

1995

# Varnell J. Dobson v. Dorothy Lynene Larson (Dobson) : Brief of Appellant

Utah Court of Appeals

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## Recommended Citation

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BRIEF

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AP

IN THE UTAH COURT OF APPEALS

FILE NO.

950106CA

VARNELL J. DOBSON,

Plaintiff/Appellant,

v.

DOROTHY LYNENE LARSON  
(DOBSON),

Defendant/Appellee

CASE NO. 950106-CA

Priority 15

BRIEF OF THE APPELLANT

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

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FILED

SEP 26 1995

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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

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BRIEF OF THE APPELLANT

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On appeal from the Third Judicial District  
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Honorable Kenneth Rigtrip, District Court Judge Presiding

Counsel for Appellee:  
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### **STATEMENT OF JURISDICTION**

The Court of Appeals has jurisdiction over this matter pursuant to Utah Code Annotated section 78-2a-3(2)(i) (1992) as an Appeal from final Orders denying Plaintiff's Petition for Modification of a Decree of Divorce in the Third Judicial District Court.

### **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

1. Whether the trial court abused its discretion by awarding attorney fees to Appellee when Appellee failed to put forth any evidence of the reasonableness of the amount of fees, the necessity of the number of hours dedicated, the reasonableness of the rate charged in light of the difficulty of the case and result accomplished, and the rates commonly charged in the community. This Court will reverse a trial court only if the appealing party can prove an abuse of discretion. Jones v. Jones, 700 P.2d 1072, 1074 (Utah 1985).

2. Whether the trial court's finding that Appellant and his present wife's income is between \$68,000.00 and \$75,000.00 per year is clearly erroneous when the uncontroverted evidence showed that Appellant and his wife, driving as a team, make fourteen cents per mile (not per driver), including per diem, and have a total annual income of approximately \$58,000.00. This Court will reverse a factual finding if it is shown to be clearly erroneous under Utah Rules of Civil Procedure 52(a).



3. Whether the trial court erred in finding that the parties contemplated that Appellee would seek employment at the time of divorce when Appellant presented evidence that Appellee claimed that she was physically unable to obtain employment and there was no provision in the Decree which set forth that Appellee would increase her income. This Court will reverse a factual finding if it is shown to be clearly erroneous under Utah Rules of Civil Procedure 52(a).

4. Whether the trial court erred by not finding that a substantial and material change of circumstances had occurred when Appellant presented evidence of a substantial decrease in his income to less than \$30,000.00 per year, an increase in his road expenses, an increase in Appellee's income, a decrease in Appellee's needs based on contributions by her two sons, and Appellant's inability to pay the awarded amount. The reviewing court will reverse the trial court's findings if, when viewing the evidence in the light most favorable to the findings, the evidence is insufficient to support the findings or that the findings are clearly erroneous. Schindler v. Schindler, 776 P.2d 84, 88 (Utah App. 1989)(citing Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985); State v. Walker, 743 P.2d 191, 193 (Utah 1987)).

5. Whether the trial court erred by including Appellant's present wife's income in the determination that Appellant has not had a material and substantial change in circumstances when Appellee failed to put forth any law which would support an inclusion of a spouse's income to determine alimony. If a trial

court makes a determination of law, the legal decision is reviewed under a correctness standard. Crookston v. Fire Ins. Exchange (II), 860 P.2d 937, 939 (Utah 1993).

6. Whether the trial court erred in denying Appellant's motion for new trial pursuant to Utah Rules of Civil Procedure 59(a)(6) on the grounds that the evidence was insufficient to support the court's findings and that the evidence was insufficient to support an award of attorney fees when Appellant presented evidence that the trial court's findings of fact regarding Appellant's income were clearly erroneous, Appellant presented evidence that Appellee was no longer in need of alimony, and Appellant presented evidence and law which demonstrated that the award of attorney fees without carrying the evidentiary burden is clearly contrary to established Utah law. This Court can reverse a trial court's decision when viewing the evidence in the light most favorable to the finding of the trial court, the evidence is insufficient to support the finding. Utah R. Civ. Pro. 52(a). In considering a trial court's decision to deny a new trial, the reviewing court will only reverse if it finds an abuse of discretion. Crookston v. Fire Ins. Exchange, 817 P.2d 789, 804-05 (Utah 1991). See also, Schindler v. Schindler, 776 P.2d 84, 90 (Utah App. 1989).

### **STATEMENT OF THE CASE**

A Decree of Divorce was entered on December 31, 1989 divorcing Varnell Dobson and Dorothy Lynene Larson Dobson (Rec. 84-89)<sup>1</sup>. Varnell Dobson filed a Petition for Modification on October 5, 1993 (Rec. 110-15). A hearing on Appellant's Petition for Modification was held on October 5, 1994. (Rec. 180-81). The trial court entered an Order denying Appellant's Petition for modification of Decree of Divorce on October 20, 1994 (Rec. 184-86). The trial court entered Findings of Fact and Conclusions of Law on October 20, 1994 which stated that the parties stipulated to the original divorce, Appellant had no material change of circumstances because he voluntarily left his past employment and he and his current wife have annual income of approximately \$75,000.00 (Rec. 185). The court further found that the parties contemplated that Lynene Larson would have to seek employment subsequent to the divorce. (Rec. 185). The court awarded Appellee attorney fees of \$850.00 (Rec. 186).

Varnell Dobson moved for a new trial pursuant to Utah Rules of Civil Procedure, Rule 59(a) on October 28, 1994 (Rec. 187-88). Appellant did not request oral argument (Rec. 187-88). Appellee requested a decision on Appellant's Motion for New Trial without oral argument (Rec. 211). Appellant filed a Notice to Submit for Decision on November 2, 1994 (Rec. 218), and a Second Request for

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<sup>1</sup> For ease of reference, citations to the Appellate Record are cited as "Rec.", citations to the Transcript of the October 5, 1994 Modification hearing are cited as "Tr.", and citations to the Transcript of the January 30, 1995 Oral Argument are cited as "2Tr.".

Decision on December 6, 1994 (Rec. 221). On December 20, 1994, the trial court set Appellant's Motion for New Trial for oral argument on January 30, 1995 (Rec. 223). Appellant filed a Supplemental Motion for New Hearing on January 16, 1995 pursuant to Utah Rules of Civil Procedure Rule 60(b)(2) (Rec. 225). Appellant requested that his Rule 60(b) motion be heard at oral argument previously scheduled for January 30, 1995 (Rec. 234-35).

After a hearing on January 30, 1995, Appellant's motion for new trial was denied by the trial court (Rec. 237). On March 1, 1995, the trial court entered Findings of Fact and Conclusions of Law from the hearing on Appellant's Motion for New Trial finding that it was obvious to the court that Appellee would have to seek employment subsequent to the divorce, that Appellant and his current wife have annual income of between \$68,000.00 and \$75,000.00, that Appellant's current wife was only present as a driver based on Appellant's experience, that Appellant and his wife drive an average of 4,874 miles per week, 50 weeks per year, that Appellant's failure to elicit testimony from Appellee's counsel about attorney fees does not give rise to a claim for an improper award of fees, that Appellant's income of at least \$35,000.00 per year and Appellee's income of less than \$10,000.00 per year does not justify a modification of the Decree, and that the court finds Appellee's requested fees to be reasonable (Rec. 309-10). The trial court awarded Appellee further attorney fees of \$350.00 (Rec. 311).

Appellant filed a Notice of Appeal with the Third District Court on February 6, 1995 (Rec. 280). Appellant filed a Motion to Stay Judgment Pending appeal on February 3, 1995 (Rec. 283). Appellant filed a cost bond on appeal on February 23, 1995 (Rec. 299). Appellant filed a supersedes bond on appeal on February 24, 1995 (Rec. 301). Appellant filed an Amended Notice of Appeal on March 15, 1995 (Rec. 327-29).

#### **STATEMENT OF FACTS**

1. Appellant in this matter was Plaintiff below.

2. A Decree of Divorce was entered in the above-entitled matter on or about December 31, 1990 (Rec. 84-88), pursuant to a stipulation which occurred prior to October 1, 1990 and was accepted by the court on October 3, 1989 (Rec. 68). At the time the parties entered into the stipulation for the divorce, Appellee was unemployed (Rec. 10). At the time of the stipulation, Appellant believed that Appellee would not be able to work because of poor health (Tr. 72-73). Subsequent to the signing of the stipulation, but prior to the entry of the Decree, Appellee began working as a cashier for O.P. Skaggs in Preston, Idaho (Rec. 178-79).

3. The Decree required Appellant to pay Appellee \$300.00 per month as and for permanent alimony, commencing October 20, 1990 and continuing on the 20th of each month thereafter (Rec. 85). The sum of \$300.00 per month was agreed to by the parties

based upon Appellant's income at that time (Rec. 78). At the time of the Decree, Appellant had monthly gross income of \$3,776.24, and monthly net income of \$2,513.81 (Rec. 39-40). Appellant had monthly expenses of \$2,513.81 (Rec. 42). At that time, Appellant owed \$19,711.93 on his first mortgage, and \$23,935.41 on his second mortgage (Rec. 40). At that same time, Appellant owed \$11,593.11 in unsecured credit card debt exclusive of the obligation on his car (Rec. 40-41). Appellant owed \$15,862.95 on his car (Rec. 41). Appellant was ordered to assume all debt of the parties (Rec. 87-88).

4. The Decree awarded Appellee a house and property in Lewiston, Utah (Rec. 80). This property was awarded to Appellee free of any encumbrance, in that Appellant was ordered to pay the existing second mortgage which had been placed on the parties' home in Salt Lake (Rec. 80). Approximately \$15,000.00 of the funds from the second mortgage had been used to purchase the Lewiston property (Rec. 44; Tr. 56)<sup>2</sup>. Appellee was awarded two vehicles, household items, some tools, and one-half of Appellant's retirement and profit sharing plan (Rec. 81-82). Appellee was not required to assume any debt (Rec. 87-88).

5. On October 5, 1993, Appellant filed a Petition for Modification of the Decree to eliminate or reduce alimony to Appellee based on a substantial and material change of circumstances (Rec. 110-15). Appellant also alleged that

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<sup>2</sup> Citations to the Transcript of the October 5, 1994 Modification hearing are cited as "Tr." See *supra* note 1 and accompanying text.

Appellee had failed to turn over many items of property awarded to Appellant in the Decree (Rec. 115). Appellant's income had been reduced to \$2,500.00 and his monthly expenses had increased to \$3,411.51 (Rec. 119).

6. A hearing on Appellant's Motion for Modification of Divorce Decree based upon a change of circumstances of the parties' respective financial conditions and earnings, was held on October 5, 1994 before Judge Kenneth Rigtrip (Rec. 180-81).

7. Appellant presented evidence of a decline in his wages. Appellant testified that he and his current wife drive as a team for Pride Transportation, Inc. (Tr. 46) As a team driver, each driver is paid nine and one-half cents per mile while driving and four and one-half cents per mile for per diem, for a total of fourteen cents per mile driven (Tr. 46; 60). Appellant submitted evidence (exhibits 29 and 30) that based on his year-to-date earnings at the time of the hearing, he has income of approximately \$2,500.00 per month (Tr. 64-65). Appellant testified to an increase in his monthly expenses by presenting summaries of Appellant's actual monthly expenses and evidence of debts of Appellant incurred both prior to and subsequent to the parties' divorce (Tr. 50-66). Appellant presented evidence that his monthly debt load had increased by showing a total of credit card obligations in the sum of \$21,473.85 (Tr. 66; Rec. 152). Appellant presented evidence that the amount due on the credit line (the second mortgage) was currently \$25,629.97 (Tr. 56). Plaintiff's exhibit 29 evidenced that Appellant's monthly expenses

total \$2,401.10 (Tr. 64-65). Plaintiff's exhibit 30 evidenced that Appellant and his current spouse's monthly expenses total \$4,453.99 (Tr. 65).

8. Appellant testified that he left the employ of USPCI because the company was beginning to terminate employees as part of a reduction of force (Tr. 78), that USPCI had cut or reduced employee benefits (Tr. 47; 77), that the risks of driving hazardous waste were great (Tr. 47-48), and that he had the opportunity for other employment which would provide benefits (Tr. 77-78).

9. Appellee submitted a financial declaration on May 25, 1994, declaring her monthly expenses to be \$921.80 (Rec. 146-150). Appellee testified that her monthly expenses total \$929.80 (Tr. 29). Appellee testified that she earns \$5.50 per hour at her current employment and works approximately 35 hours per week (Tr. 32; 33-34). Appellee testified that she has had her current employment since November, 1990 (Tr. 35). The trial court found that Appellee's monthly income is \$865.00 (Tr. 143). Appellee testified that her two adult sons live with her in her home (Tr. 9-10; 38), that she pays \$100.00 per month as one-third of the home mortgage payment (Tr. 9), and that she pays only one-third of the utilities and other household expenses (Tr. 9;15). Appellee testified that her only debt is to her dentist (Tr. 37; Rec. 147). Appellee testified that both her adult sons who live with her have jobs and bring home income (Tr. 38). Appellee's younger son earns approximately \$700.00 to \$800.00 per month (Tr.



43) Appellee testified that the property she lives in is purchased jointly with her elder son (Tr. 8). She also testified that the Lewiston, Utah property she received in her divorce from Appellant is unencumbered and she transferred title to one or both of her sons (Tr. 26). Appellee testified that she was not able to pay her attorney fees of \$850.00 incurred in this matter (Tr. 34).

10. Appellee testified that she pays \$100.00 per month for her mortgage (Tr. 121-22), \$18.36 per month for property taxes (Tr. 122-23), \$7.50 per month for real property insurance (Tr. 123), \$150.00 per month for food and household supplies (Tr. 124), \$34.66 per month for utilities (Tr. 124), \$10.00 per month for laundry (Tr. 124), \$25.00 per month dental (Tr. 124-25), \$34.00 per month insurance (Tr. 125), \$50.00 per month entertainment (Tr. 125), \$40.00 per month incidentals (Tr. 125), and \$50.00 per month income tax (Tr. 125). Appellee testified that based on these figures, her actual monthly expenses are \$545.52 (Tr. 126).

11. At the close of testimony, counsel for Appellee proffered that his attorney fees incurred were \$850.00 (Tr. 139-40). After counsel's proffer, the trial court asked Appellant's counsel if he had questions for Appellee's counsel regarding fees (Tr. 140). Appellant's counsel stated that he would question Appellee's counsel if he were on the stand, but that it was not his burden to put Appellee's counsel on the stand (Tr. 140). Appellant's counsel stated that he did not believe fees were

necessary or that Appellee was entitled to an award of fees (Tr. 140). Appellee's counsel did not submit evidence or testimony to support his request for fees.

12. The court made a determination that Appellant voluntarily terminated his prior employment with USPCI, which provided Appellant with an annual income of \$48,000.00. (Tr. 143). The court then determined that Appellant's current income along with the income of his present wife amounts to approximately \$75,000.00 gross per year (Tr. 144-45), and that this amount exceeds Appellant's salary at the time the Decree was entered. The court found that Appellant's monthly expenses on the road are reimbursed by his employer as a non-taxed expense allowance of \$375.00 per month (Tr. 145).

13. The court found that the parties had contemplated that Appellee would have to seek employment at the time the prior Decree was entered (Tr. 143).

14. Based upon the above evidentiary findings, the court denied Appellant's Petition finding that no material change of circumstances occurred and alimony would not be decreased or terminated (Tr. 145).

15. The court also entered judgment against Appellant for Appellee's attorney fees of \$850.00 (Tr. 145).

16. On October 28, 1994, Appellant made a Motion for New Hearing pursuant to Utah Rules of Civil Procedure Rule 59 alleging that the ruling was against the evidence and there had been an error in law (Rec. 187-88). Included in Appellant's Motion was

an argument that Appellee failed to meet her burden of proof to support an award of attorney fees (Rec. 199-200), and that the court's finding that Appellant and his current wife had annual income of \$75,000.00 was clearly erroneous (Rec. 192-95). Appellant submitted an affidavit from Robert Oberg which set forth that truck drivers are governed by statutes of the United States which allow drivers to drive a maximum number of hours between time off duty, and a maximum number of hours during a week (Rec. 202-03). Appellant submitted an affidavit of Dan DeGrazio which set forth that Appellant is paid only \$.095 per mile along with \$.045 per mile in per diem for a total of \$.14 per mile (Rec. 204-06), and that the \$200.00 per trip advance is to be used for expenses related to Pride Transport's truck and is not for the driver's personal expenses (Rec. 205).

17. Appellee responded to Appellant's Motion (Rec. 207-08), and both parties submitted for decision without requesting oral argument (Rec. 211-12; 218-19; 221-22).

18. Oral argument was set by the court for January 30, 1995 to hear Appellant's Motion for Rehearing (Rec. 223-24). Subsequent to the setting of oral argument, Appellant filed a Utah Rules of Civil Procedure Rule 60(b)(2) Motion for New Hearing based on newly discovered evidence that Appellee participated in a business with her son (Rec. 225-26). Because oral argument was already set by the court, Appellant requested that both Motions be heard at the same time (Rec. 234-36).

19. At oral argument, the trial court denied Appellant's Motion for a Rehearing but, without prior notice to Appellant that evidence would be taken, the court took testimony from Appellee's counsel regarding attorney fees (2Tr. 12-18)<sup>3</sup>. The court allowed Appellee's counsel to testify to both the original modification hearing and the oral argument (2Tr. 13). Appellee's counsel offered no exhibits to show the time he expended on the matter, that the time spent was reasonable, nor that the fee charged was reasonable to the standards in the community (2Tr. 13; 15), but did testify that he had spent the time on both matters and that his rate is \$175.00 per hour (2Tr. 14).

20. Without further evidence, the court modified his prior finding and found that Appellant's income, along with that of his present wife is at least between \$68,000.00 and \$75,000.00 (Rec. 275; 309). The court found that Appellant's present wife was not hired as a team driver because of her experience but because she is married to Appellant (Rec. 275-76; 309). The court then found that more than half of the income of the couple can be attributed to Appellant (Rec. 276; 309).

21. The court found that Appellant's counsel had ample opportunity to "grill" Appellee's counsel regarding fees (Rec. 277). The court determined that \$300.00 per month for alimony, given that it is tax deductible, is conservative and there was no basis for modification (Rec. 276-77). The court denied

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<sup>3</sup> Citations to the Transcript of the January 30, 1995 Oral Argument are cited as "2Tr." See *supra* note 1 and accompanying text.

Appellant's Rule 60(b) motion and denied Appellant's Motion for New Hearing (Rec. 277; 311). The court then awarded additional attorney fees to Appellee in the amount of \$350.00 for time spent defending Appellant's Motion for Rehearing (Rec. 277; 311).

#### **DETERMINATIVE LAW**

1. It is incumbent on the party requesting attorney fees to demonstrate the necessity of the number of hours dedicated to the matter, the reasonableness of the rate charged, the complexity of the case and the result accomplished, and the rates commonly charged for divorce actions in the community. Newmeyer v. Newmeyer, 745 P.2d 1276, 1279 (Utah 1987). (citing Beals v. Beals, 682 P.2d 862, 864 (Utah 1984); Kerr v. Kerr, 610 P.2d 1380, 1384-85 (Utah 1980)); accord Delatore v. Delatore, 680 P.2d 27, 28 (Utah 1984).

2. A factual finding is clearly erroneous if a reviewing court will be firmly convinced that a mistake has been made. State v. Walker, 743 P.2d 191, 193 (Utah 1987).

3. In order to support an award of alimony, the court must examine the receiving spouse's financial conditions and need, the receiving spouse's ability to earn adequate income and contribute to her own needs, and the providing spouse's ability to provide support. Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985).

4. For a modification of a decree, there must be a showing of a substantial change of circumstances occurring since the entry of the decree which was not contemplated in the decree itself.

Moore v. Moore, 872 P.2d 1054, 1055 (Utah Ct. App. 1994); Durfee v. Durfee, 796 P.2d 713, 716 (Utah Ct. App. 1990).

#### **SUMMARY OF ARGUMENT**

The trial court erred in awarding Appellee attorney fees in the sum of \$850.00 for the modification hearing because Appellee failed to carry her burden to show that the rate charged was reasonable and that the hours spent were necessary. Appellee's failure to put on any evidence or testimony as to the necessity or reasonableness of the fees requires that the award of fees be stricken. The burden to prove the reasonableness and necessity of fees is on the party seeking the fees. Appellant does not have the burden to show that the fees requested are unreasonable if the party seeking fees has not shown that the fees are reasonable.

The trial court erred by awarding fees to Appellee at oral argument on Plaintiff's Motion for New Trial. Appellant set forth that the court had erred by awarding fees at the modification hearing because Appellee had failed to carry her burden of proof. At oral argument, the trial court apparently agreed with Appellant because the court swore in Appellee's counsel and had him testify as to both the modification hearing and oral argument. The trial court then awarded fees to Appellee. The award was in error because Appellant's motion was correct and the award of fees against Appellant was an abuse of discretion. Appellee again failed to carry her burden to support an award of fees at oral argument. Counsel testified as to the time he spent, but

submitted no evidence to support his testimony although he testified that he keeps written records. Appellee did not testify as to her ability to pay fees.

The finding that Appellant and his current wife have annual income of \$75,000.00 is clearly erroneous. Evidence submitted by Appellant establishes, and it is undisputed, that Appellant is paid \$.14 per mile driven which includes a \$.045 per diem. Appellant and his current wife drive as a team, and each is paid \$.14 per mile when driving. Appellant's income is the amount of miles he drives multiplied by \$.14. The trial court's conclusion that Appellant and his current spouse earn \$75,000.00 per year is clearly erroneous in that Appellant and his spouse would be required to drive more than 60 miles per hour, 24 hours per day, 7 days per week, 52 weeks per year to earn \$75,000.00.

The trial court erred by adding the expense reimbursement column to Appellant's gross income but failing to deduct the advances. At the beginning of each trip, Appellant is advanced \$200.00 to cover expenses involving the truck. At the end of the trip, Appellant submits receipts for funds actually expended. The advance is then deducted from his check. The trial court erred by concluding that the \$200.00 was an advance to cover Appellant's personal expenses while on the road.

The trial court erred when it modified its previous findings at oral argument without granting Appellant's motion for new trial. The trial court modified its previous findings, but made no evidentiary findings to support the modification. The court

again erred in its new findings that Appellant and his current wife have income of between \$68,000.00 and \$75,000.00 per year.

The trial court erred by finding that the parties contemplated that Appellee would seek employment at the time of the divorce. The Decree does not state that the parties contemplated that Appellee would increase her earnings. There was no evidence presented to the trial court that the parties actually contemplated that she would seek further employment, and Appellant testified that it was his understanding at that time that Appellee would not be able to work because of health problems. The increase is not contemplated within the Decree and it was error for the court to so find.

The increase in Appellee's income from almost nothing to \$865.00 per month constitutes a material change of circumstances and it was error for the court to fail to make an analysis of the factors requiring alimony. The trial court's failure to consider the substantial and material change of circumstances was clearly erroneous and requires reversal.

The trial court failed to consider the factors supporting an award of alimony of determining the need of the receiving spouse, the ability of the paying spouse to pay, and the ability of the receiving spouse to provide for her own needs. The trial court erred by not finding that Appellant no longer has the ability to pay alimony, that Appellee no longer has the need for alimony, and Appellee is able to support herself. Based on those factors, it was error for the trial court to fail to modify the Decree.



Finally, it was error for the trial court to consider Appellant's spouse's income in the determination of Appellant's ability to pay. Appellant's spouse does not have a legal obligation to pay alimony to the Appellee. The trial court took into account the income of Appellant's wife, but failed to take into consideration her expenses. Appellant and his wife do not have the ability to pay alimony to Appellee. The trial court erred by considering the income but not the total expenses.

### **ARGUMENT**

#### **I. THE AWARD OF ATTORNEY FEES WITHOUT TESTIMONY OR EVIDENCE IS CLEARLY CONTRARY TO ESTABLISHED UTAH LAW**

##### **A. Appellee failed to present any evidence to support an award of attorney fees**

This Court should strike the trial court's award of attorney fees to Appellee because the granting of attorney fees absent any evidence or testimony is clearly against established law. Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987). It is incumbent on the party requesting attorney fees to demonstrate the necessity of the number of hours dedicated to the matter, the reasonableness of the rate charged, the complexity of the case and the result accomplished, and the rates commonly charged for divorce actions in the community. *Id.* at 1279 (citing Beals v. Beals, 682 P.2d at 864; Kerr v. Kerr, 610 P.2d 1380, 1384-85 (Utah 1980)); accord Delatore v. Delatore, 680 P.2d 27, 28 (Utah 1984). Factors to be

considered for the reasonableness of fees include the time and labor required, the novelty of the issue, the skill required, the likelihood that the lawyer will not be able to accept other employment, the fee customarily charged in the locality, the amount involved, the result obtained, the time limitation imposed by the client, the nature and length of the professional relationship, and the experience of the lawyer. Code of Judicial Administration, Rule 1.5(a)(1)-(8). Appellee presented no evidence or testimony to support an award of attorney fees and as such, the award should be stricken.

This Court can reverse an award of attorney fees and costs when either financial need or reasonableness has not been shown. Haumont v. Haumont, 793 P.2d 421, 426 (Utah Ct. App. 1990); Munns v. Munns, 790 P.2d 116, 122 (Utah Ct. App. 1990). Appellee failed to show the reasonableness of the awarded fees. At the close of testimony, Appellee's counsel proffered that his fees totaled \$850.00 and that was his request. Appellee presented no evidence of the reasonableness of his rate, the necessity of the number of hours, or in fact even the actual number of hours expended, nor the rates commonly charged in the community. Appellee's counsel did not testify. There was no offer of any proof as to the award of fees. In Newmeyer, the Utah Supreme Court held that unless the party seeking attorney fees carries her burden to establish the proper evidentiary basis for the award, it is clear error to award fees. Id. at 1280. Additionally, the Utah Supreme Court in Delatore, 680 P.2d at 28-29, set forth that an award of fees

without evidence or testimony would be stricken. Appellee failed to establish that the fees were reasonable in light of the time spent and the necessity thereof. Appellee did not present any testimony or evidence as to the necessity of the fees or the reasonableness thereof. See Newmeyer, 745 P.2d at 1279. Therefore, because Appellee failed to carry her burden to support an award of fees, the award of attorney fees to Appellee was clearly an abuse of discretion and should be stricken.

Appellant does not have the burden to show that Appellee's requested fees are unreasonable and the trial court's imposition of that burden is clearly error. Appellee's counsel proffered his fees. The court asked Appellant's counsel if he had any questions. Appellant's counsel stated that if Appellee's counsel were on the stand, he would cross examine him. Appellee's counsel did not take the stand. Appellee has set forth that Appellant's failure to show that the fees were unreasonable by not calling Appellee's counsel to the stand carries Appellee's burden. The Utah Supreme Court set forth that the party opposing fees does not have the burden at trial to challenge the award when no evidence was presented on the subject. Delatore, 680 P.2d at 29. Appellant did not have the burden to show that the requested fees were unreasonable because Appellee did not present any evidence that the fees were reasonable. The trial court's imposition of the burden onto Appellant was clearly error and cannot be used to support the award of fees.

**B. There is no factual basis to support an award of additional attorney fees and those fees are not reasonable**

**1. Appellant's Motion for New Hearing was legally and factually correct**

This Court should reverse the award of additional fees because there was no factual basis upon which a fee award could be made. At oral argument on Appellant's Motion for New Hearing, the court awarded additional fees to Appellee of \$350.00. Appellant's Motion for Rehearing was based, *inter alia*, on Appellee's failure to carry her burden of proof for attorney fees at the modification hearing. Appellant submitted his Motion for Rehearing for decision without oral argument. Appellee submitted her opposition to Appellant's Motion without oral argument. The trial court scheduled oral argument. At the hearing on Appellant's Motion for Rehearing, the Court allowed Appellee's counsel to testify to the reasonableness of his fees in an improper and futile attempt to correct any error in the previously awarded attorney fees. Appellant's counsel was given an opportunity to cross-examine Appellee's counsel, but had no information provided upon which an effective cross-examination could be conducted. Appellee's counsel offered no exhibits to support his testimony and testified that he had brought no records to support his testimony. The court upheld its previous award of attorney fees then awarded an additional \$350.00 in fees for Appellee's defense of the matter. The previously awarded fees were awarded against the proof offered by Appellee. Appellant complained of this lack of proof. The

trial court acknowledged the error by forcing evidence at a scheduled oral argument to rectify its error. The trial court then awarded additional fees against Appellant for having brought the error to the court's attention. Because Appellant's Motion was factually and legally accurate--Appellee failed to carry her burden of proof in the first hearing--the award of additional fees is improper.

2. Appellee failed to carry her burden as to reasonableness and necessity of the awarded fees

This Court should reverse the trial court's award of attorney fees to Appellee at oral argument on Appellant's Motion for New Trial because Appellee again failed to carry her burden to show the reasonableness or necessity of the award of fees. A decision to award fees must be based on evidence of financial need and reasonableness. Rudman v. Rudman, 812 P.2d 73, 77 (Utah Ct. App. 1991). Appellee's counsel again proffered that he had expended time and Appellee incurred fees of \$350.00. Without notice to Appellant, the trial court asked Appellee's counsel to take the stand where he testified that he had spent time on the matter and the same was reasonable. Appellee's counsel did not bring any time records, or other documents showing that he had actually spent the time or that the same was reasonable. Appellee's counsel testified that he did not research any case law and that he had only spent a short amount of time drafting his response (2Tr. 16-17). Appellee's counsel proffered, while on the stand,

that his client would testify that she is unable to pay the fees (2Tr. 15). Prior to any oral argument, Appellee had requested \$350.00 for fees in her six paragraph Reply to Appellant's Motion for New Hearing (Rec. 207). Appellee's counsel's testimony is inadequate to establish that the fees requested are reasonable. Appellee's counsel testified that the time he expended was in consultation with his client, and drafting a six paragraph pleading. (2Tr. 14). There was no evidence that Appellee had a financial necessity for the award of fees, and Appellee's counsel's proffer on the stand is insufficient to support such an award. Appellee submitted no evidence to support the award as to reasonableness or necessity, and therefore the award of additional fees should be stricken.

**II. THE FINDING THAT APPELLANT'S INCOME IS IN EXCESS OF \$75,000.00 PER YEAR IS CLEARLY ERRONEOUS**

**A. Appellant earns \$.14 per mile driven for total income of between \$29,000.00 and \$30,000.00 per year**

The determination that Appellant has income of more than \$75,000.00 per year is clearly erroneous. Appellant submitted his paycheck stubs and a summary of his gross yearly income. Appellant's Exhibit 22, which was created directly from Appellant's paycheck stubs, shows that Appellant has gross income from February 11, 1994 through September 30, 1994 of \$16,292.58. On this same exhibit, April Dobson, Appellant's current wife, shows a gross income for the period February 11, 1994 through

September 30, 1994 of \$17,833.70. The court clearly erred by concluding that Appellant and his current wife had a combined yearly income in excess of \$75,000.00. The evidence is undisputed that Appellant is paid \$.14 per mile, including his per diem. This amount is paid only to the person actually driving. The trial court set forth that an average week of driving would be approximately 4700 miles and that Appellant and his current wife drive only 50 weeks per year. Multiplying 4700 miles by 50 weeks by \$.14 yields an annual income of \$32,900.00. But Appellant testified that 4700 miles per week is too high and testified that an average week would be less than 4500 miles, yielding annual income of approximately \$30,000.00. This amount is consistent with the evidence presented by Appellant that his monthly gross income is approximately \$2,500.00. In order for Appellant and his current wife to earn \$75,000.00 per year, they would have to drive more than 60 miles per hour, 24 hours per day, 7 days per week, 52 weeks per year.

**B. The trial court erred by adding expense reimbursement and advances to Appellant's total income**

Appellant testified that Appellant's Exhibit 21, his paycheck stub dated September 29, 1994, in the year-to-date column, showed a total gross income of \$13,565.10. From that gross income, taxes of \$3,283.77 were deducted. Advances of \$5,693.60 were then deducted. Appellant testified that prior to each trip, he is given an advance of \$200.00 by Pride Transport in order to cover costs of repair or items required for the truck. Upon returning

back to Pride, Appellant is required to submit receipts for costs expended on Pride's truck. Pride then deducts the \$200.00 advance from Appellant's pay, less the amount supported by receipts presented for costs actually spent. Appellant testified that the company gives him \$200.00, and when he returns from the trip if he gives the company \$150.00 in expense receipts, for funds spent on the truck, \$50.00 is deducted from his pay (Tr. 94). Appellant testified that the expense reimbursement in the year-to-date column included the reimbursement for repairs on the truck (other reimbursement) and the per diem which, Appellant testified, is \$.045 per mile. Appellant testified, that in order to read the stub correctly, the expense reimbursement column should be added in but the advances column should be subtracted (Tr. 94). In Appellant's Motion for New Hearing, Appellant presented the Affidavit of Dan DeGrazio which set forth the correct reading of the pay stub. Within this affidavit, it was set forth that the advances are only to be used by the driver to pay for repairs to the truck (Rec. 204-06). This Affidavit also set forth that no personal expenses of the driver are reimbursed by the company and that each driver is only paid \$.14 per mile including per diem. Appellant testified that his gross earnings from Pride for the period February 11, 1994 through September 30, 1994 were \$16,292.58, and that amount was listed on Appellant's Exhibit 22.

The court erred by adding the gross income to the expense reimbursement, without deducting the advances, then adding the per diem and other reimbursement again. By double counting what is



listed on one part of the pay stub and already included in the year-to-date column, the court's conclusion was clearly erroneous. The court also erroneously held that Appellant's road expenses, such as food and incidentals, are reimbursed by Appellant's employer. Appellant testified that no road expenses were reimbursed. Appellant testified that if he were required to replace a tire or do other repairs on the truck owned by his employer, those expenses are reimbursed and are accounted for in the other reimbursement category. There was no evidence whatsoever that any road expenses such as food and incidentals are reimbursed by Appellant's employer. It was clearly erroneous for the trial court to consider that personal expenses were reimbursed by the company.

**C. The court erred when it modified its findings**

The trial court erred in modifying its previous findings at oral argument and concluding that Appellant and his current wife have annual income of between \$68,000.00 and \$75,000.00. As set forth above, based on a high average of miles driven, Appellant and his wife have an annual income of approximately \$60,000.00. The trial court, at oral argument, made the change in his conclusion, based on Appellant's Motion for New Hearing, of Appellant's salary, but made no findings as to the information on which he based the change. The court's modified findings that Appellant and his wife have an annual income of between \$68,000.00

and \$75,000.00 is clearly erroneous and does not have any factual support, nor did the trial court make any further findings on which the modified conclusion regarding Appellant's income could be based.

**D. This case should be remanded for a proper evidentiary finding**

This Court should remand this matter to the trial court because the finding that Appellant's income exceeds \$75,000.00 per year is clearly erroneous, and as such, the evidence is insufficient to justify the judgment. A factual finding is clearly erroneous if a reviewing court will be firmly convinced that a mistake has been made. State v. Walker, 743 P.2d 191, 193 (Utah 1987). The erroneous factual finding, along with the errors in law, require this matter be remanded.

**III. THE COURT'S FINDING THAT THE PARTIES CONTEMPLATED THAT APPELLEE WOULD SEEK EMPLOYMENT WAS CLEARLY AGAINST THE EVIDENCE**

**A. There is no provision within the Decree anticipating Appellee's increase in income**

The court erred by finding that the parties contemplated at the time of divorce that Appellee would have to seek employment to provide for herself. The Findings of Fact and Conclusions of Law upon which the original Decree of Divorce was based, did not state that the parties contemplated that Appellee would seek employment. "The fact that the parties may have anticipated an increase of income in their own minds or in their discussions does not mean

that the decree itself contemplates the change." Durfee v. Durfee, 796 P.2d 713, 716 (Utah Ct. App. 1990). Appellant testified that at the time of the divorce, Appellee was unemployed, and unable to work because of physical limitations (Tr. 72-73). In the October 5, 1994 hearing, Appellee presented no evidence that the parties contemplated she would work. In fact, Appellee began working after the stipulation was entered into, but prior to the entry of the decree of divorce in December, 1990 without informing Appellant or the court.

"In order for a material change in circumstances to be contemplated in a divorce decree there must be evidence, preferably in the form of a provision within the decree itself, that the trial court anticipated the specific change." Durfee, 796 P.2d at 716. The Decree awarded Appellee two cars and a piece of property with a house in Lewiston, Utah free of debt. Appellee did not take any of the parties' debt. Appellee was also awarded \$300.00 per month alimony. There is no indication that the parties based their agreement on the idea that Appellee would work, and no provision in the Decree which stated that any consideration was given to Appellee's future income. The sole provision regarding income is that of Appellant's income. Therefore, the Decree reflect that the parties contemplated that Appellee would increase her earnings.

The court's finding that the parties contemplated Appellee would work is clearly erroneous, especially in light of the fact that no such provision exists in the Decree. The trial court

based his conclusion that Appellee would have to seek work on his memory of the original case and that it was based upon a stipulation (Tr. 141). The court then stated that "it was clear at that time and indisputable and was within the contemplation of the parties that Ms. Larson was going to have to go back to work" (Tr. 143). However, there was no such provision in the Decree and no finding of fact that such employment would occur. Based on the silence of the Decree, it must be concluded that such employment was not contemplated within the Decree and therefore is a material change of circumstances not contemplated within the Decree. See *Durfee*, 796 P.2d at 716.

**B Appellee's substantial increase in income is a material change of circumstances**

Appellee's increase in income from almost nothing at the time of the divorce to \$865.00 per month, almost \$300.00 per month more than her stated needs, constitutes a material change of circumstances sufficient to modify the Decree. In *Durfee*, the Utah Court of Appeals held that if the decree at issue does not have a provision expressly anticipating an increase in a party's income, and no evidence is presented to the trial court that such an increase was actually anticipated, the increase is not a material change of circumstances contemplated in the original decree. 796 P.2d at 716. Because the increase in Appellee's income is not contemplated in the original decree, the court must

examine the relevant factors in the award of alimony to determine whether alimony is warranted.

The trial court failed to make a determination of the propriety of alimony in this case because it erroneously concluded that Appellee's increase in income was contemplated at the time of the Decree. The trial court erroneously failed to consider the material increase of Appellee's income within the factors of need and ability based on the court's erroneous conclusion that Appellee's increased income was contemplated at the time of the Decree. Therefore, this Court should remand this matter to the trial court with instructions to consider that Appellee's increase in her income is a material change of circumstances not contemplated at the time of the Decree. The trial court should then be instructed to consider the factors required to support an award of alimony to determine whether Appellant is entitled to a modification.

**IV. THE COURT FAILED TO APPLY THE PROPER LEGAL TEST TO DETERMINE WHETHER APPELLEE SHOULD CONTINUE TO RECEIVE ALIMONY**

**A. The trial court failed to consider the proper factors used to determine alimony**

**1. Modification of alimony must consider the need of the receiving spouse and the ability of the paying spouse to pay**

The trial court's determination that a substantial change in circumstances to warrant a modification of alimony had not occurred was clearly erroneous based upon existing law. In order to modify an award of alimony, the moving party must show a substantial change in circumstances, not contemplated at the time of divorce. Moore v. Moore, 872 P.2d 1054, 1055 (Utah Ct. App. 1994). In order to support an award of alimony, the court must examine the receiving spouse's financial conditions and need, the receiving spouse's ability to earn adequate income and contribute to her own needs, and the providing spouse's ability to provide support. Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985). These factors should also be examined in order to obtain a modification of a divorce decree, when a substantial change of circumstances has occurred. Moore, 872 P.2d at 1055.

**2. Appellant no longer has the ability to pay alimony**

Appellant does not have the ability to pay alimony because his income is substantially reduced, and his expenses have increased. Appellant presented evidence that his income is substantially reduced from the time the parties divorced.

Appellant's evidence showed that he has debt which requires monthly service and that a portion of the debt is marital debt from his marriage to Appellee, including the mortgage on the property Appellee was awarded unencumbered. Appellant presented evidence that he has more than \$21,000.00 in credit card debt which requires monthly service.

Evidence of voluntarily incurred debt can be grounds for modification of alimony if "they were incurred in a good faith attempt to meet alimony obligations or to maintain a decent standard of living." Auerbach v. Auerbach, 571 P.2d 1349, 1350 (Utah 1977). Appellant presented evidence that at the time of the Decree, Appellant was required to pay more than \$11,000.00 in credit card debt from the parties' marriage along with two mortgages on his home. Since the divorce, Appellant has increased his debt load in an almost equal proportion to the amount he is required to pay in alimony. Appellant presented evidence that he is further in debt on the second mortgage by approximately \$1,500.00 and on credit card debt by approximately \$10,000.00. During the time from the Decree until the modification hearing, Appellant has paid Appellee more than \$18,000.00 in alimony. The evidence of the increased debt is consistent with the amount Appellant is required to pay Appellee and should be considered as to his ability to continue to pay. Appellant's Exhibit 29 showed that after monthly expenses, but prior to deducting the \$300.00 alimony to Appellee, Appellant has a negative cash flow of more than \$300.00. The trial court erred by not finding that

Appellant's debt increase is consistent with Appellant's negative cash flow.

Appellant presented evidence that his expenses on the road have increased since the time of the decree. Appellant stated that his monthly road expenses are approximately \$475.00. This amount covers food and other incidentals while traveling on the road. The trial court questioned Appellant about expenses and suggested that Appellant take a cooler with apples, oranges, and bologna (Tr. 106). Appellant testified that the cooler would not be practicable because the ice would melt in approximately four hours, and that federal regulations require the driver to stop approximately every five hours and take a break (Tr. 106-08). The trial court rejected the consideration of the expenses on the road and erroneously concluded that Appellant should take a cooler on his truck, and "start stopping at McDonald's and Wendy's and fixing your own snacks" (Tr. 145). The trial court's determination that Appellant's road expenses had not increased or they were avoidable is clearly erroneous. The trial court erred by not finding that Appellant's expenses had increased since the time of the Decree.

The trial court erred by not concluding that based on Appellant's increase in debt, consistent with his negative cash flow caused by paying alimony, his increase in expenses, and his decrease in income, Appellant no longer has the ability to pay alimony.



### 3. Appellee no longer has the need for alimony

The trial court erred by not concluding that Appellee no longer has the need for alimony. The purpose of alimony is to enable the receiving spouse to maintain a standard of living enjoyed during the marriage and to prevent her from becoming a public charge. Rudman v. Rudman, 812 P.2d 73, 76 (Utah Ct. App. 1991). Appellant's evidence and Appellee's testimony showed that Appellee's monthly expenses are reduced substantially because Appellee pays only one third of the mortgage payment, only one third of the household utilities, and only one third of the household expenses, based on Appellee's two adult sons living with her and paying their fair share of expenses. Evidence also showed that Appellee has no debt except for a small mortgage on her primary residence. Appellee has land in Lewiston, Utah worth \$15,000.00 which, by her choice, is unproductive. Appellee's monthly income is \$865.00. Appellee testified that she makes \$5.50 per hour and if she were to work 40 hours per week, she would make \$950.00 per month. Appellee then testified that her **total** actual monthly expenses, including food and taxes, are \$545.52 Appellee has actual excess income of more than \$300.00 per month, and then receives an additional \$300.00 per month from Appellant. The trial court erred by not determining that Appellee no longer has a need for alimony.

**B. The trial court erred by considering Appellant's current wife's income as a factor regarding Appellant's ability to pay**

**1. Appellant's current wife's income cannot be considered for Appellant's ability to pay**

The trial court erred in considering Appellant's wife's income in determining whether Appellant has had a change in circumstances which would warrant a modification of alimony. Appellee presented no evidence of case law which supported the proposition that the Appellant's spouse's income can be used to determine Appellant's ability to provide support. Appellant's current spouse has her own circumstances and obligations with which she must deal, and has no legal obligation to support Appellee. The determination to include both Appellant's and his current spouse's income for purposes of alimony to Appellee was clearly against the law and should be remanded for the proper application of the legal test.

**2. Appellant and his wife do not have the ability to pay alimony**

Even if Appellant's spouse's income were properly considered, Appellant presented sufficient evidence to show that the two of them together had a reduction from Appellant's earlier income and no longer had the ability to pay the alimony. Appellant's Exhibit 30 listed the combined income of Appellant and his current spouse, and the total amount of their combined obligations. Appellant and his spouse still had a monthly negative cash flow of \$135.31. The

only relevance of Appellant's spouse's income for the modification was to show her contribution to Appellant's household expenses. The trial court's determination that Appellant had the ability to pay, even when his spouse's income was considered was clearly erroneous.

### **CONCLUSION**

The trial court clearly erred in awarding attorney fees to Appellee when she failed to carry her burden of proof as to the reasonableness and necessity thereof. The trial court committed further error by awarding additional fees to Appellee at oral argument when the trial court apparently agreed with Appellant that Appellee failed to carry her burden of proof.

The trial court's finding that Appellant and his current spouse have annual income in excess of \$75,000.00 is clearly erroneous and not supported by the evidence. Appellant earns \$.14 per mile driven and no more. Appellant is not reimbursed by his company for his personal expenses on the road. It was error for the trial court to conclude that those expenses are reimbursed.

The trial court's finding that it was contemplated at the time of the Decree that Appellee would seek employment is not supported by the evidence in that there is no such statement in the Decree, and there was no evidence presented to the court to make such a finding.

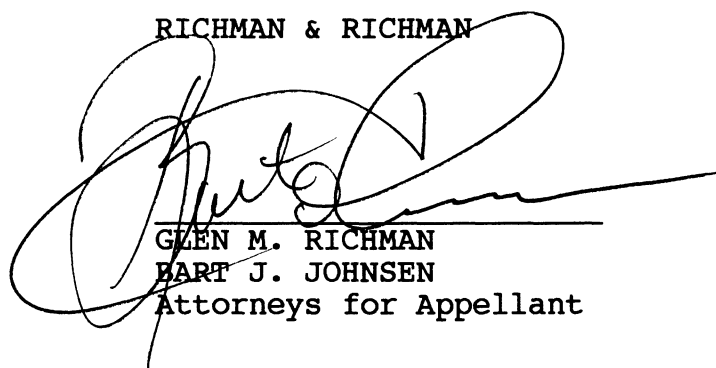
The trial court's failure to analyze the factors involved in an award of alimony was clearly erroneous. The trial court erred

by not finding that Appellant no longer has the ability to pay, that Appellee no longer has need for alimony, and that Appellee can now support herself. The trial court further erred by considering Appellant's current wife's income when determining Appellant's ability to pay. The trial court failed to consider the added expenses of the current spouse if he considered the added income. The trial court's failure to correctly consider income and expenses was erroneous.

Based on the foregoing, this Court should reverse the trial court, strike the awards of attorney fees, and remand to the trial court for correct evidentiary findings.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of September, 1995.

RICHMAN & RICHMAN

A large, stylized handwritten signature in black ink, likely belonging to Glen M. Richman, is written over the printed names of the attorneys. The signature is fluid and cursive, with a large loop at the end.

GLEN M. RICHMAN

BART J. JOHNSON

Attorneys for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of September, 1995, two true and correct copies of the foregoing BRIEF FOR THE APPELLANT were hand-delivered to :

M. Byron Fisher, Esq.  
FABIAN & CLENDENIN  
215 South State #1200  
Salt Lake City, Utah 84111

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

## **ADDENDUM**

### **EXHIBIT**

### **DESCRIPTION**

1. Trial court's ruling on Modification,  
October 5, 1994
2. Attorney fees proffer,  
Modification hearing, October 5, 1994
3. Transcript of Oral Argument,  
January 30, 1995

**ADDENDUM**

Exhibit "1" Trial court's ruling on Modification October 5, 1994

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY. STATE OF UTAH

\* \* \* \* \*

VARNELL J. DOBSON	)	
	)	
	)	
Plaintiff.	)	Transcript of:
	)	
vs.	)	Modification
	)	Hearing
	)	
DOROTHY LYNENE DOBSON	)	
	)	
Defendant.	)	Case No. 894904084

\* \* \* \* \*

The above-entitled cause of action came on regularly for hearing before the Honorable Kenneth Rigtrup, a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake County, Utah, on Wednesday, October 5, 1994, at 10:00 a.m.

APPEARANCES

For the Plaintiff:	GLEN M. RICHMAN Attorney at Law 60 South 600 East Salt Lake City, Utah
For the Defendant:	BYRON M. FISHER FABIAN & CLENDENIN 215 South State Salt Lake City, Utah



1 one-fourth hours in preparation and presentation.  
2 although it has taken more than that time today than it  
3 was anticipated. My proffer is that my usual and  
4 regular, normal hourly billing rate, and as due for my  
5 client, is \$850 in attorney's fees.

6 THE COURT: Do you have any questions to ask of  
7 Mr. Fisher?

8 MR. RICHMAN: He hasn't taken the stand. I  
9 don't agree he ought to be awarded attorney's fees or  
10 they are reasonable.

11 THE COURT: You want him to be sworn?

12 MR. FISHER: I have made my proffer, Your  
13 Honor.

14 THE COURT: I am just asking you if you want to  
15 question him, if you disagree with his proffer.

16 MR. RICHMAN: If he were on the witness stand  
17 and sworn, I would ask questions. Since he is not, I am  
18 not going to ask questions.

19 I don't have any quarrel with him having spent  
20 that much time. His hourly rate is probably reasonable.  
21 I don't think it is necessary or he is entitled to fees  
22 under this condition.

23 THE COURT: One of the most significant factors  
24 that guides the Court in what it must do in this case is  
25 that this was a bargained-for-divorce. It was agreed to,

1 and once the parties agree to something it is difficult  
2 for the Court to undo what the parties do. And sometimes  
3 that results in harsh results, inequities, unfairness.  
4 Facial unfairness just looking at things, but this isn't  
5 that case.

6 This case is one where the parties married on  
7 April 14, 1961. They bargained for their divorce on  
8 October 3, 1990. I don't remember much about it. I  
9 remember Mr. Cayias and Mr. Fisher coming into my  
10 chambers and I remember that issues were discussed. But  
11 generally the deal was put together by Mr. Fisher and Mr.  
12 Cayias, and there was exchange, I am sure, back and forth  
13 between the parties, and give and take, and the ultimate  
14 result of a tug back and forth and the final result was  
15 achieved.

16 The Court can't rely on precedence on  
17 unpublished opinions, but lower courts take their  
18 instructions from the Appellate Court, and this is merely  
19 instructional on what the Appellate Court thinks may be  
20 fair. I have only been appealed once in an alimony case,  
21 but the case is Nichols vs. Nichols which there was an  
22 order reversing in part and affirming in part, a May 26,  
23 1989 decision signed by Judge Beck. He was joined by  
24 Judges Greenwood and Judge Croft.

25 The man was employed at Kennecott Copper.

1 There were no findings so I simply relied on memory. It  
2 was the rejiggered Kennecott Copper when wages were much  
3 lower. As I recall, the man's wages were in the range of  
4 18,000 a year. The woman had two children. One was just  
5 at the age of majority. The other was still in or out of  
6 the home, and the other daughter was 16 or 17 years of  
7 age. She had a small modest home in Magna which she got.  
8 I heard a half a day's testimony from a medical doctor  
9 who testified for a whole half day with a litany, an  
10 unending litany of maladies as to why she was not  
11 employable. I cannot remember what the child support  
12 was. It would have been the guideline amount. I can't  
13 remember the amount of alimony, but it is a three-  
14 sentence order. One sentence: "Based upon the evidence  
15 in the record and the Court's findings, appellant is  
16 hereby awarded alimony of \$500 per month and child  
17 support for Rebecca at the rate of \$200 per month." So  
18 my order after a trial was less than those amounts.

19 So considering a 29-year marriage, at \$300 a  
20 month alimony, bargained for, with a tax return for 1990  
21 demonstrating income of \$49,761 for Mr. Dobson and on the  
22 other hand for Ms. Larsen, the representations to the  
23 Court then were zero.

24 The financial declaration in the file dated  
25 March 26, 1990 showed \$3776.24 income for Mr. Dobson.

1       Showed nothing for her. And the testimony the Court has  
2       heard is that she went to work in November of 1990. The  
3       decree was entered December 31, 1990, some two or three  
4       months, almost three months after the stipulation was  
5       entered between the parties.

6               It was clear at that time and undisputable and  
7       was within the contemplation of the parties that Ms.  
8       Larsen was going to have to go back to work. She wasn't  
9       going to get by on \$300 per month. She got a home in  
10      Lewiston, Utah, that wasn't inhabited then and still  
11      isn't inhabited, and she got a 1981 Cadillac. I don't  
12      recall that she got much else that was spendable or  
13      useable at all. It is obvious you couldn't get by on  
14      \$300 per month. Currently she earns \$5.50 per hour. She  
15      says she works 35 hours per week. She works a little  
16      more than that based upon a seven and a half months  
17      history and the Court finds that she earns reasonably  
18      \$865 per month from her employment at O.P. Skaggs.

19             On the other hand, Mr. Dobson worked for USPCI  
20      and during the years 1990 through termination of his  
21      employment, he earned in the range of \$48,000 to \$55,000  
22      year-in and year-out. He voluntarily terminated that  
23      employment, but did not, in the Court's mind, adversely  
24      affect his position, although the earnings that are  
25      attributable to him are somewhat less.

1           When you consider the combined earnings of he  
2     and his wife, they are not that shockingly different. He  
3     had gross earnings year-to-date of 9-30-94 having started  
4     his employment on February 11, 1994 of \$13,565.10. He  
5     received expense advances of \$5,693.60 and was reimbursed  
6     expenses of \$8,553.08, leaving a net for his pocket of  
7     \$2,859.48. Adding that to the \$13,565.10, gives him  
8     gross income year-to-date September 30, 1994, of  
9     \$16,424.58. In addition to that amount on that paycheck,  
10    he had mileage of 4,874 miles, at 4 cents a mile,  
11    yielding \$194.96. And if you figure 4500, that still  
12    yields mileage per diem of \$180. Applying that on a  
13    weekly basis and converting that to a monthly figure,  
14    means that he gets 800 to \$840 per diem on a monthly  
15    basis, which yields monthly earnings to him in the range  
16    of \$3,000 per month or \$36,000 per year.

17           His wife, going through the same analysis, has  
18    more earnings on hers and the difference is largely  
19    because she gets the same per diem he does. She gets  
20    some expense reimbursements without the large offsetting  
21    advance figure. On her year-to-date figure, she only had  
22    advances of 200 but received reimbursed expenses of  
23    \$4,959.60, which yielded to her year-to-date income of  
24    \$17,890.70, plus a monthly per diem of 800, \$840 which  
25    would yield combined income of the two of them of \$6,250

1 per month. On an annualized basis, \$75,000 per year.

2 For them to suggest she ought to make choices,  
3 going down her expenses, arguing with every \$5 and \$10  
4 and think the Court is not serious about taking a cooler  
5 onto your truck and start stopping at McDonald's and  
6 Wendy's and fixing your own snacks if you are going into  
7 debt, you have to make choices. And it is offensive to  
8 the Court that you think those choices ought to be  
9 whittled out of her \$5 or \$10 items for the sake of  
10 having a combined monthly, unreimbursed, non-taxed  
11 expense allowance of 360, \$375 per month.

12 There are not substantial and material changes  
13 of circumstances to justify a modification. The alimony  
14 shall remain at \$300 per month. The plaintiff is awarded  
15 judgment for alimony arrearages of \$2600, plus the  
16 general rate of interest which is allowable by law from  
17 the date those payments were due, plus \$850 attorney's  
18 fees.

19 Will you prepare appropriate Findings,  
20 Conclusions and Decree?

21 MR. FISHER: I will.

22 THE COURT: With respect to the issue on the  
23 \$2500, that is covered. You have got a QDRO. You have  
24 got an award of it in the decree and if per chance those  
25 funds were taken and wrongfully disbursed by the trustee,

**ADDENDUM**

Exhibit "2" Attorney fees proffer  
Modification hearing October 5, 1994

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY. STATE OF UTAH

\* \* \* \* \*

VARNELL J. DOBSON	)	
	)	
	)	
Plaintiff.	)	Transcript of:
	)	
	)	Modification
vs.	)	Hearing
	)	
	)	
DOROTHY LYNENE DOBSON	)	
	)	
Defendant.	)	Case No. 894904084

\* \* \* \* \*

The above-entitled cause of action came on regularly for hearing before the Honorable Kenneth Rigtrup. a Judge of the Third Judicial District Court of the State of Utah, at Salt Lake County, Utah. on Wednesday, October 5, 1994. at 10:00 a.m.

APPEARANCES

For the Plaintiff:	GLEN M. RICHMAN Attorney at Law 60 South 600 East Salt Lake City, Utah
For the Defendant:	BYRON M. FISHER FABIAN & CLENDENIN 215 South State Salt Lake City, Utah



1 anyone else's living expenses, except the recipient's  
2 when you are looking at her expenses. And it also cites  
3 a case of Willy vs. Willy. It doesn't matter if they are  
4 step children, adult children or grand children. It is  
5 her expenses that we care about. Although it was  
6 laborious to do so and it almost sounds picky, we went  
7 through the financial declaration and cleared some of  
8 those things up that have been falsely put before this  
9 Court, or inaccurately put before this Court.

10 I would suggest that the Court ought to make an  
11 order that would be effective in modifying the decree by  
12 terminating alimony; effective as of the date we filed  
13 this petition. And I think to do otherwise merely puts  
14 this man in a continuing posture where he cannot perform  
15 and then is made out as a bad guy. He is not a bad guy.  
16 He sat on the witness stand and told the Court the truth  
17 about his circumstances and he is a very straightforward  
18 person, hard worker. It is preposterous to think that he  
19 is intentionally earning less money with very long and  
20 hard hours to avoid paying \$300. I just can't buy that,  
21 Your Honor. Thank you.

22 MR. FISHER: I did not proffer any attorney's  
23 fees and I think for the record I need to do that.

24 THE COURT: You may do so.

25 MR. FISHER: Thank you. I have spent six and

1 one-fourth hours in preparation and presentation,  
2 although it has taken more than that time today than it  
3 was anticipated. My proffer is that my usual and  
4 regular, normal hourly billing rate, and as due for my  
5 client, is \$850 in attorney's fees.

6 THE COURT: Do you have any questions to ask of  
7 Mr. Fisher?

8 MR. RICHMAN: He hasn't taken the stand. I  
9 don't agree he ought to be awarded attorney's fees or  
10 they are reasonable.

11 THE COURT: You want him to be sworn?

12 MR. FISHER: I have made my proffer, Your  
13 Honor.

14 THE COURT: I am just asking you if you want to  
15 question him, if you disagree with his proffer.

16 MR. RICHMAN: If he were on the witness stand  
17 and sworn, I would ask questions. Since he is not, I am  
18 not going to ask questions.

19 I don't have any quarrel with him having spent  
20 that much time. His hourly rate is probably reasonable.  
21 I don't think it is necessary or he is entitled to fees  
22 under this condition.

23 THE COURT: One of the most significant factors  
24 that guides the Court in what it must do in this case is  
25 that this was a bargained-for-divorce. It was agreed to,

**ADDENDUM**

Exhibit "3" Transcript of Oral Argument, January 30, 1995

IN THE THIRD JUDICIAL DISTRICT COURT FOR  
SALT LAKE COUNTY, STATE OF UTAH

\* \* \*

VARNELL J. DOBSON,

Plaintiff,

-vs-

DOROTHY LYNENE LARSON  
(DOBSON),

Defendant.

Case No. 894904084 DA

BENCH DECISION, 1-30-95

*copy*

-----  
BE IT REMEMBERED that on the 30th day  
of January, 1995, at 10:00 o'clock a.m., this cause  
came on for hearing before the HONORABLE KENNETH  
RIGTRUP, District Court, without a jury in the Salt  
Lake County Courthouse, Salt Lake City, Utah.  
-----

A P P E A R A N C E S:

For the Plaintiff: GLEN M. RICHMAN  
Attorney at Law

For the Defendant: BYRON FISHER  
Attorney at Law

CAT by: CARLTON S. WAY, CSR, RPR

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1 work. But it is obvious to anyone that it was  
2 reasonably within the contemplation of the parties  
3 that she'd have to go to work. She couldn't get by  
4 on \$300 per month.

5 The Court may have misinterpreted the pay  
6 stubs of Mr. Dobson and his current wife. And the  
7 order specifically reports that there was combined  
8 income of the two of over \$75,000. Mr. Dobson is not  
9 here. By now he has W-2's for 1994 and any doubt  
10 could be removed.

11 I've gone back and looked at the  
12 underlying documents and I've reviewed your Affidavit  
13 of Mr. -- what is it, Degarsio (phonetic) or  
14 something?

15 MR. READING: Degrasio (phonetic), I  
16 believe, Your Honor.

17 THE COURT: -- close to that, and it's  
18 possible that I did misunderstand, but not very far.

19 The mileage reflected on the pay stubs I  
20 had, both Mr. and Mrs. Dobson, reflected 4,874 miles  
21 for one week of driving. Assuming that's a fairly  
22 average week, assuming that they drive 50 years -- or  
23 50 weeks of the 52 and taking nine and a half cents  
24 per mile mileage plus four and a half percent -- four  
25 and a half cents for their reimbursement allowance or

1 14 cents per driver, you -- and doing those  
2 calculations, you come up with \$68,250 on an  
3 annualized basis.

4 MR. READING: For two people.

5 THE COURT: For two people.

6 There was a discrepancy between what was  
7 reported as expense to reimbursements and as  
8 advances. And without seeing the W-2 for the full  
9 year, the Court really could not reconcile it;  
10 though, my impression was that there was some  
11 advantage gained to both the Dobsons in getting some  
12 reimbursements for what they expended. But I would  
13 need the '94 W-2's to really size that up.

14 But at minimum, going through the  
15 calculations that I did on my mileage, it's clear to  
16 me that they have income of at least \$68,000 per year  
17 between the two of them.

18 They didn't hire Mrs. Dobson because she  
19 was an experienced driver. The marketability of the  
20 team was principally because of Mr. Dobson. He was  
21 the experienced driver that had driven for many  
22 years, and he was the guy that knew the trucking  
23 business. She took the test and she got a  
24 chauffeur's license or a commercial license so that  
25 she could drive an 18-wheeler and be part of the

1 team.

2 The statements -- the two check stubs  
3 that you gave me demonstrated that the higher income  
4 was on April Dobson's statement more than  
5 Mr. Dobson's. That is not credible in view of their  
6 respective backgrounds and experience in terms of  
7 driving.

8 So it is the Court's conclusion that it's  
9 reasonably inferable from that that more than half of  
10 the 68,000 is reasonably attributable to Mr. Dobson.

11 Given a 29-year marriage and given the  
12 conservative estimate of alimony at \$300 per month,  
13 the \$35,000 income at least that he had and the  
14 income that she had at five dollars and fifty cents  
15 per hour or roughly 825 -- or \$830 per month income,  
16 does not justify modification.

17 There's still a large disparity in  
18 income. The choice to leave the subsidiary at Union  
19 Pacific was that of Mr. Dobson's, and his current  
20 situation were the choices of Mr. Dobson. The fact  
21 that she had an interest in a broken-down property in  
22 Smithfield, Utah, was a property division. Her  
23 acquisition of modest housing in Preston, Idaho, is  
24 within the reasonable contemplation of the parties.  
25 And the fact that she's taken up camp with two sons



1 is some reasonable indication to the Court that they  
2 do that in their interest of -- self-interest of  
3 survival.

4 And given all of those circumstances, the  
5 Court's decision to not modify was sound and  
6 sustainable on appeal.

7 I think I gave you ample opportunity to  
8 grill Mr. Fisher to a fare-thee-well if you had  
9 desired to do so. And the starting of a business  
10 after that hearing is done with wild expectation, I'm  
11 sure, on the part of Mrs. Dobson and her son, but the  
12 proof of the pudding is down the line in terms of  
13 whether that's going to be productive. I suspect if  
14 she makes lot of money, then the Court's in a  
15 position certainly at that point to modify.

16 \$300 a month alimony, given the fact that  
17 Uncle Sam and the state tax collector pay 30, 35  
18 percent of that is still a very, very modest alimony  
19 award under all the circumstances.

20 The motion for relief based upon newly  
21 discovered evidence is denied.

22 The motion for a new trial is denied.

23 And an additional \$350 is awarded to  
24 Mr. Fisher for his rendering a defense herein.

25 MR. FISHER: I will prepare that order,

1 Your Honor. Thank you.

2 THE COURT: If the 1994 W-2 reflects that  
3 the \$75,000 is in error, then I suppose I would  
4 accept a late-filed exhibit and correct that one  
5 finding. But on an annualized basis, I suspect my  
6 analysis of the 60,000 on an annual basis as a  
7 minimum threshold is still reasonably accurate.

8 MR. FISCHER: Thank you, sir.

9 THE COURT: We will be in recess.

10 (Hearing adjourned.)

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STATE OF UTAH                   )  
County of SALT LAKE         ) ss.

I, CARLTON S. WAY, CSR, do hereby certify  
that I am a Certified Shorthand Reporter and a Notary  
Public in and for the State of Utah;

That I took down the proceedings aforesaid at the time and place therein named and thereafter reduced the same to print by means of computer-aided transcription (CAT) under my direction and control;

I further certify that I have no interest in the event of this action.

WITNESS MY HAND AND SEAL this the 1st day of  
February, 1995.

(Signature)

CARLTON S. WAY, CSR, RPR.