, the Court adjusted Defendant's expenses as set forth in his Full Disclosure Financial Declaration. Again, there was competent evidence to support this determination and Plaintiff has failed to meet her obligation to marshal such supporting evidence.

Based upon the income and expenses of Defendant, the trial court determined that he had a shortfall of some \$345.00 per month which was less than Plaintiff's shortfall. The Court also determined that Defendant's shortfall would be reduced sometime in the future and that his child support obligation would be reduced. (FF. 18). Accordingly, based upon all of these factors, along with the long term of the marriage, the fact that the parties had always struggled financially and the fact that Plaintiff was discouraged from pursuing additional education, the Court awarded \$285.00 in alimony. The trial court clearly considered all of the factors under Jones and made detailed findings with regard to those factors. Accordingly, this Court should not disturb the trial court's award of alimony. Indeed, the trial court has met the ultimate test for the reasonableness of the alimony award; that is, "whether the party receiving alimony will be able to support him or herself 'as nearly as possible at the standard of living... enjoyed during the marriage.'" Schlinder v. Schlinder, 776 P.2d

84, 90 (Utah Ct. App. 1989)(quoting English v. English, 565 P.2d 409, 411 (Utah 1977)).

Plaintiff apparently contends that the alimony award has failed to meet the "ultimate test" of reasonableness. Plaintiff has gone to great lengths to juggle numbers and has even submitted matters that are not part of the record to support her contention. Without conceding the admissability of such evidence (see Point II above), Defendant submits that Plaintiff's contention is unfounded. Plaintiff seems to argue that, because Plaintiff is required to support herself and her three (3) children on her income, (including child support plus alimony) and Defendant must only support himself on his income, there is a gross inequity. She further contends that her income is going to be continually reduced because Defendant's obligation for child support is going to be reduced as each child reaches the age of 18. Plaintiff's contention is flawed for at least two reasons.

First, Plaintiff ignores the fact that the child support payment of Defendant is intended to cover the lion share of the children's expenses. Without regard to the parties expenses whatsoever, Plaintiff's income without child support, but including alimony would be \$1,386.00 per month. On the other hand, Defendant's disposable income after deducting child support and alimony would be \$1,345.00 per month. In other words, Plaintiff conceivably has some \$41.00 more income than Defendant to cover her personal expenses. Defendant recognizes that Plaintiff is probably going to have to use some of her own income to support the

children; however, there are also economies of scale that offset that obligation. For example, Plaintiff's mortgage payment for the home of herself and all three children is only \$340.00; whereas Defendant's rent for just himself is \$390.00. (See Full Disclosure Financial Declarations).

A second flaw in Plaintiff's argument is that although her income is reduced by some \$239.00 per month as each child reaches majority, Plaintiff's expenses should be reduced by a like amount or more. In other words, Plaintiff's obligation to support a child after it reaches 18 is eliminated at the same time as Defendant's obligation is eliminated. The law presumes that when a person reaches age 18 he or she must earn his own "keep".

In summary, the lower court made specific and detailed findings as to all of the elements of a reasonable alimony award. Additionally, it appears that the trial court made every effort to equalize the shortfalls of both parties so that they could, as nearly as possible, maintain the standard of living that they both enjoyed during their marriage. Thus, the lower court's award of alimony was within its discretion and should not be disturbed.

POINT IV

THE TRIAL COURT ACTED PROPERLY WHEN IT DENIED PLAINTIFF AN AWARD OF ATTORNEY'S FEES

In Muir v. Muir, 200 Utah Adv. Rep. 41, (Utah Ct. App. 1992), this Court set forth the criteria for the court to consider in awarding attorneys fees. Those criteria are "(1) the requesting party is in need of financial assistance; (2) the requested fees

are reasonable; and (3) the other spouse has the ability to pay." Id. at 44 (citing Crouse v. Crouse, 817 P.2d 836, 840 (Utah Ct. App. 1991) Haumount v. Haumount, 793 P.2d 421, 425 (Utah Ct. App. 1990); Riche v. Riche, 784 P.2d 465, 470, (Utah Ct. App. 1989)).

The criteria for an attorneys fees award are virtually identical to those for determining alimony. The only addition is the requirement that the fees be reasonable. As stated above, the trial court has already made adequate detailed findings regarding the parties respective abilities to pay. (FF. 16 & 17). The trial court also so found in a separate finding. (FF. 20).

Under Muir, all three factors must be in existence before the Court can award attorneys fees. If the court cannot make an affirmative finding as to any one factor, then attorneys fees are not appropriate. The trial court in this case was able to determine that Plaintiff was in need of financial assistance but also determined that because of the expenses and shortfalls of both parties, Defendant did not have an ability to pay attorneys fees. Having been unable to affirmatively find that Defendant was able to pay attorneys fees, it was unnecessary for the court to determine the reasonableness of the fees. In other words, even assuming the fees were eminently reasonable, Defendant was still unable to pay any amount. Accordingly, an attorneys fee award was not appropriate.

POINT V

PURSUANT TO RULES 33 AND 24(k), UTAH RULES OF APPELLATE PROCEDURE, THE DEFENDANT IS ENTITLED TO ATTORNEY'S FEES FOR THE REASON THAT PLAINTIFF'S APPEAL IS FRIVOLOUS AND WITHOUT MERIT

Pursuant to Rule 33 and Rule 24(k), Utah Rules of Appellate Procedure, the Defendant is entitled to attorney's fees for the reason that Plaintiff's appeal is frivolous, without merit, inaccurate, misleading and burdensome. The Defendant requests this Court for an award of attorney's fees pursuant to Rule 33(a), Utah Rules of Appellate Procedure which states:

(a) Except in a first appeal of right in a criminal case, if the Court determines that a made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney's fees to the prevailing party. The Court may order that the damages be paid by the party or by the party's attorney.

This Defendant also seeks an award of attorney's fees pursuant to Rule 24(k) which states:

All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the Court, and the Court may assess attorney's fees against the offending lawyer.

Defendant's first contention is that the appeal is frivolous. The lower court made detailed findings regarding alimony and attorneys fees. In determining an alimony award the trial court followed the factors set forth in Jones. The Court further looked at the Full Disclosure Financial Declarations of the parties, the evidence of both parties, and heard the evidence of a Certified Public Accountant, Mr. Claude Slack. Based on the fact that the

trial court followed the proper procedure in determining a permanent alimony award, the Plaintiff's appeal is frivolous.

The same holds true with Plaintiff's claim for attorneys fees. The trial court made a specific finding that the Defendant did not have the ability to pay Plaintiff's attorney's fees. (FF. 20) Therefore, it was not necessary for the Court to determine whether or not the attorney's fees claimed by the Plaintiff are reasonable. Once again, this illustrates the frivolous nature of Plaintiff's appeal.

The Plaintiff also has failed to marshal the evidence with regard to either issue as is necessary under the policies and procedures of the reviewing court. The Defendant relies on Eames v. Eames, 735 P.2d 395, (Utah 1987), the Utah Supreme Court recognized the right of a party to attempt to correct what that party deems to be an error in the court below. However, the Supreme Court went on to hold that "when there is no basis for the argument presented and when the evidence or law is mischaracterized and misstated, the Court must question the party's motives." That is exactly what has happened in Plaintiff's brief. The Plaintiff has mischaracterized and misstated the evidence to this Court by setting forth arguments and attaching addenda which were not a part of the trial court record. Because of the Plaintiff's conduct, this Defendant has had to defend himself against misleading and misstated information presented by the Plaintiff.

Should this Court view Plaintiff's appeal worthy of consideration and not subject to the effect of Rule 33(a)

sanctions, this Defendant nonetheless is entitled to an award of attorney's fees pursuant to Rule 24(k), Utah Rules of Appellate Procedure.

CONCLUSION

For the reasons stated above Defendant respectfully requests that the decision of the trial court be affirmed, that he be awarded his attorneys fees for appeal and that the case be remanded for a determination of the amount of Defendant's attorneys fees.

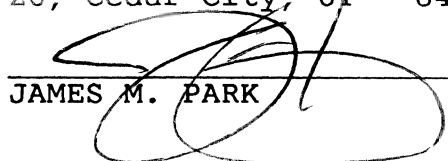
DATED this 1 day of September, 1993.



JAMES M. PARK

CERTIFICATE OF MAILING

I hereby certify that on this 16 day of September, 1993, I mailed TWO (2) true and correct copies of the BRIEF OF APPELLEE first class, postage prepaid to: Hans Q. Chamberlain, CHAMBERLAIN & HIGBEE, P.O. Box 726, Cedar City, UT 84720.



JAMES M. PARK

ADDENDUM A-1

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) Damages for delay or frivolous appeal. Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) **Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) **Procedures.**

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

ADDENDUM A-2

(k) **Requirements and sanctions.** All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.