

1995

Varnell J. Dobson v. Dorothy Lynene Larson (Dobson) : Reply Brief

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

VARNELL J. DOBSON,)	
)	
Plaintiff/Appellant,)	
)	
v.)	CASE NO. 950106-CA
)	
DOROTHY LYNENE LARSON)	
(DOBSON),)	
)	
)	Priority 15
Defendant/Appellee)	

REPLY BRIEF OF THE APPELLANT

On appeal from the Third Judicial District
Court for Salt Lake County, State of Utah
Honorable Kenneth Rigtrup, District Court Judge Presiding

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FILED

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ARGUMENT

I. THE AWARD OF ATTORNEY FEES AT THE TWO HEARINGS WAS AN ABUSE OF THE TRIAL COURT'S DISCRETION

A. The proffer of attorney's fees at the modification hearing was insufficient to carry Defendant's burden of proof

The trial court abused its discretion in awarding attorney fees at the Modification Hearing because Defendant failed to offer any evidence to support the award of fees, and as such, Defendant completely failed to carry her burden to show reasonableness or necessity of the fees awarded. Utah law clearly establishes that the party seeking an award of attorney fees has the burden to show the reasonableness and necessity of those fees. Delatore v. Delatore, 680 P.2d 27, 28 (Utah 1984). In Delatore, the Utah Supreme Court held that statements by plaintiff's counsel that he was requesting \$1,500.00 in fees were insufficient to carry the burden of proof. Id. In the instant case, Defendant's counsel requested fees in the amount of \$850.00 for six and one-fourth hours work. Defendant's counsel did not state the necessity of the time spent, the reasonableness of his rate, nor the rate commonly charged in the community. There was no evidence presented to support the proffer. Defendant's counsel did not take the stand, was not sworn, and was not subject to cross examination, although Plaintiff's counsel stated he would cross examine if he were sworn (Tr. 140). Defendant now argues that Plaintiff accepted the proffer, waived any right

to cross examination, and failed to enter any evidence of his own. This argument, however, fails to recognize that it was not Plaintiff's burden to show that the requested fees were unreasonable, but it was Defendant's burden to show that the fees were reasonable. Delatore, 680 P.2d at 28. Defendant failed to carry her burden. The trial court's award of fees was clearly an abuse of discretion and must be stricken.

B. There is no factual basis to support the award of additional fees at the rehearing

Although not addressed by Appellee in her brief, the award of additional fees to Defendant at the oral argument on Plaintiff's Motion for Rehearing was improper and should be stricken. Plaintiff requested a rehearing based upon Plaintiff's argument that the findings by the trial court were erroneous, and that it was error to award attorney fees at the modification hearing due to the lack of evidence presented by Defendant. The trial court attempted to rectify the error of the award of fees at the prior hearing by forcing evidence at the oral argument. Counsel for Defendant testified but presented no evidence as to the reasonableness or necessity of fees. In light of the fact that Plaintiff's Petition for Rehearing was legally and factually correct, the award of fees at oral argument was improper and should be stricken.

II. THE TRIAL COURT'S FINDINGS REGARDING PLAINTIFF'S INCOME AND HIS ABILITY TO PAY ALIMONY ARE CLEARLY ERRONEOUS

A. The trial court's finding that Plaintiff voluntarily changed employment is clearly erroneous

The trial court's determination that Plaintiff voluntarily left the employment of USPCI is erroneous because Plaintiff testified that USPCI had cut his benefits, began layoffs, and was financially unstable (Tr. 47-49, 76-77). Plaintiff was forced to change employment when faced with the demise of the company for which he worked. The trial court found that Plaintiff voluntarily changed employment to his detriment. But this finding is erroneous in light of evidence presented by Plaintiff that USPCI, his former employer, was downsizing, had phased out and eliminated benefits, and was actively seeking a buyer. Plaintiff testified that at the time he left the employ of USPCI, he no longer had health benefits, four persons just below him in seniority had been laid off, and the financial future of the company was uncertain (Tr. 47). Plaintiff testified that he no longer was paid mileage, but paid on an hourly rate, which reduced his income (Tr. 48). Plaintiff testified that based on these factors, he obtained new employment which provided benefits and better security (Tr. 48-49). Defendant's argument that Plaintiff took a pay cut from \$54,000.00 per year to \$30,000.00 per year in order to avoid paying an alimony obligation of \$3,600.00 per year is without merit and flies in the face of

common sense. Plaintiff was forced to seek other employment because of the demise of the company for which he worked. Based on the necessity of changing employers, the trial court's finding that Plaintiff voluntarily changed employment, or that he did so to avoid paying alimony, is clearly erroneous.

B. The trial court erred in considering Plaintiff's wife's income

The trial court erred by considering Plaintiff's wife's income in determining Plaintiff's annual income. Defendant sets forth in her brief that the court made a determination that Plaintiff's wife was not a skilled driver and therefore a portion of her income must be imputed to Plaintiff. But such is not the case. There was no evidence whatsoever that Plaintiff's wife is not a skilled driver, nor that she was hired because of Plaintiff. Defendant failed to present any evidence on which the trial court could make a finding that Plaintiff's wife's income should be imputed to Plaintiff. Defendant failed to present any case law which supports the trial court's determination to impute to Plaintiff a portion of his wife's income. Plaintiff presented evidence that April Dobson, Plaintiff's wife, is paid for her driving in her own right. The evidence showed that April is paid the same mileage rate as Plaintiff, and that she incurs expenses on the road just like Plaintiff. Defendant asserted to the trial court that April Dobson's income was in fact Plaintiff's second

income (Tr. 63), without any evidence to support such an assertion. Defendant then urged the trial court to commit error by considering April Dobson's income as Plaintiff's income. The trial court clearly erred by considering Plaintiff's wife's income in the analysis of Plaintiff's ability to pay, necessitating remand with instructions as to the propriety of considering Plaintiff's wife's income in determining Plaintiff's ability to pay.

C. The trial court erred by considering Plaintiff's wife's income but failing to consider her expenses

The trial court's determination that a portion of Plaintiff's wife's income should be considered as Plaintiff's income in the determination of Plaintiff's ability to pay without considering the added monthly expenses was erroneous. Plaintiff presented evidence of his monthly expenses and his income. Plaintiff also presented evidence of the monthly expenses of he and his wife and their combined income. The trial court determined that a portion of Plaintiff's wife's income should be considered, but failed to consider the increase in monthly expenses. The failure to consider the increase in monthly expenses, especially in light of the fact that Plaintiff presented evidence that even considering his wife's income, the couple does not have the ability to pay alimony, is clearly erroneous.

D. The trial court's finding that Plaintiff and his wife have annual income of \$75,000.00 is clearly erroneous

Plaintiff and his wife do not earn \$75,000.00 per year. This finding of fact by the trial court is clearly erroneous. There is no evidence that Plaintiff has such an income, and in fact, all the evidence presented to the trial court supports Plaintiff's assertion that he and his wife have annual income of approximately \$60,000.00. The trial court's error in determining that Plaintiff and his wife had income of \$75,000.00 coupled with the trial court's error in considering Plaintiff's wife's income for a determination of Plaintiff's ability to pay requires reversal. As set forth in Appellant's Brief, Plaintiff presented evidence of monthly income of approximately \$2,500.00. Plaintiff's wife makes the same monthly income. Plaintiff presented evidence that his road expenses, i.e., food and incidentals, had increased dramatically. In making its determination of annual income, the trial court used a high mileage week, multiplied that figure by the mileage pay, and extrapolated an annual salary inconsistent with the testimony and the facts (Tr. 144-45). Plaintiff had actual income in 1994 of approximately \$2,500.00 per month. Plaintiff's wife had actual income in 1994 of approximately \$2,500.00 per month. Together they had annual income of approximately \$60,000.00. The evidence presented to the trial court supports these facts, and it was

clearly error for the trial court to make a finding that Plaintiff and his wife have annual income of \$75,000.00.

E. The trial court's failure to consider Plaintiff's increase in debt incurred to pay alimony was error

The trial court's failure to consider the increase in Plaintiff's debt load was erroneous. Plaintiff presented evidence that his debt load had increased from the time of divorce in an amount consistent with his alimony obligation. An increase in debt can be used to support a modification if the debt was incurred in a good faith attempt to meet alimony obligations or maintain a decent standard of living. Auerbach v. Auerbach, 571 P.2d 1349, 1350 (Utah 1977). Plaintiff presented evidence that he had incurred substantial debt in an effort to both maintain his standard of living and to pay his alimony obligation. Plaintiff's evidence showed a monthly negative cash flow of more than \$300.00 prior to paying alimony to Defendant. The negative cash flow is consistent with the total amount of debt incurred by Plaintiff, and it was error for the trial court to fail to consider that debt, and the attendant monthly payments, to determine whether Plaintiff has suffered a material change of circumstances warranting a modification.

F. The trial court failed to make adequate findings to support its denial of Plaintiff's Petition for Modification

The trial court erred by failing to make adequate findings to support the denial of Plaintiff's Petition to Modify. In order to sustain such a finding on appeal, the trial court must make findings of fact which demonstrate the obligee's ability to pay. These findings must include not only the amount of the income, but the expenses of the obligee. Baker v. Baker, 866 P.2d 540, 547 (Utah Ct. App. 1993). In Baker, the Court of Appeals vacated the alimony award and remanded the case after the trial court awarded alimony based only upon Mr. Baker's annual income. The Court of Appeals held that it is error to award alimony without making specific and adequate findings about the paying spouse's expenses. Id. Plaintiff presented evidence at the modification hearing that his monthly expenses exceeded his monthly income (Tr. 57). The trial court made no findings as to Plaintiff's expenses, basing its decision solely on the trial court's erroneous determination that Plaintiff and his current wife have annual income of \$75,000.00 (Tr. 144-45). The failure of the trial court to consider Plaintiff's expenses in determining his ability to pay alimony is clearly error and the trial court's ruling should be vacated and the matter remanded for a proper factual determination.

III. THE TRIAL COURT ERRED BY NOT FINDING THAT DEFENDANT'S EMPLOYMENT WAS A MATERIAL CHANGE IN CIRCUMSTANCES NOT CONTEMPLATED BY THE DECREE

A. The Findings of Fact and the Decree do not contemplate Defendant's employment

There is no evidence that the parties anticipated that Defendant would seek employment and as such, it was clearly error for the trial court to make a finding that the parties anticipated that Defendant would seek employment. There is no provision within the original Findings of Fact and Decree of Divorce which recognize that Defendant would seek employment (Rec. 76-89). The Findings of Fact clearly set forth that alimony is based on Plaintiff's income at that time (Rec. 78). It is undisputed that at the time of the stipulation, Defendant was unemployed. It is also undisputed that at the time of the entry of the Decree, some months later, Defendant had obtained part-time employment, but had failed to inform Plaintiff or the court. If there is no provision in the Decree itself regarding future employment, such employment cannot be anticipated by the Decree. Durfee v. Durfee, 796 P.2d 713, 716 (Utah Ct. App. 1990). In Durfee, the Court of Appeals held that even if the parties discuss future employment, it is not anticipated by the Decree if it is not contained in the Decree. Id. Defendant argues that her employment was anticipated by the decree, yet the Decree and the Findings of Fact are completely devoid of any reference to Defendant's income. Plaintiff testified that at the

time of the divorce, it was his understanding that Defendant would not work because she was in ill health which prevented her from working (Tr. 72-73). Defendant testified that at the time of the stipulation, she was unemployed (Tr. 14-15). Defendant testified on cross-examination that at the time the stipulation was reached, it was in her mind that she would have to seek employment (Tr. 29). Defendant failed to offer any evidence that the parties contemplated that Defendant would seek employment, other than what was in Defendant's mind at the time. The lack of an express provision in the Decree, and the lack of any evidence that the parties actually anticipated the employment make the increase in Defendant's income an increase not contemplated in the decree. Durfee, 796 P.2d at 716. Absent any recognition of Defendant's future income, her increase in earnings is necessarily a material change of circumstances not contemplated within the Decree, and it was error for the trial court to find that her increase in income was contemplated within the Decree.

B. Plaintiff demonstrated that Defendant's increase in income is a material change because her income is sufficient to meet her needs

Plaintiff presented evidence in the form of Defendant's testimony that Defendant's income is sufficient to meet her needs, and as such, Defendant is no longer in need of alimony. At the time of the Decree, Defendant did not have income to meet

her needs (Rec. 10-11). At the Modification hearing, the trial court determined that Defendant has monthly income of \$865.00 from her employment (Tr. 143). Defendant testified that her actual monthly expenses are \$545.52 (Tr. 126). Based on her ratio of income to expenses, Defendant is amply able to provide for her needs. The trial court failed to make a determination as to Defendant's ability to provide for her needs in the analysis of whether or not a modification is warranted. The Court of Appeals set forth that a trial court must make a finding as to each of the elements of an alimony award in order to survive scrutiny. Baker, 866 P.2d at 546. In Baker, the Court of Appeals reversed the trial court on the award of alimony stating that the trial court must make adequate findings on all material issues, and the trial court's failure to make findings regarding Mrs. Baker's needs and expenses required remand. Id. In the instant case, the trial court failed to make any findings about Defendant's ability to meet her needs which is a material prong of the alimony analysis. The trial court's failure to make adequate findings regarding Defendant's ability to meet her needs is erroneous and requires remand.

CONCLUSION

The trial court abused its discretion by awarding attorney fees to Defendant at the Modification hearing because Defendant completely failed to carry her burden to show reasonableness and necessity. The burden of proof to show the propriety of the fees, and whether or not she is entitled to an award of fees, rests upon the party seeking an award of fees. Defendant failed to carry her burden. Defendant's argument that Plaintiff failed to present evidence that the fees requested were unreasonable is erroneous because Plaintiff does not have the burden of proof. Defendant failed to present evidence to support an award of fees. The trial court's award of fees was an abuse of discretion and the award must be stricken.

The trial court's award of further fees at oral argument on Plaintiff's Petition for Rehearing was an abuse of discretion because Plaintiff's Petition was legally and factually correct. The award was an abuse of discretion because Defendant again failed to carry her burden to prove that the fees requested were reasonable and necessary. The trial court's award of additional fees to Defendant was an abuse of discretion and must be stricken.

The trial court erred by finding that Plaintiff had voluntarily changed employment when the evidence presented to the court showed that Plaintiff was forced to change employment to

avoid being laid off. Plaintiff testified that his former employer had reduced his wages, cut or eliminated his benefits, and was actively laying off drivers. The trial court failed to consider the evidence and erroneously made a finding that Plaintiff voluntarily changed his employment.

The trial court erred by considering Plaintiff's wife's income in its determination of Plaintiff's ability to pay alimony. There was no evidence before the trial court which would support consideration of Plaintiff's wife's income. Defendant wholly failed to demonstrate the propriety of such a consideration. The trial court's inclusion of Plaintiff's wife's income was clearly error and must be remanded with instructions.

The trial court erred by considering Plaintiff's wife's income but failing to consider her expenses. Plaintiff presented evidence that even with his wife's income, their monthly expenses exceeded their income. The trial court clearly erred by failing to consider the added expenses of both Plaintiff and his wife in the determination of Plaintiff's ability to pay alimony.

The trial court's determination that Plaintiff and his wife have annual income of \$75,000.00 is clearly erroneous and requires remand. Plaintiff presented evidence that his monthly income is approximately \$2,500.00. The evidence showed that Plaintiff's wife had approximately the same monthly income. There was no evidence before the trial court upon which a

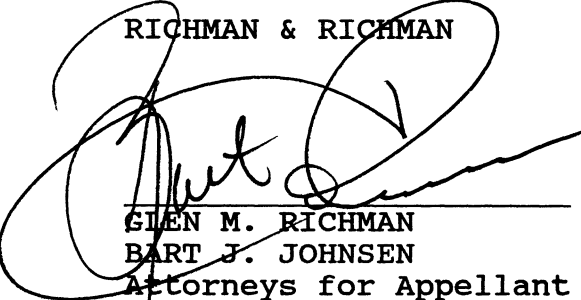
determination of annual income of \$75,000.00 could be based. As such, the trial court's finding is clearly erroneous and requires remand.

The trial court clearly erred by failing to consider Plaintiff's monthly expenses and his additional debt in the determination of his ability to pay alimony. The trial court committed further error by failing to make adequate findings to support its denial of Plaintiff's Petition. The trial court failed to make a finding as to Plaintiff's expenses, contrary to established Utah law. The trial court's failure to make a finding as to Plaintiff's expenses cannot withstand scrutiny and requires remand.

Finally, the trial court committed reversible error by failing to consider Defendant's employment and income in the determination of whether to modify the alimony award. The trial court erred by finding that Defendant's employment was contemplated by the Decree because no such language exists in the Decree. The Findings of Fact consider only Plaintiff's income. The trial court committed further error by failing to determine that Defendant's income adequately meets her needs and expenses. Defendant's employment is a material change not contemplated by the Decree. As such, the trial court was obliged to make a determination as to whether Plaintiff is entitled to a modification. The trial court failed to make such a

determination and its failure to so do requires remand with instructions.

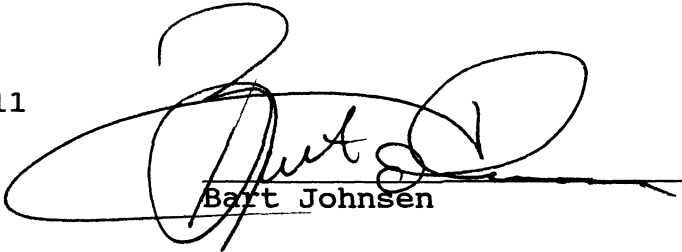
RESPECTFULLY SUBMITTED this 27th day of November, 1995.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November, 1995, Two true and correct copies of the foregoing REPLY BRIEF OF THE APPELLANT were hand-delivered to:

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