

1995

Mary Elizabeth Colburn v. James Robert Colburn : Brief of Appellee

Utah Court of Appeals

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John B. Anderson; Michael W. Wright; Anderson & Holland; Attorneys for Plaintiff

Terry L. Christiansen; Adkins & Christiansen; Attorneys for the Defendant

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

MARY ELIZABETH COLBURN,)	
)	
Plaintiff/Appellee,)	
)	Docket No. 950225 CA
vs.)	
)	
JAMES ROBERT COLBURN,)	Priority No. 15
)	
Defendant/Appellant.)	

BRIEF OF APPELLEE

Appeal From Judgment
Entered in the Third Judicial District Court
for Summit County, State of Utah

Honorable Glenn K. Iwasaki
District Court Judge

John B. Anderson (091)
Michael W. Wright (6153)
ANDERSON & HOLLAND
623 East First South
P.O. Box 11643
Salt Lake City, Utah 84147-0643
Telephone: (801) 363-9345
Attorneys for Plaintiff/Appellee

Terry L. Christiansen (0654)
ADKINS & CHRISTIANSEN, P.C.
P.O. Box 680284
Park City, Utah 84068
Telephone: (801) 649-9061
Attorney for Defendant/Appellant

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Telephone: (801) 363-9345
Attorneys for Plaintiff/Appellee

Terry L. Christiansen (0654)
ADKINS & CHRISTIANSEN, P.C.
P.O. Box 680284
Park City, Utah 84068
Telephone: (801) 649-9061
Attorney for Defendant/Appellant

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BRIEF OF APPELLEE

JURISDICTION

The Utah Court of Appeals has jurisdiction pursuant to Section 78-2a-3(2)(i) of the Utah Code Annotated, 1953, as amended.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the trial court properly find that Defendant was voluntarily underemployed, and did the court properly impute income of \$40,000.00 per year to Defendant, for purposes of awarding alimony, where Defendant chose to start his own business as a certified financial planner, even though he knew that it would take him a minimum of five years to establish a profitable practice, rather than utilize his readily transferrable and marketable skills to seek full time employment, which could earn him up to \$100,000.00 per year? Reviewed under the clearly erroneous standard to determine if the court improperly found that Defendant

was voluntarily underemployed. Hill v. Hill, 869 P.2d 1209 (Utah App. 1993).

2. Did the trial court abuse its discretion in awarding alimony of \$1,000.00 per month for five (5) years and \$500.00 per month thereafter, where the parties enjoyed a very high standard of living during their marriage, and where Mrs. Colburn demonstrated both that she lacks sufficient funds to meet her ordinary monthly expenses and that Defendant had the capacity to pay his expenses and to provide spousal support for Mrs. Colburn? Reviewed for abuse of discretion. Howell v. Howell, 806 P.2d 1209, (Utah App. 1991) cert. denied, 817 P.2d 325 (Utah 1991), Crockett v. Crockett, 836 P.2d 818 (Utah App. 1991).

3. Did the trial court properly divide Defendant's naval pension when it utilized the formula set forth in Woodward v. Woodward, 656 P.2d 432, (Utah 1982), rather than the point system allegedly used by the United States Armed Services, where there was no testimony regarding the mechanics of the point system? Reviewed under the correction of error standard to determine if the court committed clear error in dividing the pension. Bingham v. Bingham, 872 P.2d 1065, 1067 (Utah App. 1994).

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION AT TRIAL COURT:

This is an appeal from a Judgment awarding Mrs. Colburn alimony and a portion of Defendant's Navy pension. The judgment

was entered on September 12, 1994, by the Honorable Glenn Iwasaki, Third District Court Judge, in connection with an action for decree of divorce filed on May 12, 1994.

On September 14, 1994, Judge Iwasaki awarded Mrs. Colburn permanent alimony in the amount of \$1,000.00 per month for five (5) years, and in the amount of \$500.00 per month thereafter. (Tr. 10 [Bench Ruling - Appellant's Addendum 1]). The court also awarded Mrs. Colburn thirty-four percent (34%) of Defendant's naval retirement plan in accordance with the formula set forth in Woodward v. Woodward, supra.

Various post-trial motions concerning the language of the findings of fact and conclusions of law were filed by both parties, and were resolved at a hearing held on March 3, 1995; the findings, conclusions and decree were entered on that date. Defendant also filed a motion to alter or amend the judgment in re: alimony, which motion was denied, without hearing, on December 29, 1994.

B. STATEMENT OF THE RELEVANT FACTS OF THE CASE:

1. Mrs. Colburn and Defendant were married on September 1, 1973, in San Francisco, California. (R. 212, Para. 2 FOF).

2. The parties have two children born as issue of this marriage: Michelle Rene Colburn, born March 19, 1977, and James Andrew Colburn, born April 12, 1983. (R. 212, Para. 4 FOF).

3. During the course of the parties' marriage Mrs. Colburn did not work for extended periods of time. (Tr. 36).

4. During the course of the parties' marriage, Defendant worked for National Aviation Underwriters from 1971 through February, 1988 and Southern Marine and Aviation Underwriters from May, 1988 until July 1, 1992. (Tr. 77, 83, 85, 90).

5. While working for National Aviation Underwriters Defendant advanced through the ranks to become Regional Vice-President and eventually President and Chief Operating Officer for the company. (Tr. 36, 37, 76, 77, 78).

6. After leaving National Aviation Underwriters Defendant was hired by Southern Marine and Aviation Underwriters as one of its Vice-Presidents. (Tr. 85).

7. During his time with National Aviation Underwriters Defendant oversaw a variety of insurance related projects and also acted in a managerial capacity over other employees. (Tr. 36, 77, 78).

8. The parties enjoyed a high standard of living during their marriage, which included twice yearly vacations, and a financial situation which permitted them to make regular contributions to their savings and stock plans, beginning in 1982. (Tr. 41, 42).

9. During the course of their marriage the parties accumulated approximately \$450,000.00 in non-IRA assets, and \$608,000.00 in IRA accounts, which were divided equally between the parties. (R. 214, 219; Para. 15, 35 FOF).

10. On July 1, 1992, the day he was ordered to pay \$5,000.00 in family support by a Louisiana Court, Defendant submitted his

resignation from Southern Marine and Aviation Underwriters, at the request of the company. (Tr. 32, 33, 34).

11. In 1989 Defendant earned \$117,980 from employment; in 1990 Defendant earned \$129,802.00; in 1991 Defendant earned \$140,585.00; and, in 1992 Defendant earned \$126,286.00. (Defendant's Exhibit 27; R. 212, Para. 7 FOF).

12. After resigning from Southern Marine and Aviation Underwriters, Defendant contacted three (3) or four (4) individuals, and attended one (1) interviews seeking employment. (Tr. 39, 94).

13. Defendant declined to seek employment in other areas of the insurance business, and turned down two (2) job offers. (Tr. 98).

14. Defendant declined to seek employment outside of his specific areas of expertise in the aviation insurance industry, desiring instead to start his own business as a financial planner in Park City. (Tr. 98, 99, 100, 101).

15. In June of 1993, the parties relocated to Park City, Utah, and Defendant started Summit Financial Advisors Group, Inc., in August of 1993. (Tr. 101, 102).

16. At the time Defendant chose to become a certified financial planner he realized that it would take four to five years to establish a profitable business. (Tr. 105; R. 213; Para. 11 FOF).

17. Defendant refused to seek additional or outside employment to support his family, in spite of repeated requests from Mrs. Colburn to do so. (Tr. 34).

18. Defendant was requested by the President of VEMCO to head up its commercial department. (Tr. 180).

19. Defendant testified that he did not look for employment in other areas of the insurance industry because he was tired of getting bumped out of the corporate jobs. (Tr. 180).

20. Defendant's refusal to seek employment was a precipitating factor in inducing the divorce, and caused Mrs. Colburn to seek employment outside the home for the first time in seven (7) years. (Tr. 34, 36).

21. At the time of trial, Defendant was fifty-one (51) years of age. He is in good health, has a college education, and a certificate as a Certified Financial Planner, and has job skills acquired during his employment as an officer in the Naval Armed Services and as a high level executive with National Aviation Underwriters and Southern Marine and Aviation Underwriters that can be transferred to different or other fields of employment, including marketing and public relations manager and management consultant. (Tr. 75, 142; R. 213, Para. 10 FOF).

22. In the Salt Lake labor market there are close to 100 firms that are engaged in financial planning services. (Tr. 128).

23. The salary for those employed in the area of financial planning services ranges from \$28,000.00 to \$71,000.00 annually. (Tr. 128).

24. Normally, Utah salaries are ninety-five percent (95%) of the national average. (Tr. 128).

25. Defendant could expand his practice by expanding his business into commission sales planning. (Tr. 150).

26. Employees hired by financial planning services are also given the opportunity to earn their security licenses while they work for those firms. (Tr. 128, 129).

27. Defendant did not desire employment with an established financial planning firm because he believed that he can make more money as an independent Certified Financial Planner. (Tr. 186).

28. Management consultants can commonly earn between \$75,000.00 and \$100,000.00 per annum. The middle range of salaries for those in this position is between \$24,900.00 and \$51,000.00 per annum. Salaries in Utah would be approximately ninety-five percent (95%) of this range. (Tr. 143).

29. Salaries for public relations managers range between \$36,000.00 to \$52,000.00 per annum. (Tr. 142).

30. Defendant is a licensed pilot, with a commercial classification, trained by the United States military. (Tr. 162).

31. Co-pilots earn an annual salary in the range of \$28,000.00 to \$36,000.00. (Tr. 129).

32. Defendant estimates that he can eventually earn between \$30,000.00 and \$40,00.00 per year as a certified financial planner. (Tr. 189).

33. In addition to the non-IRA and IRA funds divided equally by the parties, Defendant is the owner of an ULTRA investment account, which was valued, at the time of trial, at \$61,220.67. The court imputed income to Defendant at a rate of six percent (6%) per annum on that account, for a monthly total of \$306.10. (R. 214, Para. 17 FOF).

34. The court also imputed income to both parties in the amount of \$1,125.00 per month, as interest, on their non-IRA funds. (R. 214, Para. 16 FOF).

35. The trial court found that Defendant was voluntarily underemployed, and determined that he could earn an annual salary of \$40,000.00, or \$3,333.33 per month, should he choose to remedy his voluntary underemployment. This figure was based on his work history, his occupational qualifications, the transferability of his skills, the prevailing earnings of people with similar backgrounds in the community and the testimony of experts. (R. 213, Para. 12 FOF).

36. Defendant's gross monthly income from all sources, including income imputed due to his voluntary underemployment, is \$5,028.43. (R. 213, 214; Para. 12, 16, 17 FOF).

37. Defendant's monthly expenses at the time of trial, including child support, were \$2,179.00. Defendant's child support

obligation was reduced by \$260.00 in June of 1995, when his oldest child reached 18 years of age. (Defendant's Exhibit 28, as corrected in Appellant's Brief, Point II).

38. Defendant has a positive cash flow of \$2,849.43 per month. (\$5,028.43 [income] - \$2,179.00 [expenses] = \$2,849.43). (R. 213, 214; Para. 12, 16, 17 FOF; Defendant's Exhibit 28, as corrected in Appellant's Brief, Point II).

39. Mrs. Colburn is a registered nurse, earning a gross monthly salary of \$2,900.00 per month. (Tr. 35; Para. 13 FOF).

40. At the time of divorce, Mrs. Colburn's total gross monthly income, including interest imputed on the non-IRA funds and child support, was \$4,729.00 (\$2,900.00 employment, \$1,125.00 non-IRA earnings, \$704.00 child support). (R. 213, 214, 215; Para. 18 FOF).

41. Mrs. Colburn's monthly expenses at the time of divorce totaled \$3,906.30, which did not include allowances for regular vacations generally taken by the family or contributions to her savings plan. (Tr. 42, Plaintiff's Exhibit 7).

42. Based on gross wages, not taking into account tax considerations, Mrs. Colburn has a monthly positive cash flow of \$822.70. (R. 213, 214, 215; Para. 18 FOF; Plaintiff's Exhibit 7).

43. During the year prior to the parties' divorce the marital residence was sold. (Tr. 168).

44. The court found that Mrs. Colburn would need to purchase a new home. (Tr. 9 [Bench Ruling - Appellant's Addendum 1]).

45. The parties were married for twenty-one (21) years. (R. 212, Para. 2 FOF).

46. Defendant served on active duty in the United States Navy from 1965 through 1969, and on inactive duty from 1969 until March 31, 1987. (Defendant's Exhibit 20).

47. The trial court applied the Woodward formula in dividing the value of the naval pension plan. (R. 217, Para. 29 FOF).

SUMMARY OF ARGUMENTS

I. Defendant has failed to marshal the evidence in a manner sufficient for the Court of Appeals to overturn the trial court's finding that Defendant was voluntarily underemployed. Defendant has set forth only that testimony and those facts which tend to show that Defendant was unable to obtain employment in the aviation insurance industry after resigning from Southern Marine and Aviation. Defendant failed to refer to evidence and testimony introduced at trial which demonstrated that the skills obtained during his employment as a high level insurance executive are readily transferrable in the job market. Defendant also failed to cite expert testimony given which showed that with his skills he could expect to earn anywhere from \$25,000.00 to \$100,000.00 per annum.

II. Imputing income to Defendant at the rate of \$40,00.00 per year was proper. Defendant is a highly trained insurance executive, with readily transferable and marketable skills. Evidence introduced at trial indicated that Defendant could earn up

to \$100,000.00 a year, if he chose to seek employment rather than start his own financial planning business.

III. The trial court was well within its discretion when it awarded Mrs. Colburn \$1,000.00 per month in alimony for the first five (5) years after the divorce, and \$500.00 per month thereafter. The court provided the necessary analysis for each of the factors required to award alimony, and also considered that Mrs. Colburn had been accustomed to a relatively high standard of living during the course of the parties' marriage. Mrs. Colburn demonstrated a need for alimony, and Mr. Colburn has both the earning capacity and the accumulated capital necessary to provide such support.

IV. The trial court properly awarded Mrs. Colburn thirty-four percent (34%) of Defendant's military pension, based upon the formula set forth in Woodward v. Woodward, 656 P.2d 431 (Utah 1982). Woodward is the leading case regarding the distribution of retirement benefits, and there was no testimony introduced at trial as to how the navy "point system" worked.

ARGUMENT

POINT I

DEFENDANT HAS FAILED TO SATISFACTORILY MARSHALL
THE EVIDENCE TO SHOW THAT THE COURT COMMITTED
CLEAR ERROR WHEN IT FOUND THAT DEFENDANT WAS
VOLUNTARILY UNDEREMPLOYED. THE TRIAL COURT'S
FINDING SHOULD BE LEFT UNDISTURBED.

In contesting the conclusion that he is voluntarily underemployed, Defendant has posed a challenge to a finding of fact made by the trial court after hearing, considering and weighing the

testimony and evidence introduced by both parties and a rehabilitation/employment specialist. Hill v. Hill, 869 P.2d 963 (Utah App. 1994). Accordingly, Defendant is under a burden to marshal all evidence introduced at trial tending to support the court's finding, and then demonstrate that despite such evidence the finding is so lacking in support as to be against the clear weight of the evidence. Hagan v. Hagan, 810 P.2d 478, 481 (Utah App. 1991).

Defendant has failed to satisfy that burden. In arguing that the court improperly determined that he was voluntarily underemployed, Defendant has done little more than recite and reargue the evidence that he presented at trial. He claims that the court erred in its decision because he was forced to resign from his last place of employment, and because after "diligently" searching for a new position in the rapidly contracting aviation underwriting industry he was offered only two low paying positions. The simple repetition of the evidence and arguments presented by Defendant at trial is insufficient to challenge the factual findings made by the trial court. Schaumberg v. Schaumberg, 875 P.2d 598, 603 (Utah App. 1994).

Defendant's recounting of the facts fails to include a substantial amount of the testimony and evidence introduced at trial. Most egregious is the omission of the fact that Defendant had been a high level executive during most of his career, serving as the President and C.O.O. of National Aviation Underwriters from

1986 to 1988 and vice president of Southern Marine and Aviation Underwriters from 1988 until 1992. (Tr. 78, 126). Defendant also failed to note that Connie Romboy, rehabilitation\employment specialist at the Career Guidance Center, testified that it is essential to look at the transferability and marketability of the skills obtained as a result of Defendant's employment as a high-level executive to accurately determine what he might make in the current labor market. (Tr. 137). Without reference to that testimony, Ms. Romboy's conclusion that Defendant might make between \$36,000.00 and \$52,000.00 per year as a public relations manager and up to \$100,00.00 per year as a management consultant is taken out of its proper context and thereby rendered less meaningful. (Tr. 142, 143). Defendant also declined to note that he sent no resumes or applications for employment to companies operating outside of a contracting aviation insurance industry; that after losing his job with Southern Marine and Aviation, the president of VEMCO asked him to head up its commercial department; and, that he declined to seek employment outside of aviation insurance because he was "tired of getting bumped out of corporate jobs". (Tr. 180).

Defendant's failure to adequately marshall the evidence is also apparent when the court considers that paucity of references to the evidence of career possibilities that exist for him outside of operating his own business. For example, Defendant makes no mention of the fact that he was trained as a pilot by the United

States Military; that he holds a commercial pilot's license; that co-pilots could earn between \$28,000.00 and \$36,000.00 annually; or, that he declined to look for a job as a pilot because he felt that the pay was too low. (Tr. 129, 163, 165).

Finally, Defendant also failed to include testimony that tends to show that, even inside of the field of financial planning, there are opportunities to obtain a more lucrative position than that provided by his own business. (Tr. 189). For instance, Ms. Romboy testified that there are over one hundred (100) companies selling financial planning services located along the Wasatch Front. (Tr. 128). Defendant stated that he contacted only one of these firms, which started its new employees at \$10.00 per hour (or \$20,800.00 annually), an amount he found unattractive. (Tr. 156, 188, 189). Finally, there is no mention of the testimony introduced by Defendant's own expert that if Defendant branched out from fee-only planning into commission sales planning he could expand his business. (Tr. 150).

The flagrant omission of testimony and other evidence relevant to the question of voluntary underemployment demonstrates that Defendant has failed to meet his burden of marshalling the evidence, and that his challenge to the trial court's finding on this issue should therefore fail.

POINT II

THE EVIDENCE PRESENTED AT TRIAL DEMONSTRATED THAT DEFENDANT IS A HIGHLY TRAINED CORPORATE EXECUTIVE WITH JOB SKILLS THAT COULD BE READILY TRANSFERRED TO OTHER SECTORS OF PRIVATE EMPLOYMENT. IN IMPUTING INCOME OF \$40,000.00 PER ANNUM TO DEFENDANT THE COURT ACTED CONSERVATIVELY BY CHOOSING A FIGURE AT THE LOW END OF SPECTRUM OF THE SALARIES PAID FOR THE TYPES OF EMPLOYMENT AVAILABLE FOR SOMEONE WITH DEFENDANT'S SKILLS AND EXPERIENCE.

Utah law requires that prior to imputing income to a party in a divorce action the court must first find that the party is voluntarily unemployed or underemployed. Utah Code Ann., Section 78-45-7.5(7)(a), which has been applied in both child support and alimony cases, codifies this requirement and provides:

Income may not be imputed to a parent unless the parent stipulates to the amount imputed or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.

The question of what constitutes voluntary underemployment has been the subject of considerable activity in the appellate courts in recent years. In Hall v. Hall, supra, at 1026, the Utah Court of Appeals explained that a finding of voluntarily underemployment must be based on a thorough appraisal of a variety of factors, including the party's abilities, his employment capacity, his earnings potential, and the possible job openings available to the party. In this case, the trial court considered and weighed each of these factors, and concluded that Defendant had significant marketable skills, acquired over a lifetime of employment as a high level executive, which would allow him to obtain meaningful

employment, if he so desired. (Tr. 6 [Bench Ruling - Appellant's Addendum 1]). The court also found that Defendant had chosen not to pursue other available employment opportunities, electing instead to operate his own business, even though he knew that it would take four (4) to five (5) years to establish a profitable enterprise. (Tr. 4 [Bench Ruling - Appellant's Addendum 1]).

Analyzing each factor enunciated in Hall in light of the testimony and evidence presented at trial leads to the inescapable conclusion that the trial court acted in conformity with the statutory and case authority when it found that Defendant is voluntarily underemployed.

In terms of Defendant's abilities and capacities, there can be no doubt that he has the skills and personal qualities necessary to find lucrative employment, should he choose to seek it. (Tr. 7 [Bench Ruling - Appellant's Addendum 1]). Defendant, who has a degree in business from California State University, started out selling insurance for National Aviation Underwriters, and within seven (7) years was promoted to Regional Vice-President. (Tr. 77). This promotion eventually led to his appointment as President and Chief Operating Officer of the company, a position he held until 1988. (Tr. 78). After leaving National Aviation Underwriters, Defendant became Vice-President of Southern Marine and Aviation Underwriters, a post that lasted until 1992. (Tr. 85).

While Defendant has attempted to highlight the unique aspects of aviation underwriting, and the diminishing business

opportunities available in that arena, such a narrow focus could mislead the Court into thinking that he has no opportunities for meaningful employment outside of the general aviation industry. Upon direct examination, Ms. Connie Romboy, a vocational expert, who specializes in displaced workers testified as follows:

Either of these positions [vice-president and president] would plan and develop policies and objectives, coordinate functions of operations between divisions and departments to establish responsibilities and procedures. They would set financial goals. They would plan with the current conditions of the labor market, and they would direct coordinate the formulation of financial programs to maximize profits and increase productivity ... and then based on the specific industry or product, then they would be -- then that would be specific to their particular duties.

But the things that I have read off in terms of this definition is really the definition of transferability of skills. There's the assumption that if one can plan and develop policies to operate, for instance, a career guidance center, that same individual could go to the University of Utah and plan and develop policies for perhaps the Department of Social Work, or perhaps transfer into a hospital setting where still -- so the whole basis is that the functional things are much more important than the specific work content skills which are often the things that are the easiest. In other words, its easier to learn about a product than it is ... how to direct and plan and manage people. That is the foundation that most vocational evaluators will go in terms of doing a workup on potential employment. (Tr. 140, 141) (emphasis added).

The plain import of this testimony demonstrates that the skills Defendant obtained during the course of his working life are readily transferable to other areas, and that Defendant could utilize them to obtain alternate employment, if he so chose. After weighing Ms. Romboy's testimony, the court ultimately found it to be persuasive as to the question of whether employment opportunities other than starting his own business existed. (Tr. 6 [Bench Ruling Appellant's Addendum 1]).

When asked by the court to specify what jobs might be available to Defendant, based on her analysis of his credentials, Ms. Romboy identified public relations manager and management consultant as likely areas of possible employment. Ms. Romboy further opined that according to government statistics, Defendant could earn upwards of \$100,000.00 per annum as a management consultant, and between \$36,000.00 and \$52,000.00 per year as a public relations manager. (Tr. 142, 143).

While it found Ms. Romboy's testimony **persuasive**, the court did not rely upon it as its sole source of information in making the finding of voluntary underemployment. During cross examination, Defendant admitted that after losing his job at Southern Marine and Aviation he did not send resumes to companies other than those which specialized in general aviation, because he

was "tired of getting bumped out of corporate jobs".¹ (Tr. 180). He also testified that he had limited himself to fee-only financial planning, rather than the broader and more profitable field of commission sales planning. (Tr. 150, 180). This self-imposed limitation means that he did not seek employment from any of the more than one hundred (100) companies selling financial planning services that are located on the Wasatch front. (Tr. 128). Ms. Romboy testified that nationally such financial consultants can expect to earn between \$28,000.00 and \$71,000.00 per year, with Utah wages being ninety-five percent (95%) of the national average. (Tr. 128).

Defendant's testimony, in conjunction with Ms. Romboy's testimony about transferable skills, was the foundation upon which the court determined that Defendant was voluntarily underemployed. In his bench ruling Judge Iwasaki stated:

There were many times in his testimony when asked, upon cross examination or even direct examination, if he would choose to go into one area or another. There were answers to the effect that: I choose to be a certified financial planner. [...] This is what I want to develop.

He did that knowing that the start up time at a minimum of four to five years will have to occur before anything of fruition will come of his efforts ...

¹ This testimony was elicited in connection with an inquiry about possible employment outside of the general aviation underwriting business, and testimony that after resigning from Southern Marine and Aviation Underwriting he was asked by the Chairman of VEMCO to head up its commercial department. (Tr. 180).

... Even being conservative in looking at Ms. Romboy's testimony, it appears to the court that if Mr. Colburn, with his vast experience, his education and his practical aspects that I find of him to be attractive in that nature, if he were just to apply himself in any other area instead of persisting in the certified financial planning area --- he could be selling insurance ... he could be working with IDS, which was a product sales as well as service; he could be doing stock brokerage, if he completes his licensing, from six to eight months he indicated that would take; there would be no doubt in the court's mind that he would be successful ... (Tr. 4, 6, 7 [Bench Ruling - Appellant's Addendum 1]).

Finally, it should be recognized that the amount of income imputed by the trial court represents a conservative estimate of Defendant's earning potential. Prior to determining that figure, Judge Iwasaki noted that Ms. Romboy gave a possible salary range of from mid-\$30,00.00 to \$72,000.00 per year.² (Tr. 6 [Bench Ruling - Appellant's Addendum 1]). The \$40,000.00 figure imputed to Defendant lies in the bottom of that range.

In spite of the volume of evidence presented at trial, and the carefully articulated bench ruling, the Defendant attempts to convince this court that Judge Iwasaki acted outside of the well recognized legal standards in finding that he was voluntarily underemployed. In support of his position Defendant relies on

² These figures give lie to Defendant's assertion that his long term financial interests are best served by developing his own business. Defendant testified that eventually he could make \$30,000.00 to \$40,000.00 as a financial planner. (Tr. 189) This is less than the money that Defendant could earn at this point should he choose to obtain salaried employment.

three recent cases: Hall v. Hall, 858 P.2d 1018 (Utah App. 1993); Bell v. Bell, 810 P.2d 489 (Utah App. 1991); and Willey v. Willey, 866 P.2d 547 (Utah App. 1993).

In Hall v. Hall, supra, the husband had been employed as a computer consultant and software developer and had earnings in excess of \$100,000.00 per year in the three (3) years immediately preceding trial. Approximately ten (10) days before trial the husband lost his job and obtained another, which paid only \$40,000.00 per year. The trial court found, on the basis of his prior earnings history, that the husband was voluntarily underemployed and that income should be imputed at a level equal to his prior wages. The court of appeals overturned that decision, and remanded the case for more detailed finding, stating that past salary was only one factor that must be considered in making a determination of underemployment.

In Bell v. Bell, supra, the trial court ignored undisputed testimony that Mrs. Bell actually earned \$863.00 per month as a part time teaching assistant at Utah State University, and imputed income to her at a level equal to that which she had previously enjoyed as a full-time school teacher in another state. Similarly, in Willey v. Willey, supra, the trial court first imputed income to the wife based upon full-time employment at her current wage, and then raised that figure by speculating, without foundation, that Mrs. Willey would be able to raise her income to \$1,500.00 to

\$2,000.00 per month. In both cases the Court of Appeals remanded the case to the trial court for further findings.

Each of these cases is inopposite to the case at bar. In explaining its remand in Willey v. Willey, supra, the court stated that imputing income can not "be premised on mere conjecture; instead it demands a careful and precise assessment requiring detailed findings." Id., at 554. Here the court carefully based its decision on Defendant's qualifications, education and experience, as well as on his firmly expressed desire not to look for employment other than that which could be developed through his own business. The decision was not predicated solely on past earnings, as was the imputation in Hall, nor was it the result of unfounded conjecture, as was the case in Bell and Willey.

More directly on point is the decision in Hill v. Hill, supra. In that case the husband had quit his job at Thiokol, and obtained employment in Utah County at a substantial decrease in salary. The husband claimed that his decision to seek and accept a lower paying position was based upon his desire to obtain employment more closely related to his educational background. The Court of Appeals noted that there were higher paying, albeit less meaningful, positions available to the husband, and therefore that the trial court's decision to impute income at a higher level was proper under the circumstances.

The similarity between the facts in Hill and the case at bar are striking. In justifying his decision to become a self-employed

financial planner earning \$260.00 per month, Defendant continually asserted he chose to do so because that is where his education and interests lie. (Tr. 180). This choice was made at the expense of the opportunity to make a higher salary in a job less related to his expressed desire to become a fee-only financial planner. While, Mr. Colburn is free to make such a personal decision, in light of the ruling in Hill, his personal preferences should not undermine his obligations to support Mrs. Colburn.

POINT III

THE COURT DID NOT ABUSE ITS DISCRETION
IN AWARDING \$1,000.00 PER MONTH IN ALIMONY
TO MRS. COLBURN. MRS. COLBURN DEMONSTRATED BOTH
THAT SHE NEEDED THE SUPPORT AND THAT DEFENDANT
HAD THE CAPACITY TO PAY.

It is a well established principle of Utah law that a trial court is granted broad discretion in fashioning an award of alimony. Crockett v. Crockett, 836 P.2d 818, 819 (Utah App. 1992). It is equally clear that the appellate courts must presume that the trial court has made the proper decision in this area, and uphold its ruling, unless the record indicates that there has been a clear and prejudicial abuse of discretion. Id., at 819-820 (quoting Turner v. Turner, 649 P.2d 6, 8 (Utah 1982)). See also Bingham v. Bingham, 872 P.2d 1065, 1067 (Utah App. 1994) (quoting Howell v. Howell, 806 P.2d 1209, 1211, cert. denied, 817 P.2d 325 (Utah 1991)). An abuse of discretion is committed when a trial court has made its decision without reference to established standards. Willey, supra at 550.

In Jones v. Jones, 700 P.2d 1072, 1075 (Utah 1985), the Utah Supreme Court set forth the standard test for awarding alimony in Utah. The court stated:

Three factors ... must be considered in fixing a reasonable alimony award:

[1] the financial conditions and needs of the [spouse seeking support]

[2] the ability of the [spouse seeking support] to produce a sufficient income for herself; and

[3] the ability of the [payor spouse] to provide support.

This standard has appeared repeatedly in cases addressing the issue of the propriety of awarding alimony. Thronson v. Thronson, 810 P.2d 428, 435 (Utah App. 1991), Hill v. Hill, supra, and Schaumberg v. Schaumberg, supra.

In the case at bar, there can be no doubt that the trial court utilized these criteria in determining that Defendant should pay Mrs. Colburn alimony. It is equally clear that, under the facts of this case, the trial court acted well within its discretion in fixing the award at \$1,000.00 per month for the first five (5) years, and \$500.00 per month thereafter.

In considering the needs of Mrs. Colburn the court first looked to her fixed monthly expenses and determined that the total of \$3,906.30 was a reasonable amount for a person of her station in life. (Plaintiff's Exhibit 7). This sum did not include amounts normally used for regular savings and family vacations, which had

been substantial in the past.³ In addition, the court noted that the parties had previously sold their marital residence, and that Mrs. Colburn would have a specific need for a new home. (Tr. 9 [Bench Ruling - Appellant's Addendum 1]).

The court then looked to Mrs. Colburn's ability to pay those expenses. It was uncontroverted that Mrs. Colburn, who returned to the work force as a registered nurse after many years of not working, earns \$2,900.00 a month. (Tr. 35, 36; R. 213; Para. 13 FOF). The court also imputed income of \$1,125.00 per month as a reasonable rate of return on her non-IRA investments. (R. 214; Para. 16 FOF). Together with child support in the amount of \$704.00 awarded at trial⁴, Mrs. Colburn has gross monthly resources of \$4,729.00 to meet her expenses. Defendant has claimed that this leaves Mrs. Colburn with a positive cash flow of \$823.00 per month, exclusive of alimony. Of course this statement completely ignores all tax consequences. In fact, Mrs. Colburn pays \$800.00 in regular taxes and deductions from her paycheck; these taxes, in themselves, completely consume the alleged positive cash flow.

In contrast Defendant has the ability to generate \$5,028.43 in gross monthly income, including income imputed to him by the trial

³ It is entirely proper that the court consider these additional expenditures. In Schaumberg, supra, at 602, the Court of Appeals stated that when the payor spouse's resources are adequate, an alimony award should also consider the recipient's station in life.

⁴ This sum has subsequently been reduced when the parties' oldest child reached 18 years of age in June of 1995.

court. (R. 213, 214; Para. 12, 16, 17 FOF). His fixed monthly expenses total \$2,179.00, including child support, leaving him with a positive cash flow of \$2,849.43 per month. (Defendant's Exhibit 28, as corrected in Appellant's Brief, Point II). Thus, Defendant is able to pay his monthly expenses, provide Mrs. Colburn the support ordered by the court, and still have a positive cash flow of \$1,849.43. This, in fact, is slightly greater than the positive cash flow that is enjoyed by Mrs. Colburn when alimony is added to her gross monthly income ($\$823.00 + \$1,000.00 = \$1,823.00$).

Since all three elements set forth in Jones, supra, were weighed by the court and adequate findings were entered, it is difficult to imagine that the court has abused its discretion in making such an award.

Defendant's sole argument for abuse of discretion lies in his convoluted reasoning that the court should have considered only his actual income in fashioning his alimony obligation. Thus he claims that the payment of alimony lowers his standard of living below that enjoyed by Mrs. Colburn, which would be impermissible under the holding in Rasband v. Rasband, 752 P.2d 1331, 1333 (Utah App. 1988). Defendant's argument ignores the obvious point; it is not the payment of alimony that is creating his alleged financial distress, it is his voluntary choice not to seek the salaried employment for which he is eminently qualified.

Defendant also briefly argues that the alimony award was, in part, based on the trial court's recognition that Mrs. Colburn is

currently pursuing a graduate degree in nursing so as to obtain a better paying position in the future. (Tr. 42). This is simply not the case. In fact, the court determined that after Mrs. Colburn obtained her degree she would be capable of a greater level of self support. This in turn was used to justify a **decrease** in the award to \$500.00 per month after the five (5) years she estimated it would take to finish her education. Under the second prong of the Jones test, such reasoning is both appropriate and necessary in fixing an alimony obligation.

Simply stated the court committed no abuse of discretion in awarding Mrs. Colburn alimony in the amount of \$1,000.00 per month.

POINT IV

THE COURT WAS CORRECT IN APPLYING THE WOODWARD
FORMULA IN DIVIDING DEFENDANT'S NAVAL RETIREMENT.
NO TESTIMONY WAS INTRODUCED TO SUPPORT DEFENDANT'S
CONTENTION THAT THE VALUE OF HIS PENSION IS
DETERMINED BY A POINT SYSTEM.

Under well established Utah law, pension rights are subject to equitable division by the court under the formula set forth in Woodward v. Woodward, 656 P.2d 431 (Utah 1982). In that case, the court stated that the proper method of distribution is to divide the number of years the parties' have been married by the number of years the spouse has worked at the relevant place of employment; with the non-pensioned spouse entitled to receive one-half (1/2) of that amount. This is precisely what the court did in this case.

Defendant has sought to have this decision overturned, by claiming that the true value of his pension is measured by a point

system rather than by the total number of years he served in the service. Unfortunately, there was no testimony introduced at trial to substantiate that claim. Defendant, himself, attempted to explain the system to the court, however, his testimony was excluded, upon objection of Plaintiff's counsel, as lacking proper foundation to testify in that regard. (Tr. 114).

Without competent testimony, the court was without a reliable means of determining how to translate the accrued points into a set monetary value. Accordingly, it relied upon the formula set forth in Woodward, supra, to determine the proper equitable division of the asset.

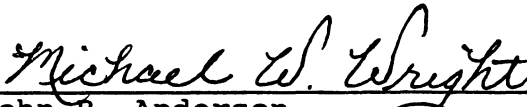
CONCLUSION

Defendant's challenge to the court's imputation of income fails on two points. First, he has failed to marshall the evidence in a manner sufficient for the Court of Appeals to determine that the trial court committed clear error in finding that he was voluntarily underemployed. Second, the evidence and testimony introduced at trial clearly supports the court's finding. Defendant is a highly trained executive, with skills that could be easily transferred to other areas of employment, if he so desired.

Defendant's challenge to the amount of the alimony award must also be denied. The court fixed his obligation in accordance with well established legal standards, and any financial hardship suffered by Defendant is the result of his refusal to seek employment, rather than as a result of the award itself.

Finally, the court should decline to overrule the trial court's distribution of Defendant's naval pension. The court accomplished that division by clear reference to the appropriate legal standards set forth in Woodward, supra, and Defendant failed to introduce any testimony in support of his alternate "point system" theory of distribution.

RESPECTFULLY SUBMITTED this 8th day of November, 1995.



John B. Anderson
Michael W. Wright
ANDERSON & HOLLAND
Attorneys for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of November, 1995, two true and correct copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Terry L. Christiansen, Attorney for Defendant/Appellant, P.O. Box 680284, Park City, Utah 84068.

