

2004

# Kenneth J. Warner v. Colleen C. Warner : Brief of Appellant

Utah Court of Appeals

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Colleen C. Warner; Pro Se.

Brian T. Hunt; Justin T. Ashworth; Ashworth Hunt; Attorneys for Petitioner/Appellant .

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## Recommended Citation

Brief of Appellant, *Warner v. Warner*, No. 20040915 (Utah Court of Appeals, 2004).  
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IN THE UTAH COURT OF APPEALS

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KENNETH J. WARNER,  
Petitioner/Appellant,

v.

COLLEEN C. WARNER,  
Respondent/Appellee.

Court of Appeals Case No.  
20040915

Trial Court Case No. 024903459

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BRIEF OF APPELLANT KENNETH J. WARNER

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APPEAL

THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH  
HONORABLE TIMOTHY R. HANSEN

---

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**UTAH COURT OF APPEALS  
BRIEF**

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UTAH APPELLATE COURTS  
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## **JURISDICTION**

This Court has jurisdiction of this appeal of the judgment and proceedings of the domestic relations case in the district court pursuant to Utah Code Ann. § 78-2a-3(2)(h) (2001).

## **STATEMENT OF ISSUES**

### **First Issue**

Did the trial court commit an error in law by improperly considering the income of third parties in making a determination on the question of alimony, in contravention of Utah Code Ann. § 30-3-5(6)(g)(iii).

**Standard of Review:** Whether Utah Code Ann. § 30-3-5(6)(g)(iii) prohibits the consideration of the income of third parties other than the obligor's current spouse in making a determination on the question of alimony presents an issue of statutory interpretation, which is a question of law and is reviewed for correctness with no special deference given to the trial court. *Child v. Newsom*, 892 P.2d 9, 10 (Utah 1995).

**Statement of Grounds:** This issue concerns an error of law which could not be ascertained prior to the trial court's handing down of its ruling in its Memorandum Decision, and therefore does not require preservation of the issue below.

## **Second Issue**

Did the trial court commit an error of law in not considering the Petitioner's ability to pay in awarding attorney's fees subsequent to a finding that the Petitioner, as the supporting spouse, did not have the ability to pay more than the amount awarded in alimony.

**Standard of Review:** "Whether the trial court's findings of fact in support of an award of attorney fees are sufficient is ... a question of law, reviewed for correctness" with no special deference given to the trial court. *Selvae v. J.J. Johnson & Assocs.*, 910 P.2d 1252, 1257 (Utah App.1996).

**Statement of Grounds:** This issue concerns an error of law which could not be ascertained prior to the trial court's handing down of its ruling in its Memorandum Decision, and therefore does not require preservation of the issue below.

## **RELEVANT STATUTE**

Utah Code Ann. 30-3-5 (Amd. 2003).

## **STATEMENT OF THE CASE**

Kenneth Warner ("Petitioner") filed for divorce from his wife Colleen Warner ("Respondent") on May 30, 2002. (R. at 1-7.) The



Respondent moved for an Order to Show Cause and requested a temporary support. (R. at 27-29.) The hearing on the Order to Show Cause was held on August 2, 2002 before Commissioner T. Patrick Casey. (R. at 70.)

The Respondent objected to the Commissioner's findings, specifically arguing that the Commissioner "erred by failing to give adequate consideration to petitioner's historical income, ... respondent's needs, and petitioner's ability to pay while he is admittedly living with his girlfriend", and requested a hearing on the Objection. (R. at 82-83.) The Judge issued a Minute Entry denying the hearing and denying the Respondent's Objection. (R. at 111-113.)

The divorce action was bifurcated and a Bifurcated Decree of Divorce was entered on September 23, 2003 on the grounds of "irreconcilable differences", and in which decree all matters other than the termination of the marriage were reserved. (R. at 175-177.)

The reserved issues, including child support and alimony, were heard by the Third District Court Judge Timothy R. Hanson on July 1, 2004. (R. at 267.) The court issued a "Memorandum Decision" on August 12, 2004, from which Findings of Fact and Conclusions of Law and a Decree of

Divorce Following Bifurcation were entered on September 20, 2004. (R at 239-238, 242-247.)

In the Memorandum Decision, the Court made a ruling granting Child Support of \$427 per month, and alimony at the rate of \$1,757 per month. (R. at 235.) The Court also stated: “In the final analysis, the petitioner’s financial needs are basically met by his minimal efforts at employment, the assistance of his girlfriend, and his family”. (R. at 234.)

### **STATEMENT OF THE FACTS**

1. Commissioner found that the Respondent’s need exceeded the Petitioner’s ability to pay. (R. at 79.) at who have no known

2. The Commissioner then awarded a temporary child support amount of \$427.00 per month and a temporary alimony amount of \$1,757.00 per month based upon Petitioner’s income of approximately \$50,000.00 annually and an income imputed to Respondent of \$18,000.00 annually. (R. at 79.)

3. The Commissioner also made a specific finding that “petitioner’s ability to pay alimony is limited to \$1,757.00”. (R. at 116.)

4. The Judge issued a Minute Entry denying the hearing and denying the Respondent's Objection. (R. at 111-113.)

5. In the **Memorandum Decision**, the Court made a ruling granting Child Support of \$427 per month, and alimony at the rate of \$1,757 per month. (R. at 235.)

6. The court stated that attorney's fees and should be awarded to the respondents. (R. at 236.)

7. The "Findings of Fact and Conclusions of Law" ordered the petitioner to reimburse the respondent \$1674.77 in attorneys' fees. (R. at 245.)

8. In the Memorandum Decision, the Court **stated**: "In the final analysis, the petitioner's financial needs are basically met by his minimal efforts at employment, the assistance of his girlfriend, and his family". (R. at 234.)

### **SUMMARY OF THE ARGUMENT**

#### **I. The Court Erred in Consideration of Third Party Income in Determining Ability to Pay Alimony.**

Utah Code Ann. § 30-3-5(6)(g)(iii) prohibits the consideration of an obliger's current spouse in the **determination** of alimony except under

certain exceptional circumstances. The statute does not consider any occasions in which the income of any third party- who is not the obliger's current spouse- may be considered. The trial court erred in considering the sharing of expenses with the Petitioner's girlfriend and the financial assistance of other family members in making the determination that the Petitioner had the ability to pay alimony.

**II. The Court Errord in Ordering Attorneys' Fees without Consideration of Obligor Spouse's Ability to Pay.**

The trial court committed an error of law in failing to consider the Petitioner's ability to pay before ordering that he'd pay the Respondent's attorney's fees. The trial court had previously found that the Petitioner could not pay the entire amount of the Respondent's needs in making an award of alimony. The subsequent award of attorney's fees to the Respondent, without also making a secondary and separate finding of fact in support of such an award, was clearly erroneous. Moreover, in the case that bar, even if the trial court had made findings of fact in support of its award of attorneys' fees, such a finding would have - as a logical necessity - required the making of a finding inconsistent with the court's own previous finding that the Petitioner did not have the ability to pay an amount beyond the amount already awarded as alimony.

## **ARGUMENT**

### **I. The Court Below Committed Error by Considering Past Assistance and Support of Petitioner's Family in Determining Alimony**

The trial court committed legal error in considering the financial assistance Petitioner had received from others who were not his spouse, including his girlfriend and members of his family, in making a determination on the Petitioner's ability to pay alimony.

In the Memorandum Decision handed down by the trial court in the present case, the trial court stated that the "The petitioner has been able to meet his expenses through the assistance of his girlfriend, marginal work that he has obtained, and the assistance of his family, primarily to cover his attorney's fees..." (Record at 234.) In making a determination of alimony, the "trial court must consider the financial conditions and needs of the receiving spouse, the ability of receiving spouse to produce a sufficient income, and the ability of supporting spouse to provide support". *Marshall v. Marshall*, 915 P.2d 508, 516 (Utah Ct. App. 1996). In determining the ability of the supporting spouse to provide support requires the trial court to also consider that spouse's income and expenses, as it would be impossible for a court to assert that a party is "able" to pay a specific alimony award amount without first considering that party's income and expenses.

Utah Code Ann. § 30-3-5(6)(g)(iii) specifically contemplates those occasions in which the income of a party's spouse may be considered in the determination of alimony. The statute states:

- (iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this Subsection (8).
  - (A) The court may consider the subsequent spouse's financial ability to share living expenses.
  - (B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

Id.

The statute specifically excludes the consideration of the income of a subsequent spouse in the determination of alimony except in limited situations. Further, the statute does not mention any other persons, groups, or class of individuals whose income may be considered when making a determination of alimony.<sup>1</sup> Thus, it is reasonable to conclude that in making the statutory expression that the income or ability to share expenses

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<sup>1</sup> It is axiomatic in American Law that there are certain linguistic and textual inferences, which may be used in determining the meaning of a given statute. One of these "canons" of statutory interpretation is the principle *expressio unius est exclusio alterius*, which may be interpreted as "the expression of one thing suggests the exclusion of all others." Eskridge, Frickey and Garrett, Legislation and Statutory Interpretation, Foundation Press, 2000, page 255.

of a payor's subsequent spouse may only be considered in determining alimony in certain exceptional cases, the Utah Legislature has declared that the income of any and all other persons may not be considered in making alimony determinations.

Such a reading of this statute is also supported by the canon that "provisos and statutory exceptions should be read narrowly". Eskridge, Frickey and Garrett, Legislation and Statutory Interpretation, Foundation Press, 2000, page 255. Accordingly, the exceptional cases in which Utah Code Ann. § 30-3-5(6)(g)(iii) allows the income or ability to share expenses of a subsequent spouse to be considered in determining alimony should be limited to include only the subsequent spouse, and not other third parties, such as a subsequent girlfriend, a parent, or other friends or family members.

An examination of the **significant** differences between a person's spouse and a person's other friends and relations provides further support for the **suggested** interpretation. Married couples owe social and legal **duties** to one another, which are far more extensive and permanent than those owed to an individual by others.

While the law requires a parent to provide and support his or her minor children, regardless of whether the parent lives with the child, is married to the child's other parent, or has custody of the child, this duty is generally extinguished by the child's reaching the age of maturity. Further, in most cases, an unmarried couple can live together and act in many ways precisely as a married couple would, and yet—absent a finding of “common law marriage”—they have no legal duty to support.

In stark contrast, a person's duties of support to their spouse exist whether they live together or separately, whether they act as a married couple or not, whether they have children or not, and irrespective of their ages. See, e.g., Utah Code Ann. § 30-4-1, et seq. (providing for the “separate maintenance” of a spouse who does not live with the supporting spouse). The only way that a person can become “divorced” of their duties to their spouse is through judicial intervention.

The social and legal nature of the spousal relationship suggests, among other things, permanency. In this light, it makes sense to allow consideration of a spouse's income or support in making a permanent determination on alimony. However, it makes no sense to allow the income or support of non-spouse third parties to be considered when



making such determinations, in light of the limited and transient nature of the duties arising from those relationships.

Legislative enactments and subsequent decisions of this Court following the Utah Supreme Court decision *Kiesel v. Kiesel*, 619 P.2d 1374 (Utah 1980) support this interpretation of Utah law.<sup>2</sup>

In *Kiesel* the Utah Supreme Court considered a father's contention that a trial court improperly considered his new wife's income in setting his child support obligations. The Court held:

While it is true that a stranger to a divorce action should not be constrained, by reason of marriage, to lend financial support to his or her spouse's children by a prior marriage, the court is not precluded from taking such circumstances into

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<sup>2</sup> Support for this interpretation of Utah Code Ann. 30-3-5(6)(g)(iii) may be found by a review of legislative statements and signals that have been expressed through legislative actions on similar matters. One such informative review concerns actions by the Utah Legislature in determining the appropriateness of considering a subsequent spouse's income and sharing of expenses when determining an award of child support. In proceedings involving the setting or the modification of child support, the ability of the payor spouse to pay is a factor which is considered in the determination. Similarly, proceedings such as the one at bar which concern determinations of alimony require the consideration of the ability of the payor spouse to pay the requested support. Because the "ability to pay" factor is considered in both instances, legislative actions and judicial precedents from each can effectively inform those of the other. See *Paffel v. Paffel*, 732 P.2d 96, 102 (Utah 1986) (holding that a finding governing the propriety of considering a subsequent spouse's income in a proceeding for the increase of child support was applicable to a proceeding considering the award of spousal support where both cases considered ability to pay as factor in making determination).

consideration in determining the ability of one who does have the legal obligation to pay.

*Id.* at 1376. Subsequently, the Utah Legislature passed Section 78-45-7.4 of the Utah Code Annotated, which “limits the discretion of trial courts by prohibiting them from considering a new spouse’s income in setting child support obligations”. *Crockett v. Crockett*, 836 P.2d 818 (Utah Ct. App. 1992).

In *Paffel v. Paffel*, 732 P.2d 96 (Utah 1986), the Utah Supreme Court, relying in part on *Kiesel*, upheld the award of alimony by a trial court in which the court considered evidence of the ex-husband’s present spouse as a circumstance affecting his ability to provide support. *Id.* at 102. Again, the Legislature revised the controlling law to limit the consideration of the present spouse’s income. See Utah Code Ann. § 30-3-5(7)(g)(ii) (1995) (amending L. 1994, ch. 284.). The Legislature’s 1995 amendment of Utah Code Ann. § 30-3-5 includes the language now found in § 30-3-5(6)(g)(iii), which includes the prohibition on considering the income or support of a subsequent spouse except under certain exceptions. *Id.*

If any trend or signal is to be discerned from the Legislature’s actions regarding the consideration of the income of third parties in making

determinations on spousal support or child support, it is that the Legislature intends to exclude consideration of such third parties.

In the alternative, if § 30-3-5(6)(g)(iii) is not read to exclude the consideration of individuals who are not current spouses of the supporting spouse in an alimony determination, then those individuals who *are* considered should be considered under the same factors as a subsequent spouse is considered. That is to say, they should be excluded except to consider the sharing of expenses with the payor spouse, or unless the court finds that the payor's improper conduct justifies that consideration.

In the present case, the court did not make a finding as to the fault of the Petitioner, which would justify the consideration of a spouse's—or another's—income in the determination of alimony. Even if the trial court *had* made such a finding, those findings would have to be “detailed enough and consist of enough subsidiary facts to reveal the steps the court took to reach its conclusion on each factual issue presented”. *Sampinos v. Sampinos*, 750 P.2d 615, 617 (Utah Ct. App. 1988). Moreover, the “[f]ailure to substantiate such findings constitutes reversible error unless the facts in the record are ‘clear, uncontroverted, and capable of supporting

only a finding in favor of the judgment’.” *Id.* (quoting *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987)).<sup>3</sup>

By way of example, before even finding a spouse responsible for contributing to the support of a former spouse, the “trial court must consider the financial conditions and needs of the receiving spouse, the ability of receiving spouse to produce a sufficient income, and the ability of supporting spouse to provide support”. *Marshall*, 915 P.2d 508 at 516. Therefore, even if it were appropriate to consider the income or ability to share expenses of a third party in making an alimony determination, it would be grossly unjust and inappropriate to fail to consider the “ability to provide support” of the third party who, by virtue of the court’s decision, must then essentially provide support.<sup>4</sup> If not, then a party to a divorce

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<sup>3</sup> The record contains allegations of fault and evidence to support a finding of fault against either or both parties. In the absence of a specific finding of fault in the present case, a showing of *any* evidence that would controvert such a finding against the Petitioner is sufficient to show that the facts are capable of supporting findings other than a finding in favor of (a presumed finding of fault) in the judgment. For example, the Respondent testified that she only visited her husband who lived in an adjoining state “twice in fourteen months” (R. at 157.), and the Petitioner testified that, during that time, the Respondent obtained credit cards without her husband’s knowledge and failed to pay the corresponding bills, which put her husband’s job and career in jeopardy (R. at 33-40, 47.) Either of these facts alone provide sufficient controverting evidence in this case.

<sup>4</sup> See, e.g., *Paffel* at 101 (holding that court properly considered the income of ex-husband’s present spouse as a circumstance affecting his ability to pay, particularly in light of failure to make a timely objection to the admission of such

would be protected from support obligations, which are financially untenable, by the mere existence of third parties with relationships with a party, which would not be afforded such protection.

In the final analysis, a finding in favor of the trial court's decision in the present case would be tantamount to the creation of a new regime of support law in the State of Utah. It would be a regime in which the siblings, parents, aunts or girlfriends of the parties to a divorce may be considered and obliged by the court to provide ongoing or additional support one or both of the parties because of the parties' combined inability to support themselves. Such a proposition is legally unfounded and represents poor public policy.

The Appellant urges this Court to find that the trial court committed reversible legal error in considering the intermittent and temporary support received by Petitioner from his family and girlfriend in making a determination that the Petitioner had the requisite "ability to pay" the *alimony award*.

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evidence, and in light of the fact that the ex-husband himself presented testimony on expenses of himself and his present spouse.)

**II. The Court Committed Error by Awarding Attorney Fees to Respondent Subsequent to Determination that Petitioner was Unable to Pay Entire Amount of Alimony**

The trial court made an error of law in founding that Petitioner could not pay the entire amount of Respondent's needs in making an award of alimony, and then subsequently making an award of attorney's fees to Respondent, without finding that the Petitioner did have the ability to pay for Respondent's need. In this case, the trial court committed error by both ordering attorney's fee subsequent to a finding that Petitioner was already unable to pay alimony and by failing to make the logically incongruent finding that Petitioner had the ability to pay the Respondent's attorney's fees.

While, Utah law grants the trial court the authority to award attorney's fees in a divorce action, pursuant to Utah Code Ann. § 30-3-3 the "decision to make such an award " 'must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees.' " *Marshall v. Marshall*, 915 P.2d 508, 517 (Utah App. 1996) (quoting *Willey v. Willey*, 866 P.2d 547, 555 (Utah App. 1993)). Moreover, the failure to consider any of the enumerated factors is ground for reversal on the fee issue. See *Willey* at 547; *Rudman v. Rudman*, 812 P.2d 73, 77 (Utah App.1991).

In the case below, the trial court did not give adequate consideration nor make adequate findings on the question of the Petitioner's ability to pay an award of attorneys' fees.

The Commissioner had found that the Respondent's need exceeded the Petitioner's ability to pay. (R. at 79.) The Commissioner then awarded a temporary child support amount of \$427.00 per month and a temporary alimony amount of \$1,757.00 per month based upon Petitioner's income of approximately \$50,000.00 annually and an income imputed to Respondent of \$18,000.00 annually. (R. at 79.) The Commissioner also made a specific finding that "petitioner's ability to pay alimony is limited to \$1,757.00". (R. at 116.)

The Respondent objected to the Commissioner's findings, specifically that the Commissioner "erred by failing to give adequate consideration to petitioner's historical income, ... respondent's needs, and petitioner's ability to pay while he is admittedly living with his girlfriend", and requested a hearing on the Objection. (R. at 99.) The Judge issued a Minute Entry denying the hearing and denying the Respondent's Objection. (R. at 111-113.)

The Minute Entry stated, in relevant part, that

“... the parties’ financial picture has been altered dramatically, particularly since the petitioner is no longer employed in the same capacity or under the same pay standards. Therefore, the Court concludes that while the current amount of support has been approximately cut in half, this amount only reflects the reality of the situation that the petitioner simply does not have the same resources from which he can continue to pay the prior level of support. Accordingly, the Court concludes that the Commissioner’s recommendation is justified. The respondent’s objection is denied.”

(R. at 112.)

Thus, it was the finding of the Commissioner and the Court that Petitioner’s income as used as a basis for the Temporary Order was not sufficient to pay for Respondent’s financial need. Moreover, the trial court incorporated by reference its own prior ruling upholding the commissioners finding that the respondents need exceeded the Petitioner’s ability to pay.

Counsel for Petitioner pointed out the insufficiency of the parties’ resources on the record, stating:

There’s not enough money in this case, however you cut it, however one assesses it, there’s not enough here to pay both parties reasonable living expenses. That was the finding of the commissioner, and I think that’s still the case.

(R. at 398.)



The trial court did not find that the Petitioner should be imputed any higher amount of income after trial on the merits than was imputed for the purposes of the Temporary Order. In fact, in its Memorandum Decision, the trial court stated: “The Court is satisfied that the temporary Order ought to become the permanent Order...”. (R. at 236.) However, the trial court did not make any findings concerning the Petitioner’s ability to pay attorneys’ fees, beyond those findings made in the previous determination on the question of alimony confirming that the income levels used to compute the support amounts on the Temporary Order were the appropriate income levels. (R. at 235.)

Thus, the trial court failed to make an appropriate finding as to the Petitioner’s *ability to pay attorney’s fees*, which requires a separate analysis and necessitates findings of fact in support of the court’s award of attorney’s fees. *See Shinkoskey v. Shinkoskey*, 2001 UT App 44, ¶ 18, 19 P.3d 1005 (trial court must base award of attorney fees and costs in divorce case upon evidence of receiving spouse’s need, payor spouse’s ability to pay and reasonableness of fees). In making an analysis on the Petitioner’s ability to pay attorney’s fees, a trial court must examine not only the Petitioner’s income, but also his expenses.

Moreover, in the present case, even if the trial court had made appropriate findings, the trial court's award of alimony should certainly have been considered as an "expense" to the Petitioner. Based upon the income that was imputed to the Petitioner, his net monthly income is only \$3,363.00. When the support and alimony award of \$2,184.00 is subtracted from that amount, the Petitioner is left with \$1,179.00 on which to live. Although the payment of attorneys' fees is a one time expense, it is difficult to see how someone who nets under \$1200.00 per month can be expected to pay several thousand dollars in attorney's fees for his wife.

Even more significantly, given that both the Commissioner's findings and the Court's findings were that the Respondent's needs regarding support and alimony are in excess of the Petitioner's ability to pay, the trial court's award of attorney's fees (which requires a finding of Petitioner's ability to pay in excess of the amount which the court has already found is the most the Petitioner can pay) is manifestly unjust. Thus, this Court should reverse the trial court's award of attorney's fees, and should further hold that it would be manifestly unjust to make a finding that the Petitioner has the ability to pay the Respondent's attorney's fees in

light of the trial court's previous finding regarding the award of alimony that the Respondent's needs exceed the Petitioner's ability to pay.

Thus, this Court should reverse the trial court's award of attorney's fees, and should further hold that it would be manifestly unjust to make a finding that Petitioner has the ability to pay Respondent's attorney's fees in light of the trial court's previous finding regarding the award of alimony that Respondent's needs exceed Petitioner's ability to pay.

### **CONCLUSION**

The Appellant urges this Court to find that the trial court committed reversible legal error and reverse and remand the following decisions of the trial court. First, as the trial court erred by considering the support provided to the Petitioner by his family and girlfriend in making a determination that the Petitioner had the requisite "ability to pay" the alimony award, this Court should reverse the trial courts alimony award, subject to remand back to the trial court for a proper evaluation of Petitioner's ability to pay. Second, as the trial court erred in not considering Petitioner's inability to pay in granting an award of attorneys' fees, this Court should strike the trial court's award of attorneys' fees to Respondent.

Respectfully submitted,

ASHWORTH HUNT, PLLC

A handwritten signature in black ink, appearing to read "BTH", is written over a horizontal line.

BRIAN T. HUNT

JUSTIN T. ASHWORTH

Attorneys for Petitioner/Appellant

## **ADDENDUM**

### **Utah Code Annotated § 30-3-5.**

Disposition of property -- Maintenance and health care of parties and children -- Division of debts -- Court to have continuing jurisdiction -- Custody and parent-time -- Determination of alimony -- Nonmeritorious petition for modification.

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children;

(c) pursuant to Section 15-4-6.5:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or

obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders; and

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) Child support, custody, visitation, and other matters related to children born to the mother and father after entry of the decree of divorce may be added to the decree by modification.

(5) (a) In determining parent-time rights of parents and visitation rights of grandparents and other members of the immediate family, the court shall consider the best interest of the child.

(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a parent-time or visitation schedule a provision, among other things, authorizing any peace officer to enforce a court-ordered parent-time or visitation schedule entered under this chapter.

(6) If a petition for modification of child custody or parent-time provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(7) If a petition alleges noncompliance with a parent-time order by a parent, or a visitation order by a grandparent or other member of the immediate family where a visitation or parent-time right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation or parent-time.

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

- (i) the financial condition and needs of the recipient spouse;
- (ii) the recipient's earning capacity or ability to produce income;
- (iii) the ability of the payor spouse to provide support;
- (iv) the length of the marriage;
- (v) whether the recipient spouse has custody of minor children requiring support;
- (vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and
- (vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

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

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (8)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short



duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

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

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

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

(g) (i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony

to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

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

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

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

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

(9) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage or death of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(10) Any order of the court that a party pay alimony to a former spouse


terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

Amended by Chapter 129, 2005 General Session

**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing **BRIEF OF THE**  
**PETITIONER/APPELLANT** were hand-delivered this 6 day of May, 2005, to the  
following:

COLLEEN C. WARNER  
416 East 9000 South  
Sandy, Utah 84070

  
A handwritten signature, appearing to be "C. Warner", is written over a horizontal line.