

1994

# Marilyn L. Ahluwalia v. Haminder S. Ahluwalia : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

\* \* \* \* \*

MARILYN L. AHLUWALIA,	)	
	)	
Plaintiff-Appellant,	)	REPLY BRIEF OF APPELLANT
	)	
vs.	)	
	)	Appeal No. 940052-CA
HAMINDER S. AHLUWALIA,	)	
	)	(Oral Argument
Defendant-Appellee	)	Priority No. 4)
	)	
	)	

\* \* \* \* \*

Appeal from a Final Judgment  
of the Third Judicial District Court  
of Salt Lake County, Utah  
The Honorable J. Dennis Frederick

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**FILED**  
Utah Court of Appeals

NOV 07 1994

Marilyn M. Branch  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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\* \* \* \* \*

I.

REPLY BRIEF OF APPELLANT

ARGUMENT I.

I. THE TRIAL COURT CLEARLY ERRED IN DENYING MRS. AHLUWALIA'S REQUEST FOR CUSTODY, POSSESSION OF THE MARITAL RESIDENCE AND IN CONSEQUENTLY ORDERING CHILD SUPPORT.

Two areas of evidence that were crucial to the appropriate decision on the custody issue were completely ignored by the Trial Court.

A. The Trial Court clearly and wrongly ignored the requirement of Roendahl v. Roendahl 240 Utah Adv. Rpt. 25 (Utah App. 1994) which referenced at page 26, Utah Code Annotated §30-3-10 regarding the fact that a Trial Court must consider, among other factors, which parent is most likely to allow the child frequent and continued contact with the non-custodial parent. The Trial Court is required to consider this element regarding custody. No finding on the record below exists to show that the Trial Court considered this issue.

The evidence at trial was clear that Mr. Ahluwalia made obvious and blatant attempts to interfere with Mrs. Ahluwalia's visitation relationship with her children by asserting that the Plaintiff should be out looking for a job rather than being with her child. (Tr. at R. 207, 209, 252-253). As cited in her

Appellant's brief, the case of Smith v. Smith, 793 P.2d 407 (Utah App. 1990) states at page 411 that the custodial parent has a duty to foster the child's relationship with the non-custodial parent.

The evidence at trial was undisputed that Mrs. Ahluwalia had been the primary care taker and care provider for the minor children. (Tr. at R. 182-183) The evidence was undisputed that Mrs. Ahluwalia had caused the children to develop into good, well adjusted children, (Tr. at R. 182-183), and that she had made the hard decision to remove stress in their lives by separating herself from Mr. Ahluwalia. (Tr. at R. 209-210). Mrs. Ahluwalia obviously knew how to foster children in their growth and relationships.

In the testimony of Elizabeth Hickey, she could not testify that Mr. Ahluwalia would foster the relationship of the children with their mother, while she could testify that their mother would do so. (Tr. at R. 185-187). The evidence at trial was undisputed that Mr. Ahluwalia failed to foster the parent/child relationship when he had the chance to do so. (Tr. at R. 207-209, 252-253). The Trial Court ignored this most critical issue, and as a result the decision on the issue is clearly erroneous and must be reversed.

B. The Court below really wanted to leave the children in the family home, and to leave them together. Those were the two keys to the decision. The custody evaluator indicated that stress in the family was relieved once there was a separation of the parties and had Mr. Ahluwalia rather than Mrs. Ahluwalia left the home, the same result in terms of relieving stress in the family



would have likely occurred (Tr. at R. 183-184). In other words, a principal reason the children had flourished in the care of their father is because stress was removed from the family and the children would have flourished whether the mother or father remained as the custodial parent.

Consequently, to decide that at a later time the children were better off than they were at the time of separation, credit must be given to the primary cause of that positive result. In this instance the primary cause of the positive result was the wise yet extremely painful decision of a mother that would rather remove herself away from her children, leaving them where they would be physically safe, in order to eliminate a serious emotional condition of the home. According to the wisdom of King Solomon, such a mother truly would be the one with the children's best interests at heart.

While it is true that the case law generally holds that the facts at the time of trial are the facts upon which the custody decision should be based, this particular circumstance presents a compelling counter-argument to that general rule. The Plaintiff testified that she moved out of the home because her presence in the home was creating so much stress in the family, she believed that it was in the children's best interest to relieve that stress (Tr. at R. 209-210). That is exactly the situation that occurred. To fail as the Court below did, to give Mrs. Ahluwalia credit for her perception and sacrifice, when she clearly did not simply abandon the family, but created a situation where there could be

healing and things could and did get better, was clear error by the Trial Court and must be reversed.

## **ARGUMENT II.**

### **II. THE TRIAL COURT CLEARLY ERRED IN DENYING MRS. AHLUWALIA'S REQUEST FOR ALIMONY.**

The Trial Court and Mr. Ahluwalia both concluded that Mrs. Ahluwalia had not made what they considered to be a "reasonable effort" to support herself since separation. Where in all the literature of divorces in the State of Utah is a requirement found that a woman who has been at home, as a mother and primary care-taker of minor children, in order to justify her request for alimony, must show that she has made a "reasonable attempt" to support herself since separation? That requirement cannot be found in the law of the State of Utah. Yet, it was the primary element of the Court's conclusion regarding the alimony issue.

There is law in our State that the Trial Court must make specific findings regarding the needs of both the payor and payee as well as the ability of each to earn income and make specific findings regarding both those issues prior to making an award of alimony. See Morgan v. Morgan, 795 P.2d 684 (Utah App. 1990). The decision regarding the payee's ability to support his or her self must be made independent of any analysis of the property distribution of the parties. See Roberts v. Roberts, 835 P.2d 193 (Utah App. 1992).

It is a totally different finding to determine the

ability of a party to earn income versus a decision about what that party has done by way of effort to earn income since the separation.

The Trial Court, in a mean-spirited attack on a long term stay-at-home mother, ignored the undisputed evidence at trial that Mrs. Ahluwalia left a "tenured" teaching position in Florida to follow and support the career of her husband to Pennsylvania and thereafter Utah. (Tr. at R. 177-179, 147-152, 157). There is nowhere in the literature of divorce law in the State of Utah a requirement that at every step along the way the spouse now requesting alimony must have made "reasonable efforts" in each of those circumstances to obtain employment.

Contrary to the Trial Court's view of the law, if Mrs. Ahluwalia had made absolutely no effort to gain employment at any time prior to the trial, the Court would still have the same decision to make. That decision would have been as cited in the cases above, i.e. what is Mrs. Ahluwalia's ability to earn a living? Regarding a 17 year marriage, to consider only what temporary earnings, or earnings less than those available in the field of a party's training and experience would provide, and to attach too much importance to such earnings, is clear error on the part of the Trial Court.

Mrs. Ahluwalia testified that she had applied at all the local school districts for employment but had not been able to obtain full time employment at the time of trial. Mrs. Ahluwalia did everything that she could do in this geographic area in order

to obtain employment in her professional field and had not been successful in obtaining any such employment at the time of trial. (Tr. at R. 150-152, 157) That evidence is uncontroverted.

The Trial Court gave no weight at all to Mrs. Ahluwalia's professional training or work history in her profession. The Trial Court completely ignored the desire of Mrs. Ahluwalia to continue to reside in the geographic area where her children were and where her children wanted to remain. The Court in effect told Mrs. Ahluwalia that if she could not find a teaching job in this geographic area, she should move away from her children to obtain work or she was not worthy of assistance from the man and family she had left her job for in Florida early in this marriage. The Trial Court ignored the fact that Mrs. Ahluwalia had left her professional field at the request of her husband to support him in his for the vast majority of the marriage.

The Trial Court ignored all standards of fairness, decency and equity in imputing income to Mrs. Ahluwalia for times when she was not working. The evidence was uncontroverted that the job she had only paid for the days she worked, and was not a salaried position, even though when the work was available she worked 38 hours per week. The Court created a new obligation for alimony consideration that unless a person seeks to maximize their ability to support themselves prior to the divorce trial, they apparently do not deserve alimony. See Findings of Fact nos. 19, 20, 21, 27 and 28.

The Trial Court's approach is totally contrary to Utah

law which holds that in the event that Mrs. Ahluwalia could not obtain a job in the teaching field in which she was trained, an award of rehabilitative alimony would be appropriate. See Bell v. Bell, 810 P.2d 492 (Utah App. 1991). This Court has clearly set forth that where there is a discrepancy in the earnings between professionals that discrepancy should be addressed and resolved through an appropriate award of such rehabilitative alimony. See Dunn v. Dunn, 802 P.2d 1314 (Utah App. 1990), Thronson v. Thronson, 810 P.2d 248 (Utah App. 1991), Davis v. Davis, 749 P.2d 647 (Utah 1988) and Watson v. Watson, 837 P.2d 1 (Utah App. 1992).

The standard of living to which Mrs. Ahluwalia was accustomed, the discrepancy in the earnings and needs of the parties to equalize the standard of living was addressed in testimony at trial. (Tr. at R. 139, 158-162, 177-178, 228-249, 262-263). See also Trial Exhibits 2, 15 and 17.

As with the other critical evidence referenced above, the Trial Court ignored the issue of the parties standard of living. The Court made an incorrect finding that Mr. Ahluwalia could not afford to pay alimony. The Trial Court ignored the fact that Mr. Ahluwalia went on a spending spree after the parties' separation, incurring a loan for a vehicle that cost four times the amount of any other vehicle ever previously purchased by the parties. (Tr. at R. 241). The Court called Mrs. Ahluwalia's expenses of \$1500.00 per month "somewhat inflated". See Finding of Fact no. 27. Yet, when Mr. Ahluwalia listed \$400.00 per month for entertainment that he never previously spent, the Court made no comment or finding

regarding that issue. (Tr. at R. 245).

The evidence the Court ignored regarding Mr. Ahluwalia's ability to pay, clearly establishes error by the Trial Court. When that evidence is coupled with a fair analysis of the parties' standard of living, Mrs. Ahluwalia's need, her work history and training, alimony must be awarded in this 17 year marriage.

### III. CONCLUSION

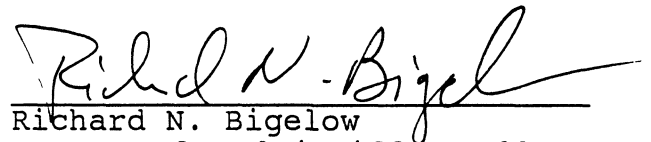
The primary care-taker of the children, who cared for their needs and improved their quality of life even by making the painful decision to move out of the home, should have been awarded custody in this matter. Mrs. Ahluwalia clearly met all the criteria necessary in order to be awarded custody of the minor children, and consequently possession of the marital residence and child support. Mr. Ahluwalia clearly failed to meet several of the critical criteria for being awarded custody. To fail to have awarded custody to Mrs. Ahluwalia was clear error by the Trial Court and should be reversed.

That the Trial Court gave absolutely no weight to Mrs. Ahluwalia's training, prior work history, length of the marriage, sacrifice for the family by leaving her tenured teaching position in Florida to support her husband's career and that the Court made no findings concerning any attempt to equalize the standard of living of the parties was clear error by the Court on the alimony decision. Such decision must be reversed and Mrs. Ahluwalia must be given an opportunity to rehabilitate herself. Mrs. Ahluwalia

respectfully requests that in the event the Court of Appeals agrees and reverses the Trial Court, that it set the alimony award in its decision, since Judge Frederick has clearly shown an unwillingness to award any consideration for Mrs. Ahluwalia's efforts to this family.

DATED this 7th day of November, 1994.

Respectfully submitted,

  
Richard N. Bigelow  
Attorney for Plaintiff-Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of November, 1994 a true and correct copy of the foregoing Brief of Appellant was hand delivered to:

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