

1993

## Mary Coelho v. Alcides J. Coelho : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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MARY COELHO,	:	
	:	
Plaintiff/Appellant,	:	Case No. 930350-CA
	:	
v.	:	Priority No. 16
	:	
ALCIDES J. COELHO,	:	
	:	District Court 11093
Defendant/Appellee,	:	
	:	

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**APPELLANT'S REPLY BRIEF**

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AN APPEAL FROM A JUDGMENT AND DECREE OF DIVORCE OF THE  
 THIRD JUDICIAL DISTRICT, SUMMIT COUNTY, UTAH,  
 THE HONORABLE DAVID S. YOUNG, PRESIDING

**UTAH COURT OF APPEALS  
 BRIEF**

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**FILED**  
 Utah Court of Appeals

MAR 14 1994

*Mary T. Noonan*  
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 Clerk of the Court

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii
DETERMINATIVE AUTHORITY .....	iii
STATEMENT OF THE FACTS .....	1
ARGUMENT	
POINT I .....	3
MRS. COELHO’S FAILURE TO OBJECT TO THE NATURE OF THE SUMMARY PROCEEDINGS AT TRIAL DOES NOT PRECLUDE THIS COURT AWARDING HER EQUITABLE RELIEF.	
POINT II .....	6
THE EXCLUSION OF EVIDENCE AFFECTED MRS. COELHO’S SUBSTANTIAL RIGHTS.	
POINT III .....	7
THE COURT ABUSED ITS DISCRETION IN FASHIONING SUPPORT AWARDS, ALLOCATING DEBT AND AWARDING ATTORNEY’S FEES.	
CONCLUSION .....	10

**TABLE OF AUTHORITIES**

**RULES CITED**

	<u>Page</u>
Rule 103, Utah Rules of Evidence . . . . .	6
Rule 401, Utah Rules of Evidence . . . . .	6

**DETERMINATIVE AUTHORITY**

All determinative authority has been set forth in Exhibit "A" to Appellant's Primary Brief. There is no additional determinative authority in reply.

## STATEMENT OF FACTS

Due to Mr. Coelho's misrepresentation in his appellate brief of the facts that were presented at trial, and his inclusion of certain "facts" that were not presented at all and are not part of the record, Mrs. Coelho must respond and clarify the facts.

Under his heading of "Marital and Income History," Mr. Coelho grossly misstates Mrs. Coelho's previous employment, her schooling, and her decisions regarding them. Specifically, Mr. Coelho states that Mrs. Coelho "quickly became successful" as a real estate agent and averaged "during her full-time employment" approximately \$35,000 per year. This is simply unsupported by the evidence. What the evidence does support, however, is that during her entire career selling real estate, Mrs. Coelho made one very big commission, early in her career, (Tr. 75, lines 15-20) and two payments of that commission were carried over to the two years following the sale. (Tr. 75, lines 23-24) Both prior to and after this sale she averaged considerably less, and due to the demands of a young, growing family and Mr. Coelho's construction business, she worked only "part-time" and eventually stopped trying to sell real estate altogether. (Tr. 76, lines 4-10) Contrary to Mr. Coelho's attempt to portray Mrs. Coelho as less than diligent about the continuity of her employment by suggesting that she flitted from one occupation to another, she testified at trial that the real estate scene had changed dramatically from the mid-eighties to the time of trial, and unlike the situation when she was selling full-time, there was now "a lot of competition." (Tr. 84-85) At the time of trial, her license had expired, and she reasonably estimated it would take her five (5) years to establish a viable business. (Tr. 84)

Conversely, Mr. Coelho's argument relating to his monthly income at time of trial lacks credibility. On appeal, he claims he should not be required to include W-2 income earned in

the State of Georgia but completely fails to offer a basis or explanation as to why this should be so. He also fails to explain why, if he had no income at time of trial and no job prospects, he was "willing" to agree that his income should be \$5,000 per month.

The summary "exhibit" which Mr. Coelho includes for the first time in his appellate brief at Page 6, was prepared by picking and choosing certain lines from the tax returns admitted into evidence at trial, and by doing so, Mr. Coelho again misrepresents the facts of this case. For example, Exhibit 2 is the parties' joint tax return for 1983. In the chart on Page 6 of his appellate brief, Mr. Coelho lists his gross income for that year at \$63,198, but his net profit at only \$22,690. However, before he "calculated" his net profit for illustrative purposes, he deducted nearly \$20,000, or almost half again as much as he has shown, for depreciation, interest expense and other "paper" losses. Reduction for these amounts is not appropriate in a determination of net income for alimony and child support computations.

In addition, Mrs. Coelho also testified at trial that the parties would "play around" with their respective business expenses to obtain the greatest tax relief, and that they paid particular attention to Mr. Coelho's self-employment taxes. (Tr. 75, 78) In other words, many of Mrs. Coelho's real estate expenses during the few years that she sold real estate were actually claimed as expenses for Mr. Coelho's construction company. Thus, on the parties' tax returns, her earnings appeared greater than they actually were, and Mr. Coelho's net profits appeared less than what he had actually received. Therefore, Mr. Coelho's argument on appeal that his income was only \$2,000 per month was not only never introduced at trial, it is without merit on appeal.

Similarly incredible is his claim relating to his inability to find work. This had been an issue for some time, and during the pendency of this action, Mr. Coelho made a motion to satisfy his temporary support obligation by drawing on the parties' equity credit line. However, his lifestyle never reflected his alleged lack of employment or income. Instead, in the fall of 1992, just months before trial, Mr. Coelho took at least two elk hunting trips to Montana and had a third one planned. (R. 133-134) This, together with the evidence of historical earnings and the evidence of availability of construction work in Park City which Mrs. Coelho claims was inappropriately excluded by the court, it is clear that the court erred in finding Mr. Coelho's income to be only \$5,000 per month.

Turning to the second section of Mr. Coelho's statement of facts labeled "Trial Proceedings," he states that there were no irregularities in the way the trial was conducted, and that the record is silent as to whether the court would have continued the trial after the trial judge had "fulfilled his other commitments." It is clear from a review of the record that this was not an option, and Mrs. Coelho's brief cites specific instances throughout the course of the proceedings when the trial court urged the parties to be brief and move things along. Mr. Coelho's "statement of fact" in this regard is speculation without any basis.

### **ARGUMENT I**

**MRS. COELHO'S FAILURE TO OBJECT TO THE NATURE OF THE SUMMARY PROCEEDINGS AT TRIAL DOES NOT PRECLUDE THIS COURT AWARDING HER EQUITABLE RELIEF.**

Mr. Coelho dismisses Mrs. Coelho's argument that the trial court committed error by substantially limiting the time available for trial, by arguing that her failure to object and her

participation in the proceedings prohibits her from making this claim. While the failure to object to the proffered admission of evidence at trial is a basis to preclude a claim later that the admission was prejudicial, the application of that legal principle to the facts of this case is too simplistic. Instead, under all of the facts and circumstances, Mrs. Coelho acted appropriately.

To begin with, Mrs. Coelho and her counsel appeared on the morning of trial prepared with witnesses and exhibits. It was only at this time that she first learned she would be unable to present her case in the time frame she previously understood was available to her. She and her counsel had three options:

- a. Request a continuance;
- b. Object strenuously to the proceeding and risk frustrating the court and ultimately prejudicing Mrs. Coelho; and
- c. Proceed in the time allotted with the expectation that the court would give due weight to the evidence presented in such an abbreviated manner.

The difficulty with the first option not only consists of the expense and the delay inherent in a continuance, but in this case was much more serious. Specifically, Mr. Coelho was satisfying his temporary support obligation and his personal living expenses from a home equity credit line. Thus, a delay would result not only in an increase in what Mr. Coelho was arguing was a joint debt, but also a decrease in the value of the parties' major asset - equity in their residence.

The second option is a difficult one to gauge and even harder to argue on appeal given the sterility of a written transcript. However, even the transcript which is devoid of body

language and intonation establishes the court's obvious impatience. It was therefore, not unreasonable for Mrs. Coelho's counsel not to strenuously object to the procedures while at the same time utilizing precious time to present substantive evidence and point out her areas of concern relating to her inability to cross-examine Mr. Coelho. For example, in one such instance, counsel for Mrs. Coelho pointed out that she was unable to discuss with Mr. Coelho the basis for his exorbitant monthly expenses of \$3,900 a month, and the fact that these expenses exceeded those of Mrs. Coelho who was residing with the three children at the time (Tr-135). Therefore, it cannot be said that, as a matter of law, Mrs. Coelho's claim on appeal is barred by her failure to more strenuously object to the time limitations imposed upon her.

Under all of the facts and circumstances, therefore, it was not unreasonable to choose the third option, that being to make the best of a bad situation with the expectation that the court would still give sufficient consideration to the evidence and issues potentially subject to cross-examination. Even if Mrs. Coelho cannot now complain about the cursory treatment her case received from the trial court, she is still entitled to an equitable decision based upon the law and all the facts and circumstances of her case. Therefore, even if the procedure was not an abuse of discretion, the substance of the lower court's ruling was and she is entitled to certain relief as outlined more fully in this appeal.

## ARGUMENT II

### THE EXCLUSION OF EVIDENCE AFFECTED MRS. COELHO'S SUBSTANTIAL RIGHTS.

In the second point of his brief, Mr. Coelho argues that the exclusion of the building permit evidence was not error and that Mrs. Coelho failed to show that the exclusion affected her substantial rights. Mr. Coelho goes on to say that "[t]here is a significant difference between the concept of work going on in a particular area and whether that work might be 'available' to a particular person." This statement which is made as if it were a self-evident truth, ignores the fact that the availability of work was a primary issue at trial.

Mr. Coelho claimed he had absolutely no income at trial and had been unable to find work for several months. This claim was made in the face of an average monthly income during the immediately preceding year of \$7,945.00 per month. The averaging of income is especially important in this case because construction work, by its very nature, is not consistent and the trial was held in February. The evidence was offered, at least in part, to impeach Mr. Coelho's claim. As such, it was relevant pursuant to Rule 401 of the Utah Rules of Evidence in that it made Mr. Coelho's claim "less probable" than it would be without the evidence. Taken in conjunction with Mr. Coelho's average historical income, the length of time during which he claimed to have no work and the numerous vacations he had taken during this time, the evidence of availability of work rendered Mr. Coelho's claim totally incredible. Instead the court accepted his proffer that he only expected to earn \$5,000 per month in 1993 and based its ruling as to child support and alimony on this figure. Therefore, Mrs. Coelho's substantial rights were

affected by the exclusion of this evidence as required by Rule 103 of the Utah Rules of Evidence.

This court should enter its own order relating to Mr. Coelho's obligation to pay child support and alimony based on an average income of at least \$6,500 per month, or remand the issues to the trial court with instructions for an appropriate redetermination of support.

### **ARGUMENT III**

#### **THE COURT ABUSED ITS DISCRETION IN FASHIONING SUPPORT AWARDS, ALLOCATING DEBT AND AWARDING ATTORNEY'S FEES.**

##### **A.**

#### **Child Support and Alimony**

The bulk of Mr. Coelho's brief relies on his belief that the court did not abuse its discretion in this case. In arguing that Mrs. Coelho failed to "marshall all of the evidence" in support of her position, he states that "Mrs. Coelho is operating under a misconception of what constitutes fact and what is evidence." The only thing in this case which is neither fact nor evidence is Mr. Coelho's proffer that he expected to earn only \$5,000 per month in 1993. The court accepted this speculation as "fact," despite that it was without corroboration and contrary to all documentary evidence introduced at trial.

Turning to Mr. Coelho's claim that Mrs. Coelho failed to marshall evidence, Mrs. Coelho would point out to this court that there was very little time to submit evidence at trial. Even so, without reiterating specific details as previously set forth in her primary Brief, the evidence is sufficient to establish that Mr. Coelho's historical earnings greatly exceeded his

proffer of the speculative \$5,000 per month, and that the court abused its discretion in so finding. From this point, it is an abuse of discretion for the trial court to award 500 per month child support and \$1,000 per month in alimony based on Mrs. Coelho's income at \$6,500 per month and Mrs. Coelho's income of \$1,300 per month. The amounts are clearly inadequate.

Further, the court's decision to review the permanency of the alimony does not make this facet of the award any less of an abuse of discretion. First of all, the decision to review the alimony award is contrary to the often stated policy that courts should, whenever possible, render a decision that specifically defines the parties' future financial rights and obligations to each other such that future disputes may be avoided. The trial court's failure to make this decision at trial was clearly error. Instead, based on the law in the State of Utah, Mrs. Coelho was entitled to an award of permanent alimony and postponing this decision for one year does not negate this error. This court should enter its own order to this effect.

## **B.**

### **Equity Line Mortgage and Tax Liabilities**

Mr. Coelho claims the trial court fairly divided the marital debt. It is difficult to see how Mr. Coelho can take this position even assuming the trial court's findings as to the parties' monthly incomes were correct. Using Mr. Coelho's monthly income at the \$5,000 figure and Mrs. Coelho's monthly income at \$1,500, Mrs. Coelho, whose earnings were only 23% of the total combined income of the parties, was ordered to pay 50% of the debt. Mr. Coelho, whose earnings were 77% of the combined income, was also ordered to pay 50% of the debt. On its

face, this decision was clearly an abuse of discretion, especially in light of a complete lack of specific findings to support it.

Although Mrs. Coelho will concede that generally assets should be valued at the time of trial, the circumstances in this case mandated a departure from the general rule. Claiming no income, Mr. Coelho had previously convinced the court to allow him to use the parties' equity credit line to pay his own personal living expenses and two months of his temporary support obligation to Mrs. Coelho. As counsel for Mrs. Coelho argued at page 13 of the transcript, Mr. Coelho should have been solely responsible for this obligation. By ordering the parties to assume liability equally for this obligation, the court in essence retroactively reduced by half Mrs. Coelho's temporary support award, without making any findings to support the modification of the temporary order. Contrary to Mr. Coelho's statement, Mrs. Coelho did present her position to the Court, and the Court summarily ignored it. Clearly, this was an abuse of discretion. Likewise, with respect to the tax obligation, ordering the parties to split the liability equally in light of their disparate earnings is also a clear abuse. The abuse is exacerbated as the evidence establishes, Mr. Coelho earns \$6,500 per month.

This court should modify the lower court's order to reflect an equitable distribution of debt, including an order requiring Mr. Coelho to pay all portions of the equity credit line incurred by him after separation of the parties. In the alternative, the case should be remanded to the lower court with appropriate instructions.

## CONCLUSION

The trial court failed to allow Mrs. Coelho adequate time to present her case. The trial court compounded this error by failing to consider the evidence that she was able to submit during the brief time allowed for trial. As a result, the lower court's award of child support and alimony were grossly inadequate and its allocation of debt inequitable in light of the disparity in the parties' earnings. This court should enter its own orders or, in the alternative, remand to the lower court with specific instructions for entry of appropriate orders, relating alimony, child support, allocation of debt and attorney's fees.

RESPECTFULLY SUBMITTED this 14th day of March, 1994.

GUSTIN & CHRISTIAN

A handwritten signature in black ink, appearing to read 'Helen E. Christian', written over a horizontal line.

HELEN E. CHRISTIAN  
Attorneys for Plaintiff/Appellant.

CERTIFICATE OF DELIVERY

I hereby certify that two true and correct copies of the above and foregoing BRIEF OF APPELLANT were duly hand delivered, addressed to:

B. L. Dart, Esq.  
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DATED this 14 day of March, 1994.

A handwritten signature in black ink, appearing to read 'HELEN E. CHRISTIAN', written over a horizontal line.

HELEN E. CHRISTIAN