

1994

# Marilyn L. Ahluwalia v. Haminder S. Ahluwalia : Brief of Appellant

Utah Court of Appeals

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940052 CA

IN THE UTAH COURT OF APPEALS

\* \* \* \* \*

MARILYN L. AHLUWALIA,	)	
	)	
Plaintiff-Appellant,	)	<b>BRIEF OF APPELLATE</b>
	)	
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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Utah Court of Appeals

JUL 12 1994

I am representing ~~the~~ to the Court  
that an addendum is not required in  
my brief.

Rick A. Sigel 7/12/94

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**I.**

**JURISDICTION**

The authority believed to confer jurisdiction on the Supreme Court of the State of Utah to hear this appeal from the Third Judicial District Court of Salt Lake County is Article VIII, Section 4 of the Utah Constitution; Utah Code Ann., Section 78-2-2(3)(j) (1988); and Rule 3(a) Utah Rules of Appellate Procedure. The Supreme Court, acting pursuant to Rule 42, Utah Rules of Appellate Procedure, transferred this appeal to this Court by order dated January 27, 1994.



## II.

### STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. DID THE TRIAL COURT ERR IN DENYING MRS. AHLUWALIA'S REQUEST FOR CUSTODY, POSSESSION OF THE MARITAL RESIDENCE AND IN CONSEQUENTLY ORDERING CHILD SUPPORT? This is a question of Law and fact reviewed for correctness and under a clearly erroneous standard. Marchant v. Park City, 771 P.2d 677 (Utah App. 1989); Matter of Estate of Bartell, 776 P.2d 885 (Utah 1989).

B. DID THE TRIAL COURT ERR IN DENYING MRS. AHLUWALIA'S REQUEST FOR ALIMONY? This is a question of law and fact reviewed for correctness and a clearly erroneous standard. Marchant v. Park City, 771 P. 2d 677 (Utah App. 1989); Matter of Estate of Bartell, 776 P.2d 885 (Utah 1989).

## III.

### DETERMINATIVE STATUTES, ORDINANCES OR RULES

There are no constitutional provisions, statutes, ordinances or rules whose interpretation is believed to be solely determinative of the outcome of this case.

#### IV.

#### STATEMENT OF THE CASE

##### A. Nature of Case, Course of Proceedings and Disposition in District Court.

This is an appeal from a final judgment in a divorce case entered by the Honorable J. Dennis Frederick in the Third Judicial District Court, Salt Lake County, State of Utah. The final judgment was entered on December 16, 1993. Mrs. Ahluwalia filed her notice of appeal on January 14, 1994. There has been no cross-appeal filed in the action.

##### B. Statement of Facts.

This case was instituted against the appellee Haminder S. Ahluwalia, for a divorce by his wife the Plaintiff, Marilyn L. Ahluwalia. Mrs. Ahluwalia sought custody of the party's minor children and permanent alimony from an almost 17 year marriage. Mrs. Ahluwalia had initially separated from her husband and moved from the family residence because her husband would not move, to relieve the stress imposed on the family by the parties' marital problems. Mrs. Ahluwalia then filed for divorce. The children remained in the residence with their father from the time of separation through the time of trial.

Mr. Ahluwalia had been ordered temporarily to pay alimony which was paid until the time of trial. The parties had real and

personal property, the division of which is not in dispute in this appeal except in so far that the Plaintiff had requested that if she were awarded custody of the minor children that she retain the marital residence and pay the Defendant one-half of the equity in such residence.

Mr. Ahluwalia counter-claimed, contesting custody, alimony, and possession and ownership of the marital residence.

A custody evaluation was performed by Elizabeth Hickey. In such evaluation, Ms. Hickey found both parents to be fit and proper. Ms. Hickey recommended that the Defendant receive custody of the minor children. Ms. Hickey's recommendation was based on her reasoning that the children had been with their father through the period of separation, that such situation was stable and adjusted to and that the children had better come to know and relate to their father during the separation period, even though Mrs. Ahluwalia had been the primary care taker for their entire lives prior thereto. Ms. Hickey did not recommend upsetting the current situation because the children had adjusted. Ms. Hickey also reported the children did not want the situation to change while not directly wanting to choose between their parents. For those reasons Ms. Hickey recommended the Defendant receive custody.

The Court ignored the substantial evidence at trial that Mr. Ahluwalia would make and had made visitation by Mrs. Ahluwalia difficult and that he had not and would not encourage the parental

rights of the Plaintiff. The Court ignored the recommendation of Ms. Hickey regarding joint custody and awarded the custody of the minor children of the parties to the father. The Court ignored the substantial evidence of Mr. Ahluwalia's emotional and abusive problems. Additionally, the Court either misunderstood or ignored the nature of the testimony of the Plaintiff concerning her employment and wrongly imputed excess income to the Plaintiff for purposes of child support, doing so even in an incorrect amount given the Court's imputing of income figure.

The Court denied alimony, notwithstanding the fact that the Defendant is a successful engineer whose career was supported and enhanced by moves of the parties throughout the course of the marriage. The moves of the parties necessitated Mrs. Ahluwalia terminating her tenured, professional teaching employment in Florida in the early stages of the marriage. Mrs. Ahluwalia has been unable to regain similar employment because of the difficult job market in her profession, although it was uncontested that she has been attempting to do so.

In denying alimony, the Trial Court ignored the sacrifices for the marriage of Mrs. Ahluwalia in following her husband and supporting his career, to the detriment of her career. Even though Mrs. Ahluwalia sacrificed for the career of the Defendant to the extent that she had to give up her full-time, tenured employment in her chosen and qualified profession, the Trial Court found she deserved no opportunity or support from the

Defendant to regain employment in her chosen field or any opportunity to be retrained in a field in which she could have comparable opportunities or benefits. The Trial Court ignored the obviously overstated financial information of the Defendant in finding he had no ability to pay alimony.

The decision of the Trial Court resulted in a woman in a 17-year marriage, who had been the primary care taker of the minor children, and who as a result of extreme marital stress and abuse stress was forced to leave her home for her own mental stability, and did so in a manner that benefitted the children, was denied custody as a result of that division to escape from an abusive situation. Additionally, the Trial Court found that a woman who was a professional with tenured employment at the time of the marriage, who terminated that employment to move with her husband and family in pursuit of his career, who supported her husband to develop an excellent earning capacity, is not entitled to any alimony whatsoever after 17 years to at least at a minimum permit her to reestablish herself in the workforce in a professional capacity similar to the position she was in at the time of the marriage. Our so-called court of equity permitted Mr. Ahluwalia to utilize the effort and support of Mrs. Ahluwalia to place him in an excellent earning position and at the time of divorce, denied Mrs. Ahluwalia the chance to have the same benefit.

V.

SUMMARY OF APPELLANT'S ARGUMENTS ON APPEAL

A. DID THE TRIAL COURT ERR IN DENYING MRS. AHLUWALIA'S REQUEST FOR CUSTODY, POSSESSION OF THE MARITAL RESIDENCE AND IN CONSEQUENTLY ORDERING CHILD SUPPORT?

The Trial Court accepted as the evidence to support custody for Mr. Ahluwalia the statements of Ms. Hickey that the children were doing well, that they had developed a better relationship with their father from the separation until the time of trial and the Court followed an inferred preference of the minor daughter to keep the children with their father. The Trial Court ignored the evidence that Mrs. Ahluwalia was the primary care taker of the children, that she was and had been a good mother, that her relationship with the children was one of a loving, caring relationship, that she would encourage the parental rights and opportunities of Mr. Ahluwalia and that the children were well adjusted, good children that she had nurtured and cared for their entire lifetime.

The inability of Mr. Ahluwalia to support Mrs. Ahluwalia in her parental rights to be with the children as was clearly stated in the evidence, and the contrary being true that Mrs. Ahluwalia would support the Defendant in his parental rights with the children was critical evidence the Court ignored in awarding custody to Mrs. Ahluwalia. The Court ignored the evidence that Mr. Ahluwalia had not during the course of the children's lives paid

any substantial attention until he was forced to by virtue of the separation of the parties. The Court ignored the evidence of Mr. Ahluwalia's physical and emotional abusive behavior, and his double standards for family members. The critical evidence ignored by the Trial Court constituted a clear abuse of a discretion and a serious injustice when custody of the minor children was awarded to the Defendant.

If the Court changes the award of custody, it should consequently consider change of possession of the marital residence and should require the Defendant to pay child support.

**B. DID THE TRIAL COURT ERR IN DENYING MRS AHLUWALIA'S REQUEST FOR ALIMONY?**

The evidence of the earnings and financial condition of the parties in terms of month to month living was uncontroverted at Trial. The Defendant did not contest the claimed income and expenditures of the Plaintiff. The evidence at trial proved the Defendant had at least \$1900 a month in discretionary income from which he could pay alimony. (Tr. at R. 234-254). The Court's finding to the contrary (Tr. at R. 131) is simply not supported by the evidence.

Notwithstanding the fact that the Plaintiff fell short in income to match her need of approximately \$1500 every month (for a bare minimum income level), while the Defendant had the ability to pay her to meet this sum, the Trial Court still refused to require

the Defendant to pay alimony to the Plaintiff.

The Trial Court in this case has seriously abused its obligation and discretion as a court of equity. The evidence is uncontroverted that Mrs. Ahluwalia was working in a tenured teaching position at the time of the marriage of the parties and continued to do so for a couple of years after the marriage. She then had to terminate her employment to follow the Defendant and family and support the growth of his professional career by moving to Pennsylvania and thereafter to Utah. During the time period that the family lived in Pennsylvania and in Utah, the Plaintiff was unable to obtain a full-time teaching position and was not even permitted to do so by the demands of Mr. Ahluwalia that she immediately go to work once they got to Pennsylvania and remain in a less-skilled, lower paying job to assist in the purchase of a house for the family.

The Defendant has now developed his professional career to the point where he is earning in excess of \$55,000 per year. Mrs. Ahluwalia on the other hand, is forced to work part time work earning \$6.25 an hour because she has not been able to obtain a similar kind of teaching position to that which she had in the beginning of the marriage. For the Trial Court to not require Mr. Ahluwalia to assist Mrs. Ahluwalia to obtain a teaching position, to be retrained or assisted for at least a period of time, when he has the ability to pay, is clearly an abuse of the Trial Court's discretion and is a serious injustice to Mrs. Ahluwalia.



## VI.

### APPELLANT'S ARGUMENTS

#### A. DID THE TRIAL COURT ERR IN DENYING MRS. AHLUWALIA'S REQUEST FOR CUSTODY, POSSESSION OF THE MARITAL RESIDENCE AND IN CONSEQUENTLY ORDERING CHILD SUPPORT?

In order to determine if the Trial Court erred in denying Mrs. Ahluwalia's request for custody, the Appellant must overcome the requirement for the Appellate Court, as set forth in Baker v. Baker, 226 Utah Adv. Rep. 27 (Utah Ct. of App. 1993) where at page 28, the Court stated:

Accordingly we view "the evidence and all the inferences that can reasonably be drawn therefrom in a light most supportive of the trial court's findings.... We will alter the trial court's property division "only if there was a misunderstanding or misapplication of the law resulting in a substantial and prejudicial error, the evidence clearly preponderated against the findings, or such a serious inequity has resulted as to manifest a clear abuse of discretion.... Thus, to prevail on appeal of the trial court's findings as to the property division, Mrs. Baker must marshal the evidence that supports the findings and then demonstrate that, despite such evidence, the findings are "so lacking in support as to be against the clear weight of the evidence and, therefore, clearly erroneous."....

The same standard of overturning the trial court's findings applies to a custody decision as to property division decisions.

The facts in evidence which support the finding of custody on behalf of Mr. Ahluwalia are as follows:

1. As set forth in the custody evaluation of Elizabeth

Hickey, the Defendant, since he received physical custody of the children after this divorce case was filed, has spent more time than previously with the children and his relationship with his children has been strengthened. (Tr. at R. 171-172).

2. As set forth in the Custody Evaluation and testimony of Ms. Hickey, the children desired the stability of staying in the family residence (Tr. at R.172).

3. Ms. Hickey expressed that the Defendant, at the time of Trial, had custody of the minor children for approximately 19 months, the children had adjusted to the current situation, were doing well and she believed that they would be better off staying in that situation than upsetting them having their mother move back in and having to readjust to their mother's custody. (Tr. at R. 172-177).

4. The Defendant is a professional person with a steady and consistent means of employment (Tr. at R. 229-231, 264), Trial Exhibit 15.

5. As set forth in the testimony of Ms. Hickey (Tr. at R. 172-178, 181-183), she supported her report by testifying that the Defendant believed in more of a structured environment than the Plaintiff and to have that such structure implemented in the home. Ms. Hickey testified that she believed that structure was important for the children. Additionally, Ms. Hickey testified (Tr. at R. 172) that the children were doing better in school and especially the parties' daughter since the separation of the parties.

The above stated facts are the only ones in the record that take the position that the Defendant is the better choice as a custodial parent. All remaining facts are either neutral, that is that Ms. Hickey could not determine that one parent was better than the other in a close call (Tr. at R. 182-183), or are in favor of Mrs. Ahluwalia being named the custodial parent.

The evidence that supports Mrs. Ahluwalia being the custodial parent are as follows:

1. Mrs. Ahluwalia was admittedly the primary care provider for the minor children the entire time of the marriage from the children's birth until the time of separation. See Exhibit 14.

2. Elizabeth Hickey testified that the children were good, well adjusted children. (Tr. at R. 182-183), and this came about primarily as a result of their nurturing by Mrs. Ahluwalia.

3. Mrs. Ahluwalia is the type of person that provides a spontaneity and appreciation for life in the children. (Tr. at R. 180-182).

4. It is uncontroverted that Mrs. Ahluwalia was the parent involved in taking the children to all their activities (Tr. at R. 201-202). The Defendant did not participate on a regular basis in the taking the children to their activities and being involved with them. (Tr. at R. 201-202, 204-205).

5. The Defendant is a controlling, manipulative person. (Tr. at R. 194-201, 205).

6. The Defendant is a physically and mentally abusive

person. (Tr. at R. 144-146, 194-201, 208-209). See also Trial Exhibit 1.

7. Mrs. Ahluwalia cared enough for her children to be willing to make the difficult decision to move out of the home and leave the children in the home in order to remove the stress related to her marital difficulties with the Defendant while having as an utmost consideration the well being of the children (Tr. at R. 209-210), contrary to the Defendant who was willing to invite an outsider into the home to live (his father), (Tr. at R. 205-207) with no consideration to the feelings of Mrs. Ahluwalia or the other family members.

8. Ms. Hickey testified that Mrs. Ahluwalia was willing to support and encourage the parental relationship of the Defendant (Tr. at R. 185), while on the other hand, Ms. Hickey was not willing to testify that the Defendant would do the same thing, (Tr. at R. 186-187).

9. The Defendant in fact refused to permit Mrs. Ahluwalia to visit with the parties' minor son, insisted that he go to a day-care instead of being with Mrs. Ahluwalia on the basis that Mr. Ahluwalia stated that Mrs. Ahluwalia should be out looking for a job instead of spending time with her son. (Tr. at R. 207-209, 252-253).

10. The Defendant admitted that his own mother in India lived in a situation where she had servants to do her housework so she did not work outside of the home, (Tr. at R. 228-229), yet the Defendant insisted that Mrs. Ahluwalia work every chance she got

outside of the home (Tr. at R. 147), and when the Plaintiff was not working to the level of the Defendant's satisfaction, the Defendant refused to permit the Plaintiff to see her minor son and instead sent him to a day care (Tr. at R. 208-209).

11. The Defendant had the minor son (age 9) in a daycare when he could have been with his mother, especially if she had custody and a teaching position (Tr. at R. 208-209).

12. The Defendant did not support the children's and Mrs. Ahluwalia's efforts to obtain spiritual and religious growth or opportunity. (Tr. at R. 201).

The Court below failed to consider any of the relevant factors except the inferred preference of one child, the fact that the subject children are good kids who adjusted and so did Mr. Ahluwalia to a difficult situation, to the extent the relative abilities of the parents to provide care and perhaps the desire for custody.

To the contrary, the Court ignored the critical factors such as:

1. Mrs. Ahluwalia's history as the primary care taker of the children.

2. Mrs. Ahluwalia's interest in maintaining that roll.

3. The fact that Mrs. Ahluwalia's caretaker relationship with her children would be substantially harmed and diminished were they not in her custody due to Mr. Ahluwalia's abusive, manipulative and controlling nature.

4. Mr. Ahluwalia's history of not being involved in the

children's extra-curricular activities.

5. The unstable character and lack of emotional stability of Mr. Ahluwalia.

6. The fact that Mr. Ahluwalia believed in one standard of living for his own mother, and another for his wife who has supported his career and children, thus indicating a potential serious problem as to how he will treat his children in the future.

7. The fact that Mrs. Ahluwalia was willing to move out of her home to remove the stress of her relationship with Mr. Ahluwalia, and to follow the wishes of the children in leaving them in the home, not out of self-interest, but out of an interest in the well-being of the children, indicates her love and concern for the children's well-being.

8. To the contrary, Mr. Ahluwalia brought his father into the home and permitted him to live without discussing the matter with Mrs. Ahluwalia and without her consent. (Tr. at R. 205-207), indicating a total lack of concern for the family's situation and feelings.

Trial Courts must consider seriously such issues. In the case of Meyers v. Meyers 768 P.2d 979 (Utah App. 1989) the Court at page 93 indicated that frequently custody determination involve "good versus better" and therefore a Trial Court should consider various relevant factors in determining which custodial arrangement is in the child's best interests. No one set of factors governs every case and the Trial Court has an obligation to articulate findings of those factors which may be pertinent to a child's best

interest which the Court considered in making its determination of the custody issue.

As set forth in the case of Roendahl v. Roendahl, 240 Utah Adv. Rep. 25 (Utah App. 1994) at page 26, the Court there quoted Utah Code Annotated Section 30-3-10 (Supp. 1993)(2) and stated:

(2) The Court shall consider, among other factors the Court finds relevant, which parent is most likely to act in the best interests of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the court finds appropriate.

The Court is required to consider this element regarding custody. The language of the statute says shall consider. The Trial Court failed to give this issue any weight at all even though the evidence indicated Mrs. Ahluwalia should have custody because of this issue. Multiple other factors may be considered as set forth in Roendahl, supra.

As set forth in the case of Smith v. Smith, 793 P.2d 407 (Utah App. 1990) at page 411 the Court indicated:

"the best interest of a minor child are promoted by having respect and love **both** parents. Fostering a child's relationship with the non-custodial parent has an important bearing on the child's best interest."

The overwhelming weight and preponderance of the important evidence as set forth above, clearly shows that while both parties are fit and proper parents, Mrs. Ahluwalia as the primary caretaker and nurturer of the minor children and the one

who was willing to make difficult and sacrificial decisions to remove stress from the lives of her children and family clearly exhibit that Mrs. Ahluwalia has the greatest amount of love, concern and ability to care for the well being of the children. To take these children away from such a mother is a clear abuse of discretion and has resulted in such a serious inequity as to manifest a clear abuse of discretion, and clearly cuts against the weight of the evidence.

The decision to leave the children together and in the family home could have been as easily made by placing the Plaintiff back in the family home, and the Defendant being required to move out. Ms. Hickey testified that after the family stress was minimized by virtue of the separation of the parties, the children began to flourish. Yet Ms. Hickey further testified that the reduction in stress was really as a result of Mrs. Ahluwalia being gone and if the reverse had occurred with Mr. Ahluwalia leaving, the effect on the children and in the home would have been the same. (Tr. at R. 183-184). In other words, the reason the children had flourished is because stress was removed from the family and the children would have flourished whether the mother or father remained as the custodial parent.

The Court stated (Tr. at R. 277) that it was to deal with the custody situation at the time of the divorce trial rather than at the time of separation. At the time of separation, the Plaintiff had made a difficult decision which at this point in time appears to have been the best one for the family. However, it



turned out to be the most negative one for Mrs. Ahluwalia's personal rights as decided by the Trial Court regarding custody of her children. Whether the Trial Court believed it or not, in essence, Mrs. Ahluwalia has been severely penalized by moving out of the home to the benefit of the children, rather than seeking to have Mr. Ahluwalia removed from the home and potentially continuing the stress. This is an inequitable result that should not go against Mrs. Ahluwalia. What she did benefitted the children. She must receive credit for such sacrifice.

It is uncontroverted that Mrs. Ahluwalia substantially raised and nurtured these children without participation from the Defendant, who when he would come home from work would simply sit down and watch television (Tr. at R. 204). While it is admirable that the Defendant, since he has had custody of the children, has worked to establish a better and more participatory relationship with the minor children. It is still a serious injustice rising to the level of an abuse of discretion to take the minor children from the parent who has spent so much time with them, nurturing them and caring for them, during their entire lives and to place it with a person who did not do that until he was forced pursuant to a separation. For these reasons, the Trial Court should be reversed on its custody decision and Mrs. Ahluwalia should be awarded custody of the minor children, she should be placed in the family residence with them and the Defendant should be required to pay the appropriate amount of child support.

**B. DID THE TRIAL COURT ERR IN DENYING MRS. AHLUWALIA'S REQUEST FOR ALIMONY?**

The Trial Court clearly and blatantly abused its discretion in refusing to grant Mrs. Ahluwalia's request for alimony. In marshalling the evidence in support of the Court's verdict, as required of an appellant, such evidence is as follows:

1. The Plaintiff has a teaching degree and has taught school. (Tr. at R. 141-143).

2. The Plaintiff was employed as a full time substitute in the Granite School District, which means that she substitutes on a regular basis on every day that school is in session. However, she only gets paid for the hours she works, she does not get paid for vacations, teacher's work days and does not receive benefits and her hours are limited on a weekly basis. (Tr. at R. 151-154, 225-226, 266-267), Trial Exhibit 4.

3. The Plaintiff worked in the optical/contact lens field for a period of time while the parties lived in Pennsylvania (Tr. at R. 147-148).

4. The Plaintiff had a job interview in the contact lens field but did not follow through with it because she wanted to see what would happen with the custody of her children and did not want to be precluded from having custody by virtue of any conflict that employment might cause. (Tr. at R. 217-218).

5. The Court imputed income to Mrs. Ahluwalia in the sum of \$1,021 based upon the erroneous calculation of \$6.25 per hour for 38 hours per week. (Tr. at R. 275), notwithstanding a complete

lack of testimony or other evidence to support that Mrs. Ahluwalia can earn such amount on a full-time, year round, regular basis.

6. The Court made the finding that the Plaintiff was not specifically looking hard enough for employment to satisfy the Court and therefore declined her any alimony whatsoever. (Tr. at R. 264-265).

To the contrary, the Court clearly overlooked the weighty evidence which supported that Mrs. Ahluwalia was entitled to permanent alimony. That evidence is as follows:

1. This is a 17-year marriage (Tr. at R. 140).

2. Mrs. Ahluwalia was employed in a tenured teaching position in Florida at the time of the marriage between the parties and continued that employment for the first two years of the marriage. (Tr. at R. 177-178).

3. Mrs. Ahluwalia left her tenured teaching employment to support the Defendant in his career when the family left Florida and moved to Pennsylvania (Tr. at R. 178-179).

4. Mrs. Ahluwalia was not able to look for a teaching position because of the insistence of the Defendant that she go to work immediately upon their arrival in Pennsylvania (Tr. at R. 147-148).

5. Mrs. Ahluwalia's employment in the optical/contact lens field and in the day care field when she worked in Pennsylvania paid her substantially less than she would have earned in the teaching profession (Tr. at R. 148-149).

6. When the parties left Pennsylvania and moved to Utah, Mrs. Ahluwalia sought to be requalified to teach (Tr. at R. 150-151).

7. Mrs. Ahluwalia has been seeking employment in the teaching field for several years but has been unable to obtain or secure any kind of tenured or salaried position (Tr. at R. 151-152).

8. Mrs. Ahluwalia desires to remain employed in be employed in the teaching field because it provides her with an opportunity to spend more time with her children, it was where she was trained and it paid better than the temporary types of employment she had outside of the teaching field since leaving Florida (Tr. at R. 157).

9. Mrs. Ahluwalia has been used to living in homes with enough rooms and bedrooms to provide for her family. (Tr. at R. 158-162). Trial Exhibit 2.

10. Mrs. Ahluwalia 's financial information indicates that she had expenses of approximately \$1500 per month. Trial Exhibit 2.

11. Mr. Ahluwalia's financial declaration indicates that he has a disposable income above and beyond his expenses, of at least \$1900 per month from which alimony could be paid. (Tr. at R. 228-249, 262-263). Trial Exhibits 15 and 17.

12. Mrs. Ahluwalia would lose money each month at either her actual current or imputed income earning level while she worked as a full time substitute or in the optical/contact lens field and

could not meet her monthly expenses. (Tr. at R. 139). Trial Exhibit 4.

13. Mr. Ahluwalia made a \$19,000 expenditure for a car, roughly a four times more expensive vehicle than he had ever purchased in the past, after this divorce action was filed and had the resources to support such a purchase. (Tr. at R. 241).

14. On the other hand, Mrs. Ahluwalia has an old car that breaks down continually. (Tr. at R. 162-163).

15. The Defendant has the money to take children on trips and pay for entertainment expenses of \$400 per month. (Tr. at R. 245).

16. The Defendant's employment is stable. (Tr. at R. 226-27).

17. Mrs. Ahluwalia's employment has no stability whatsoever. (Tr. at R. 154-157).

18. The Court found Mrs. Ahluwalia to be capable of full time work, but did not find the income level at which she could be employed, except for imputing \$6.25 per hour, which she has not earned on a full time basis. (Tr. at R. 128-29).

19. Mr. Ahluwalia stated and agreed Mrs. Ahluwalia should work where she is qualified (Tr. at R. 254-55).

As set forth in the Roendahl, supra case at pages 26 and 27:

"the general purpose of alimony is to prevent the receiving spouse from becoming a public charge and to maintain the standard of living enjoyed during the marriage, to the extent possible.... In determining whether to award alimony and in setting the amount, the trial court must consider (1) the financial conditions

and needs of the receiving spouse; (2) the ability of the receiving spouse to provide for him or herself; and (3) the ability of the payor spouse to provide support .... Where "the payor spouse's resources are adequate, alimony needs not be limited to provide for only basic needs, but should also consider the recipient spouse's 'station in life'". ....

The trial court must make findings concerning the elements raised above. In the extant matter, the trial court barely noted the Defendant's and Plaintiff's financial conditions. The Court then made its own conclusions rather than relying upon the uncontroverted testimony at trial and the court's conclusions are not supported by any evidence.

In the Utah case of Howell v. Howell, 806 P.2d 1209 (Utah App. 1991) this court has indicated that alimony should be based upon the standard of living at the time of the divorce trial. This Court indicated that in determining the standard of living in order to set alimony after a divorce is a fact sensitive subjective task and not determined by the expenses alone. This Court further ruled that, at page 1212:

"Second, the court should set alimony as permitted by those parameters, to approximate the parties' standard of living as closely as possible...." The Utah Supreme Court reviewed an alimony award after a long term marriage. The court found that the alimony award in that situation should "to the extent possible, equalize the parties' respective standard of living and maintain them at a level as close as possible to that standard of living enjoyed during the marriage."

The Court also found that when the payor spouse's resources are adequate, alimony should not just be limited to provide for basic needs but also should consider the recipient's spouse's "station in life". Howell, supra at 1212.

This reasoning is supported by multiple Utah cases including Bingham v. Bingham, 236 Utah Adv. Rep. 29 (Utah App. 1994); Schaumberg v. Schaumberg, 240 Utah Adv. Rep. 11 (Utah App. 1994); Hill v. Hill, 229 Utah Adv. Rep. 46 (Utah App. 1993); Rappleye v. Rappleye, Utah Adv. Rep. 45 (Utah App. 1993); Hoagland v. Hoagland, 212 Utah Adv. Rep. 25 (Utah App. 1993); and Burt v. Burt, 799 P.2d 1166 (Utah App. 1990).

Additionally, the Court totally ignored the equity of Mrs. Ahluwalia's expectation that she be given a chance to return to a position in the teaching profession after she supported the Defendant in his growth in his professional capacity. The Court's finding regarding Mr. Ahluwalia's finances are totally unsupported by the evidence and therefore an abuse of discretion in its interpretation of the financial evidence before it.

The monthly living expenses and income as stated by the parties were uncontroverted by the Defendant's own evidence. Therefore, those are the sums that should be relied upon for the determination of alimony and Mrs. Ahluwalia should not be punished by the Court for not obtaining employment in a field at a lesser rate than she could obtain in the professional field in which she is trained.

The Trial Court grossly abused its discretion and ignored the facts in failing to award the Plaintiff any alimony. The Defendant has disposable income every month. The Court had already made up its mind on the alimony issue before even reviewing the

financial exhibits of the parties, (Tr. at R. 269). In fact, the statement of the Trial Court that the case had "droned on", when in fact it had only been going about three to four hours, on the issues of a mother's custody of her children, indicates the Trial Court had lost interest in the case or came to its conclusions irregardless of the evidence.

The Court refused to award alimony on the basis that it found Mrs. Ahluwalia was not looking hard enough for employment. However, the Court had already at that time imputed income to the Plaintiff so whether the Plaintiff had imputed income or was actually earning the imaginary \$1021 per month, under any circumstance she was being charged with that liability. Notwithstanding that liability, she was still going in the hole in terms of monthly expenditures at least \$500-\$600 per month while the Defendant had \$1900 per month of disposable income with which to pay alimony.

The real obscenity and abuse of discretion in the Court's failure to award Mrs. Ahluwalia alimony is the uncontroverted testimony that Mrs. Ahluwalia had a tenured teaching position in the state of Florida which she gave up so that the family could move to Pennsylvania and then Utah, in support of the Defendant's career.

Since that time, Mrs. Ahluwalia worked in part time or lower paying jobs at the insistence of the Defendant, and was not able to secure any type of beneficial long time position for herself. This factual situation suited the Defendant fine, because



he had the money from Mrs. Ahluwalia's employment at his disposal as well as his own and yet he did not participate in the raising of the children in any meaningful manner.

When these parties are now divorced after 17 years of marriage, the Defendant is in a high paid professional position that he has held for many years with likely prospects of continued employment for the foreseeable future. To the contrary, Mrs. Ahluwalia is unable to find a job in her profession which would pay double which she is currently earning, and the Trial Court, a court of equity, did not even give enough consideration for her efforts to this family to award her alimony for a period of time to rehabilitate or retrain herself to find a professional position consistent with her training so that she could at least return to the position she was in which she gave up for the benefit of the Defendant's career. This is a serious injustice resulting in an abuse of discretion that should be reversed, and an appropriate award of alimony should be ordered.

## **VII.**

### **CONCLUSION**

Mrs. Ahluwalia was the primary caretaker of the children and through her efforts for the family deserves to be awarded full custody of the minor children of the parties. Her sacrifices, love and concern for the children have always been utmost and the evidence unquestionably supports that set of facts. On the other hand, the Defendant only paid attention to the children when he was

forced to by virtue of the separation of the parties and was willing to impose difficult situations on the family without consideration for Mrs. Ahluwalia or the children's feelings.

As a result of Mrs. Ahluwalia's love, concern and efforts for the minor children, it is an abuse of discretion and a serious injustice to not award her custody of the minor children, possession of the residence of the parties, subject to a lien by the Defendant and an appropriate award of child support under the schedule in effect for the State of Utah.

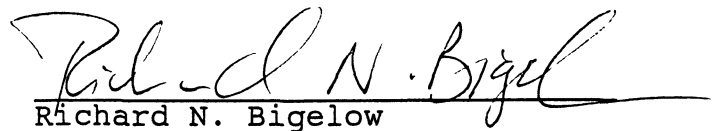
The Trial Court seriously abused its discretion in not awarding any alimony whatsoever to Mrs. Ahluwalia. After a 17-year marriage, when she gave up a tenured teaching position in Florida to support the career of the Defendant and after the uncontroverted evidence at Trial indicates that Mr. Ahluwalia has at least \$1900 every month in disposable income, to not require Mr. Ahluwalia to pay alimony is a serious injustice. The fact that Mrs. Ahluwalia goes in the hole every month regarding her income/expenses and that she has been reduced to living in a one-bedroom apartment losing money every month as a result of this court's callous disregard for her "station in life" is also a serious injustice resulting in an abuse of discretion. The Trial Court should not be permitted to so ignore the evidence.

As a Court of equity, this Court must recognize the substantial contribution to this family and to the career of the Defendant made by the Plaintiff and permit her at the very least an opportunity, by virtue of an award of permanent alimony, to be

retrained in a profession where she can earn a living similar to that which she would have been earning in a teaching position or to be given the time and opportunity to find a teaching position in a location close to where her children are located in order to continue her career in her trained profession. To do otherwise to Mrs. Ahluwalia is a clear and obvious abuse of her rights as a contributing human being to this family and this Court should be embarrassed that she was treated so callously.

DATED this 8th day of July, 1994.

Respectfully submitted,

  
Richard N. Bigelow  
Attorney for Plaintiff-Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that on this 8th day of July, 1994 a true and correct copy of the foregoing Brief of Appellant was hand delivered to:

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