

1995

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

Utah Court of Appeals

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UTAH COURT OF APPEALS

VARNELL J. DOBSON, )  
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 Appellant, )  
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 vs. ) Case No. 950106-CA  
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 DOROTHY LYNENE LARSON ) Priority No. 15  
 (DOBSON), )  
 )  
 Appellee, )  
 )

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BRIEF OF THE APPELLEE

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Appeal from the Ruling of the Third Judicial District Court,  
Salt Lake County  
The Honorable Kenneth Rigtrup, Presiding

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Attorneys for Appellee

**FILED**

**NOV - 6 1995**

**COURT OF APPEALS**

UTAH COURT OF APPEALS

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Appellee files this Brief in response to the issues raised by Appellant.

#### **STATEMENT OF JURISDICTION**

Appellee admits jurisdiction of this Court as alleged by Appellant herein under Section 78-2a-3(2)(i), U.C., 1995, as an appeal from a final order.

#### **STATEMENT OF ISSUES FOR RESPONSE AND STANDARDS OF REVIEW**

1. Whether the Court properly awarded attorney's fees to Appellee. The Standard of Review is whether there was an abuse of discretion in the award.

2. Whether Appellant's income was properly assessed. The standard of review is whether there was clearly an erroneous finding of fact.

3. Whether the Appellee's need for employment and her continued employment was anticipated at the time of Decree. The standard of review is whether there was clearly an erroneous finding of fact.

4. Whether there was a substantial change of circumstances in Appellant's income. The standard of review is whether the ruling was an abuse of discretion. Not only whether there was substantial change of circumstance but also whether the circumstances were anticipated by the parties at the time of Decree of Divorce.

5. Whether part of Appellant's wife's income was properly considered as part of Appellant's income. The standard of review is whether there was a clearly erroneous finding of fact.

6. Whether denial of a Motion for New Trial was supported by the evidence. The standard of review is whether the petitioner presented any new evidence which would give rise to a clearly erroneous finding of fact or an abuse of discretion.

#### **STATEMENT OF FACTS**

##### **Issue of attorney's fees:**

1. At the initial hearing Appellee proffered evidence as to attorney's fees and offered to present evidence under oath. (Tr. pp. 310 and 548-549.)

2. Appellant acknowledged the proffer and made no request for testimony or evidence to be presented. (Tr. pp. 310, 549 and 562-563.)

3. Appellant made no request to cross-examine any testimony and accepted the proffer as though the same were made under oath. (Tr. pp. 310 and 549.)

4. At the hearing on Motion for New Trial, Appellee's attorney provided testimony and was subject to cross-examination. (Tr. pp. 568-574.)

5. The attorney's fees claimed are reasonable and Appellant is in need of assistance to pay those fees, and Appellant is able to meet those expenses. (Tr. p. 310.)

**Issue of Income:**

1. Appellant's income at the time of Decree was \$45,000 per year. (Tr. pp. 273 and 309.)

2. Appellant voluntarily terminated his employment which he had at the time of Decree but he did not adversely affect his financial position. (Tr. pp. 310, 456, 486, 487 and 552.)

3. Appellant accepted employment to be a long haul driver with his wife. (Tr. pp. 309 and 457.)

4. Appellant received a mileage rate of pay and a per diem allowance. His wife received a mileage rate of pay for the same miles and a per diem allowance for the same days. (Tr. pp. 310 and 469.)

5. Appellant's income was augmented by his wife's mileage and per diem allowance which together, on an annualized basis, is \$75,000 per year. (Tr. p. 554.) Appellant's own income is at least \$36,000 per year plus an additional amount allocable to him because of his wife's income as a team driver. (Tr. pp. 310, 478-479 and 553.)

**Issue of Appellee's Employment:**

1. The parties anticipated that Appellant was employed or would be employed at the time of Decree in a part-time employment. (Tr. pp. 273-274, 309, 424, 444 and 458.)

2. The parties knew that Appellee could not live on the \$300 per month alimony which the parties agreed would be paid. (Tr. pp. 274, 309 and 552.)

3. Without the alimony payment, defendant is in arrears in meeting her expenses every month. (Tr. p. 440.)

4. The parties anticipated that Appellee would continue her employment and could anticipate an increase in income. (Tr. pp. 276 and 441.)

**Issue of Appellant's Wife's Income:**

1. Appellant's wife receives expense and per diem allowances in addition to mileage payment for team driving with Appellant. (Tr. pp. 275-276.)

2. Appellant's income is based in part upon his team driving with his wife. (Tr. p. 275.)

3. Appellant and his wife each receive the same payment for mileage, per diem and expense reimbursement. (Tr. p. 276.)

4. Appellant's wife's income is based in part upon Appellant's experience and expertise. (Tr. p. 275.)

**Issue of Motion for New Trial:**

1. Appellant neither produced nor alleged any new evidence in his Motion for New Trial. (Tr. p. 277.)

2. The trial court reviewed the existing evidence and the law based upon the Motion for New Trial and found no grounds for granting the motion. (Tr. p. 277.)

#### **SUMMARY OF ARGUMENT**

Appellant has failed to demonstrate a material and substantial change of circumstances upon which a Modification of Decree of Divorce could be based. The determination of income is based upon Appellant's testimony and there are good and sufficient grounds for the Findings of Fact made by the Court. The award of attorney's fees was based upon proffer which was never challenged by Appellant and is a proper basis for the award of attorney's fees to Appellant.

#### **ARGUMENT**

##### **I. Whether The Award of Attorney's Fees Was Based Upon Proper Evidence.**

The proffer of evidence or testimony when accepted by the opposing party was accepted by the Court as though the same were given under oath and subject to cross-examination. (Tr. p. 310.) In the present case, Appellant accepted the proffer, waived any right to cross-examination, entered no evidence of his own and the Court entered its Order based upon that proffer. (Tr. p. 310.)

The Court properly exercised its discretion in awarding attorney's fees to Appellee making appropriate findings that the attorney's fees were reasonable, that Appellant had need of assistance to pay those fees and that Appellant had the ability to pay the fees awarded. (Tr. p. 310.)

**II. Whether The Findings As to Appellant's Income Are Appropriate.**

Appellant voluntarily changed his employment. The voluntary incurring of debt, change of employment or voluntary decrease in income is not a basis for a finding of substantial change of circumstances. *Auerbach v. Auerbach*, 571 P.2d 1349 (Utah, 1977).

The Court found Appellant's income had not substantially changed nor had appellant substantially changed his own standard of living. Considering the portion of his wife's income was applicable to him, his income was substantially the same as in 1990. Finding that there was not a substantial change of circumstances, the Court denied the Petition to Modify Decree of Divorce.

Appellant must demonstrate that Facts are clearly erroneous by marshalling all evidence supporting the findings and then demonstrating that the findings are not supported by legally sufficient evidence. *Campbell v. Campbell*, 896 P.2d 635 (Utah App. 1995); Rules of Civ. Proc. Rule 52(a). Appellant has failed

to demonstrate any facts that would demonstrate that there was a substantial change of circumstances as to Appellant's income.

**III. Whether The Parties Anticipated Appellee's Employment.**

At the time of Hearing for Decree, Appellee was anticipating employment. At the time the Decree was entered Appellee was employed part-time. The parties knew that she would have to be employed if she was going to survive. Alimony of \$300 per month as agreed would not sustain Appellee at the lifestyle she enjoyed during marriage. Appellee's income has only increased by a small amount since the time the Decree was entered and has not reached any level that would indicate a change of circumstances not anticipated by the parties. The Court of Appeals, in *Moore v. Moore*, 872 P.2d 1054 (Utah App. 1994), held that a former wife's stable income was not a change in circumstances justifying a modification of alimony where the parties expected at the time of decree that the wife would continue to work.

The change of value of property, the acquiring of a home, assistance from Appellee's children does not alter nor change the circumstances anticipated by the parties at the Decree of Divorce. (Tr. pp. 276-277.) Appellant would be required to show a decrease in his own standard of living or an increase in Appellee's standard of living from that enjoyed during marriage.

*Wells v. Wells*, 871 P.2d 36 (Utah App. 1994). Appellant fails to demonstrate any change in the standard of living of either party.

**IV. Whether Appellee Should Continue To Receive Alimony.**

In order for this Court to find a proper basis to decrease or terminate alimony, the Court must find, first, that there is a substantial change of circumstances and, second, that the change of circumstances was not anticipated by the parties at the time of the Decree of Divorce. *Moore v. Moore*, 872 P.2d 1054 (Utah, 1994); *Cox v. Cox*, 877 P.2d 1262 (Utah, 1994); and *Wells v. Wells*, 871 P.2d 1036 (Utah, 1994); *Larsen v. Larsen*, 888 P.2d 719 (Utah App. 1994).

It is only after the Court finds a substantial change of circumstances and that that change was not anticipated at the time of the decree that the Court may consider the financial condition and the financial needs of the parties involved.

This Court has held "We will not disturb a trial court's ruling on alimony as long as the court exercises its discretion within the bounds and under the standards we have set and has supported its decision with adequate findings and conclusions." *Bell v. Bell*, 810 P.2d 489 (Utah App. 1991) (quoting *Naranjo v. Naranjo*, 75 P.2d 1144, 1147 (Utah App. 1988)). The same standard for review as to an award of attorney's fees was approved in *Udy v. Udy*, 893 P.2d 1097 (Utah App. 1995).

**V. Whether Appellant's Wife's Income Was Properly Considered.**

The Court found that appellant's wife's income as a team long-haul driver with him was at least in part based upon Appellant's experience and expertise.

In addition, the Court found that payment of expenses and per diem were in part income to Appellant.

The facts being clearly substantiated, the Court did not erroneously apply those facts to the circumstances of Appellant's income imputing a portion of his wife's income to Appellant.

QUESTION [to Appellant]: And is it to your benefit to have your wife as a team member as opposed to some third party?

ANSWER: Yes it is.

QUESTION: Is it to your financial benefit for the two of you to keep the truck going 24 hours a day if you can?

ANSWER: Yes.

(Tr. pp. 478-479.)

**VI. Whether Appellant Has The Ability To Pay Alimony.**

At the time of divorce, Appellant stipulated and agreed to pay alimony of \$300 per month. The Court found that amount to be very conservative based upon the disparate income of the parties and well within the ability of Appellant to pay based upon his annual income of \$36,000 plus an amount imparted from

his wife's income which income together reached a level of \$75,000 per year.

An award of alimony should be reversed only if it represents clear and prejudicial absence of discretion. *Crompton v. Crompton*, 888 P.2d 686 (Utah App. 1994).

**VII. Award Of Attorney's Fees On Appeal.**

Generally, when the trial court awards attorneys' fees in a divorce action to a party who then prevails on appeal, that party will also be entitled to an award of attorneys' fees on appeal. Utah Code Ann. 1953 30-3-3; *Larsen v. Larsen*, 888 P.2d 719 (Utah App. 1994).

**CONCLUSION**

Appeal should be dismissed as to every issue and Appellee should be awarded reasonable attorney's fees and costs incurred as awarded in the proceedings below

DATED this 3<sup>rd</sup> day of ~~October~~<sup>November</sup>, 1995.

  
\_\_\_\_\_  
M. Byron Fisher  
FABIAN & CLENDENIN,  
a Professional Corporation  
Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 3<sup>rd</sup> day of ~~October~~<sup>Nov</sup>, 1995,  
I caused to be mailed, first class, postage prepaid, a true and  
correct copy of the foregoing Response Brief of the Appellee, to:

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