

1994

Mary Coelho v. Alcides J. Coelho : Brief of Appellant

Utah Court of Appeals

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BRIEF

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COURT OF APPEALS

DOCKET NO. 940666-CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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MARY COELHO,	:	
	:	
Plaintiff/Appellant,	:	Case No. 940666-CA
	:	
v.	:	Priority No. 15
	:	
ALCIDES J. COELHO,	:	
	:	District Court 11093
Defendant/Appellee,	:	

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BRIEF OF APPELLANT

AN APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER ON PLAINTIFF'S MOTION TO REVIEW THE ALIMONY AWARD
PURSUANT TO THE DECREE OF DIVORCE ENTERED IN
THE THIRD JUDICIAL DISTRICT COURT, SUMMIT COUNTY, UTAH,
THE HONORABLE DAVID S. YOUNG, PRESIDING

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Appellant

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES PRESENTED FOR REVIEW	iv
JURISDICTIONAL STATEMENT	1
DETERMINATIVE AUTHORITY	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	2
SUMMARY OF ARGUMENTS	6
POINT I	7
THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MRS. COELHO'S MOTION TO CONTINUE ALIMONY AT \$1,000 PER MONTH AND BY AWARDING HER ALIMONY IN THE GROSSLY INADEQUATE AMOUNT OF ONLY \$1 PER YEAR	
POINT II	12
THE COURT ABUSED ITS DISCRETION BY ORDERING THAT MR. COELHO BE REIMBURSED FROM MRS. COELHO'S SHARE OF THE EQUITY IN THE MARITAL RESIDENCE FOR MORTGAGE PAYMENTS MADE BY HIM UNTIL IT IS SOLD	
CONCLUSION	13

TABLE OF AUTHORITIES

Page

UTAH CASES CITED

<u>Hall v. Hall</u> , 858 P.2d 1018 (Utah App. 1993)	iv
<u>Howell v. Howell</u> , 806 P.2d 1209 (Utah App. 1991)	iv
<u>Munns v. Munns</u> , 790 P.2d 116, 121 (Utah App. 1990)	7
<u>Naranjo v. Naranjo</u> , 751 P.2d 1144 (Utah App. 1988)	7, 11
<u>Rasband v. Rasband</u> , 752 P.2d 1131 (Utah App. 1988)	11
<u>Watson v. Watson</u> , 837 P.2d 1 (Utah App. 1992)	7

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court abused its discretion by denying Mrs. Coelho's motion to continue alimony in the amount of \$1,000 per month and awarding her only \$1.00 per year alimony.

2. Whether the trial court abused its discretion by awarding Mr. Coelho reimbursement from Mrs. Coelho's share of the home sale proceeds for mortgage payments made by him pending the sale.

The trial court's decision as to these issues is to be accorded considerable discretion by this court. However, although the court's actions are entitled to a presumption of validity, this court cannot affirm those actions where there has been an abuse of discretion. It is an error of law constituting an abuse of discretion for the court to fail to support its decision by specific and detailed findings and the findings are themselves subject to the clearly erroneous standard of review. (See Hall v. Hall, 858 P.2d 1018 (Utah App. 1993) and Howell v. Howell, 806 P.2d 1209 (Utah App. 1991).)

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APPELLANT'S JURISDICTIONAL STATEMENT

Jurisdiction of this Court is conferred pursuant to the provisions of Utah Code Ann. §78-2a-3(2)(i) (1994). This action involves the appeal of certain provisions of the Findings of Fact, Conclusions of Law and Order on Plaintiff's Motion to Review the Alimony Award Pursuant to the Decree of Divorce signed and entered in the Third Judicial District Court in and for Summit County, State of Utah on October 4, 1994. A timely Notice of Appeal was filed on November 1, 1994.

DETERMINATIVE AUTHORITY

There are no specific statutes or cases which are identifiable as determinative authority. Instead, see cases cited in the Tables of Cases.

STATEMENT OF THE CASE

This is the second appeal in this case. After the first trial, Mrs. Coelho appealed, among other things, the lower court's decision awarding her alimony in the amount of only \$1,000 per month for a period of one year, with a review to determine whether alimony should continue beyond that period. This Court affirmed the lower Court's ruling in a Memorandum Decision entered on or about June 7, 1994. Mrs. Coelho filed her Motion to Review the Alimony Award pursuant to the Decree of Divorce on or about February 9, 1994, and the matter was heard before the Honorable David S. Young on May 10, 1994. The court denied the motion, refused to continue alimony at \$1,000 per month and awarded alimony in the amount of \$1.00 per year.

STATEMENT OF THE FACTS

The plaintiff/appellant, Mrs. Mary Coelho (hereinafter Mrs. Coelho), and defendant/respondent, Alcides J. Coelho (hereinafter Mr. Coelho), were married on July 16, 1977. (R.2) Three children were born as issue of this marriage, Sara, now 16 years of age, born August 7, 1978; Tony, now 14 years of age, born August 19, 1980; and Emily, now 8 years of age, born September 29, 1986. (R.

2, 13) At the first trial, the parties stipulated that the two youngest children would remain in Mrs. Coelho's custody, and that the oldest child would remain in the custody of Mr. Coelho, subject to liberal visitation for each of them with the child or children not in their physical custody. (R. 333)

The parties' middle child, Tony, is handicapped and has been diagnosed with Attention Deficit Disorder (ADD) and has started hearing voices and having problems at school. (R. 631) Tony requires substantial personal time, attention and care from Mrs. Coelho, who is concerned that now, because of his physical size, Tony could mistreat or harm his younger sister, or set the house on fire in her absence. (R. 632)

After the parties married, Mrs. Coelho did not complete her college education but held various jobs, in addition to being a full-time homemaker and mother. (R. 466) She worked as a real estate agent during the 1980's, (R. 467) as a ski repairer, as a ski instructor, and as a bookkeeper for Mr. Coelho's business. (R. 466)

At the time of the second trial, Mrs. Coelho was a full-time pre-nursing student at the University of Utah (R. 634), and also worked as a full-time ski instructor, which was only seasonal, and as a trainer in a center for handicapped adults, which was a part-time position. (R. 626) Mrs. Coelho's earnings from the Park City Ski Corporation for 1993 were \$4,841.61 (R. 615) and her earnings from Chrysalis Enterprises for 1993 were \$1,717.56. (R. 617) In

addition, Mrs. Coelho briefly worked for Select Home Care and her 1993 W-2 earnings from that job were \$133.90. (R. 616). Her combined total earnings for 1993 were \$6,693.07. (R. 621)

Mrs. Coelho testified that her minimum monthly expenses, for herself and two children are \$2,361.00, and that her standard of living has deteriorated substantially since the parties have been divorced. (R. 638-643)

Mrs. Coelho testified at the second trial that, due to Tony's handicap and his increasing need for supervision, she could not work nights and weekends as she would be required to do if she returned to the real estate business. (R. 633) She also testified that she did not have an appropriate vehicle to use, and that her real estate license had expired in 1992. (R. 630-31, 662)

At the time of the first trial, the lower court found that Mr. Coelho's earnings were \$5,000 per month. At the second trial, Mr. Coelho was still self-employed and submitted his 1993 income tax return, which reflected as gross income of \$48,226, and an adjusted gross income of \$27,385. (See Exhibit 14-D) Mr. Coelho's claimed business expenses, as shown on his 1993 return, include deductions for health insurance, the use of his personal residence as an office, telephone charges, legal and accounting fees, and entertainment.

At the second trial, Plaintiff offered evidence that Mr. Coelho had taken personal draws from his business in the amount of \$48,104.93 during 11 months of 1993, or \$4,373.18 per month. (Ex.

8-P) Mr. Coelho testified that much of this amount was a loan as he was only entitled to one-third of the draws he had taken during the year, and that the remaining amounts allegedly belonged to his two partners in the business. (R. 704) There was no evidence other than his testimony to support this position.

The trial court expressed its opinion that both parties had made voluntary choices which reduced their present ability to earn amounts consistent with what they had historically earned. The court went on to find that Mr. Coelho's gross monthly income is \$3,000 and that Mrs. Coelho made a voluntary choice to attend school rather than re-enter the work force as a real estate agent. (R. 747,750) The court made no specific finding as to her monthly income.

After presentation of the evidence, the trial court made its ruling from the bench:

1. Denying Mrs. Coelho's Motion to continue the alimony of \$1,000 per month without prejudice, and awarding her alimony in the amount of \$1.00 per year commencing February 1994;

2. Terminating Mrs. Coelho's alimony award of \$1,000 per month as of January 1, 1994;

3. Based on its conclusion that Mrs. Coelho had insufficient funds to do so, the trial court entered its order requiring Mr. Coelho to keep the mortgage payments current on the marital residence in which Mrs. Coelho and two of the parties' children reside until the house is sold. Upon sale of the house, the court

ordered that Mr. Coelho be reimbursed for such payments from Mrs. Coelho's share of the equity. (R. 607)

Mrs. Coelho filed her Notice of Appeal on November 1, 1994. (R. 797)

SUMMARY OF ARGUMENTS

1. The trial court abused its discretion by awarding Mrs. Coelho the grossly inadequate alimony amount of \$1.00 per year. It was clear from the testimony at the hearing on Plaintiff's Motion that she simply had insufficient funds, even without the payment of the monthly mortgage, to meet her needs. Despite the overwhelming evidence to the contrary, the trial court did not award her any additional alimony to supplement her income.

2. The trial court abused its discretion by ordering that Mr. Coelho be reimbursed from Mrs. Coelho's share of the equity in their home for mortgage payments the court ordered him to pay until the home was sold. The trial court's order, in light of its acknowledgment that Mrs. Coelho had insufficient funds to pay the mortgage is inherently inconsistent with its order terminating alimony of \$1,000 per month. Further, it will result in the depletion of Mrs. Coelho's share of the only marital asset having any significant value. It is simply inequitable to require her to deplete this asset to meet her monthly living expenses when Mr. Coelho has the ability to pay alimony for this purpose.

ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MRS. COELHO'S MOTION TO CONTINUE ALIMONY AT \$1,000 PER MONTH AND BY AWARDING HER ALIMONY IN THE GROSSLY INADEQUATE AMOUNT OF ONLY \$1 PER YEAR

The factors a court must consider when making an award of alimony are well-settled in Utah law. In awarding alimony, a court is required to consider:

1. The financial condition and needs of the party seeking alimony;
2. That party's ability to produce sufficient income for him or herself; and
3. The ability of the other party to provide support.

See Munns v. Munns, 790 P.2d 116, 121 (Utah App. 1990); Naranjo v. Naranjo, 751 P.2d 1144, 1147 (Utah App. 1988); Watson v. Watson, 837 P.2d 1 (Utah App. 1992).

This court has also held that the "[f]ailure to analyze the parties' circumstances in the light of these three factors constitutes an abuse of discretion." Naranjo v. Naranjo, 751 P.2d at 1147 (Utah App. 1988).

Applying these factors to the case on appeal, the court clearly abused its discretion in denying Mrs. Coelho's motion to continue the alimony awarded to her in the Decree of Divorce and instead, awarding her alimony of only \$1.00 per year. At the second trial, Mrs. Coelho testified that her monthly living expenses are \$2,361.00, and this testimony was undisputed. Even so, the court completely failed to address the first factor and failed to make any findings whatsoever as to Mrs. Coelho's monthly

needs. This is critical to a determination of whether Mrs. Coelho has the ability to meet her needs without any alimony from Mr. Coelho. It is curious, however, that the trial court did acknowledge, in Finding No. 4, that Mrs. Coelho was responsible for the mortgage payments in the amount of \$1,320 under the terms of the original Decree of Divorce, "but has insufficient money with which to do this." (R. 788) This inherent inconsistency constitutes an abuse of discretion. The absence of a finding in this regard negates the need to marshal evidence in its support. However, the record in this case suggests that the court concluded that a consideration of Mrs. Coelho's needs was not relevant in light of her voluntary decision to continue her pre-nursing education instead of re-entering the work force. This, likewise, is an abuse of discretion.

The second factor a court must consider in awarding alimony is the ability of a receiving spouse to produce a sufficient income for herself. As in the first trial, the lower court once again found that Mrs. Coelho had demonstrated the historical ability to generate sufficient income for herself as a real estate agent.

After the second trial, the trial court simply restated its first findings in this regard:

The court finds that [Mrs. Coelho] is currently working at employment as a [ski] instructor and working with disabled children, earning an income substantially below what she has historically earned when she was active as a real estate sales person during the 1985, 1986, 1987 and 1988 years, as reflected in plaintiff's own Exhibit 11. It is anticipated that [Mrs. Coelho] should be able to

become more gainfully employed and after a short period of time earn an income sufficient to meet her own needs based upon her demonstrated ability.

(Finding No. 8; R.340 and Finding No. 1; R. 787, emphasis added)

There is no dispute that Mrs. Coelho earned the amounts set forth in Exhibit 13 during the years listed. However, it is also undisputed that she had derived no income from selling real estate for more than five years before the first trial and that her license had expired in 1992. As Mrs. Coelho argued in the first appeal, the court erred in this conclusion given the period of time which had lapsed. At the second trial, over two years later, the court compounded this error by continuing to speculate that she could and should "maximize her earnings" by once again selling real estate. At this point, she has not derived income from selling real estate for almost seven years.

Mrs. Coelho's current employment and income, as well as her full time attendance in school, are likewise undisputed. What is in dispute is the propriety of the court's conclusion under the circumstances that Mrs. Coelho has the current ability to meet her needs. The court seemed to recognize her dilemma when it concluded that Mrs. Coelho did not have the ability to pay the mortgage payment on the residence pending its sale and ordering Mr. Coelho to do so. By its very ruling in this regard, the court implicitly found that Mrs. Coelho has a financial need which she cannot satisfy and that Mr. Coelho has the ability to satisfy this need. This inherent inconsistency is an abuse of discretion.

Finally, the court must consider the ability of the defendant, Mr. Coelho, to pay alimony. The Court made only one finding with regard to Mr. Coelho's income, specifically:

2. Based upon the evidence adduced at the trial on May 10, 1994, the Court finds that defendant has present earnings as reflected by his income tax return of \$28,000 a year. He, in fact, has been drawing \$4,000 a month but that draw is in part against other partner's money. Based upon all of the circumstances the Court finds that defendant's present earnings are \$3,000 a month or \$36,000 a year.

This findings was based upon the adjusted gross income reflected on Mr. Coelho's 1993 tax return (Exhibit D-14) and upon his testimony. (R. 703-4)

First of all, the court erred in finding that Mr. Coelho's present earnings were only \$28,000, thereby giving him "paper losses," such as entertainment expense and the use of a portion of his residence for company purposes, to reduce his taxable income. The tax return also shows that his actual income from the operation of his business was \$48,226. Further, there was no evidence, except Mr. Coelho's self-serving testimony to verify that he had two partners in his business and that he would be required to pay back the monies he had received. Instead, the court seemed to split the difference between the adjusted gross monthly income of approximately \$2,000 and the gross monthly income of \$4,000 to arrive at an arbitrary figure of \$3,000 per month.

The error is even more apparent in light of the expenses claimed by Mr. Coelho. His testimony established he had expenses

for rent and the mortgage payment which totalled \$2,450 per month, plus \$500-600 in credit card expenses, and his own utilities and other expenses. Essentially, Mr. Coelho's own figures established that he had paid out in personal expenses more money that he had claimed to earn or been able to borrow. The court ignored these facts.

Based upon all of the foregoing, it is clear the lower court abused its discretion in denying Mrs. Coelho's motion to continue alimony. The parties were married for sixteen years. When a marriage is of long duration and the earning capacity of one spouse greatly exceeds that of the other, an alimony award is made to insure that the supported spouse may maintain a standard of living that would have been enjoyed had the marriage continued. (See Naranjo, at 1147; See also Rasband v. Rasband, 752 P.2d 1131, 1134 (Utah App. 1988). Neither Mr. nor Mrs. Coelho could continue to enjoy the standard of living the parties had while they were married; however, even Mrs. Coelho's substantially compromised standard of living necessitated an award of alimony to sustain it.

The parties' historical and present abilities to earn income are significantly and substantially disparate. The evidence of Mrs. Coelho's minimum needs and the reasonableness of the needs was undisputed. It is clear that she cannot meet these needs without substantial financial support from Mr. Coelho. The court recognized this in ordering Mr. Coelho to pay the monthly house payment. Finally, it was clear from the evidence that Mr. Coelho

has an ability to continue to pay alimony to Mrs. Coelho. In essence, Mrs. Coelho has been punished for her voluntary decision not to continue to sell real estate, while at the same time Mr. Coelho has been rewarded for being voluntarily underemployed.

This court should reverse the lower court's denial of Mrs. Coelho's motion, and enter its own order awarding Mrs. Coelho alimony, retroactive to January 1, 1994, in the amount of \$1,000 per month, which should continue until she remarries, cohabits, dies, or until further order of the Court. In the alternative, the case should be remanded for appropriate findings and a determination of alimony.

POINT II

THE COURT ABUSED ITS DISCRETION BY ORDERING THAT MR. COELHO BE REIMBURSED FROM MRS. COELHO'S SHARE OF THE EQUITY IN THE MARITAL RESIDENCE FOR MORTGAGE PAYMENTS MADE BY HIM UNTIL IT IS SOLD

The trial court correctly found that Mrs. Coelho had insufficient financial means to meet her monthly mortgage payment and correctly ordered Mr. Coelho to pay it. However, instead of properly characterizing the assistance as alimony, the court, in essence, characterized it as a loan. Specifically, Mr. Coelho is entitled to reimbursement of all amounts paid on the home from Mrs. Coelho's share of the equity from its sale.

First, implicit in such a ruling is the finding that Mr. Coelho had the ability to pay alimony and that Mrs. Coelho is certainly in need of alimony.

Second, the ruling essentially forces Mrs. Coelho, who is without sufficient funds to meet her monthly expenses, to deplete the only major marital asset awarded to her in the Decree of Divorce in order to meet her monthly living expenses. This ruling results in a modification of the property division set forth in the Decree of Divorce. As a result, Mrs. Coelho has been damaged twice: First, her alimony was inappropriately terminated, and second, her share of the home equity is being depleted to meet her monthly expenses. Conversely, Mr. Coelho has no alimony obligation, and his share of this asset continues to increase in value. Such a result is inequitable and clearly an abuse of discretion.

This court should reverse the lower court's denial of Mrs. Coelho's motion, enter its own order awarding her alimony retroactively to January 1, 1994, and continuing until she remarries, cohabits or dies, or until further order of the court. The mortgage payments made by Mr. Coelho pending entry of this court's order should be deemed as payments of alimony to which Mr. Coelho is not entitled to reimbursement. In the alternative, the case should be remanded with instructions to the lower court to make sufficient findings and enter an award of appropriate alimony.

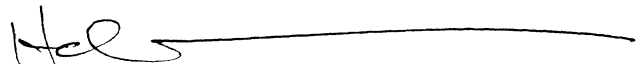
CONCLUSION

The lower court abused its discretion in denying Mrs. Coelho's Motion to Continue Alimony in light of the court's recognition that she had insufficient financial means to meet her monthly expenses.

Further, the lower court abused its discretion in ordering that Mr. Coelho be reimbursed from Mrs. Coelho's portion of the equity in the home for amounts paid by him on the mortgage. This results in a depletion of Mrs. Coelho's assets to meet her needs and a windfall for Mr. Coelho. This court should reverse the lower court's order and enter its own, awarding Mrs. Coelho \$1,000 per month in alimony from January 1, 1994, until she remarries, cohabits, dies, or until further order of the court and characterizing the mortgage payments made by Mr. Coelho since January 1, 1994 as alimony for which he is not entitled to reimbursement. In the alternative, this case should be remanded for sufficient findings and an order awarding Mrs. Coelho an appropriate amount of alimony.

RESPECTFULLY SUBMITTED this 4th day of December, 1995.

GUSTIN & CHRISTIAN



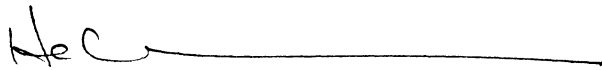
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Plaintiff/Appellant.

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:

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DATED this 4th day of December, 1995.



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